THE

THIRD PART

OF THE

Institutes of the Laws of England;

CONCERNING

HIGH TREASON,

AND OTHER PLEAS OF THE CROWN.

AND

CRIMINAL CAUSES.

Eccles. viii. 11.

Quia non profertur cito contra malos sententia, absque timore ullo filii hominum perpetrant mala.

Inertis est nescire quod sibi liceat.

AUTHORE EDWARDO COKE, MILITE, *J. C.*

HÆC EGO GRANDÆVUS POSUI TIBI, CANDIDE LECTOR.

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THE

THIRD PART

OF THE

INSTITUTES

OF THE

LAWS OF ENGLAND.

A TABLE *of the ſeveral* CHAPTERS *of the* Third Part of the Inſtitutes, of the Pleas of the Crown.

MULTI MULTA, NEMO OMNIA NOVIT.

THE TABLE.

98. *De*

DEO,

DEO,
PATRIÆ,
TIBI.

A PROEME

TO THE

THIRD PART *of the* INSTITUTES.

IN the Second Part of the Inſtitutes we have ſpoken only of acts of parliament, (viz.) of Magna Carta, and many ancient and other acts of parliament, which we have explained, and therein obſerved which of them are declaratory of the ancient lawes of this realme, which are introductory of new, and which mixt: all of them (excepting a very few) concerning common pleas, and theſe two great pronouns, *meum* and *tuum*.

In this Third Part of the Inſtitutes, we are to treat *de malo*, viz. of high treaſon, and other pleas of the crowne, and criminall cauſes, moſt of them by act of parliament, and ſome by the common law: in which caſes the law of all other is moſt neceſſary to be knowne, becauſe it concerneth the ſafety of his majeſtie, the quiet of the common-wealth, and the life, honour, fame, liberty, blood, wife, and poſteritie of the party accuſed, beſides the forfeiture of his lands, goods, and all that he hath: for it is truly ſaid of theſe laws, *Reliquæ legis privatorum hominum commodis proſpiciunt, hæ regiæ majeſtati, ſubditorum vitæ, ac publicæ tranquillitati conſulunt.* And that in theſe caſes the ancient maxime of the law principally holdeth, *Miſera ſervitus eſt, ubi jus eſt vagum, aut incognitum.* And where ſome doth object againſt

See the 1. part of the Inſtitutes ſect. 500.

Malum non habet efficientem, ſed deficientem cauſam. Evill hath not an efficient, but a deficient cauſe, by reaſon of the want of ſome vertue or notable good.

Stamford.

againſt the lawes of England, that they are darke and hard to be underſtood, we have ſpecially in theſe and other parts of the Inſtitutes opened ſuch windowes, and made them ſo lightſome, and eaſie to be underſtood, as he that hath but the light of nature, (which Solomon calleth the candle of Almighty God, Prov. 20. 27.) adding induſtrie and diligence thereunto, may eaſily diſcerne the ſame. And that may be verified of theſe lawes, that *lex eſt lux*, Prov. 6. 23, the law itſelfe is a light. See Rom. 2. 14. And when we conſider how many acts of parliament (publiſhed in print) that have made new treaſons and other capitall offences, are either repealed by generall or expreſſe words, or expired: how many indictments, attainders of treaſons, felonies, and other crimes, which are not warrantable by law at this day: and how few book-caſes there have been publiſhed of treaſons, (though a ſubject of greateſt importance) and thoſe very ſlenderly reported: we in reſpect of the places which we have holden, and of our own obſervation, and by often conferences with the ſages of the law in former times concerning criminall cauſes or pleas of the crowne, have thought good to publiſh this third part of the Inſtitutes, wherein we follow that old and ſure rule, *Quod judicandum eſt legibus, et non exemplis.* A worke arduous, and full of ſuch difficultie, as none can either feele or beleeve, but he onely which maketh tryall of it. And albeit it did often terrifie me, yet could it not in the end make me deſiſt from my purpoſe; (eſpecially in this worke) ſo farre hath the love and honour of my country, to paſſe through all labours, doubts, and difficulties, prevailed with me.

This, as other parts of the Inſtitutes, wee have ſet forth in our Engliſh tongue, not onely for the reaſons in the preface to the firſt part of the Inſtitutes alledged, which we preſume may ſatisfie any indifferent and prudent reader: but ſpecially this treatiſe of the pleas of the crowne, becauſe, as it appeareth by that which hath been ſaid, it concerneth all the ſubjects of the realme more neerly by many degrees, then any of the other. Hereunto you may adde that which Robert Holcoth an Engliſh

Bal. cent. 5. fo. 143.

man

man ſurnamed *Theologus magnus*, upon the ſecond chapter of the book of Wiſdome, in or about the 20. yeare of king E. 3. wrote to this effect. *Narrant hiſtoriæ quod cum Willielmus dux Normannorum regnum Angliæ conquiſiviſſet, deliberavit quomodo linguam Saxonicam poſſit deſtruere, et Angliam, et Normanniam in idiomate accordari, et ideo ordinavit, quod nullus in curia regia placitaret niſi in Gallico, et iterum quod puer quilibet ponendus ad literas addiſceret Gallicum, et per Gallicum Latinum, quæ duo uſque hodie obſervantur. Hæc ille.* But the ſtatute of 35 E. 3. cap. 15. made not long after Holcoth wrote, hath taken theſe edicts of a conqueror away, and given due honour to our Engliſh language, which is as copious and ſignificant, and as able to expreſſe any thing in as few and apt words, as any other native language, that is ſpoken at this day. And (to ſpeake what we think) we would derive from the Conqueror as little as we could. 35 E. 3. ca. 15.

When Henry the firſt died, all the iſſue male of the Conqueror, and of his ſonnes were dead without iſſue male.

The wife of king H. 1. was Mawde daughter of Malcolme king of Scotland ſirnamed Canmor, and of Margaret his wife, who was the granchild of Edmond Ironſide king of England, viz. the ſaid king Edmond had iſſue Edward ſirnamed the Outlaw, becauſe he lived a long time beyond ſea with Salamon king of Hungary out of the extent of the lawes of this realme. Edward had iſſue the ſaid Margaret his eldeſt daughter, famous for her piety and vertue; ſhe had iſſue Mawde wife of king H. 1. who by her had iſſue Mawde, of whoſe Engliſh blood by Geffery Plantagenet earle of Anjou all the kings of England are lineally deſcended.

We have in this Third Part of the Inſtitutes cited our ancient authors, and bookes of the law, viz. Bracton, Britton, the Mirror of Juſtices, Fleta, and many ancient records, never (that we know) before publiſhed, to this end, that ſeeing the pleas of the crown are for the moſt part grounded upon, or declared by ſtatute

ſtatute lawes, the ſtudious reader may be inſtructed what the common law was before the making of thoſe ſtatutes, whereby he ſhall know, whether the ſtatutes were introductory of a new law, declaratory of the old, or mixt, and thereby perceive what was the reaſon and cauſe of the making of the ſame, which will greatly conduce to the true underſtanding thereof.

We ſhall firſt treat of the higheſt, and moſt hainous crime of high treaſon, *Crimen læſæ majeſtatis*; and of the reſt in order, as they are greater and more odious then others.

CAP. I.

OF HIGH TREASON.

BY the ſtatute of 25 E. 3. *de proditionibus*, is declared in certaine particular caſes, what offences ſhall be taken to be treaſon, with this reſtriction, that if any other caſe ſuppoſed to be treaſon ſhould happen before any juſtices, the juſtices ſhould tarry without going to judgment of the treaſon, till the caſe be ſhewed before the king and his parliament, whether it ought to be adjudged treaſon or other felony: therefore we will lay our foundation upon, and begin with that act of parliament, the letter whereof *in proprio idiomate* enſueth. 25 E. 3. cap. 2.

AVXINT pur ceo que divers opinions ount eſtre eins ceux heures qen caſe doit eſtre dit treaſon (1), *et en quel caſe nemi, le roy a le requeſt des ſeigniours et commons ad fait declariſment* (2) *que enſuiſt. Ceſtaſſavoire, quant home* (3) *fait compaſſer* (4) *ou imaginer* (5) *la mort* (6) *noſtre ſeignior* (7) *le roy* (8), *madame ſa compaigne* (9), *ou de lour fitzeigne et heire* (10), *ou ſi home violaſt la compaigne le roy* (11), *ou leigne file le roy nient marie* (13), *ou la compaigne leigne fitz* (12) *et heire le roy. Ou ſi home leve guerre enconter noſtre ſeignior le roy* (14) *en ſon realme, ou ſoit aidant as enemies noſtre dit ſeignior le roy en ſon realme, donnant a eux aid, ou comfort en ſon roialme, ou per aylours* (15), *et de ceo provablement ſoit attaint de overt fact per gents de lour condition* (16). *Et ſi home counterface le grand* (17), *ou privie ſeale le roy, ou ſa monye* (18). *Et ſi home apport faux money en ceſt roialme counterfait al mony dangliterre, ſicome la mony appelle* * *Luſheburgh, ou auter ſembleble a la dit mony dangliterre, ſachant le money eſtre faux* (19) *pur merchander ou payment faire en diſceite noſtre dit ſeignior le roy et de ſon people. Et ſi home tuaſt chancellor, treaſurer, ou iuſtices noſtre ſeignior le roy del un banke ou del auter, iuſtices in eire et daſſiſes, et touts auters iuſtices aſſignes de oier et terminer* †, *eſteaunts en lour places en feſants lour offices. Et ſoit a entendre que les caſes ſuiſnomes doit eſtre adjudge treaſon, que ſe extent a noſtre ſeigniour le roy et ſa roiall majeſtie: Et de tiel manner de treaſon la forfeiture des eſcheates appertenont a noſtre ſeignior le roy, cibien des terres et tenements tenus des auters, come de luy meſme* (20).

Divers opiniona. *Ad fait declariſement.*

Nota, This is a law for the moſt part declaratory, but addeth alſo divers things to the ancient law.

* Luſheburghs, alias Luxenburghs were a kinde of baſe coine to the likeneſſe of our Engliſh money, ſo called, becauſe they were coined in Luſheburgh, which ſometime was an earledume, and after a dukedome. See Chaucer in the Prologue to the Monk's Tale, the hoſt ſpeaking to a luſty monk, ſaith, *God woot, no Luſshburghes pay ye*, that is (upon the coherence of the verſe) No payment make ye that is not full and currant.

† *Injuria illata judici ſeu locum tenenti regis videtur ipſe regi illata, maxime ſi fiat, in exercente officium.*

Item, WHEREAS divers opinions have been before this time, in what caſe treaſon ſhall be ſaid, and in what not; the king at the requeſt of the lords and of the commons, hath made a declaration in the manner as hereafter followeth: that is to ſay, when a man doth compaſſe or imagine the death of our lord the king, of my lady his queene, or of their eldeſt ſonne and heire: or if a man doe violate the kings compagnion, or the kings eldeſt daughter unmarried, or the wife of the kings eldeſt ſonne and heire: or if a man doe levie warre againſt our lord the king in his realme, or be adherent to the kings enemies in his realme, giving to them aide and comfort in the realme or elſewhere, and thereof be provably attainted of open deed by people of their condition. And if a man counterfeit the kings great or privie ſeale, or his money: and if a man bring falſe money into this realme counterfeit to the money of England, as the money called Luſheburgh, or other like to the ſaid money of England, knowing the money to be falſe, to merchandize or make payment, in deceipt of our ſaid lord the king and of his people. And if a man ſlay the chancellor, treaſurer, or the kings juſtices of the one bench or the other, juſtices in eire, or juſtices of aſſize, and all other juſtices aſſigned to heare and determine, being in their place doing their offices. And it is to be underſtood, that in the caſes above rehearſed, it ought to be judged treaſon, which extend to our lord the king and his royall majeſtie; and of ſuch treaſon the forfeiture of the eſcheates pertaineth to our lord the king, as well of the lands and tenements holden of others, as of himſelf.

And albeit nothing can concerne the king, his crowne, and dignity, more then *crimen læſæ majeſtatis*, high treaſon: yet at the requeſt of his lords and commons, the bleſſed king by authority of parliament made the declaration, as is above-ſaid: and therefore, and for other excellent lawes made at this parliament, this was called *benedictum parliamentum*, as it well deſerved. For except it be Magna Charta, no other act of parliament hath had more honour given unto it by the king, lords ſpirituall and temporall, and the commons of the realme for the time being in full parliament, then this act concerning treaſon hath had. For by the ſtatute of 1 H. 4. cap. 10. reciting that where at a parliament holden 21 R. 2. divers paynes of treaſon were ordained by ſtatute, in as much as there was no man did know how to behave himſelfe, to doe, ſpeak, or ſay, for doubt of ſuch paines: It is enacted by the king, the lords and commons, that in no time to come any treaſon be judged otherwiſe, then it was ordained by this ſtatute of 25 E. 3. The like honour is given to it by the ſtatute of 1 E. 6. cap. 12. and by the ſtatute of 1 Ma. cap. 1. ſeſſ. 1. different times, but all agreeing in the magnifying and extolling of this bleſſed act of 25 E. 3. Of this act of 1 Mariæ, we ſhall ſpeak more hereafter.

1 H. 4. cap. 10.

1 E. 6. cap. 12.

1 Mar. cap. 1. Seſſ. 1.

hereafter. But to proceed to give a light touch how other acts of parliament have been called. The parliament holden at Oxford, *an.* 42. H. 3. was called *inſanum parliamentum.* 12 E. 2. the parliament of whitebands, *albarum fibularum* or *metellarum.* 5 E. 3. *parliamentum bonum.* 10 R. 2. *parliamentum quòd fecit mirabila,* that wrought wonders. 21 R. 2. *magnū parliamentū.* 6 H. 4. *parliamentū indoctū,* lack-learning parliament. 4 H. 6. *parliamentū fuſtiū,* the parliament of bats. The ſeſſion of parliament in *an.* 14. H. 8. called the black parliament. The act of 1 E. 6. was called *parliamentū pium,* the pious parliament. And the ſaid act of 1 Mar. *parliamentū propitium,* the merciful parliament. The parliaments of queen Elizabeth ſtiled *pia, juſta, et provida.* The parliament holden *anno* 21 of king James, called *fœlix parliamentum,* the happy parliament. And the parliament holden in the third yeare of our [3] ſoveraigne lord king Charles, *benedictum parliamentum,* the bleſſed parliament. The ſeverall reaſons of theſe former appellations appeare of record and in hiſtory, and the latter are yet freſh in memory. At the making of the ſtatute of 25 E. 3. the high courts of juſtice were furniſhed with excellent men, *viz.* Sir William Shardſhill knight (ſhortly written in bookes Shard) lord chiefe juſtice of the kings bench, and his compagnions juſtices of that court; Sir John Stonor knight, commonly written in books Stone, lord chief juſtice of the court of common pleas, and his compagnions juſtices of that court; and Gervaſius de Wilford, lord chiefe baron of the exchequer, men famous in their profeſſion, and excellent in the knowledge of the lawes. At the making of the ſtatute of 1 H. 4. were Sir Walter Clopton knight, lord chiefe juſtice of the kings bench, and his compagnions juſtices of that court; and Sir William Thirning knight, lord chief juſtice of the court of common pleas, and his compagnions juſtices of that court; and Sir John Caſſie knight, lord chiefe baron of the exchequer; men equall to any of their predeceſſors in the knowledge of the lawes. At the making of the ſtatute of 1 E. 6. were Sir Richard Liſter knight, lord chiefe juſtice of the kings bench, and his compagnions juſtices of that court; and Sir Edward Montague knight, lord chiefe juſtice of the court of common pleas, and his compagnions juſtices of that court; and Sir Roger Cholmeley knight, lord chiefe baron of the exchequer; men of that excellency, as they were worthy of the name of The worthies of the law. At the making of the ſtatute of 1 Mar. were Sir Thomas Bromley knight, lord chiefe juſtice of the kings bench, and his compagnions juſtices of that court; and Sir Richard Morgan, knight, lord chiefe juſtice of the court of common pleas, and his compagnions juſtices of that court; and Sir D. Brook knight, lord chiefe baron of the exchequer, men renounced for their great knowledge and judgement in their profeſſion. All theſe we have named in the honour of

them, and of their families and poſterities, for that they in their ſeverall times were great furtherers of theſe excellent lawes concerning treaſon. *In memoria æterna erit juſtus.* And all this was done in ſeverall ages, that the faire lillies and roſes of the crowne might flouriſh, and not be ſtained by ſevere and ſanguinary ſtatutes. But let us come to the act it ſelfe, and for the better underſtanding thereof, and of the book-caſes, and other records grounded upon the ſame: let us divide this act concerning high treaſon into ſeverall claſſes or heads, and then proſecute the ſame in order.

The firſt concerneth death,
- By compaſſing or imagining the death of the { King, Queene, Prince, } and declaring the ſame by ſome overt deed.
- By killing and murdering of the { Chancellor. Treaſurer. Juſtices of the one Bench or other. Juſtices in eyre. Juſtices of aſſize. Juſtices of oier and terminer, &c. } In their places doing their offices.

The ſecond concerneth, violation, that is, to violate or carnally to know { the kings conſort, or queene. the kings eldeſt daughter unmarried. the princes wife. }

The third is levying war againſt the king.

[4] The fourth is adhering to the kings enemies within the realme, or without, and declaring the ſame by ſome overt act.

The fifth is counterfeiting of { the great ſeale. the privie ſeale. the king's coyne. }

The ſixth and laſt, by bringing into this realme counterfeit money to the likeneſſe of the kings coine, &c.

So as treaſon is *membrum diviſum*, and theſe ſeverall claſſes or heads are *membra dividentia*. And if the offence be not within one of theſe claſſes or heads, it is no treaſon.

(1) *Treaſon*] is derived from [*trahir*] which is treacherouſly to betray. *Trahue*, betrayed, and *trahiſon, per contractionem*, treaſon, is the betraying it ſelfe.

Detegit imbelles animos, nil fortiter audens
Proditio.

Inter leges Canuti, fo. 118. ca. 61. *Proditiones* (hlaforb þpice) *numera-*

numerabantur inter ſcelera jure humano inexpiabilia. Treaſon is divided into two parts, *viz.* high treaſon, *alta proditio*, and into petit treaſon, *proditio parva*. The Latin word uſed in law is *proditio (à prodere)* and thereof cometh *proditorè*, which of neceſſity muſt be uſed in every indictment of treaſon, and cannot be expreſſed by any other word, periphraſis, or circumlocution.

(2) *Ad fait declariſement.*] This law is for the moſt part declaratory of the ancient law, and therefore this word *(declariſement)* is uſed. But yet the ſtudious reader ſhall obſerve, that in divers clauſes it addeth to the former law, whereunto this word *(declariſement)* will ſufficiently extend.

(3) *Quant home*, &c.] This extendeth to both ſexes, *homo* including both man and woman. This act is generall, and therefore extendeth to ſome perſons which claimed a priviledge to be exempted from ſecular juriſdiction. (For example,) [a] Adam de Orleton biſhop of Hereford was indicted of high treaſon for aiding the Mortimers, &c. with men, and armour againſt king E. 2, &c. Whereupon he was arraigned, and alledged *ſe abſque offenſa Dei, et ſanctæ eccleſiæ, et abſque licentia domini ſummi pontificis non poſſe nec debere reſpondere in hac parte.* And thereupon the archbiſhop of Canterbury, York, and Dublin, and their ſuffragans came to the barre, claimed his priviledge, and took him away; and he was ſo far from puniſhment, as he was after tranſlated to Worceſter, and after to Wincheſter. But this ſtatute (to cleare all doubts) extendeth to all perſons, * as well eccleſiaſticall as temporall, and ſo hath it ever ſince been put in execution, as hereafter in divers caſes it appeareth. See hereafter cap. Murdre et Larceny.

A man that is *non compos mentis*, as ſhall be ſaid more fully hereafter in the next ſection, or an infant within the age of diſcretion is not *(un home)* within this ſtatute; for the principall end of puniſhment is, that others by his example may feare to offend, *ut pœna ad paucos, metus ad omnes perveniat:* but ſuch puniſhment can be no example to mad-men, or infants that are not of the age of diſcretion. And God forbid that in caſes ſo penall, the law ſhould not be certaine; and if it be certaine in caſe of murder and felony, *à fortiori*, it ought to be certaine in caſe of treaſon.

If a man commit treaſon or felony and confeſſeth the ſame, or be thereof otherwiſe convict, if afterward he become *de non ſane memorie (qui patitur exilium mentis)* he ſhall not be called to anſwer: or if after judgement he become *de non ſane memorie*, he ſhall not be executed, for it cannot be an example to others.

And all aliens that are within the realme of England, and whoſe ſoveraignes * are in amity with the king of England, are within the protection of the king, and doe owe a locall obedience to the king, (are *homes* within this act) and if they commit high treaſon againſt the king, they ſhall be puniſhed as traytors, but otherwiſe it is of an enemy, whereof you may reade at large, lib. 7. Calvin's caſe, fol. 6, &c. and 17, &c.

(4) *Fait compaſſer.*] Let us ſee firſt what the compaſſing or imagining the death of a ſubject was before, and at the time of the making of this ſtatute, [a] when *voluntas reputabatur pro facto.* And [b] Bracton ſaith, that *ſpectatur voluntas et non exitus, et nihil intereſt utrum quis occidat, aut cauſam mortis præbeat.* So as when the law was ſo holden, he muſt *cauſam mortis præbere*, that is, declare the ſame

[a] Rot. Romana. 17 E. 2. m. 6. Rot. Claus. 1 E. 3. part 1. memb. 13. Artic. Cleri. 9 E. 3. cap. 15, & 16. Tr. 21 E. 3. coram rege Rot. 173. *Privilegium ſeculare non competit ſeditioſo equitanti cum armis, &c. ſecundum leges eccleſiæ.* 25 E. 3. ſtat. 1. cap. 4. which was before this act. Mich. 31 E. 3. coram rege Rot. 55. Buck. Abbot de Miſſeny. See in the Chap. of Clergy in what caſes the priviledge of clergy is taken away.

* To perſons eccleſiaſticall and temporall. Bract. lib. 3. 120, 121. 134, 135. Britton, 5. 18. Fleta, cap. 23. 30. Mirror, cap. 1. cap 2. § 11. de appeale de homicide, 3 E. 3. cor. 383. 25 E. 3. 42. cor. 139. 26 aſſ. 27. 3 H. 7. cap. 1. 3 H. 7. 1. 12. 21 H. 7. 31. 1. Mar. Dier. 104. Tr. 32 E. 1. Coram rege. 15. 8 E. 2. Corone. 369. 395. Cuſtum. de Norm. cap. 79. fo. 94, 95. 33 H. 8. cap. 20. 1 & 2 Mar. c. 10. To aliens.

* [5]

[a] See hereafter, cap. 73. Where and how *voluntas reputabatur pro facto*, by the ancient law and the change thereof.

[b] Bracton, fol.

ſame by ſome open deed tending to the execution of his intent, or which might be cauſe of death, as juſtice [c] Spigurnel reporteth a caſe adjudged; that a man's wife went away with her avowterer, and they [d] compaſſed the death of the huſband, and as he was riding towards the ſeſſions of oier and terminer and gaole-delivery, they aſſaulted him and ſtroke him with weapons, that he fell downe as dead, whereupon they fled; the huſband recovered and made hue and cry, and came to the ſeſſions and ſhewed all this matter to the juſtices, and upon the warrant of the juſtices, they were taken, indicted, and arraigned; and all this ſpeciall matter was found by verdict; and it was adjudged that the man ſhould be hanged, and the woman burnt. And Sir William Beresford, chiefe juſtice of the common pleas ſaid, that before him and his compagnions juſtices of oier and terminer and gaole-delivery, a youth was arraigned, for that he would have ſtolne the goods of his maſter, and came to his maſters bed, where he lay aſleepe, and with a knife attempted with all his force to have cut his throat; and thinking that he had indeed cut it, he fled, whereupon the maſter cried out, and his neighbours apprehended the youth; and all this matter being found by ſpecial verdict, in the end he was adjudged to be hanged, &c. *Quia* * *voluntas reputabitur pro facto.* So as it was not a bare compaſſing or plotting of the death of a man, either by word, or writing, but ſuch an overt deed, as is aforeſaid, to manifeſt the ſame. So as if a man had compaſſed the death of another, and had uttered the ſame by words or writing, yet he ſhould not have died for it, for there wanted an overt deed tending to the execution of his compaſſing. [e] But if a man had imagined to murder, or rob another, and to that intent had become *inſidiator viarum*, and aſſaulted him, though he killed him not, nor took any thing from him, yet was it felony, for there was an overt deed. But in thoſe days, in the caſe of the king, if a man had compaſſed, or imagined the death of the king (who is the head of the commonwealth) and had declared his compaſſing, or imagination by words or writing, this had been high treaſon, and a ſufficient overture by the ancient law. And herewith agree all our ancient books. Glanvil ſaith, *oum quis de morte regis, &c. infamatus, &c.*

Bracton in the title *de criminibus læſæ majeſtatis. Ipſe accuſatus præloquutus fuit mortem regis.* And Britton. fol. 16. *grand treaſon eſt a compaſſer noſtre mort.* and fo. 39. b. *cyface lencuſor ſon appeale &c. que il oya meſme cēi John pur parler tiel mort, ou tiel treaſon &c.* And Fleta ſaith in his title *de crimine læſæ majeſtatis, ſi quis mortem regis auſu temerario machinatus fuerit &c. quamvis voluntatem non perduxit ad effectum.* And the Mirror ſaith, *crime de majeſtie eſt un peche horrible fait al roy &c. p. ceux q. occirent le roy, ou compaſſant a faire.* And it will delight you (in reſpect of reverend antiquity) to heare a preſident of an appeale (which then and after was in uſe) of high treaſon, *en pleine pliam. &c. ēn temps roy Edmond en ceſtes parolx. Rocelyn icy dit vers Waligrot illonq. q. a tiel iour tiel anne del raigne de tiel roy, en tiel lieu vient celuy Waligrot a cēi Rocelyn, et luy trova deſtre en company, et en aide enſemblement ove Atheling, Thurkild, Ballard, et autres de faire priſoner, ou en tache pur occire mē ſeignior le roy Edmond, ou en auter manner p. coupe felonionſment, et a ceo faire fuer' entreinrēs a ceo counſel celer, et a ceo felony iſſint fornit ſelonq. lour poier.* By all which it is manifeſt, that compaſſing, machinating, counſelling, &c. to

[c] 15 E. 2. tit. Cor. 383.

[d] Note this word [compaſſed.]

* *Sed hæc voluntas non intellecta fuit de voluntate nudis verbis, aut ſcriptis propalata, ſed modo manifeſtata fuit per apertum factum, Id eſt, cum quis dederat operam, quantum in ipſo fuit, ad occidendum, et ſic de ſimilibus,*

[e] *Inſidiator viarum.* See hereafter, cap. 5. De Hereſie. 25 E. 3. 42. 27. aſſ. p. 38. 4 H. 4. ca. 2. 13 H. 4. 7. per Gaſcoign. But ſee 9 E. 4. fo. 26. *Inſidiator viarum* without taking of ſomewhat, reſolved to be no felony. V. lib. 11. fo. 29. b. Al. Poulter's caſe. Vid. poſtea cap. 16. Robbery, in fine. Glanvil, lib. 14. cap. 14. lib. 1. c. 2. Bract. lib. 3. f. 118. Britton, fol. 16. & 39. b. Note the word *Compaſſe.* Fleta, lib. 1. c. 21. Mirr. cap. 1. § 5. cap. 2. § 11. Note this word *Compaſſe.* Mirror, c. 2. § 13. De Iappeale de majeſtie. Rot. pat. 25 E. 3. part 1. m. 16. Vide Mic. 4 H. 4. Coram rege. Rot. 22. See hereof more in the 59 cha. of Appeales. Bracton, Britton, Fleta, &c.

to kill the king, though it hath no other declaration thereof but by words, was high treaſon by the common law. And ſee hereafter, *verb. per overt fait, et de ceo provablement, &c.*

(5) *Fait compaſſer ou imaginer.*] So as there muſt be a compaſſing or imagination, for an act done *per infortunium*, without compaſſing, intent, or imagination, is not within this act, as it appeareth by the expreſſe words thereof. *Et actus non facit reum, niſi mens ſit rea.* And if it be not within the words of this act, then by force of a clauſe hereafter, *viz. Et pur ceo que pluſors autres, &c.* It cannot be adjudged treaſon, untill it be declared treaſon by parliament, which is the remedie in that caſe, which the makers of the law provided in that caſe. This compaſſing, intent, or imagination, though ſecret, is to be tryed by the peers, and to be diſcovered by circumſtances precedent, concomitant, and ſubſequent, with all endeavour evermore for the ſafety of the king. This was the caſe of Sr. Walter Tirrel a French knight, who the firſt day of Auguſt *ann.* 13 Williel. 2. *ann. dom.* 1100 being a hunting with the king in the new foreſt, was commanded by the king to ſhoot at a hart, *exiit ergo telum volatile, et obſtante arbore in obliquum reflexum faciens, per medium cordis regem ſauciavit, qui ſubito mortuus corruit.*

Regula.

Mat. Par. pa. 51. Holling. pa. 26. b. Mat. Weſtm. W. Malmeſbury.

It appeareth alſo by the Cuſtumer of Normandy, treating of treaſon, and the expoſition of the ſame, that this act was not treaſon. To calculate or ſeek to know by ſetting of a figure or witchcraft, how long the king ſhall raigne or live, is no treaſon, for it is no compaſſing, or imagination of the death of the king, within this ſtatute of 25 E. 3. and this appeareth by the judgment of the parliament in 23 Eliz. whereby this offence was made felony during the life of queen Eliz. which before was puniſhable by fine and impriſonment.

Cuſtum. de Nor. cap. 14. Vide inter Indictamenta de 17 E. 4. de Th. Burdit. al. ſed judicandum eſt legibus, et non exemplis. 23 Eliz. cap. 2.

The ancient law was, that if a mad man had killed or offered to kill the king, it was holden for treaſon; and ſo it appeareth by king Alfred's law before the conqueſt, and in lib. 4. in Beverlyes caſe. But now by this ſtatute and by force of theſe words, *fait compaſſer ou imaginer la mort*, he that is *non compos mentis* and totally deprived of all compaſſings, and imaginations, cannot commit high treaſon by compaſſing or imagining the death of the king: for *furioſus ſolo furore punitur*: but it muſt be an abſolute madneſſe, and a totall deprivation of memorie. And this appeareth by the ſtatute of 33 H. 8. for thereby it is provided, that if a man being *compos mentis* commit high treaſon, and after accuſation, &c. fall to madneſſe, that he might be tryed in his abſence, &c. and ſuffer death, as if he were of perfect memory: for by this ſtatute of 25 E. 3. a mad man could not commit high treaſon. It was further provided by the ſaid act of 33 H. 8. that if a man attainted of treaſon became mad, that notwithſtanding he ſhould be executed; * which cruell and inhuman law lived not long, but was repealed, for in that point alſo it was againſt the common law, becauſe by intendment of law the execution of the offender is for example, *ut pœna ad paucos, metus ad omnes perveniat*, as before is ſaid: but ſo it is not when a mad man is executed, but ſhould be a miſerable ſpectacle, both againſt law, and of extreame inhumanity and cruelty, and can be no example to others.

* *Inter leges Alwredi*, cap 4. lib 4. fo. 124. Beverlie's caſe. Ovid. *Scilicet in ſuperis etiam fortuna lucnda eſt. Nec veniam læſo numine, cujus habet.*

33 H. 8. cap. 20. * 1 & 2 Ph. and Mar. ca. 10. [a] Bract. lib. 3. fo. 118. Britton, cap. 8. a diſheriter. Glanv. lib. 1. cap. 2. Fleta, lib. 1. cap. 21. Mirror, ca. 1. § 5. *Vers roy de la tre.*

(6) *Mort.*] [a] He that declareth by overt act to depoſe the king, is a ſufficient overt act to prove, that he compaſſeth and imagineth the death of the king. And ſo it is to [b] impriſon the king, or to take the king into his power, and manifeſt the ſame by ſome overt act, this is alſo a ſufficient overt act for the intent aforeſaid. But peruſe adviſedly the ſtatutes of 13 Eliz. cap. 1. 2. & 14 Eliz. cap. 1.

[a] 13 Eliz. cap. 1. nota declared. Brook, tit. treaſon, 24.
[b] 1 H. 4. 1. 19 H. 6. 47. 33 H. 8. 12. *vide infra verb.* (16) *Per overt fait.*

(7) *Nrē ſeignior le roy.*] Theſe words extend to all his ſucceſſors, as it hath been alwayes taken.

3 Mar. Dier. 131. pl. 7.

(8) *Le roy.*] Is to be underſtood of a king regnant, and not of one that hath but the name of a king, or a nominative king, as it was reſolved in the caſe of king Phillip, who married queen Mary, and was but a nominative king, for queen Mary had the office and dignity of a king, ſo as ſhe that wanted the name of a king, but had the office and dignity, was within this act of 25 E. 3. And hee that had the name, and not the office and dignity of the king was not within it. And therefore an act was made, that to compaſſe or imagine the death of king Phillip, &c. during his marriage with the queen, was treaſon. A queen regnant is within theſe words *(nrē ſeignior le roy)* for ſhe hath the office of a king.

[7]

1 & 2 Phi. and Mar. cap. 10.

Vide 11 H. 7. c. 1.

This act is to be underſtood of a king in poſſeſſion of the crowne, and kingdom: for if there be a king regnant in poſſeſſion, although he be *rex de facto, et non de jure*, yet is he *ſeignior le roy* within the purvien of this ſtatute. And the other that hath right, and is out of poſſeſſion, is not within this act. Nay if treaſon be committed againſt a king *de facto, et non de jure*, and after the king *de jure* cometh to the crowne, he ſhall puniſh the treaſon done to the king *de facto*: and a pardon granted by a king *de jure*, that is not alſo *de facto*, is voyde.

4 E. 4. 1.
9 E. 4. 1. 2.

If the crown deſcend to the rightfull heire, he is *rex* before coronation; for by the law of England there is no *interregnum*: and coronation is but an ornament or ſolemnity of honour. And ſo it was reſolved by all the judges Hil. 1 Ja. in the caſe of Watſon and Clarke ſeminary prieſts: for by the law there is alwayes a king, in whoſe name the lawes are to be maintained, and executed, otherwiſe juſtice ſhould faile. Divers kings before the conqueſt voluntarily renounced their kingly office: and ſo did king H. 2. in the 16. yeare of his reigne, and Henry his ſonne was created and crowned.

Hil. 1 Ja. in the caſe of Watſon and Clark ſeminary prieſts.
9 E. 4. 1. b.

It appeareth by Britton, that to compaſſe the death of the father of the king, is treaſon, and ſo was the law holden long after that: for after king E. 2. had diſmiſſed himſelfe of his kingly office, and duty, and his ſonne by the name of E. 3. was crowned, and king regnant, thoſe curſed caitifs, Thomas Gourny, and William Ocle, and others were attainted of high treaſon for murthering the king's father, who had been king by the name of E. 2. and had judgement to be drawne, hanged, and quartered.

See the preamble, *Auxint pur ceo que divers opinions ount eſtre eins ceux heures, que quel caſe doit eſtre dit treaſon, et in quel caſe nemi*, Rot. parliam. 4 E. 3. num. 5.

* The like judgement was given againſt Sir John Matrevers knight, and others, as being guilty of the death of the king's uncle, Edmond earl of Kent, which at that time (being ſo neer of the bloud royall) was by ſome holden alſo treaſon. But now this act of 25 E. 3. hath reſtrained high treaſon in caſe of death *(al nrē ſeignior le roy, ſa compaigne, et al eigne fitz, et heire le roy.*

* Eodem rot. num. 3. and 4.

Plac. in parliam. E. 1. *anno regni ſui*, 33 North, Rot. 17. & 22.

Nicholas de Segrave was charged in open parliament *in præſentia dni. reg. comitum, baronum, et aliorum de conſilio regis tunc ibi exiſtent'*;

that

that the king in the warre of Scotland being amongſt his enemies, Nicholas Segrave his liege man, and holding of the king by homage, and fealty, ſerved him for his aid in that warre, did maliciouſly move contention and diſcord without cauſe, with John de Crombewell, charging him with many enormous crimes, and offered to prove it upon his body. To whom the ſaid John anſwered, that he would anſwer him in the king's court, as the court ſhould conſider, &c. and thereupon gave him his faith. After Nich. withdrew himſelfe from the king's hoſt, and from the king's aid, leaving the king amongſt his enemies, *in periculo hoſtium ſuorum*, and adjourned the ſaid John to defend himſelf in the court of the king of France, and prefixed him a certaine day, *et ſic quantum in eo fuit, ſubjiciens, et ſubmittens dominium regis, et regni ſubjectioni dni. regis Franciæ, ad hoc faciendum, iter ſuum arripuit uſque Dovoriam, ad tranſfretandum, &c.* All which the ſaid Nich. confeſſed, *et voluntati dni. regis de alto et baſſo inde ſe ſubmiſit. Et ſuper hoc dns. rex volens habere aviſamentum comitum, baronum, magnatum, et aliorum de conſilio ſuo, injunxit eiſdem in homagio, fidelitate, et ligeantia quibus ei tenentur, quod ipſum fideliter conſulerent, qualis pœna pro tali facto ſic cognito fuerit infligenda: qui omnes, habito ſuper hoc diligenti tractatu, et aviſamento conſideratis, et intellectis omnibus in prædicto facto contentis, &c. dicunt quod hujuſmodi factum meretur amiſſionem vitæ et membrorum, &c.* So as this offence was then ſolemnely in parliament adjudged high treaſon. But this is taken away by this act of 25 E. 3. being not under any of the claſſes, or heads ſpecified in this act. [8]

So piracy by any of the king's ſubjects upon another, was taken to be treaſon before this act, for ſo is the book to be intended, becauſe a pirat is *hoſtis humani generis*. But by this act it is not now to be judged treaſon. See hereafter in the chapter of Piracy. 40 Aſſ. 25.

One doth marie a queen regnant, if the huſband compaſſe the death of the queene, and declare the ſame by overt act, he is guilty of treaſon, and puniſhable by this act, for to this and many other purpoſes ſhe is a diſtinct perſon by the common law. And ſo if a queene wife of a king regnant, compaſſe the death of the king, and declare the ſame by overt act, ſhe is guilty of treaſon, and puniſhable by this act. So as (that we may ſpeak it once for all) by theſe and many others that might be cited, (ſome whereof ſhall hereafter be touched) the preamble of this act appeareth to be true, that divers opinions had been before the making of this act, what offences ſhould be adjudged high treaſon, and what not. Britton, cap. 8. and other ancient authors *ubi ſupra*.

This ſtatute having reſtrained the compaſſing, &c. of death to the king, queen, and prince, it came to paſſe after the making of this act, that in 3 R. 2. two citizens of London, John Kerby, mercer, and John Algore, grocer conceiving malice againſt John Impetiall Janevois of S. Mary in Genoa that came as ambaſſadour from the ſtate of Genoa to the king (under the king's letters of ſafe conduct, for alliance to be had betweene the king and the duke and comminalty of Genoa aforeſaid) for that the ſaid John Imperiall had obtained a * monopolie to furniſh this land (keeping his ſtaple at Southampton) of all ſuch wares as came from the Levant, ſo plentifully as was to be had in all the weſt parts of Chriſtendome, the ſaid John Imperiall was killed by them, as more at large appears by the record. And albeit the ſaid John Imperiall was an ambaſſadour Rot. parlia. 3 R. 2. num. 18. See placita coram rege Hill. an. 3 R. 2. (Cavendiſh) rot. 8. London Holl. cron. 3 R. 2. pa. 422. 60. b. &c. * Monopoly. *nota* his end.

ſadour under the king's ſafe conduct, and the killing of him was *juſti belli cauſa*, yet the killing of him was no treaſon, becauſe it was not under any of the ſaid claſſes or heads, until it was at that time declared by parliament in theſe words, *quel caſe examine et diſpute inter les ſeigniors, et commons, et puis nre. al roy en pleine parliament, eſtoit illonques devant nre. ſeignior le roy declares, determinus et aſſentus, que tiel fait, et coupe eſt treaſon, et crime de royall majeſtie blemye, en quel caſe il ne doit allower a nulluy priviledge del clergie*, and accordingly the ſaid Kerby and Algore were attainted of high treaſon in the king's bench, Hill. 3 Rich. 2. *ubi ſupra*: but this declaration is taken away by the ſtatute of 1 Mariæ, as hereafter ſhall be ſaid, and yet of this declaration we ſhall make much uſe hereafter.

2 Regum, cap. 10. 4. 12. 31. The killing of a foreine ambaſſadour. *Honor legati, honor mittentis eſt, et proregis dedecus redundat in regem.*

In the 22 yeare of E. 3. which was about 3 yeares before the making of this act, one John at Hill had murdered A. de Walton the king's ambaſſadour, *nuncium dni. regis miſſ. ad mandatum regis exequendum*: this was adjudged high treaſon, for which he was drawne, hanged, and beheaded, &c. For true it is, *quod legatus ejus vice fungitur, a quo deſtinatur, et honorandus eſt ſicut ille cujus vicem gerit, et legatos violare contra jus gentium eſt.* But by this act of 25 E. 3. it is reſtrained to the death *de nre. ſeignior le roy*, and therefore *prorex* is not within this ſtatute.

22 Aſſ. p. 49. *Mort dun ambaſſad. le roy.*

(9) *Sa compaigne.*] This word *compaigne*, (which is all one with conſort or wife) was uſed, that compaſſing, &c. muſt be during the marriage with the king, for after the king's death ſhe is not *ſa compaigne*, and therefore it extendeth not to a queene dowager, and for this cauſe this word *compaigne* was uſed in this act.

(10) *Le fitz eigne et heire le roy.*] The eldeſt ſonne and heire of a queen regnant is within this law. Before this ſtatute ſome did hold, that to compaſſe the death of any of the king's children, was treaſon. But by this act it is reſtrained to the prince, the king's ſonne, being heire apparant to the crowne for the time being: and he need not be the firſt begotten ſonne, for the ſecond after the deceaſe of the firſt begotten without iſſue, is *fitz eigne* within this ſtatute, *et ſic de cæteris.* If the heire apparant to the crowne be a collateral heire apparant, he is not within this ſtatute, untill it be declared by parliament, as it was in the duke of York's caſe.

Britton *ubi ſupra.*

[9]

Roger Mortimer, earle of March, was in *anno domini* 1487 (11 R. 2.) proclaimed heire apparant. *Anno* 39 H. 6. Richard duke of York was likewiſe proclaimed heire apparant. And ſo was John de la Poole earle of Lincolne, by R. 3. And Henry marquiſſe of Exeter, by king Henry the eighth. But none of theſe or of the like, are within the purvieu of this ſtatute. And now that we have handled compaſſings and imaginations, let us proceed to the reſidue which concerne acts and deeds.

Heire is here taken for heire apparant, for he cannot be heire in the life of the father.

(11) *Si home violaſt la compaigne le roy.*] The Mirror ſaith, *Crime de majeſtie vers le roy p. ceux avowterors q. ſpergiſſent la feme le roy.* Whereby it appeareth that this was high treaſon by the common law.

Mirror, ca. 1. §. 5. Brit. c. 23. fo. 43. a.

Violare is here taken for *carnaliter cognoſcere*; and it is no treaſon, unleſſe it be done during the marriage with the king, and extendeth not to a queen dowager, as hath been ſaid. And if the wife

33 H. 8. cap. 21.

of

of the king doth yeeld and conſent to him that committeth this treaſon, it is treaſon in her.

(12) *Ou la compaigne de lour fitz et heire.*] This alſo extendeth to the wife of the prince during the coverture betweene them, and not to a dowager, and if the wife yeeld and conſent to him that commits this treaſon, it is treaſon in her.

Heire] Here is taken *ut ſupra*, for heire apparant.

(13) *Ou leigne file nient marie.*] (That is,) eldeſt daughter not married at the time of the violation, albeit there had been an elder daughter then ſhe, who is dead without iſſue. * The Mirror. *Avowterors q. ſpergiſſont la file le roy eignes legittime, avant ceo q. el ſoit marie.*

And the reaſon that the eldeſt only is here mentioned, is, for that for default of iſſue male, ſhe only is inheritable to the crowne.

(14) *Ou ſi home leva guerre enconter noſtre ſeignior le roy.*] [a] This was high treaſon by the common law, for no ſubject can levie warre within the realme without authority from the king, for to him it only belongeth, See F. N. B. 113. a. *Le roy de droit doit ſaver et defender ſon realme vers enemies, &c.*

[b] A compaſſing or conſpiracy to levie war, is no treaſon, for there muſt be a levying of war *in facto*. But if many conſpire to levie war, and ſome of them do levie the ſame according to the conſpiracy, this is high treaſon in all, for in treaſon all be principals, and war is levied.

If any levie war to expulſe ſtrangers, to deliver men out of priſons, to remove counſellors, or againſt any ſtatute, or to any other end, pretending reformation of their own heads, without warrant; this is levying of war againſt the king: becauſe they take upon them royall authority, which is againſt the king. There is a diverſity betweene levying of war and committing of a great riot, a rout, or an unlawfull aſſembly. [c] For example, as if three, or foure, or more, doe riſe to burne, or put down an incloſure in Dale, which the lord of the manor of Dale hath made there in that particular place; this or the like is a riot, a rout, or an unlawfull aſſembly, and no treaſon. But if they had riſen of purpoſe to alter religion eſtabliſhed within the realme, or laws, or to go from town to town generally, and to caſt downe incloſures, this is a levying of war (though there be no great number of the conſpirators) within the purview of this ſtatute, becauſe the pretence is publick and generall, and not private in particular. And ſo it was reſolved in the caſe of Richard Bradſhaw, miller, Robert Burton, maſon, and others of Oxfordſhire, whoſe caſe was, that they conſpired and agreed to aſſemble themſelves with ſo many as they could procure at Enſlowe-hill in the ſaid county, and there to riſe, and from thence to go from gentlemans houſe to gentlemans houſe, and to caſt downe incloſures, as well for inlargement of high-wayes as of errable lands. And they agreed to get armour and artillery at the lord Norrys his houſe, and to weare them in going from gentlemans houſe to gentlemans houſe for the purpoſe aforeſaid, and to that purpoſe they perſwaded divers others: and all this was confeſſed by the offenders. And it was reſolved, that this was a compaſſing and intention to levie war againſt the queen, becauſe the pretence was publick within the ſtatute of 13 Eliz. cap.

Paſch. 28 H. 8. in Spilman's Reports in caſe of Queen Anne. 33 H. 8. ubi ſupra, in caſe of Queen Katherine.

* Mirror, ca. 1. § 5.

See Brit. cap. 23. fo. 43. 44. and cap. 29. fol. 71. 1 Mar. Parl. 2. c. 1.

[a] Glanvil, lib. 1. cap. 2. l. 14. c. 1. Bracton, lib. 3. fol. 118. Britton, f. 16, &c. Fleta, li. 1. ca. 21. Mir. ca. 1. § 5.

[b] 1 Mar. 98. b. Dier. in Sir N. Throgmorton's caſe. See 21 E. 3. 23. 21 R. 2. cap. Repeale. 1 H. 4. cap. 3. 8 E. 3. 20. See hereafter, cap. 73. againſt going or riding armed.

[c] See Rot. Parl. in Cro. Epiphan. 20 E. 1. Rot. 23. Humfrey de Bohun's caſe. 4 Eliz. 210. b. Dier. See the ſtatute of 1 Mar. ca. 2. By which, grand riots in ſome caſes be made felony.

[10]

Paſch. 39 Eliz. by all the judges of England, I being attourney-generall, and preſent.

cap. 1. (the letter whereof herein ſhortly followeth,) and the offenders were attainted and executed at Enſlowe-hill.

And this diverſity is proved by a latter branch of this act.

Et ſi per caſe aſcun home de ceſt realme chimancha arme diſcovert ſecretment ove gents armes, contre aſcun autre, pur luy tuer, ou diſrober, ou pur luy prender, ou retayner tanq. il face fine, ou ranſome pur ſa deliverance, neſt lentention le roy et de ſon counſell, q. en tiel caſe ſoit adjudge treaſon, mes ſoit adjudge felony, ou treſpaſſe, ſolonq. le ley del tre. auncient-ment uſe. Whereby it appeareth, that bearing of armes in warlike manner, for a private revenge or end, is no levying of war againſt the king within this ſtatute. So that every gathering of force is not high treaſon. And ſo it was reſolved in parliament, in 5 H. 4 rot. parliam. nu 11. & 12. the earle of Northumberland's caſe.

Rot. Parl. 5 H. 4. nu. 11, 12.

By the ſaid ſtatute of 13 Eliz. cap. 1. it is enacted, declared, and eſtabliſhed, that during the naturall life of queene Elizabeth, if any within the realme or without, ſhould compaſſe, imagine, invent, deviſe, or intend to levie war againſt her majeſty, within this realme, or without, and the ſame declare by writing, or word, &c. that it ſhould be high treaſon: ſo during the life of the queen, a conſpiracy to levie war was high treaſon, though no war were levied; and upon that law, Bradſhaw, Burton, and others, were attainted of high treaſon, for conſpiracy only to levie war. But it was reſolved by all the juſtices, that it was no treaſon within the ſtatute of 25 E. 3. as hath been ſaid. The words in this law are [*levie guerre*] an actuall rebellion or inſurrection is a levying of war within this act, and by the name of levying war is to be expreſſed in the indictment. If any with ſtrength and weapons invaſive, and defenſive, doth hold and defend a caſtle or fort againſt the king and his power, this is levying of war againſt the king within this ſtatute of 25 E. 3.

13 Eliz. cap. 1. b. The indictments and attainders of treaſon by force of this ſtatute are not more to be followed, becauſe the ſtatute which made them good, is expired. Dier, 3 & 4 Ph. and Mar. 144. 10 E. 4. 6. 1 Mar. Treaſon, Br. 24. Ter. Mic. 8 H. 8. Mich. 7 H. 5. Coram rege. Heref. Rot. 20.

It was reſolved by all the judges of England in the reigne of king H. 8. that an inſurrection againſt the ſtatute of labourers, for the inhanſing of ſalaries and wages, was a levying of war againſt the king, becauſe it was generally againſt the kings law, and the offenders took upon them the reformation thereof, which ſubjects by gathering of power ought not to do. It was ſpecially found, that divers of the kings ſubjects did miniſter and yeeld victuals to Sir John Oldcaſtle, knight, and others, being in open war againſt the king, and that they were in company with them in open war; but all this was found to be *pro timore mortis, et quod receſſerunt, quam cito potuerunt:* and it was adjudged to be no treaſon, becauſe it was for feare of death. *Et actus non facit reum, niſi mens ſit rea.* And therefore this in them was no levying of war againſt the king within this act.

[a] Rot. Parl. 20 E. 1. nu. 2. John de Brittaine's caſe. Rot. Parl. 33. E. 1. Rot. 6. Rob. de Ros de Werke's caſe. 8 E. 3. 20. 38 E. 3. 31. a. Parl. 4 R. 2. nu. 17, 18, &c. 5 R. 2. Triall 54. Hil. 18 E. 3. coram rege. Rot. 145. Eborum, 43. Aſſ. 28. 42. Aſſ. 29. Gilbert de M. was a Scot. Rot. Parl. 7 R. 2. nu. 15. 17. 24. 7 H. 4. 47. Cuſt. de Norm. ca. 73.

(15) *Ou ſoit adherent as enemies noſtre ſeigniour le roy, a eux donant aide et comfort en ſon roialme et ayllors.*]

Adherent.] [a] This is here explained, viz. in giving aide and comfort to the king's enemies within the realme or without: delivery or ſurrender of the king's caſtles or forts by the kings captaine thereof to the kings enemie within the realme or without for reward, &c. is an adhering to the kings enemy, and conſequently treaſon declared by this act. [b] A. is out of * the realme at the time of a rebellion within England, and one of the rebels flye out of the

[b] *Vid* 13 Eliz. Dier. 298.

the realme, whom A. knowing his treaſon doth aide or ſuccour, this is no treaſon in A. by this branch of 25 E. 3. becauſe the traytor is no enemy, as hereafter ſhall be ſaid; and this ſtatute is taken ſtrictly.

See hereafter, 35 H. 8. cap. 2.

As enemies.] *Inimicus* in legall underſtanding is *hoſtis*, for [c] the ſubjects of the king, though they be in open war or rebellion againſt the king, yet are they not the king's enemies, but traytors; for enemies be thoſe that be out of the allegiance of the king. If a ſubject joine with a foraine enemy, and come into England with him, he ſhall not be taken priſoner here and ranſomed, or proceeded with as an enemy ſhall, but he ſhall be taken as a traytor to the king.

[c] 43 Aſſ. 28, 29. 33 H. 6. 1. 19 E. 4. 6. a. and b. 4 Mar. Treaſon. Br. 32. 1 Mar. ibid. 24. 21 E. 3. 23. 22 Aſſ. p. 49. 13 El. Dyer, 298. Ex libro de Griffin de Perkin Werbeck.

[d] An enemy coming in open hoſtility into England, and taken, ſhall be either executed by marſhall-law, or ranſomed; for he cannot be indicted of treaſon, for that he never was within the protection or ligeance of the king, and the indictment of treaſon ſaith, *contra ligeantiam ſuam debitam.*

[d] Dier, 4. Mar. *fo.* 145. a. Lib. 7. fo. 6. b. Calvin's caſe.

[e] David prince of Wales levied war againſt E. 1. this was treaſon, for that he was within the homage and ligeance of the king, and had judgement given againſt him as a traytor, and not as an enemy. And albeit in many preſidents of indictments, ſubjects that be rebels, and traytors, &c. be called *proditores et inimici*; yet within this ſtatute they are not *inimici.*

[e] Fleta, lib. 1. c. 16.

[f] In the duke of Norfolk's caſe the queſtion was, a league being between the queene of England and the king of Scots, whether the lord Heriſe and other Scots *in aperto prælio* burning and waſting divers townes in England without the aſſent of the king, were enemies in law within this ſtatute, and reſolved that they were.

[f] Mich. 13. & 14. Eliz. per Juſtice. 19 E. 4. 6. b. 18 H. 6. ca. 4. 20 H. 6. cap. 1.

[g] See more hereafter in this third part of the Inſtitutes. cap. 49. of Piracy, &c. upon the ſtatute of 28 H. 8. cap. 15.

[g] 27 E. 3. cap. 13. 31 H. 6. cap. 4. 7 E. 4. 14. 13 E. 4. 9. 21 E. 3. 16, 17. Regiſt. 129. Fit. N. B. 114.

Ou per ailors.] That is to ſay, out of the realme of England. But then it may be demanded, how ſhould at this time this foraigne treaſon be tried? And ſome [h] of our books doe anſwer, that the offender ſhall be indicted and tried in this realme where his land lyeth, and ſo it was adjudged in 2 H. 4. But now by the ſtatute of 35 H. 8. cap. 2. (which yet remains in force) all offences made or declared, or hereafter made or declared treaſons, miſpriſions of treaſon, and concealements of treaſon, committed out of the realme of England, ſhall be inquired of, heard, and determined, either in the king's bench or before commiſſioners in ſuch ſhire as ſhall be aſſigned by the king. If it be before commiſſioners, it hath been commonly uſed, that the king doth write his name in the upper part of the commiſſion. But in the caſe of Patrick o'Cullen an Iriſhman, the queene did put her ſignature to the warrant to the lord keeper, and not to the commiſſion: * and it was holden by the juſtices that the one way and the other was a ſufficient aſſignement by the king within the ſtatute of 35 H. 8.

[h] 4 Aſſ. p. 15. 5 R. 2. *ubi ſupra.* 19 E. 4. 6. b. Dier. 3. Mar. 132. Paſch. 2 H. 4. *coram rege.* Rot. 8. Wallis. 35 H. 8. cap. 2. 3 Mar. *ubi ſupra.* 13 Eliz. Dier. 298. Stanford Pl. Cor. fo. 90. a. and b. See the firſt part of the Inſtitutes, 440.

* Hil. 36 Eliz. in the caſe of Patrick o'Cullen, for a treaſon at Bruſſels *in partibus marinis.*

[i] It was reſolved by all the judges of England, that for a treaſon done in Ireland the offender may be tryed by the ſtatute of 35 H. 8. in England, becauſe the words of the ſtatute be, all treaſons committed out of the realme of England, and Ireland is out of the realme of England. And ſo it was reſolved in Sir John Parrot's caſe. And our word here [*per ailors*] is as much as out of the realme

[i] 33 El. in Ornick's caſe, lib. 7. f. 23. Calvin's caſe. *Vid.* Dier. Mich. 19 & 20 Eliz. fo. 360. lib. 11. fo. 63. in Doct. Foſter's caſe.

realme of England. See Paſch. 2 H. 4. *coram rege rot.* 8. Salop. Treaſon in Wales.

[12]

[k] All treaſons done upon the ſea ſhall be inquired, heard, and determined in ſuch ſhires and places of the realme as ſhall be limited by the king's commiſſion, in like forme and condition, as if the ſame had been done upon the land, &c. after the common courſe of the lawes of this land. And by the preamble it appeareth, that it could not be tryed by the common law, but by the civill law before the lord admirall. See hereafter in the expoſition of the ſtatute of 28 H. 8. cap. 15. *et infra*, cap. 49.

[k] 28 H. 8. ca. 15. This act concerning treaſons is not taken away by the ſtatute of 35 H. 8. cap. 2. *Vide infra* cap. 49. fo. 181. of Piracy, &c. Vid. 5 Eliz. c. 5.

(16) *Et de ceo provablement ſo t attaint per overt fait per gents de lour condition.*] In this branch four things are to be obſerved, [z] firſt this word [*provablement*] provably, that is, upon direct and manifeſt proof, not upon conjecturall preſumptions, or inferences, or ſtraines of wit; but upon good and ſufficient proofe. And herein the adverb [*provablement*] provably, hath a great force, and ſignifieth a direct and plain proof, which word the king, the lords, and commons in parliament did uſe, for that the offence was ſo hainous, and was ſo heavily, and ſeverely puniſhed, as none other the like, and therefore the offender muſt provably be attainted, which words are as forcible, as upon direct and manifeſt proof. Note, the word is not (probably) for then *commune argumentum* might have ſerved, but the word is [*provably,*] be attainted.

[z] See 1 E. 6. ca. 12. the laſt clauſe. 5 E. 6. ca. 11. 1 & 2 Ph. & Mar. ca. 10. and 11. 1 Eliz. cap. 6. 13 Eliz. cap. 1. Stanf. pl. Cor. 89. and 164. Br. coron. 4 Mar. 220. Dier. 2 Mar. fo. 99.

2. This word *(attaint)* neceſſarily implyeth that he be proceeded with, and attainted according to the due courſe, and proceedings of law, and not by abſolute power, or by other meanes, [a] as in former times had been uſed. [b] And therefore if a man doth adhere to the enemies of the king, or be ſlaine in open warre againſt the king, or otherwiſe die before the attainder of treaſon, he forfeiteth nothing, becauſe (as this act ſaith) he is not attainted: wherein this act hath altered that, which before this act, in caſe of treaſon, was taken for law. And the ſtatute of 34 E. 3. cap. 12. ſaves nothing to the king, but that which was in *eſſe*, and pertaining to the king at the making of that act. And this appeareth by a judgement in parliament in *anno* 29 H. 6. cap. 1. that [c] Jack Cade being ſlaine in open rebellion could no way be puniſhed, or forfeit any thing, and therefore was attainted by that act of high treaſon.

[a] Rot. parl. an. 33 E. 1. Rot. 6. Jo. Salvyn's caſe.
[b] 43. Aſſ. 28. 8 E. 3. 20. 7 H. 4. 27. 34 E. 3. cap. 12. Lib. 4. fo. 57. the Sadler's caſe.
[c] 29 H. 6. cap. 1.

3. *Per overt fait,*] *per apertum factum.* This doth alſo ſtrengthen the former expoſition of the word *(provablement,)* that it muſt be provably, by an open act, which muſt be manifeſtly proved. As if divers doe conſpire the death of the king, and the manner how, and thereupon provide weapons, powder, [d] poiſon, aſſay harneſs, ſend letters, &c. or the like, for execution of the conſpiracy. Alſo preparation by ſome overt act, to depoſe the king, or take the king by force, and ſtrong hand, and to impriſon him untill he hath yeelded to certaine demands, this is a ſufficient overt act to prove the compaſſing, and imagination of the death of the king: for this upon the matter is to make the king a ſubject, and to diſpoyle him of his kingly office of royall government. And ſo it was reſolved by all the judges of England. Hill. 1 Jac. *regis*, in the caſe of the lo. Cobham, lord Gray, and Watſon and Clarke ſeminary prieſts: and ſo had it been reſolved by the juſtices, Hill. 43. Eliz. in the caſe of the earles of E. and of S. who intended to goe to the court

Vide ſupra verbo ¶ Mort. fo. 6. Vide 21 R. 2. cap. 3. but it is repealed by 1 H. 4. ca. 3.
[d] Hill. 36 Eliz. Doctor Lopes caſe, 13 Eliz. c. 1. Brooke, Treaſon, 24.

Hill. 1 Ja. R. Lo. Cobham's caſe.

court where the queen was, and to have taken her into their power, and to have removed divers of her counſell, and for that end did aſſemble a multitude of people; this being raiſed to the end aforeſaid was a ſufficient overt act for compaſſing the death of the queen. And ſo by woful experience in former times it hath fallen out, in the caſes of king E. 2. R. 2. H. 6. and E. 5. that were taken, and impriſoned by their ſubjects. And this is made more plain by the legall forme of an inditement of treaſon: for firſt it is alledged according to this act, *quod* * *proditorie compaſſavit, et imaginatus fuit mortem et deſtructionem dni. regis, et ipſum dom. regem interficere, &c.* in the ſecond part of the inditement is alledged the overt act, *et ad illam nephandam, et proditoriam compaſſationem, imaginationem, et propoſitum ſuum perficiend' et perimplend'* and then certainly to ſet downe the overt fact for preparation to take, and impriſon the king, or any other ſufficient overt act, which of neceſſity muſt be ſet downe in the inditement. Hereby it appeareth how inſufficient many inditements were of high treaſon, wherein it was generally alledged, that *per apertum factum compaſſavit et imaginatus fuit mortem dom. regis, &c.* * For example *termo. Mic. anno* 5 E. 6. Edward duke of Somerſet was indited before commiſſioners of oyer and terminer in London, *quod ipſe deum præ oculis ſuis non habens, ſed inſtigatione diabolica* ‡ *ſeductus, apud Holborne in parochia Sancti Andreæ infra civitatem London, viz. 20 die Aprilis anno regni domini regis Edw. ſexti quinto, et diverſis diebus et vicibus antea et poſtea falſe, malicioſe, et proditorie* * *per apertum factum circumivit, compaſſavit, et imaginavit cum diverſis aliis perſonis prædictum dominū regem de ſtatu ſuo regali deponere et deprivare, &c.* Which indictment, and all others of like forme were againſt law, as hath been ſaid, and of the matter of this indictment that noble duke was by his peers found not guilty. But then it may be demanded, for what offence he had judgement of death, and 2. what law made it an offence. The offence appeareth in his indictment, for the former part thereof contained high treaſon, whereof he was acquitted, and the latter part contained one only offence of felony (whereof he was found guilty) in theſe words, *et ulterius juratores præd. præſentant, quod præfatus Edwardus dux Somerſet deū præ oculis ſuis non habens, ſed inſtigatione diabolica ſeductus 20 Maii an. regni dicti dom. regis Edwardi ſexti quinto ſupradicto, ac diverſis aliis diebus et vicibus antea et poſtea apud Holborn in præd. paroch. Sancti Andreæ in civitate London, et apud diverſa alia loca infra civitatem London præd. felonice ut felo dicti dom. regis per aperta verba et facta procuravit, movit, et inſtigavit complurimos ſubditos ipſius domini regis ad inſurgendum, et apertum rebellionem et inſurrectionem infra hoc regnum Angliæ movend' contra ipſum dominum regem, et ad tunc et ibid. felonice ad capiendum et impriſonandum prænobilem Johannem comitem Warwick de privato conſilio domini regis ad tunc exiſten', contra pacem dicti domini regis coronam et dignitatem ſuam, et contra formam ſtatuti in hujuſmodi caſu editi et proviſi.* The ſtatute whereupon this indictment was intended to be grounded, was the branch of the ſtatute of 3 and 4 E. 6. by which it is provided, " That if any perſon or perſons by ringing of any bel, &c. or by malicious ſpeaking or uttering of any words, or making any outcry, &c. or by any other deed or act ſhall raiſe or cauſe to be raiſed or aſſembled any perſons to the number of 12 or above, to the intent that the ſame perſons ſhould

* In ancient time *traditioſè, et felonicè.* parl. 33 E. 1. rot. 6. Robert de Ros his caſe, but now *proditorie* is neceſſarily required. Vide Britton, fo. 16. et 19. 1 Mar. Br. treaſon. 24. * Ter. Mic. 5 E. 6. Lib. Intr. Coke, fo. 482. *Sanguinis O maledicta filii, &c.*

‡ [13]

* Per apertum factum.

Vid. hereafter ca. 5. de Hereſie, generall indictments againſt Lolards, &c.

The reſidue of the indictment of the duke of Somerſet.

To take and impriſon one of the privie councell. Contra formam ſtatut. 3 & 4 E. 6. cap. 5.

ſhould do, commit, or put in ure any of the acts and things above mentioned (whereof to take and impriſon any of the kings moſt honourable privie counſell was one) and the perſons to the number of 12 or above ſo raiſed and aſſembled after requeſt and commandement (in ſuch ſort as in that act is preſcribed) ſhall make their abode and continue together, as is aforeſaid, (in the act) or unlawfully perpetrate, doe, commit, or put in ure any of the acts or things abovefaid, that then all and ſingular perſons by whoſe ſpeaking, deed, act, or any other the meanes above ſpecified any perſons to the number of 12 or above, ſhall be raiſed or aſſembled for the doing, committing, or putting in ure any of the acts or things above mentioned, ſhall be adjudged for his ſo ſpeaking or doing a felon, and ſuffer execution of death as in caſe of felony, and ſhall loſe his benefit of ſanctuary and clergy." Hereby it doth manifeſtly appeare, that the truth concerning this nobleman's attainder, and execution in divers things, is contrary to the vulgar opinion, and ſome of our chronicles, and in ſome points contrary to law. Firſt, that for the felony made by the ſaid branch of the ſaid act he could not have had his clergie, for clergy in that caſe is expreſly ouſted by the ſaid act. 2. That he was not indicted for going about, &c. the death of the earle of Warwick then of the kings privie counſell, but only for his taking or impriſonment, and therefore could not be indicted upon the ſtatute of 3 H. 7. as ſome have imagined. 3. That the indictment is altogether inſufficient, for it purſueth not the words or matter of the ſaid branch of the ſaid act, as by comparing of them it manifeſtly appeareth; which (we being deſirous that truth may appeare in all things) we have thought good upon this occaſion to adde for advancement of truth. 4. That being but attainted of felony, he could not by law, be beheaded, as elſewhere we have ſhewed. And this act that created the felony ſaith, that ſuch a felon ſhall ſuffer execution of death, as in caſe of felony. 5. Laſtly, this whole act was juſtly holden to be a doubtful and dangerous ſtatute, and therefore was deſervedly repealed. And after the fall of this duke, ſee the preamble of the ſtatute of ſubſidie of 7 E. 6.

3 H. 7. ca. 14.

Lib. 9. fo. 114. in ſeignior Sancher's caſe.

1 Mar. cap. 12.
1 Eliz. ca. 16.
7 E. 6. ca. 12.

[14]

And now to returne to caſes of high treaſon. If a man be arraigned upon an indictment of high treaſon, and ſtand mute, he ſhall have ſuch judgement, and incurre ſuch forfeiture, as if he had been convicted by verdict, or if he had confeſſed it. For this ſtandeth well with this word *provablement*, for *fatetur facinus, qui judicium fugit:* but otherwiſe it is in caſe of petit treaſon, murder, or other felony.

23 Eliz. Dier, 298.
23 Eliz. cap. 1.
Nota bene. Vide ſupra verbe Mort.

If a ſubject conſpire with a foraine prince beyond the ſeas to invade the realme by open hoſtility, and prepare for the ſame by ſome overt act, this is a ſufficient overt act for the death of the king, for by this act of parliament in that caſe there muſt be an overt act. * *Qui capiti, aut ſalſuti regis perfidioſe ſive ſolus, ſive ſervis aut ſicariis mercede conductis ſtipatus inſidiabitur, vita et fortunis ejus omnibus privator.* So as thereby an overt act was required.

* Inter leges Alveredi, cap. 4.

The compoſition and connexion of the words are to be obſerved, viz. [thereof be attainted by overt deed.] † This relateth to the ſeverall and diſtinct treaſons before expreſſed), and ſpecially to the compaſſing and imagination of the death of the king, &c. for that it is ſecret in the heart) and therefore one of them cannot

† So reſolved by the juſtices Paſc. 35 Eliz. which we heard and obſerved.

be

be an overt act for another. As for example: a conſpiracy is had to levie warre, this (as hath been ſaid and ſo reſolved) is no treaſon by this act untill it be levied, therefore it is no overt act or manifeſt proofe of the compaſſing of the death of the king within this act: for the words be *(de ceo, &c.)* that is, of the compaſſing of the death. For this were to confound the ſeverall claſſes, or *membra dividentia, et ſic de cæteris, &c.*

[a] Divers latter acts of parliament have ordained, that compaſſing by bare words or ſayings ſhould be high treaſon; but all they are either repealed or expired. And it is commonly ſaid, that bare words may make an heretick, but not a traytor without an overt act. And the wiſdome of the makers of this law would not make words only to be treaſon, ſeeing ſuch variety amongſt the witneſſes are about the ſame, as few of them agree together. But if the ſame be ſet downe in writing by the delinquent himſelfe, this is a ſufficient overt act within this ſtatute.

[b] Cardinall Poole, albeit he was a ſubject to H. 8. and of the kings blood, (being deſcended from George duke of Clarence, brother to king E. 4.) yet he in his booke of the ſupremacy of the pope, written about 27 H. 8. incited Charles the emperour, then preparing againſt the Turke, to bend his force againſt his naturall ſoveraigne lord and countrey; the writing of which booke was a ſufficient overt act within this ſtatute: and to move the emperour the rather in that book, he made H. 8. almoſt as ill as the Turk, in theſe words, *in Anglia ſparſum nunc eſt hoc ſemen, ut vix à Turcico internoſci queat, idque authoritate unius coaluit.*

[c] In the preamble of the ſtatute of 1 Mar. concerning the repeale of certaine treaſons, &c. It is agreed by the whole parliament, that lawes juſtly made for the preſervation of the common-wealth without extreame puniſhment, are more often obeyed and kept, then lawes and ſtatutes made with great and extreame puniſhments: and in ſpeciall, ſuch lawes and ſtatutes ſo made: whereby not only the ignorant and rude unlearned people, but alſo learned and expert people minding honeſty, are oftentimes trapped and ſnared, yea, many times * for words only, without other fact or deed done or perpetrated: therefore this act of 25 E. 3. doth provide, that there muſt be an overt deed. But words without an overt deed [d] are to be puniſhed in another degree, as an high miſpriſion.

Per gents de lour condition.] That is, *per pares*, or their equals, whereof we have ſpoken before in the expoſition of the [e] 29 chapter of Magna Carta. verb. *per judicium parium ſuorum*, and more ſhall be ſaid hereafter. This branch *(per gents de lour condition)* extendeth only to a conviction by verdict, whereof the ſtatute particularly ſpeaketh; but yet where the party indicted confeſſeth the offence or ſtandeth mute, he ſhall have judgement as in caſe of high treaſon. For this branch being affirmative, is taken *cumulative* and not *privative*. And therefore ſeeing upon confeſſion, or ſtanding mute, the judgment in caſe of high treaſon was given at the common law, this act being, as it hath been ſaid, affirmative, taketh not away the ſame: and (to ſay once for al) the clauſe hereafter of reſtraint of like caſes, &c. extends onely to offences, and not to tryalls, judgements, or executions.

[a] 26 H. 8. cap. 13, 1 E. 6. cap. 13. 1 & 2 Ph. and Mar. cap. 9, 10. 1 Eliz. cap. 6. 13 Eliz. ca. 1, &c. 14 Eliz. cap. 1.

[b] See the fourth part of the Inſtitutes, ca. 26. Brook, treaſon 24 writing of letters.

[c] 1 Mar. ceſſ. 1. c. 1. See the ſtatute of 3 H. 7. hereafter, cap. 4. directly in the point by the judgement of the parliament. *Nota*, this act of 25 E. 3. ſaith, *per overt fait, per apertum factum*, and not *per apertum dictum*, by word or confeſſion. See 25 H. 8. c. 12. Eliz. Barton, Edw. Locking, and others attainted by parliament for divers words and conſpiracies which being not within this act without an overt act they could not be attainted by the common law.

* Nota.

[d] See in the chapter of Miſpriſion.

[15]

[e] Mag. Car. ca. 29.

Bract. l. 3. fo. 118. Brit. fo. 10, &c. Bract. l. 5. fo. 414. Fleta, l. 1. ca. 21. Mirror, ca. 1. § 6. de fauſonerie. 29 Aſſ. pa. 49. * 1 E. 3. tit. Chre. F. 13. 22 Aſſ. Pl. 49.

(17) *Si home counterface le grand ſeale.*] All our ancient authors agree that this was high treaſon by the common law, and for this offence his judgement was to be drawn, hanged, and quartered, at the common law, as in other caſes of high treaſon, (the counterfeiting of the kings mony excepted.) See the ſecond part of the Inſtitutes. W. 1. cap. 5.

*In ancient time every treaſon was comprehended under the name of felony, but not *è contra:* and therefore a pardon of all felonies was ſometime allowed in caſe of high treaſon. But the law is, and of long time hath been otherwiſe holden: and if the inditement were *felonicè*, and not *proditoriè*, (for the king may leſſen the offence, if it pleaſe him) then the pardon of felonies is good at this day, for no inditement can be of high treaſon without this word *(proditoriè:)* and *in qualibet proditione implicatur felonia, quia in quolibet brevi de exigendo ſuper quolibet indictamento de proditione proclamator facit ſic*, I. B. an exigent on thy head of treaſon and felony.

2 R. 3. 9.

3 H. 7. fo. 2.

A compaſſing, intent, or going about to counterfeit the great ſeale is no treaſon, but there muſt be an actuall counterfeiting, alſo it muſt be to the likeneſſe of the kings great ſeale, the words be, *counterface le grand ſeale le roy.*

Now it is to be ſeen what ſhall be ſaid a forging, or counterfeiting of the great ſeale. If the lord chancellor, or lord keeper put the great ſeale to a charter &c. without warrant, this is no treaſon, becauſe the great ſeale is not counterfeited. But it ſeemeth by Briton fo. 10. b. that it was treaſon at the common law, and of that opinion is Fleta fo. 29. a. but it is no treaſon now (without queſtion) by the negative clauſe of this act.

If a man take wax lawfully imprinted with the great ſeale from one patent, and fix it to a writing purporting a grant from the king, there have been divers opinions in this caſe what the offence is, which we will rehearſe.

40 Aſſ. p. 33.

In 40 Aſſ. which was about 15 years after the making of this act, it was not holden high treaſon, but a great miſpriſion, for that it is no counterfeiting of a new, but an abuſe of the true great ſeale.

Rot. Clauſ. 42 E. 3. nu. 8. in coro.

In 42 E. 3. the abbot of Bruer cauſed Rob. Rigge his commoigne to raſe a charter of R. 1. and put out the mannor of Fiſfetruda, and in place thereof put in Eſſeghe. And this offence was heard, and ſentenced before the king and his counſell in the ſtar-chamber, as a great offence and miſpriſion: for if it had been high treaſon, it ſhould have had another tryall, and yet this was a great abuſe of the great ſeal.

2 H. 4. fo. 25.

2 H. 4. The taking of the great ſeale from one patent and fixing it to a commiſſion to gather mony, &c. was adjudged to be ſuch an offence, as the offender had judgement to be drawne, and hanged. The record of which caſe we have peruſed, and the effect thereof is this. The partie is indited generally for counterfeiting of the great ſeal, whereunto he pleaded not guilty, and the jury found him not guilty of the counterfeitting of the great ſeale, as was ſuppoſed by the inditement, and found further ſpecially, that he tooke the great ſeale from one patent, and put it to the commiſſion, and that the party put the ſame in execution, and there judgement was given, that he ſhould be drawne and hanged: which (whatſoever the offence was) ought not to have been given upon this

Errores ad ſua principia referre, eſt refellere. To bring errors to their beginning, is to ſee their laſt.

this verdict, the jury finding him not guilty of the offence alledged in the inditement: and beſides the judgement is ſuch, as is given in caſe of petit treaſon, and not of high treaſon. Hereby it appeareth how dangerous it is for any to report a caſe by the ear, ſpecially concerning treaſon, unleſſe he had adviſedly read the record: for (as I take it) the miſreport of this caſe hath hatched errors, and he miſtooke the judgment, if it had been high treaſon, for then it ſhould have been drawne, hanged, and quartered.

[16]

37 H. 8. Br. tit. Treaſon. A chaplain had fixed ſuch a great ſeale to a patent of diſpenſation with non-reſidence, and this was holden a miſpriſion, and not high treaſon, for it was an abuſe of the great ſeale, and no counterfeiting of it. Stanford ſaith that it was adjudged in his time according to the book of 2 H. 4. *et ſic ex errore ſequitur error.*

37 H. 8. Br. Treaſon.

Stanf. Pl. Coron. fo. 3. c. Bracton agreeth with it. *Ubi ſupra.*

G. Leak a clark of the chancery joyned two cleane parchments fit for letters patents ſo cloſe together with mouth glew, as they were taken for one, the uppermoſt being very thinne, and did put one labell through them both, then upon the uttermoſt he writ a true patent, and got the great ſeale put to the labell, ſo the labell and the ſeale were annexed to both the parchments, the own written, and the other blanck: he cut off the glewed ſkirts round about, and tooke off the uppermoſt thinne parchment (which was written, and was a true and perfect patent) from the labell, which with the great ſeale did ſtill hang to the parchment, then he wrote another patent on the blancke parchment, and did publiſh it as a good patent. Hereupon two queſtions were moved. 1. Whether this offence be high treaſon or no. 2. If it be high treaſon, then whether he may be indited generally for the counterfeiting of the great ſeale, or els the ſpeciall fact muſt be expreſſed. And upon conference had between the judges, upon great adviſement and conſideration it was in the end, concerning the firſt point, reſolved by the juſtices (ſaving a very few) upon the authorities aforeſaid, and for that it was no counterfeiting of the great ſeale within this ſtatute, that this offence was neither high treaſon, nor petit treaſon, becauſe it is not within either of the branches of this ſtatute, but it is a very great miſpriſion, and the party delinquent liveth at this day. As to the 2. point it was reſolved, that if the ſpeciall matter had amounted to counterfeiting of the great ſeale in law within this act, then he might have been generally indited of high treaſon for counterfeiting the great ſeale. As if a man in an affray kill a conſtable that comes to keep the kings peace without any expreſſe malice prepenſed, this is murder in law, and yet the delinquent may bee generally indited of murder by malice prepenſed.

Leak's caſe. Hil. 4 Ja. R.

40 Aſſ. 33. 42 E. 3. Rot. Cl. *Ubi ſupra.* 37 H. 8. Br. der.

And [a] Fleta who wrote before this act telleth us, that *crimen falſi dicitur, cũ quis illicitus (cui non fuerit ad hoc data authoritas) de ſigillo regis rapto vel invento, et brevia cartaſque conſignaverit.* But whatſoever offence it was before the making of this ſtatute, it is after this ſtatute no high treaſon, becauſe it is no counterfeiture of the great ſeale, but a miſuſor thereof.

[a] Fleta, l. 1. ca. 22. Britton, fo. 10. b. See before, fo. 15.

Qui [b] *convictus fuerit pro falſatione ſigilli dom. regis, quòd tradatur epiſcopo Sarum, qui eum petiit ut clericum ſuum ſub pœna et in forma qua decet, quia videtur concilio quod in tali caſu non admittenda eſt purgatio, &c.* Hereby it ſhould appeare that in thoſe dayes a man might have had his clergie for this offence, and therefore as ſome hold, it

[b] Rot. Parl. Hil. 18 E. 1. fo. 92. nu. 125.

was not then holden to be high treaſon, and herein alſo is the preamble of this act, concerning divers opinions in caſe of treaſon, verified.

This ſtatute naming the great ſeale and privie ſeale, the forging and the counterfeiting of the privie ſignet, or of the ſigne manuell was not within this ſtatute. But by the [c] ſtatute of 1 Mar. it is made high treaſon in both caſes. Albeit that in this act there is no mention made of [*] ayders and conſenters to this counterfeiting, yet they are within the purview of this ſtatute, for there be no acceſſaries in high treaſon.

(18) *Ou ſa* [d] *monye.*] [e] This was treaſon by the common law, as it appeareth by all the ſaid ancient authors, *ubi ſupra (verbo, ſi home counterface le grand ſeale)* and therefore the opinion in 3 H. 7. is holden for no law, that it was but felony before this act. [f] The forging of the kings coine, is high treaſon, without utterance of it, for by this act the counterfeiting is made high treaſon. See the ſecond part of the Inſtitutes. W. 1. cap. 15. [g] See Thom. Walſingham. *Hypodigme Neuſtrie. an. dom.* 1278. *judei pro tonſura monetæ in magna multitudine ubique per Angliam ſuſpenduntur, &c.*

[h] *Si ipſe qui facit monetam authoritate regis, &c. illam facit minus in pondere vel allaiata, viz. alcumino vel alio falſo metallo contra ordinationem, &c.* This is there holden to be high treaſon, and by that book taken for a counterfeiter of the kings money within the purvien of this ſtatute. [*] And herewith agreeth Britton, who ſaith, *des fauceres q. ount noſtre monye counterfet ou pluis de allaye miſe in noſtre monye, q. nuſter, ne ſerroit ſolonq. le forme et uſage de noſtre realme.*

[h] *Ordeine fuit q. nul roy de ceſt realme ne puit changer ſa money, ne impairer, ne amender, ne auter monye faire q. de ore et argent, ſans aſſent de touts les counties.* It was ordained, that no king of this realme might not change his money, nor impaire, nor amend the ſame, nor other money make then of gold or ſilver, without aſſent of parliament.

[c] Clipping, waſhing, and filing of the money of this realme, was no counterfeiting of it within this act. And therefore being a like caſe, it was declared by parliament in anno 3 H. 5. cap. 6. to be high treaſon: but that act being repealed by 1 *Mariæ* the ſtatute of 5 Eliz. cap. 11. hath [d] declared, that clipping, waſhing, rounding, or filing, for wicked lucre and gaine, &c. to be high treaſon. And by the ſtatute of [*] 18 Eliz. it is declared, that if any perſon for wicked lucre or gaines-ſake, ſhall by any art, wayes, or meanes whatſoever, impaire, diminiſh, falſifie, ſcale, or lighten the kings money, &c. it is high treaſon, for being a like caſe, it was to be declared by parliament.

Forging [f] or counterfeiting of foraine money, which is not currant within the realme, is miſpriſion of treaſon, and the offender ſhall forfeit, as for concealement of high treaſon.

Sa money.] [g] This extendeth only to the kings money coyned within this realme; and therefore after this ſtatute, if a man had counterfeited the money of another kingdome, though it were currant within this realme, it was no treaſon, untill it was ſo de-

[17]

[a] 1 Mar. cap. 6. 1 & 2 Ph. and Mar. ca. 11.

[*] 19 H. 6. 47. 3 H. 7. 10. Stanf. Pl. Coron. 3. vide poſtea, cap. 64. *principall and acceſſ.* See Mich. 13 & 14 Eliz. Dier, 296. Conier's caſe.

[d] See Mat. Par. *anno* 34 H. 3. pag. 753. *de pecunia approbata et reprobata.* Et Walſingham, 28 E. 1. *anno Dom.* 1300. ſtat. 31 E. 1. *de weights et meaſures.* Raſt. 7.

[e] Vet. Magna Chart. ca. Itin. fo. 151. a. 22 Aſſ. p. 49. 3 H. 7. 10. 25 E. 3. 42. b. Coro. 130.

[f] 6 H. 7. 13. 1 R. 3. 1.

[g] Walſ. Hyp. Neuſtrie, pa. 69. 1278. 6 E. 1.

[h] 3 H. 7. 10. a. b.

[*] See inter leges Athelſtani, ca. 14. Canuti, cap. 61. Britton, cap. 5. fo. 10. b. See the Mirror, ca. 1. § 6. De la mony falſifie acc' with 3 H. 7. and ca. 5. § 1. and Fleta, ca. 22. acc.

[h] Mirr. ca. 1. § 3. inter Artic. per-viels royes ordeinus. Rot. Par. 17 E. 3. nu. 15. Vide hic poſtea, cap. 31. 45 E. 3. ca. 13. 9 H. 5. cap. 11. Stat. 1.

See the ſecond part of the Inſtitutes, ca. 20. Artic. ſuper Cart. and the expoſition upon the ſame.

[c] 3 H. 5. ca. 6. 1 E. 6. cap. 12. 5 Eliz. cap. 11. [d] *Nota*, for wicked lucre and gain. [e] 18 Eliz. cap. 1. [f] 14 Eliz. cap. 3. [g] See hereafter, cap. Principall and Acceſſory.

clared

clared by parliament [h] in an. 1 Mariæ, and in an. 1 & 2 Ph. and M. and the ſaid acts of 5 Eliz. & 18 El. do extend to forrain coyne currant within this realme. And it is holden, that at the making of this ſtatute of 25 E. 3. there was no money currant within this realme, but the kings own coyne. [i] See the ſtatute called *ſtatutum de moneta magnum, et ſtatutum de moneta parvum.* And it is to be knowne, that if any doe counterfeit the kings coyne contrary to this ſtatute of 25 E. 3. [k] he ſhall have the puniſhment of his body, but as in caſe of petit treaſon, that is, to be drawne and hanged till he be dead, but the forfeiture of his lands is as in other caſes of high treaſon, for this ſtatute is but a declaration of the common law, and the reaſon of his corporall puniſhment is, for that in this caſe he was only drawne and hanged at the common law, but a woman in that caſe was to be burnt.

[l] The abbot of Miſſenden in the county of Buckingham for counterfeiting and refection of the kings money, was adjudged to be drawne and hanged, and not quartered. The want of obſervation of the ſaid diſtinction hath made ſome to erre in their judgement. Nota. This act of 25 E. 3. maketh no expreſſion of the judgement, therefore ſuch judgement as was at the common law either in caſe of high treaſon or petit treaſon muſt be given.

But if one be attainted for diminiſhing of the kings mony upon any of the ſtatutes made in queen Maries time, or in the time of queen Elizabeth, becauſe it is high treaſon newly made, the offender ſhall have judgement as in caſe of high treaſon, which judgement you may ſee in the firſt part of the Inſtitutes. Sect. 747.

[m] And when a woman commits high treaſon and is quick with childe, ſhe cannot upon her arraignment plead it, but ſhe muſt either pleade not guilty, or confeſſe it: and if upon her plea ſhe be found guilty, or confeſſe it, ſhe cannot alleage it in arreſt of judgement, but judgement ſhall be given againſt her: and if it be found by an inqueſt of matrons that ſhe is quick with childe, (for *priviment enfent* will not ſerve) it ſhall arreſt, and reſpite execution till ſhe be delivered, but ſhe ſhall have the benefit of that but once, though ſhe be againe quick with childe: ſo as this reſpite of execution for this cauſe is not to be granted, only in caſe of felony, whereof juſtice Stanford ſpeaketh, but in caſe of high treaſon, and petit treaſon alſo.

(19) *Si home port faux money en ceſt roialme, counterfeit au money dangliterre, et ſachant le money eſtre faux, &c.*] By this branch ſix things are to be obſerved. Firſt, that the bringing in of counterfeit money, and not the counterfeiting is expreſſed in this word [*apport.*] Secondly, that it muſt be brought from a foraine nation, and not from Ireland, or other place belonging to, or being a member of the crowne of England, and ſo it hath been reſolved, ſo wary are judges to expound this ſtatute concerning treaſon, and that in moſt benigne ſenſe: for albeit Ireland be a diſtinct kingdome, and out of the realme of England to ſome purpoſes, as to protections and fines levied, &c. as hath been ſaid: yet to ſome intent it is accounted as a member of or belonging to the crowne of this realme. And therefore a writ of error is maintainable here in the kings bench of a judgement given in the kings bench in Ireland, ſo as the judges did conſtrue this ſtatute not to extend to falſe money brought out of Ireland, Thirdly, it muſt be to the ſimilitude of

[h] 1 Mar. cap. 6. 1 & 2 Ph. and Mar. cap. 11.

[i] Vet. Mag. Carta, part 2. fol. 38, 39, 40.

[k] Fleta, lib. 1. c. 22. who wrote before this ſtatute, which is but a law declaratory, as it appeareth before. 23 Aſſ. p. 2. Dier, 6 Eliz. Term. Tr. MS. *pro tonſura monete trahe et pend.* Tr. 24 H. 8. in Juſtice Spilmans Reports accord.

[l] Mich. 31 E. 3. coram rege. Rot. 55. Buck. within ſix yeares after making of our ſtatute.

[m] 25 E. 3. 42. b. Cor. 130. 23 Aſſ. p. 2. 22 Aſſ. p. 71. 22 E. 3. Cor. 253. 12 Aſſ. p. 11. 8 E. 2. Cor. 410.

[18]

Stanford, f. ult. b.

Vid. hereafter, cap. 30. Rot. Parl. 17 E. 3. nu. 15.

7 H. 7. 10.

Lib. 7. Calvin's caſe, *ubi ſupra.*

the money of England. Fourthly, that the bringer of it into this realme, muſt know it to be counterfeit. Fifthly, uttering of falſe money in England, though he know it to be falſe and counterfeit to the likeneſſe of the coyne of England, is no treaſon within this ſtatute, unleſſe he brought it from a foraine nation, for the words be, *ſi home apport faux money en ceſt realme.* But if money falſe or clipped be found in the hands of any that is ſuſpicious, he may be impriſoned untill he hath found his warrant, *per ſtatutum de moneta magn' vet. Mag. Cart.* fo. 38. 2 *parte.* Laſtly, he muſt merchandize therewith, or make payment thereof, expreſſed in theſe words, *pur merchandizer, ou paiment faire in deceipt noſtre ſeignior le roy et ſon people.* See more, *de moneta regis*, and of the derivation thereof in the ſecond part of the Inſtitutes, *in artic' ſuper cartas*, cap. 20.

3 H. 7. 10.

Si home tuaſt chancelour, treſurer, ou juſtice noſtre ſeigniour le roy del en banke ou del auter, juſtice in eire, ou daſſiſes et touts auters juſtices aſſignes doier et terminer eſteant en lour place feaſant lour office.

In this caſe albeit one intend to kill any of theſe here named in their place, and doing their office, and thereupon ſtrike or wound any of them, this is no treaſon: for our ſtatute ſaith, *ſi home tuaſt chancelor, &c.* If a man kill the chancellour, &c. For if it be treaſon, death muſt enſue. And the reaſon wherefore it is treaſon in theſe caſes is, becauſe ſitting judicially in their places, (that is, in the kings courts) and doing their office in adminiſtration of juſtice, they repreſent the kings perſon, who by his oath is bound that the ſame be done. And this act extends only to the perſons here particularly named, and to no other: and therefore extendeth not to the court of the lord ſteward, or of the conſtable and marſhall, nor to the court of the admiralty, or any other, nor to any eccleſiaſticall court. Nay, it extends not to the high court of parliament, if any member of the lords houſe, or houſe of commons be ſlaine in his place, and doing his office, becauſe it is *caſus omiſſus*, and not mentioned in this act. But in all thoſe caſes it is wilfull murder, for the law implyeth malice.

2 Rot. Parliam. 20 E. 1. nu. 2. John de Britain's caſe.
3 Reg. 21. 15.
See *inter leges Alveredi*, cap. 4. *ubi ſupra. Vita et fortunis omnibus privator.* Cuſt. de Norm. ca. 14. 22 lib. Aſſ. pl. 49.

Et ſoit aſſavoire q. in les caſes ſuiſnomes doit eē adjudge treaſon q. ſe extenda a noſtre ſeignior le roy et ſa royall majeſtie: et de tiel treaſon le forfeiture des eſcheates appertient a noſtre ſeignior le roy cibien des tres. et tenements tenus des auters, come de luy meſme.

(20) * *Des tres. et tenements tenus des auters come de luy meſme.*] This is an affirmance of the common law, and the reaſon thereof is, for that the offence is committed againſt the ſoveraigne lord the king, who is the light and the life of the common-wealth: and therefore the law doth give to the king in ſatisfaction of his offence, all the lands, &c. which the offender hath, and that no ſubject ſhould be partaker of any part of the forfeiture for this offence.

[19]

* ſtrook, Eſch. 9. See hereafter. *Verbo. Et de tiel manner de treaſon, &c.* Otherwiſe it is in caſe of petit treaſon and felony

And where the words be [lands and tenements holden, &c.] yet the forfeiture extends to * rents charges, rents ſeck, commons, corrodies, and other hereditaments which are not holden, for in caſe of high treaſon the tenure is not materiall.

This clauſe hath 7. limitations. Firſt, this act extends not [b] to lands in tayle, (ſaving only for the life of tenant in tayle) but the forfeiture of eſcheats is to be underſtood of ſuch lands and tenements, as he might lawfully forfeit. And theſe generall words take not away

[b] 7 H. 4. 27. See hereafter in the title of *Premunire. Verb.* (des tres, *&c.*) Vid. 26 H. 8. cap. 13.

the ſtatute of *donis conditional*' [c] but latter ſtatutes give the forfeiture of eſtates in tail. 2. Nor doth this act extend to uſes, but [*] latter ſtatutes doe name uſes. 3. [d] Nor to rights of actions, where the entrie is taken away, and ſo is the law cleerly holden at this day. 4. Nor to any conditions, but by a [e] latter ſtatute conditions, unleſſe they be inſeparably knit to the perſon, be given to the king. 5. Nor to rights of entry, where any was in the lands [f] by title before the treaſon committed, but ſuch a right of entry is ſince given by latter ſtatutes. 6. Nor to lands or tenements, or rights [g] *in auter droit*, as in the right of the church, nor to lands in the right of a wife, but only during the coverture, and it extendeth to land which the offender hath [h] for life, for the forfeiture of the profits during his life. 7. It extendeth not to [*] a founderſhip of an houſe of religion *in free almoign*, for that is annexed to the bloud of the founder. Here goods and chattels be not named, but the forfeiture of them is implyed in the judgement.

[i] *Nota* lector, the ſaid acts of 26 H. 8. 33 H. 8. 5. and 6 E. 6. doe yet remain in force, notwithſtanding the ſaid ſtatute of 1 Mar. as it hath been often adjudged and reſolved, and namely Mich. 21. Ja. in the exchequer chamber, in a writ of error, upon a judgement given in the exchequer, between Ratcliffe, and the lord Sheffeild, by all the judges of England, and is agreeable to common experience.

See more of high treaſon in the next chapter following, cap. 2. verbo. *Et pur ceo que pluſors auters caſes, &c.*

[c] 26 H. 8. ca. 13. in fine. 33 H. 8. ca. 20. 5 & 6 E. 6. cap. 11. lib. 7. fo. 12, 13.

[*] 23 H. 8. ca. 20. 5 E. 6. ca. 11.

[d] Lib. 3. fo. 210. 7 H. 4. 6, &c.

[e] 33 H. 8. c. 20. lib. 7. fo. 11. Englefield's caſe.

[f] Englefield's caſe. *Ubi ſupra.*

[g] 5 E. 6. *ubi ſupra.* 1 Mar. Dier, 123. Dier, 12 El. 289. Temps. H. 8. Br. Coron. 5.

[h] 1 Mar. Dier, 108.

[*] 24 E. 3. 33. 72. Corody, Br. 5. Temps. H. 8. Eſcheat, 239.

[i] 12 El. Dier, 289. Lib. 3. fo. 10. 35. Lib. 7. fo. 33. 34. lib. 8. 72. 166. lib. 9. fo. 140. Stanf. Pl. Corone, 187. a.

CAP. II.

OF PETIT TREASON.

ET oveſque ceo il y ad un auter manner de treaſon, ceſtaſſavoir, quant un ſervant tua ſon maiſter (1) *ou un feme tua ſon baron* (2), *ou quant home ſeculer ou de religion tua ſon prelate a que il doit foye et obedience* (3). *Et de tiel manner de treaſon la forfeiture des eſcheats appertenont a cheſcun ſeignior de ſon fee proper, &c.*

Britton, ca. 8. and cap. 22.

And moreover there is another manner of treaſon, that is to ſay, when a ſervant ſlayeth his maſter, or a wife her huſband, or when a man ſecular or religious ſlayeth his prelate to whom he oweth faith and obedience. And of ſuch treaſon the eſcheats ought to pertain to every lord of his own fee, &c.

[20]

It was called high or grand treaſon in reſpect of the royall majeſty againſt whom it is committed, and comparatively it is called petit treaſon (whereof now this ſtatute ſpeaketh) in reſpect it is

committed againſt ſubjects and inferiour perſons, whereof this act doth enumerate three kinds.

(1) *Quant un ſervant tua ſon maiſter.*] This was petit treaſon by the common law, for ſo it appeareth by the [a] book of 12 Aſſ. that a woman ſervant killed her miſtris, wherefore ſhe had judgement to be burnt, which is the judgement at this day of a woman for petit treaſon. And herewith agreeth 21 E. 3. where the reader muſt know, that in ſtead of *mere* in that caſe you muſt read maiſter.

[a] 12 Aſſ. p. 30. 21 E. 3. 17. F. coron. 447. Statham, tit. cor. 21 E. 3. 22 Aſſ. p. 49.

[b] And upon this act, if the ſervant kill the wife of his maſter, it is petit treaſon, for he is ſervant both to the huſband and wife.

[b] 19 H. 6. 47. Pl. Com. 86. b. Dier, 3 Mar. 128. 7 El. 235.

[c] If the child commit parricide in killing of his father or mother (which the law-makers never imagined any childe would doe) this caſe is out of this ſtatute, unleſſe the childe ſerved the father or mother for wages, or meat, drink or apparell, for that it is none of theſe three kinds ſpecified in this law. And yet the offence is far more hainous and impious in a child then in a ſervant, for *peccata contra naturam ſunt graviſſima:* but the judges are reſtrained by this act, to interpret this act, *à ſimili*, or *à minore ad majus*, as hereafter ſhall be ſaid. And [d] ſome ſay that parricide was petit treaſon by the common law,

[c] Exodus, c. 21. v. 15. 17. Lev. 20. v. 9. 1 Mar. per Bromley and Portman of the report of Juſtice Daliſon. vid. 1 R. 3. 4. *In culeo paricidæ cum ſimia, cane, gallo, et ſerpente incluſi mari olim mergebantur: ſed nos non habemus talem conſuetudinem.*

[d] 22 E. 1. Math. Par. 874.

[e] A ſervant of malice intended to kill his maſter, and lay in wait to doe it whileſt he was his ſervant, but did it not till a year after he was out of ſervice, and it was adjudged petit treaſon within this act.

[e] 33 Aſſ. p. 7. Li. 1. f. 99. Shelly's caſe. 10 H. 6. 47. pl. com. 260.

(2) *Un feme tua ſon baron.*] [f] This was petit treaſon by the common law, as it appeareth in our books. If the wife procure one to murder her huſband, and he doth it accordingly, in this caſe the wife being abſent is but acceſſory, and ſhall be hanged and not burnt, becauſe the acceſſory cannot be guilty of petit treaſon, where the principall is not guilty but of murder: and the * acceſſory muſt follow the nature of the principall: but if he that did the murder had been a ſervant of the huſband, it had been treaſon in them both, and the wife ſhould have been burnt. And ſo it is in the caſe before of a ſervant, and in the caſe hereafter of a clerk.

[f] 15 E. 2. Coron. 383. 19 H. 6. 47. See c. Pr. & Acc' Dier, 34 H. 8. 50. Dier, 16 El. 332. Saunders' caſe. Paſch. 32 E. 3. Rot. 62. coram rege. Ph. Clifton's caſe.

If the wife and a ſtranger kill the huſband, it is petit treaſon in the wife, and murder in the ſtranger, and ſo it is in the caſe of the ſervant next before, and of the clerk next after.

Before this ſtatute it was petit treaſon, *ſi quis falſaverit ſigillum domini ſui de cujus familia fuit.* Britton agreeth herewith. But theſe are taken away by this act, and all other ſaving theſe, that are here expreſſed.

* 40 Aſſ. p. 15. Fleta, li. 1. ca. 22. Britton, fo. 16. 19 H. 6. 47.

(3) *Quant home feculer ou de religion tua ſon prelate a que il doit foy et obedience.*] This clauſe is underſtood only of an eccleſiaſticall perſon, be he ſecular, or regular, if he kill his prelate, or ſuperiour, to whom he oweth faith, and obedience, it is petit treaſon: and ſo it was at the common law. And petit treaſon doth preſuppoſe a truſt, and obedience in the offender, either civill, as in the wife and ſervant, or eccleſiaſticall, as in the eccleſiaſticall perſon.

40 Aſſ. ubi ſupra. et 16 El. ubi ſup. 19 H. 6. 47. by all the juges.

Aidors, abettors, and procurers of any of theſe petit treaſons, are within this law.

If the ſervant kill his miſtris, viz. his maſters wife, this is treaſon (as hath been ſaid) not by equity, for that is denied as well in

petit

before the king and his parliament, whether it ought to be judged treaſon or other felony.

(1) *Semblable treaſon.*] In this caſe, the judges ſhall not judge *à ſimili*, or by equity, argument, or inference of any treaſon, high or petit, for no like caſe ſhall be adjudged treaſon, &c. And note this branch extendeth (as hath been ſaid) to the offence, viz. treaſon, and not to tryall, judgement, or execution.

(2) *Si auter caſe ſuppoſe treaſon.*] No other caſe, though of as high or higher nature, &c. ſhall be adjudged treaſon high or petit, as before it appeareth in the caſe of paricide, *anno* 1 *Mariæ*, *ubi ſupra.*

(3) *Treaſon.*] Either high treaſon, or petit treaſon, ſo as this branch extendeth as hath been ſaid to the offence of treaſon only.

[22]

(4) *Que neſt ſpecifie paramount.*] This word [*ſpecifie*] is to be ſpecially obſerved, for it is as much to ſay, as particularized, or ſet downe particularly: ſo as nothing is left to the conſtruction of the judge, if it be not ſpecified and particularized before by this act. A happy ſanctuary or place of refuge for judges to flye unto, that no mans blood and ruine of his family do lie upon their conſciences againſt law. And if that the conſtruction by arguments *à ſimili*, or *à minori ad majus* had been left to judges, the miſchiefe before this ſtatute would have remained, viz. diverſity of opinions, what ought to be adjudged treaſon, which this ſtatute hath taken away by expreſſe words: and the ſtatute of 1 Mar. doth repeale all treaſons, &c. but only ſuch as be declared and expreſſed in this act of 25 E. 3. wherein this word [expreſſed] is to be obſerved.

See the expoſition upon the ſtatute, *de frang. priſonam.* 1 H. 6. 5. 9 E. 4. 26, &c. See 1 Mar. of Juſtice Daliſon's report, ubi ſupra.

1 Mar. cap. 1.

Rot. Parl. 5 H. 4. nu. 11, 12. See nu. 15. Ibid.

In the parliament holden *anno* 5 H. 4. the earle of Northumberland came before the king and lords in parliament, and by his petition to the king, acknowledged to have done againſt his allegiance: and namely, for gathering of power and giving of liveries, whereof he prayeth pardon: and the rather, that upon the kings letters he yeelded himſelfe, and came to the king unto Yorke, where he might have kept himſelfe away. The which petition the king delivered to the juſtices by them to be conſidered. Whereupon the lords made proteſtation, that the order thereof belonged to them, as peers of the parliament, to whom ſuch judgement belonged in weighing of this ſtatute of 25 E. 3. &c. and they judged the ſame to be no treaſon, nor felony, but only treſpaſſe finable at the kings will. And the opinion in 27 Aſſ. is denied, that if one of the indicters diſcover the counſell of the king, that it ſhould be treaſon; becauſe it is not ſpecified before in this act, and therefore neither high treaſon, nor petit treaſon.

27 Aſſ. p. 65.

(5) *Tanque per devant le roy et ſon parliament.*] By this it is apparent, that any like or other caſe ought to be declared by the whole parliament, (and not by the king and lords of the upper houſe only, or by the king and the commons, or by the lords and commons.) And ſo was it done by the whole court of parliament in 3 R. 2. *ubi ſupra.* 5 Eliz. 18 Eliz. *ubi ſupra*, and many other acts of parliament.

Rot. Par. 17 R. 2. nu. 20.

John duke of Gwyen and of Lancaſter, ſteward of England, and Thomas duke of Gloceſter, conſtable of England, the kings uncles,

uncles, complained to the king, that Thomas Talbot knight, with other his adherents, conſpired the death of the ſaid dukes in divers parts of Cheſhire, as the ſame was confeſſed and well knowne, and prayed that the parliament might judge of the fault (which petition was juſt, and according to this branch of the ſtatute of 25 E. 3.) but the record ſaith further: whereupon the king and lords in the parliament adjudged the ſame fact to be open and high treaſon: which judgement wanting the aſſent of the commons, was no declaration within this act of 25 E. 3. becauſe it was not by the king and his parliament according to this act, but by the king and lords only.

(6) *Soit le caſe monſtre et declare, &c.*] This declaration may be abſolute, or *ſub modo*, for a time. 13 El. cap. 1, 2. 14 El. ca. 1, 2. &c.

By this which hath been ſaid it manifeſtly appeareth, what damnable and damned opinions thoſe were concerning high treaſon, of Treſilian chiefe juſtice of the kings bench, Sir Robert Belknap chiefe juſtice of the common bench, Sir John Holt, Sir Roger Fulthorp, and Sir William Burghe, knights, fellowes of the ſaid Sir Robert Belknap, and of John Lockton one of the kings ſerjeants, that were given to king R. the 2. at Nottingham, in the eleventh yeare of his reigne. But more deteſtable were the opinions of the juſtices in 21 R. 2. and of Hanckford and Brinchley the kings ſerjeants, (and the rather, becauſe they took no example by the puniſhment of the former) which affirmed the ſaid opinions to be good and lawfull, ſaving Sir William Thirning chiefe juſtice of the common bench gave this anſwer: That declaration of treaſon not declared belongeth to the parliament; but to pleaſe, he ſaid, that if he had been a lord or a peer of parliament, if it had been demanded of him, he would have made the like anſwers. Theſe juſtices and ſerjeants being called in queſtion in the parliament holden *anno* 1 H. 4. for their ſaid opinions, anſwered as divers lords ſpirituall and temporall did) that they durſt no otherwiſe do, for feare of death. It was thereupon enacted, that the lords ſpirituall and temporall, or juſtices, be not from thenceforth received to ſay, that they durſt not for feare of death to ſay the truth. Which opinions being ſo manifeſtly againſt our ſaid act of 25 E. 3. afterwards in the parliament holden 1 H. 4. it is affirmed by authority of parliament, that in the ſaid parliament of 21 R. 2. divers ſtatutes, judgements, ordinances, and ſtabliſhments were made, ordained, and given, erroniouſly and dolefully in great diſheriſon and finall deſtruction and undoing of many honourable lords, and other liege people of this realme, and of their heires for ever. And therefore not only that parliament of 21 R. 2. and the circumſtances and dependances thereupon, are wholly reverſed, revoked, voided, undone, repealed, and adnulled for ever, but alſo the parliament holden in 11 R. 2. by authority of which parliament, Treſilian, Belknap, and the reſt of thoſe falſe juſtices and ſerjeants aforeſaid were attainted, is confirmed, for that it was (as there the parliament affirmeth) for the great honour and common profit of the realme.

Anno 21 R. 2. in Latin.

11 R. 2. ca. 1. and 4.

[23]

Rot. Parl. 1 H. 4. nu. 97.

Melius eſt omnia mala pati quam malo conſentire.

1 H. 4. ca. 3.

See the conſequence of erroneous opinions in caſe of high treaſon.

1 H. 4. cap. 4.

Et ſi per caſe aſcun home de ceſt roialme chivache armee, &c.] And if percaſe any man of this realme ride armed, &c. For expoſition hereof, ſee the chapter hereafter againſt riding or going armed.

For

1 Mar. cap. 1. *Seſſione prima.* The like ſtatute was made, *anno* 1 E. 6. ca. 12. See the ſtatute of 1 H. 4. cap. 10. to the like effect.

For the better inſtruction of the reader to diſcerne what offences be high treaſon or petit treaſon at this day, it ſhall be neceſſary to adde hereunto the ſtatute of 1 Mar. whereby it is enacted, [That no act, deed, or offence, being by act of parliament or ſtatute made treaſon, petit treaſon, or miſpriſion of treaſon, by words, writing, ciphering, deeds, or otherwiſe whatſoever, ſhall be taken, had, deemed, or adjudged to be high treaſon, petit treaſon, or miſpriſion of treaſon, but only ſuch as be declared and expreſſed to be treaſon, petit treaſon, or miſpriſion of treaſon, in or by the act of parliament or ſtatute made in the 25 yeare of the raigne of the moſt noble king of famous memory, king Edward the third, touching or concerning treaſon, or the declaration of treaſon, and none other, &c. any act or acts of parliament, ſtatute, or ſtatutes, had or made at any time heretofore or after the ſaid 25 year of king E. 3. or any other declaration or matter to the contrary in any wiſe notwithſtanding.]

Inter leges Canuti, cap. 1. *Inprimis juſtæ leges ut efferantur injuſtæ deprimantur.* Aliter in antiquo MS. *Inprimis ut juſtæ leges erigantur, injuſtæ jubvertantur.*

Before this act ſo many treaſons had been made and declared by act of parliament ſince this act of 25 E. 3. ſome in particular, and ſome in generall, and in ſuch ſort penned, as not only the ignorant and unlearned people, but alſo learned and expert men were many times trapped and ſnared: and ſometimes treaſons made or declared in one kings time, were abrogated in another kings time, either by ſpeciall or generall words: ſo as the miſchief before 25 E. 3. of the uncertainty what was treaſon, and what not, became to be ſo frequent and dangerous, as the ſafeſt and ſureſt remedy was, by this excellent act of 1 Mar. to abrogate and repeale all, but only ſuch as are ſpecified and expreſſed in this ſtatute of 25 E. 3. By which law, the ſafety both of the king and of the ſubject, and the preſervation of the common-weale is wiſely and ſufficiently provided for, in ſuch certainty, as *nihil relictum eſt arbitrio judicis.* And certainly the two rules recited in the preamble of the ſaid act of 1 Mariæ, are aſſuredly true. The firſt, [that the ſtate of a king ſtandeth and conſiſteth more aſſured by the love and favour of the ſubject toward their ſoveraigne, then in the dread and fear of lawes made with rigorous pains and extreme puniſhment for not obeying their ſoveraigne.] And the other, [that lawes juſtly made for the preſervation of the common-weale without extreme puniſhment or penalty, are more often, and for the moſt part better obeyed and kept, then lawes and ſtatutes made with great and extreme puniſhment.] *Mitiùs imperanti melius paretur.*

[24]

Seneca.

In which act five notable things are to be obſerved. Firſt, it extendeth (without exception) to all high treaſons made by any act of parliament ſince the ſaid act of 25 E. 3. Secondly, to all declarations of high treaſons by any act of parliament ſince the ſaid act of 25 E. 3. (as of the ſaid declaration in 3 R. 2. of killing an ambaſſadour and the like.) Thirdly, to all petit treaſons made or declared by any act of parliament ſince the ſaid act of 25 E. 3. Fourthly, albeit miſpriſion of treaſon is not mentioned in the act of 25 E. 3. yet every miſpriſion of any treaſon made or declared ſince that act by any act of parliament, is abrogated. Fifthly, no offence to be treaſon, petit treaſon, or miſpriſion of treaſon, but only ſuch as be declared and expreſſed to be treaſon, petit treaſon, or miſpriſion of treaſon by the ſaid act of 25 E. 3. Here three things are to be obſerved: firſt, that this word [expreſſed] excludeth all implications

implications or inferences whatſoever. Secondly, here miſpriſion of treaſon is taken for concealement of high treaſon or petit treaſon, and only of high treaſon or petit treaſon ſpecified and expreſſed in the act of 25 E. 3. Thirdly, that no former judgement, attainder, preſident, reſolution, or opinion of judges or juſtices of high treaſon, petit treaſon, or miſpriſion of treaſon, other then ſuch as are ſpecified and expreſſed in the ſaid act of 25 E. 3. are to be followed or drawne to example: for the words be direct and plaine, [that from henceforth, no act, deed, or offence, &c. ſhall be taken, had, deemed, or adjudged to be treaſon, petit treaſon, or [a] miſpriſion of treaſon, but only ſuch as be declared and expreſſed in the ſaid act of 25 E. 3. &c. any act of parliament or ſtatute after 25 E. 3. or any other declaration or matter to the contrary notwithſtanding.] So as there is no high treaſon, petit treaſon, or miſpriſion of any treaſon made or declared by any act of parliament or otherwiſe ſince the act of 25 E. 3. but only ſuch as have been made ſince the ſaid act of 1 Mariæ, and of thoſe only ſuch as were made [b] perpetuall, and not during the life of queen Mary or of queen Elizabeth, whereof there be divers which now are expired, which you may reade being all in print. But there wanted nothing to the perfection of the ſtatute of 25 E. 3. but a limitation of ſome certaine time wherein the offender ſhould be accuſed. [c] *Poſt intervallum temporis accuſator non erit audiendus, niſi docere poteſt ſe fuiſſe juſtis rationibus impeditum.*

Or the declaration of treaſon, &c. [d] Declarations made during the naturall life of queen Elizabeth ceaſed by her death: for declarations may have limitations as well as ſtatutes introductory of new lawes.

There is another excellent branch of a ſtatute made [e] in 1 & 2 Ph. & Mar. in theſe words. [And be it further enacted by the authority aforeſaid, that all trials hereafter to be had, awarded, or made for any treaſon, ſhall be had and uſed only according to the due order and courſe of the common law.]

All trials.] [f] Upon theſe words many things have been obſerved by others. Firſt, that the letter of this act extendeth only to triall of high treaſons, or petit treaſons, and not to miſpriſion. Secondly, foraine treaſons are to be tried by the ſtatute [g] of 35 H. 8. cap. 2. and ſo it was reſolved by all the juſtices of England in Orurks caſe, and had been ſo reſolved before. But for trials of treaſons to be had in Wales, or where the kings writ runneth not, in ſuch ſhires as the king ſhall aſſigne by his commiſſion by the [e] ſtatute of 32 H. 8. ca. 4. are abrogated by this act, becauſe they are triable by the law.

[h] It hath been holden, that upon the triall of miſpriſion of treaſon there muſt be two lawfull witneſſes, as well upon the triall, as upon the indictment, as it was reſolved by the juſtices in the lord Lumleyes caſe, Hil. 14. Eliz. reported by the lord Dier, under his own hand, which we have ſeen, but left out of the print, which for other purpoſes is cited hereafter. Thirdly, it hath beene holden, that this act extendeth not to the indictment of any treaſon, but to the triall by peers, if the offender be noble: or by freeholders, if the offender be under the degree of nobility: and therefore upon the indictment which is in manner of an accuſation, by the ſtatutes of 1 E. 6. and 5 E. 6. two lawfull witneſſes are requiſite:

[a] That is, of ſuch treaſon, high or petit, as is expreſſed in the act of 25 E. 3. and of no other treaſon.

[b] 1 Mar. cap. 6. 1 & 2 Ph. and Mar. cap. 11. 5 Eliz. ca. 1. and 11. 18 Eliz. cap. 1. 13 Eliz. cap. 2. 23 Eliz. cap. 1. 27 Eliz. cap. 2. 3 Jac. cap. 4.

[c] Bracton, lib. 3. fol. 118. b.

[d] 13 Eliz. cap. 1. 14 Eliz. cap. 1. and cap. 2.

[e] 1 & 2 Ph. and M. cap. 10.

[f] See the ſecond part of the Inſtitutes, Mag. Carta, cap. 29. Verbo (per judicium parium.)

[g] 35 H. 8. cap. 2. 3 Mar. Dier, 132. lib. 7. fol. 23. in Calvin's caſe. Paſch. 33 Eliz. Orurk's caſe.

[e] 32 H. 8. cap. 4.

[h] 1 E. 6. cap. 12. 5 E. 6. cap. 11. Both which are mentioned in the next ſection. Hill. 14 Eliz. Dier, MS. *Nota.* This is the laſt reſolution of the judges in this point. At this time Catlin and Dier were chief juſtices, and Sanders chiefe baron, &c.

quiſite: the words of the ſtatute of 1 E. 6. in the laſt branch be, [that none ſhall be indicted, arraigned, condemned, or convicted for any treaſon, petit treaſon, miſpriſion of treaſon, or for any words before ſpecified to be ſpoken, after the ſaid firſt day of February, for which the ſame offender or ſpeaker ſhall in any wiſe ſuffer pains of death, impriſonment, loſſe or forfeiture of his goods, chatels, lands, or tenements, unleſſe he be accuſed by two ſufficient and lawfull witneſſes, or ſhall willingly without violence confeſſe the ſame.

1 E. 6. cap. 12. 5 E. 6. cap. 11. See 13 El. cap. 1. See before verb. [*De ceo provable-ment ſoit attaint.*]

Nota that [before ſpecified] doe refer to the words mentioned before in the act. 1. It is manifeſt by the connexion of the words, viz. [for any words before ſpecified to be ſpoken, &c.] 2. The treaſons in 25 E. 3. were mentioned before. 3. The firſt words be [for any treaſon, petit treaſon, miſpriſion of treaſon, &c.]

And by 5 E. 6. ca. 11. it is provided by the laſt clauſe ſave one, [that none ſhall be indicted, arraigned, condemned, convicted, or attainted for any of the treaſons or offences aforeſaid, or for any * other treaſons that now be, or hereafter ſhall be, which ſhall hereafter be perpetrated, committed, or done, unleſſe the ſame offender be thereof accuſed by two lawfull accuſers, &c. unleſſe the ſaid party arraigned ſhall willingly, without violence confeſſe the ſame.] Here two things are to be obſerved. 1. The particular penning of both theſe acts, viz. indicted, arraigned, convicted, &c. and the words of 1 & 2 of Ph. & Mar. extend to tryalls only, and not to the indictment. 2. Two lawfull accuſers in the act of 5 E. 6. are taken for two lawfull witneſſes, for by two lawfull accuſers, and accuſed by two lawfull witneſſes (as it is ſaid 1 E. 6.) is all one: which word (accuſers) was uſed, becauſe two witneſſes ought directly to accuſe, that is, charge the priſoner, for other accuſers have we none in the common law, and therefore lawfull accuſers muſt be ſuch accuſers as law allow. And ſo was it reſolved in the Lo. Lumleys caſe by the juſtices: for if accuſers ſhould not be ſo taken, then there muſt be two accuſers, by 5 E. 6. and two witneſſes by 1 E. 6. And the ſtrange conceit in 2 Mar. that one may he an accuſer by hearſay, was utterly denied by the juſtices in the Lo. Lumleys caſe. And this word (awarded) in the ſtatute of 1 & 2 Ph. and Mar. extendeth to the tryall upon the arraignment, and not to the indictment, for that is not ſaid to be awarded.

See 1 El. cap. 6. Stanf. Pl. Coron. 89. and 164. 4 Mar. Coron. Br. 220. Dier, 2 Mar. 99. and 3 Mar. 132.

* Nota the generality of theſe words. *Regula. verba generalia generaliter ſunt intelligenda.* See hereafter c. 49. of Piracy, &c.

Hil. 14 El. Lo. Lumley's caſe. Ubi ſupra. 2 Mar. Dier, 99, 100. Thomas' caſe.

And it was reſolved by all the juſtices in [a] Rolſtons caſe upon the rebellion in the north, that theſe words [ſhall willingly without violence confeſſe the ſame] are to be underſtood where the party accuſed upon his examination before his arraignment, willingly confeſſed the ſame without violence, that is, willingly without any torture: and is not meant of a confeſſion before the judge, for he is never preſent at any torture, neither upon his arraignment was ever any torture offered. And here commeth another [b] ſtatute made in 1 & 2 Mar. to be conſidered, by which it is provided, that treaſon for the counterfeiting and impairing of the coin currant in this realm, &c. the offender therein, &c. ſhall be indicted, arraigned, tried, convicted, or attainted by ſuch like evidence, and in ſuch manner and form, as hath been uſed and accuſtomed within this realm, at any time before the firſt year of king E. 6. &c.

[a] Mich. 13 & 14 El. Rolſton's caſe.

[b] 1 & 2 Ph. and Mar. c. 11. ſupra.

Wherein

Wherein the ſpeciall penning of this act is to be obſerved, which in caſe of treaſon concerning the counterfeiting or impairing of coin, &c. hath by particular words reſtored the evidence requiſite by the common law, before the ſtatute of 1 E. 6. as well upon the indictment as the triall. But the act of 1 & 2 Ph. and Mar. cap. 10. extends to trials only in other caſes of high treaſon, and therefore that act extendeth not to the indictment of other high treaſons. Alſo it is moſt neceſſary (as many doe hold) that there ſhould be two lawfull accuſers, that is, two lawfull witneſſes at the time of the indictment, for that it is commonly found in the abſence of the party accuſed, and it may be when the party ſuſpected is beyond ſea, or in remote parts, and may be outlawed thereupon; and therefore ſeeing the indictment is the foundation of all, it is moſt neceſſary to have ſubſtantial proof in a cauſe ſo criminall, where *probationes oportent eſſe luce clariores.* Laſtly, * if the indictment were part of the tryall, then ought he that is noble, and a lord of parliament be indicted of high treaſon, &c. by his peers: for the tryall of him (without queſtion) muſt be by his peers: but the indictment of peers of the realm is always by free-holders, and not by their peers, as hereafter ſhall appear. We have been the longer herein in reſpect of ſome variety of opinion (for want of due and intire conſideration had of all and every part of that which hath been ſaid) upon ſerious ſtudy touching this point, without reſpect of a common wandring opinion.

1 & 2 Ph. and Mar. cap. 10.

* [26]

See Magna Cart. c. 29. and the expoſition thereupon.

And it ſeemeth that by the ancient common law one accuſer, or witneſſe was not ſufficient to convict any perſon of high treaſon: [a] for in that caſe, where is but one accuſer, it ſhall be tried before the conſtable and marſhall by combat, as by many records appeareth. [b] But the conſtable and marſhall have no juriſdiction to hold plea of any thing, which may be determined or diſcuſſed by the common law. And that two witneſſes be required, appeareth by our [c] books, and I remember no authority in our books to the contrary: and the common law herein is grounded upon the law of God expreſſed both in the old and new Teſtament: [d] *in ore duorum aut trium teſtium peribit qui interficietur: nemo occidatur uno contra ſe dicente teſtimonium.*

[a] Pat. 25 E. 3. part 1. nu. 16. Rot. Parl. 21 R. 2. nu. 19. 21. the D. of Norff. caſe. Rot. Pat. 3 H. 4. Ballieſhul's caſe. Rot. Vaſcon. 9 H. 4. nu. 14. John Bolemer's caſe. Rot. Parl. 2 H. 6. nu. 9. the earl of Ormond's caſe. Rot. Pat. 8 H. 6. pt. 2. m. 7. between Upton and Dowy. Vide the 4. part of the Inſtitutes. cap. the Court of Chivalry, &c. See Bract. lib. 3. fo. 119. a.

[b] 13 R. 2. cap. 2.

[c] Mirror, ca. 3. §. ordenance de attaint. Bract. l. 3. f. 354. 48 E. 3. 30. 35 H. 6. 46. Fort. ca. 32. 15 E. 4. f. 1. Pl. Com. fo. 8.

[d] Deu. 17. 6. 19. 15 Mat. 18. 16. John 18. 23. 2 Cor. 13. 1. Heb. 10. 28.

And this ſeemeth to be the more clear in the triall by the peers, or nobles of the realm, becauſe they come not *de aliquo vicineto*, whereby they might take notice of the fact in reſpect of *vicinitie*, as other jurors may doe.

Having now rehearſed what others have ſaid and holden, we upon due conſideration had of the whole matter will ſet down our own opinion, and reaſons, in theſe four points following. Firſt, that the ſtatute of * 5 E. 6. cap. 11. is a generall law, and extends to all high treaſons, as well by the common law declared by the ſtatute of 25 E. 3. as to any other ſtatute made or to be made, the negative words of which ſtatute be: [no perſon ſhall be [f] indicted, arraigned, convicted, condemned, or attainted for any treaſon, that now is, or hereafter ſhall be, &c.] Which words without all queſtion are generall, and ſo to be taken. The words of that ſtatute be further, [unleſſe the ſame offender be accuſed by two lawful accuſers,] theſe two lawful accuſers are in judgement of law taken for two lawful witneſſes, and that for two cauſes: firſt, they muſt be lawful, that is, allowed by the laws of the realm: and by the law, upon

[e] And ſo I hold the ſtatute of 1 E. 6. c. 12. to be a generall law, and to extend to all high treaſons, &c.

[f] Nota as well upon the indictment as the arraignment of treaſon there ought to be two accuſers. See Dier, 2 & 3 Ph. and Mar. 132.

upon the arraignment of the priſoner upon the indictment of treaſon, no other accuſer can be heard, but witneſſes only. Secondly, the words of the ſtatute are [which ſaid accuſers at the time of the arraignment of the party accuſed, if they be then living, ſhall be brought in perſon before the party ſo accuſed, and avow, and maintain that which they have to ſay to prove him guilty of the treaſon, unleſſe the party arraigned ſhall willingly without violence confeſſe the ſame,] as by that act it appeareth. Now to avow and maintain that which they have to ſay to prove him guilty of the treaſon, is the proper office and duty of witneſſes, and ſo it is ſaid in the ſtatute of [g] 1 E. 6. c. 12, in the laſt clauſe (by two lawful witneſſes.) See the ſtatute of 5 El. c 1. where it is ſaid [accuſed by good and ſufficient teſtimony:] and to the ſame intent, the ſtatute of 1 & 2 Ph. and Mariæ, cap. 11. for the word [accuſed.]

1. *Puniantur accuſatores penes dominum regem, quòd amodò rex eis de faciii non credat: et talis pœna fiat eis, qualis debeat fieri illis, qui injuſte fideles dni. regis exhæredari et deſtrui fecerunt, &c.*

2. That this act of 5 E. 6. extend as well to petit treaſon, as high treaſon, for the words be [any treaſon] and ſo doth the ſtatute of 1 E. 6. cap. 12.

3. That the ſtatute of 1 & 2 Ph. and Mar. cap. 10. doth not abrogate the ſaid act of 1 E. 6. or of 5 E. 6. For that act of 1 & 2 Ph. and Mar. extends only to trialls by the verdict of twelve men *de vicineto*, of the place where the offence is alleadged, and [k] the indictment is no part of the triall, but an information or declaration for the king, and the evidence of witneſſes to the jury is no part of the triall, for by law the tryall in that caſe is not by witneſſes, but by the verdict * of twelve men, and ſo a manifeſt diverſity between the evidence to a jury, and a tryall by jury. And the word [awarded] in that ſtatute doth prove that that act extended only to the *venire facias* for trial, for neither the indictment nor the evidence can be ſaid to be awarded: *veritas quæ minime defenſatur, opprimitur, et qui non improbat, approbat. Et ſic liberè animam meam liberavi.*

[a] The tryall againſt an alienee, that lived here under the protection of the king, and amity being between both kings, for high treaſon, ſhall by force of this act of 1 & 2 Ph. & Mar. be tried according to the due courſe of the common law, and therefore in that caſe he ſhall not be tried *per medietatem linguæ*, as he ſhall be in caſe of petit treaſon, murder, and felony, if he prayeth it.

4. [b] That a tryall in a forein county upon examination before three of the councell, &c. by the ſtatute of 33 H. 8. cap. 23. is abrogated by this act of 1 & 2 Ph. and Mar. being a tryall contrary to the due courſe of the common law, which is to have it tryed by jurours of the proper county, [c] but the indictment being found in the proper county, it may be by ſpeciall commiſſion heard and determined before commiſſioners in any forein county, but the tryall muſt be by jurours of the proper county; and this is warranted by the courſe of the common law. And albeit when the term begins, all commiſſions of oier and terminer in the county where the kings bench ſit, be ſuſpended during the term, yet if an indictment be found before ſuch commiſſioners before the tearm, there may be a ſpeciall commiſſion made to commiſſioners in the ſame county, ſitting the kings bench in that county, to

[g] 1 E. 6. cap. 12. the laſt clauſe. 5 El. cap. 1. 1 & 2 Ph. and Mar. cap. 11. Bract. li. 3. f. 118. *Qui accuſat inte gratæ famæ ſit, et non criminoſus.*

[i] Stat. de Kenelw. ſecunda parte, Vet. Mag. Cart. cap. 16.

[k] See the firſt part of the Inſtitutes. ſect. 194. See Forteſcue, cap. 26, 27. Juries ought to be informed by evidences, and witneſſes.

*[27]

[a] 27 E. 3. cap. 8. 28 E. 3. cap. 18. 8 H. 6. cap. 29. 1 Mar. fo. 144. Shirley's caſe, and ſo it was reſolved by all the judges, Hil. 36 El. in the caſe of doctor Lopez, Emanuel Loyſie, and Stephen Ferreira de Gama.

[b] 33 H. 8. c. 23. 3 Mar. Dier, 132. Dier, 12 El. 286. b. li. 11. fo. 63. a. in doctor Foſter's caſe.

[c] 27 Aſſ. p. 1. 21 Aſſ. p. 12. W. 1. c. 3. &c. Mic. 25 & 26 El. per les juſtices in Somerville's and Arden's caſe. Dier 12 El. 286. b. And this was reſolved, Mic. 1 Ja. in Sir Walter Raleigh's caſe. Pl. Com. 388. Count de Leiceſter's caſe.

to hear and determine the ſame during the tearm: for the kings bench hath no power to proceed thereupon, till the indictment be before them. And it is the better, if the ſpeciall commiſſion bear teſte after the beginning of the tearm. Note a diverſity between generall commiſſions of oier and terminer, and ſuch a ſpeciall commiſſion; and the court of kings bench may be adjourned, and in the mean time the commiſſioners may ſit there.

[d] And where it is provided by the ſtatute of 33 H. 8. cap. 23. that peremptory challenge ſhould not from thenceforth be admitted or allowed in caſes of high treaſon, or miſpriſion of treaſon: [e] this branch is abrogated by the ſaid act of 1 Mar. For the end of challenge is to have an indifferent tryall, and which is required by law; and to bar the party indicted of his lawfull challenge, is to bar him of a principall matter concerning his tryall: and all acts of parliament concerning incidents to tryalls contrary to the courſe of the common law, are abrogated by the ſaid words, [and that all trialls hereafter, &c.] but all this is to be underſtood of perſons under the degree of nobility; for in caſe of a triall of a noble man, lord of parliament, he cannot challenge at all any of his peers.

[f] Henry Garnet ſuperiour of the jeſuites in England upon his arraignment for the powder treaſon, did challenge Burrel a citizen of London peremptorily, and it was allowed unto him by the reſolution of all the judges; [g] ſo as in caſe of high treaſon, or miſpriſion of high treaſon, a man may challenge 35. peremptorily, which is under three juries, but more he cannot.

Laſtly, all ſtatutes made before the ſaid act of 1 & 2 Ph. & Mar. for tryall of high treaſon, petit treaſon, or miſpriſion of treaſon, contrary to the due courſe of the common law, are abrogated by the ſaid act of 1 & 2 Ph. & Mar. and tryalls by the due courſe of the common law, with challenges incidents in thoſe caſes are reſtored.

[h] If a man be indicted of high treaſon, he may at this day plead a forein plea, as he might doe by the common law, and ſhall be tryed in the forein county; but otherwiſe it is in caſes of petit treaſon, murder, or felony, for there it ſhall be tryed in the county where the indictment is taken.

And foraſmuch as the proceeding againſt a noble peer of the realm, being a lord of parliament in ſome points agrees, and in other points differeth from the proceeding againſt a ſubject under the degree of nobility: it ſhall be neceſſary to ſhew wherein they agree, and wherein they differ.

1. The noble peer of the realme muſt be indicted before commiſſioners of oier and terminer, or in the kings bench, if the treaſon, miſpriſion of treaſon, felony, or miſpriſion thereof be committed in that county where the kings bench ſit, as it was reſolved in the caſe of Tho. d. of N. in an. 13. Eliz. And this is common to both degrees to be indicted by jurors of that county where the offence was committed.

2. When he is indicted, then the king by his commiſſion under the great ſeale conſtitutes ſome peer of the realme, to be *hac vice*, ſteward of England: for his ſtile in the commiſſion, is, *(ſeneſchallus Angliæ)* who is judge in this caſe of the treaſon or felony, or of the miſpriſion of the ſame committed by any peer of the realm.

[d] 33 H. 8. c. 23.

[e] And ſo it was reſolved. an. 1 Ja. in Sir Walter Raleighs caſe, by all the judges and had been reſolved ſo before. Stan. pl. cor. 157.

[f] 3. Ja. R. in Garnets caſe. And ſo it was reſolved, M 25 & 26 El. in Somerviles and Ardens caſe.

[g] Br. tit. Challenge, 217.

[h] 22 H. 8. c. 14. 32 H. 8. c. 3. See 4 H. 8. c. 2. and 22 H. 8. c. 2. pleading, &c. for being taken out of ſanctuary in a forain county in caſe of murder or felony. See hereafter, cap. Sanctuary, all ſanctuaries taken away: and note that the ſtat. of 22 H. 8. &c. extend only to indictments and not to appeals.

[28]

1 H. 4. 1.

1 H. 4. 1.
10 E. 4. 6. b.
13 H. 8. 12.

This commiſſion reciteth the indictment generally as it is found: and power given to the lord ſteward to receive the indictment, &c. and to proceed, *ſecundum legem et conſuetudinem Angliæ*. And a commandement is given thereby to the peers of the realme, to be attendant and obedient to him: and a commandement to the lieutenant of the Tower to bring the priſoner before him.

3. A *certiorari* is awarded out of the chancery to remove the indictment it ſelfe before the ſteward of England *indilate*, which may either beare date the ſame day of the ſtewards commiſſion, or any day after.

4. The ſteward directs his precept under his ſeale to the commiſſioners, &c. to certifie the indictment ſuch a day and place.

5. Another writ goeth out of the chancery directed to the lieutenant of the Tower, to bring the body of the priſoner before the ſteward at ſuch day and place as he ſhall appoint.

6. The lord ſteward maketh a precept under his ſeale to the lieutenant of the Tower, &c. and therein expreſſeth a day and place when he ſhall bring the priſoner before him.

7. The ſteward maketh another precept under his ſeale to a ſerjeant at armes, to ſummon *tot et tales dominos, magnates, et proceres hujus regni Angliæ prædicti R. comitis E. pares, per quos rei veritas melius ſciri poterit, quòd ipſi perſonaliter compareant coram prædicto ſeneſchallo apud Weſtm. tali die et hora, ad faciend. ea quæ ex parte domini regis forent facienda, &c.* Wherein four things are to be obſerved. Firſt, that all theſe precepts moſt commonly beare date all in one day. Secondly, that no number of peers are named in the precept, and yet there muſt be twelve or above. Thirdly, that the precept is awarded for the returne of the peers before any arraignment or plea pleaded by the priſoner. Fourthly, that in this caſe the lords are not *de vicineto*, and therefore the ſitting and triall may be in any county of England. And herein are great differences between the caſe of a peer of the realme, and of one under the degree of nobility.

8. At the day, the ſteward with ſix ſerjeants at armes before him takes his place under a cloth of eſtate, and then the clerk of the
1 H. 4. 1. crown delivereth unto him his commiſſion, who redelivereth the ſame unto him. And the clerk of the crown cauſeth a ſerjeant at armes to make three oyes, and commandement given in the name of the lord high ſteward of England to keep ſilence: and then is the
1 H. 4. 1. commiſſion read. And then the uſher delivereth to the ſteward a white rod, who re-delivereth the ſame to him againe, who holdeth it before the ſteward. Then another oyes is made, and commandement given in the name of the high ſteward of England, to all juſtices and commiſſioners to certifie all indictments and records, &c. Which being delivered into court, the clerk of the crown readeth the return. Another oyes is made, that the lieutenant of the Tower, &c. returne his writ and precept, and to bring the priſoner to the bar: which being done, the clerk reads the retorne. Another oyes is made, that the ſerjeant at armes return his precept with names of the barons and peers by him ſummoned, and the return of that is alſo read. Another oyes is made, that all earles, barons and peers (which by the commandement of the high ſteward be ſummoned)
[29] anſwer to their names, and then they take their places and ſit down, and their names are recorded; and the entry of the record is, that they

they appear, *ad faciendum ea quæ ex parte domini regis eis injungentur.* And when they be all in their places, and the priſoner at the bar, the high ſteward declares to the priſoner the cauſe of their aſſembly, and perſwades him to anſwer without feare, that he ſhall be heard with patience, and that juſtice ſhall be done. Then the clerk of the crown reades the indictment, and proceeds to the arraignment of the priſoner, and if he plead not guilty, the entry is, *et de hoc de bono et malo ponit ſe ſuper pares ſuos, &c.* Then the high ſteward giveth a charge to the peers, exhorting them to try the priſoner indifferently according to their evidence. 1 H. 4. 1.

9. The peers are not ſworn, but are charged, *ſuper fidelitatibus, et ligeantiis domino regi debitis:* for ſo the record ſpeaketh.

10. Then the kings learned councell give evidence, and produce their proofes for the king againſt the priſoner.

11. But the priſoner, when he pleadeth not guilty, whereby he denieth the fact, he needs have no advice of councell to that plea. But if he hath any matter of law to plead, as Humfrey Stafford in 1 H. 7. had, viz. The priviledge of ſanctuary, he ſhall have councell aſſigned to him to plead the ſame, or any other matter in law: as to plead the generall pardon, or a particular pardon, or the like. And after the plea of not guilty, the priſoner can have no councell learned aſſigned to him to anſwer the king's councell learned, nor to defend him. And the reaſon thereof is, not becauſe it concerneth matter of fact, for *ex facto jus oritur:* but the true reaſons of the law in this caſe are: Firſt, that the teſtimonies and the proofs of the offence ought to be ſo clear and manifeſt, as there can be no defence of it. * Secondly, the court ought to be in ſtead of councell for the priſoner, to ſee that nothing be urged againſt him contrary to law and right; nay, any learned man that is preſent may inform the court for the benefit of the priſoner, of any thing that may make the proceedings erroneous. And herein there is no diverſity between the peer and another ſubject. And to the end that the triall may be the more indifferent, ſeeing that the ſafety of the priſoner conſiſteth in the indifferency of the court, the judges ought not to deliver their opinions before-hand of any criminall caſe, that may come before them judicially. And we reade, that in the caſe of Humfrey Stafford that arch-traytor, Huſſey chief juſtice, beſought king Henry the ſeventh, that he would not deſire to know their opinions before-hand for Humfrey Stafford, for they thought it ſhould come before them in the kings bench judicially, and then they would do that which of right they ought: and the king accepted of it. And therefore the judges ought not to deliver their opinions before-hand upon a caſe put, and proofs urged of one ſide in abſence of the party accuſed: eſpecially in caſes of high nature, and which deſerve ſo fatall and extreme puniſhment. For how can they be indifferent, who have delivered their opinions before-hand without hearing of the party, when a ſmall addition, or ſubſtraction may alter the caſe: And how doth it ſtand with their oath, who are ſworn, That they ſhould well and lawfully ſerve our lord the king and his people in the office of a juſtice? and they ſhould do equall law, and execution of right to all his ſubjects, &c. See more of this matter in the 13 ſection here following. 18 E. 3.

In Scotland in all criminall caſes, yea in caſes of high treaſon, *pars rea* may have councell learned.

Vide hereafter upon the ſtatute of 31 Eliz. concerning witneſſes.

*See more hereof cap. 63. Councell learned in Pleas of the Crown.

1 H. 7. fo. 26.

12. There be alwayes either all, or ſome of the judges ever attendant

dant upon the high ſteward, and ſit at the feet of the peers, or about a table in the middeſt, or in ſome other convenient place.

13. After all the evidence given for the king, and the priſoners anſwers, and proofs at large, and with patience heard; then is the priſoner withdrawn from the bar to ſome private place under the cuſtody of the lieutenant, &c. And after that he is withdrawn, the lords that are tryers of the priſoner go to ſome place to conſider of their evidence: and if upon debate thereof, they ſhould doubt of any matter, and thereupon ſend to the high ſteward, to have conference with the judges, or with the high ſteward, they ought to have no conference, either with the judges or the high ſteward, but openly in court, and in the preſence, and hearing of the priſoner; as it was reſolved by all the juſtices of England in the reign of king H. 8. in the caſe of the lord Dacres of the North. And this was a juſt reſolution; for when the lords ſhould put a caſe, and aſk advice thereupon, the priſoner ought by law to be preſent, to ſee that the caſe or queſtion be rightly put: and therefore that nothing be done in his abſence, untill they be agreed on their verdict. Hereupon it followeth, that if the peers of the realm, who are intended to be indifferent, can have no conference with the judges, or with the high ſteward in open court in the abſence of the priſoner; *à fortiori*, the king's learned counſell ſhould not in the abſence of the party accuſed, upon any caſe put, or matter ſhewed by them, privately preoccupate the opinion of the judges: and upon ſo juſt a reſolution the caſe ſucceeded well, for the peers found the lord Dacres not guilty.

[30]

Paſch. 26 H. 8. in the caſe of the lord Dacres of the North, reported by juſtice Spilman, which we have ſeen.

14. A noble man cannot waive his triall by his peers, and put himſelfe upon the triall of the country, that is, of twelve freeholders: for the ſtatute of Magna Carta is, that he muſt be tried *per pares*. And ſo it was reſolved in the lord Dacres caſe, *ubi ſupra*.

Mag. Cart. cap. 29.

15. * The peers ought to continue together (as juries in caſe of other ſubjects ought to do) until they be agreed of their verdict: and when they are agreed, they all come again into the court, and take their places, and then the lord high ſteward publicly in open court, beginning with the puiſne lord, (who in the caſe of the lord Dacre was the lord Mordant,) ſaid unto him; My lord Mordant, is William lord Dacre guilty of the treaſons, whereof he hath been indicted or arraigned, or of any of them? And the lord ſtanding up ſaid, Not guilty; and ſo upward of all the other lords *ſeriatim*: who all gave the ſame verdict: In which caſe the entry is, *ſuper quo W. Comes E. & cæteri antedicti pares inſtanter ſuper fidelitatibus & legeantiis dicto domino regi debitis, per præfatum ſeneſcallum ab inferiori pare uſq; ad ſupremum ſeparatim publice examinati dicunt quòd W. dominus Dacre non eſt culp. &c.*

* Reſolved by all the judges. Mich. 13 & 14 El. in the caſe of Thom. duke of Norff. 1 M. 4. fo. 1. 10 E. 4. 6. b. 33 H. 8. fo. 12. Tr. 26 H. 8. Spilman's report.

16. The peers give their verdict in the abſence of the priſoner, and then is the priſoner brought to the bar again: and then doth the lord ſteward acquaint the priſoner with the verdict of his peers, and give judgement accordingly, either of condemnation or acquitall. But it is not ſo in the caſe of another ſubject; for there the verdict is given in his preſence.

17. Every lord of parliament, and that hath voice in parliament, and called thereunto by the king's writ, ſhall not be tried by his peers, but only ſuch as ſit there *ratione nobilitatis*, as dukes, marquiſſes,

Rot. Roman. 17 E. 2. m. 6. Adam Orleton B. of Hereford.

marquiſſes, countes, viſcounts or barons, and not ſuch as are lords of parliament, *ratione baroniarum, quas tenent in jure eccleſiæ*, by reaſon of their baronies which they hold in the right of the church, as arch-biſhops, and biſhops, and in time paſt ſome abbots and priors, but they ſhall be tried by the countrey, that is, by freeholders, for that they are not of the degree of nobility.

2 H. 4. Marks. B. of Carliſle. Stanf. Pl. Coron. li. 3. ca. 62. fo. 153. in Temps H. 8.

18. [a] No noble man ſhall be tried by his peers, but only at the ſuit of the king upon an indictment of high treaſon, or miſpriſion of the ſame, petit treaſon, murder, or other felony, or miſpriſion of the ſame. But in caſe of a premunire or the like, though it be at the ſuit of the king, he ſhall not be tried by his peers, but by freeholders. And ſo in an appeale at the ſuit of the party for petit treaſon, murder, robbery, or other felony, he ſhall be tryed by freeholders. See more hereof in the ſecond part of the Inſtitutes, Magna Carta, cap. 29.

[a] 10 E. 4. 6. b. Mag. Cart. c. 29.

19. [b] And albeit a man be noble, and yet no lord of the parliament of this realm, (as if he be a nobleman of Scotland, or of Ireland, of France, &c.) he ſhall be tried by knights, eſquires, or others of the commons. And ſo it is of the ſonne of a duke, marquiſſe, earle, &c. he is noble, and called lord: and yet becauſe he is no lord of parliament, he ſhall be tried as one under the degree of a peer, and lord of parliament.

[b] 11 E. 3. brc. 473. 8 R. 2. proces. pl. ultimo. 20 E. 4. 6. 20 El. Dier, 360. 38 H. 8. Br. treaſon. Seignior Sancras caſe. Lib. 9. fo. 117.

20. No peer of the realm, or any other ſubject ſhall be convicted by verdict, but the ſaid offences muſt be found by above four and twenty, viz. by twelve, or above, at his indictment, or by twelve peers, or above, if he be noble, and by twelve, and not above, if he be under the degree of nobility.

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21. A peer of the realme being indicted of treaſon, or felony, or of miſpriſion, as is aforeſaid, and duly tranſmitted to the lords, may be arraigned thereof in the upper houſe of parliament, as frequently in parliament rolls it doth appeare: but then there muſt be appointed a ſteward of England, who ſhall put him to anſwer: and if he plead not guilty, he ſhall be tried *per pares ſuos*, and then the lords ſpiritual muſt withdraw, and make their proxies: but no appeal of treaſon can be in parliament, [a] but is ouſted by the ſtatute of 1. H. 4. cap. 14.

10 E. 4. 6. Rot. par. 21. R. 2. Countee de Arundels caſe. Rot. Parliam. 5 H. 4. nu. 11. 12 31 H. 6. nu. 49. Countee de Devons caſe. 28 H. 6. nu. 19. Duke of Suff.

[a] 1 H. 4. cap. 14.

22. [b] And as the beginning (viz. the finding of the indictment by freeholders) is equall to them both: ſo the moſt extreme and heavy judgement, if they be found guilty, is equal to both, &c. which you may reade in the firſt part of the Inſtitutes, Sect. 147.

[b] 1 H. 4. 1. Stanf. Pl. Coron. 132. E. K. See hereafter. cap. Judgement and Execution.

23. [c] And though the commiſſion of the lord ſteward be only in theſe latter times *hac vice*, yet may the ſame be adjourned, as other commiſſioners *hac vice* may. And ſo it was holden in the lord Dacres caſe. And ſo it was done by the ſteward of England in the caſe of R. earle of S. and of F. his wife, who adjourned his commiſſion until the next day.

[c] Paſch. 26 H. 8. ubi ſupra. L. 5 E. 4. 33. 12 H. 4. 20.

24. If execution be not done according to the judgement, then the high ſteward in the caſe of a peer of the realm, or the court or commiſſioners in caſe of another ſubject, may by their precepts under their ſeales command execution to be done according to the judgement: but in caſe of high treaſon, if all the reſt of the judgement (ſaving the beheading, which is part of the judgement) be pardoned, this ought to be under the great ſeale of England.

25. And when the ſervice is performed, then is an oyes made for the diſſolving of the commiſſion; and then is the white rod, which hath been borne and holden before the ſteward, by him taken in both his hands, and broken over his head.

Laſtly, the indictments together with the record of the arraignment, triall, and judgement, ſhall be delivered into the king's bench, there to be kept and inrolled.

Hitherto we have ſpoken when a noble man doth appear, and plead not guilty, and put himſelf upon his peers: Now let us ſee what ſhall be had againſt him when he is indicted and appears not, and cannot be taken: and generally he ſhall be outlawed, *per judicium corronatorum*. But how doth that ſtand with Magna Charta, *nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum?* That is to be intended, when he appears and pleads not guilty, and puts himſelf upon his peers: but when he abſents himſelf, and will not yeild himſelf to the due tryall of his peers, then he ſhall be outlawed *per judicium coronatorum*, or elſe he ſhould take advantage of his own contumacy, and flying from judgement. [d] For proces to be awarded upon the indictment or appeal of treaſon, felony, or treſpaſs, either againſt a nobleman or any other, ſee the ſtatute of 6 H. 6. and 8 H. 6. and if the proces and order preſcribed by thoſe ſtatutes be not purſued, the outlawry may be reverſed by writ of error, which writ ought to be granted to him *ex merito juſtitiæ*, as it was adjudged in Ninian Menvils caſe: and thoſe ſtatutes doe extend as well to the kings bench, as to other courts having by commiſſion power to hear and determine the ſame, and very few outlawries of treaſon or felony, are of force and validity in law, for that theſe acts are not purſued.

Mag. Cart. ca. 29.

[d] See hereafter in the chapter of Judgement and Execution concerning reverſing of outlawries. 6 H. 6. c. 1. 8 H. 6. ca. 10. Mich. 26 and 27 Eliz. in bre. de error coram Rege in Ninian Menvills caſe. Utlary de haut treaſon reverſe in bank le roy. * 19 H. 6. fo. 1. 2. 11 H. 6. 54. 1 E. 4. 1. 30 H. 6. proces. 192. 31 H. 6. 11. Vide F. N. B. 213. l. Li. Intr. R. f. 122. Stanf. Pl. cor. 68, 69. 152 l.

And theſe acts are well expounded by our * books, and therefore they ſhall not need to be recited at large. This is neceſſary to be added, that the opinion of Stanf. Pl. Cor. 182. l. upon the ſtatute of 33 H. 8. c. 20. is, where the attainder is not erroneous, but lawfull by the courſe of the law: and ſo it was reſolved, Tr. 28 Eliz. and thereupon [e] the ſtatute of 28 Eliz. ca. 2. was made, that no attainder that then was for any high treaſon ſhould be reverſed for error where the party was executed. But that act extendeth only to attainders before that act, and where the party attainted ſuffered pains of death, as hath been ſaid.

[e] 28 El. ca. 2.

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But admitting the proces be awarded according to theſe ſtatutes, and the truth is, that the party indicted of high treaſon (be he noble or other) at the time of the outlawry pronounced, is out of the realm, &c. whether may he avoid the ſame by writ of error? The anſwer is, that he might have avoided the ſame by writ of error at the common law: but now in caſe of high treaſon he is barred of his writ of error by the ſtatutes of 26 H. 8. and 5 E. 6. which ſtatutes are expounded to extend generally to all treaſons, but thoſe ſtatutes extend not to any other offence than high treaſon only, and therefore all other offences remain as they did at the common law for that point.

See the firſt part of the Inſti. ſect. 26 H. 8. cap. 13. 5 E. 6. cap. 11. 12 El. Dier 287.

Now for that all indictments for any offence whatſoever, as well of noblemen, as of any under the degree of nobility, ought by the common law of the realm to be by perſons duly returned, and by * lawfull liege people, indifferent as they ſtand unſworn, and without any denomination of any: a good and profitable law

* Artic. ſup. cart. cap. 9. 28 E. 1. 20 E. 3. cap. 6. 34 E. 3. c. 4. 42 E. 3. c. 11. Regiſt. 178. Raſt. pl. 117.

was

[*] was made in that behalf at the parliament holden 11 H. 4. in theſe words. *Item* becauſe that now of late [a] inqueſts were taken at Weſtm' of perſons named to the [b] juſtices, without due return of the ſherif, of which perſons ſome were [c] outlawed before the ſaid juſtices of record, and ſome fled to ſanctuary for treaſon, and ſome for felony, there to have refuge; by whom as well many offenders were indicted, as other lawfull liege people of our lord the king, not guilty by conſpiracy, abetment, and falſe imagination of other perſons for their ſpeciall advantage and ſingular lucre, againſt the courſe of the common law uſed and accuſtomed before this time. Our ſaid lord the king for the greater eaſe and quietneſſe of his people, will and granteth, that the ſame indictment ſo made, with all the dependance thereof be [d] revoked, annulled, void, and holden for none for ever. And that from henceforth no indictment be made by any ſuch perſons, but by enquett of the king's lawful [e] liege people, in the manner, as was uſed in the time of his noble progenitors, returned by the ſherifs, or baylifs of franchiſes, without any [f] denomination to the ſherifs, or baylifs of franchiſes before made by any perſon of the names, which by him ſhould be impanelled, except it be by the officers of the ſaid ſherifs or baylifs of franchiſes ſworn and known to make the ſame, [g] and other officers to whom it pertaineth to make the ſame according to the law of England. And if any indictment be made hereafter in any point to the contrary, that the ſame indictment be alſo void, revoked, and for ever holden for none.

[*] 11 H. 4. ca. 9.
[a] Stanf. pl. cor. 87. c.
[b] Rot. Parl. 11. H. 4. nu. 15. in the kings bench.
[c] Vid. 11 H. 4. fo. 47. 21 H. 6. 30. 9 E. 4. 16. 3 H. 6. 55. 26 Aſſ. 28.
[d] 11 H. 4. 47.
[e] 13 H. 4. 19.
[f] 21 E. 3. 5. 15 E. 3. chal. 113. 27 Aſſ. pa. 65. 28 Aſſ. 24. 22. 49 E. 3. 1. 49 Aſſ. 1. 28. 43 E. 3. chall. 94. 6 R. 2. ch. ii. 102. 7 H. 4 10. 21 E. 4. 74. 19 H. 6. 9. 21 H. 6. 22. 14 H. 7. 1.
[g] Nota.

The body of this act conſiſteth upon two diſtinct purviens or branches, the one to remedy a miſchief paſt, the other to provide for the time to come. The firſt branch conſiſteth of a preamble, and a purvien: and the preamble containeth theſe eight parts. Firſt, it ſheweth divers inqueſts had been taken at Weſtminſter by perſons named to the juſtices. Secondly, without due return of the ſherif. Thirdly, of which ſome were outlawed before the ſaid juſtices of record. Fourthly, ſome fled to ſanctuary for treaſon, and ſome for felony. Fifthly, by whoſe many offenders were indicted. Sixthly, ſome not guilty. Seventhly, by conſpiracy, &c. Eighthly, that all this was againſt the courſe of the common law. By the body of the act, it is enacted, that the ſame indictment, with all the dependance thereof, be revoked, and made void. Then followeth the ſecond branch or purvien for the time to come, and this purvien conſiſteth of divers parts: Firſt, in deſcribing by what perſons indictments ought to be found, and therein 1. *privativè*, that is, not by any ſuch perſons, having reference to the preamble, which perſons we have before particularly diſtinguiſhed. 2. *Poſitivè*, that all indictments muſt be found by perſons of theſe qualities. 1. They muſt be the kings lawfull liege people. 2. Returned by ſherifs, or baylifs of franchiſes, and other officers to whom it pertaineth. 3. Without any denomination to the ſherifs, baylifs, or other officers: and this purvien is in affirmance, and declaratory of the common law.

The ſecond part of the purvien is introductory of a new law, viz. that if any indictment be made hereafter in any point to the contrary, that the ſame indictment be void, revoked, and holden for none. Wherein theſe two things are to be obſerved: 1. That this is a generall law, and extendeth to all indictments for any crime, de-

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fault, or offence whatſoever: for the words be [if any indictment] generally without naming of any court, or before whom. 2. If the indictment be found by any perſons that are outlawed, or not the kings lawfull liege people, or not lawfully returned, or denominated by any, viz. by all or any of theſe, that then the indictment is void, for the words be, [if any indictment be made hereafter in any point to the contrary, &c.] Upon this ſtatute in the caſe of Robert Scarlet before the juſtices of aſſize at Bury in the county of Suffolk, in ſommer vacation, 10 Ja. R. theſe points were reſolved and adjudged: Firſt, where at the ſeſſions of the peace holden at Woodbridge in the ſaid county of Suffolk, Robert Scarlet by confederacy between him and the clerk, that was to read the pannell of the grand jury returned by the ſherif, (whereof he was none, albeit he laboured the ſherif to have returned him) that the clerk ſhould read him as one of the pannell, which was done accordingly, and he ſworn. It was reſolved and adjudged that this caſe was within the ſtatute, for that he was not returned by the ſherif. Secondly, that where the reſt of the great inqueſt giving faith to him indicted ſeventeen honeſt and good men upon divers penall ſtatutes, which was done by the ſaid Robert Scarlet maliciouſly. It was reſolved and adjudged, that albeit he * alone was ſworn without the return of the ſherif, and all the reſt duly returned, yet this caſe was within this ſtatute, and all the indictments found by him and the reſt were void by this ſtatute: for hereby it appeared what miſchief ſuch a one might doe. Thirdly, that Robert Scarlet upon this caſe had offended againſt the ſaid act, and might be indicted thereupon: and accordingly he was upon ſufficient proof of the fact, as aforeſaid, indicted upon the ſaid act, and pleaded not guilty, and was found guilty. Fourthly, that this act extended not only to indictments of treaſon and felony, but of all other offences and defaults whatſoever, according to the generality of the words. Fifthly, conſideration was had of the act of 3 H. 8. cap. 12. and reſolved clearly that this ſtatute had not altered the act of 11 H. 4. in any thing concerning the offence of Scarlet, as upon that, which ſhall be ſaid of the act of 3 H. 8. ſhall appear. And upon hearing of councell learned what they could ſay in arreſt of judgement, at laſt judgement was given, that he ſhould be fined and impriſoned, and ordered by the court that no proces ſhould goe out upon the ſaid indictments found by the ſaid great inqueſt, whereof Scarlet was one.

* 47 E. 3. 1.
7 H. 4. 10.
21 E. 4. 74.

3 H. 8. ca. 12.

But notwithſtanding this good law, through the ſubtilty, and untrue demeanor of ſherifs, and their miniſters, great extortions and oppreſſions be and have been committed and done to many of the kings ſubjects by means of returning at ſeſſions holden within counties and ſhires for the body of the ſhire, the names of ſuch perſons as for the ſingular advantage, &c. of the ſaid ſherifs and their miniſters, will be wilfully forſworn and perjured by the miniſter labour of the ſaid ſherifs and their miniſters, by reaſon whereof many ſubſtantial perſons, the king's true ſubjects have been wrongfully indicted of murders, felonies, and miſdemeanours: and ſometime by labour of the ſaid ſherifs and their miniſters, divers great felonies and murders have been concealed, &c. For remedy of which miſchiefs it is enacted by the ſaid ſtatute of 3 H. 8. cap. 12. That the juſtices of gaol delivery, or juſtices of peace, whereof

whereof one to be of the quorum, in their open ſeſſions may reform the panell returned by the ſherif to inquire for the king, by putting to and taking out the names of the perſons ſo impanelled by the diſcretion of the ſaid juſtices, &c. and that the ſherif ſhall return the panells ſo reformed. This act extends only to juſtices of gaol delivery, and of the peace: the body of the act for offences is generall and evident. *Vide* 11 H. 7. cap. 24.

Vid. 11. H. 7. ca. 24.

Nota Lector, that the aforeſaid parliament of 11 H. 4. begun in *quindena Hillarii*, anno 11 H. 4. and the ſame tearm, viz. Hil. 11 H. 4. fo. 41. it was according to the ſaid act of 11 H. 4. reſolved by Gaſcoign chief juſtice, and all the reſt of the juſtices, that an indictment of felony found by an inqueſt before 5 H. 4. whereof one was outlawed of felony, and another was acquitted by the generall pardon, ſo as they were not *probi et legales homines* to enquire as the law willeth, and after the party had pleaded not guilty to the felony, it was awarded, that all the indictments by them found, were adnulled and made void. Herewith agreeth Stanford in his pleas of the crown, fo. 87. and 88. Vide F. tit. Indictment 25. and Coron. 89. and Brook tit. Indictment 2. Note the act ſaith, that they were outlawed before themſelves, ſo as the court may take knowledge thereof of themſelves, or of any other, as *amicus curiæ*: but the ſafeſt way for the party indicted is to plead, upon his arraignment, the ſpeciall matter given unto him by the ſtatute of 11 H. 4. for the overthrow of the indictment, with ſuch averments, as by law are required, (agreeable to the opinion of the Lord Brook. *Ubi ſupra.*) and to plead over to the felony, and to require councell learned for the pleading thereof, which ought to be granted, and alſo to require a copy of ſo much of the indictment, as ſhall be neceſſary for the framing of his plea, which alſo ought to be granted. And theſe laws made for indifferency of indicters, ought to be conſtrued favourably, for that the indictment is commonly found in the abſence of the party, and yet it is the foundation of all the reſt of the proceeding.

Hil. 11 H. 4. f. 41.

[34]

Stanf. Pl. cor. 87, 88. F. tit. Indictment 25. and Coron. 89. Br. tit. indict. 2.

Vid. le ſtatutes de 1 R. 3. ca. 4. 33 H. 6. c. 2. W. 2. ca. 13. 1 E. 3. ſtat. 2. ca. 17.

All tending that indictments may be duly had.

To draw to an end concerning tryals: it is regularly true, that by the common law the tryall ſhall be in the county, where the indictment is taken: and by the aforeſaid act of 35 H. 8. treaſons and miſprifions of treaſons committed or done out of the realm, &c. ſhall be enquired of, heard, and determined before the juſtices of the king's bench, &c. Now the caſe fel out upon this ſtatute to be thus: * one was indicted before the juſtices of the kings bench, at the tearm holden at Hertford, by a jury of the county of Hertford, for divers high treaſons committed out of this realm, and after the tearm was adjourned to Weſtm. in the county of Midd. The queſtion was, by which of the counties the party indicted ſhould be tried: and it was reſolved, that he ſhould be tried by men of that county where the indictment was taken. But otherwiſe it is upon the ſtatute of 5 El. ca. 1. the caſe being, that Horn biſhop of Winch. tendred to Edmond Bonner late biſhop of London, in the county of Surrey, within his dioces the oath of ſupremacy according to the act 1 Eliz. which Bonner refuſed, and this was certified by the biſhop of Winch. into the kings bench, then ſitting at Weſtminſter in the county of Midd. Now, by the ſtatute of 5 El. he that refuſeth the oath is to be indicted of a premunire by a jury of Midd. as a jury of that county might doe for any offence done in that

Dier 3 Mar. 131, 132. Stanf. pl. cor. 90. 35 H. 8. ca. 2.

* Mich. 35 & 36 El. in the caſe of Francis Dacres.

5 El. cap. 1.

Mich. 6 & 7 El. Dier fo. 234. Bonner's caſe.

that county, and extendeth only to the indictment, where the words of the act of 35 H. 8. be, [ſhall be enquired of, heard, and determined,] the queſtion upon the ſtatute of 5 Eliz. was, if Bonner ſhould appear and plead not guilty, by what county he ſhould be tried, whether by a jury of Midd. where the indictment was, or by a jury of Surrey, where the offence was committed; and reſolved that he ſhould be tried by a jury of Surrey: for the ſtatute of 5 El. extendeth to the indictment only, and leaveth the triall to the common law, which appointeth the tryall to be, where the offence is committed, and ſo a manifeſt diverſity between the two caſes: for regularly by the common law in all pleas of the crown, *debet quis juri ſubjacere, ubi deliquit.*

Bract. lib. 3. fo. 154. b. *Vincula qui ſenſit, didicit ſuccurrere vinctis.*

It is now neceſſary to be known, how priſoners (to ſpeak once for all) committed for treaſon, or any other offence ought to be demeaned in priſon. Bracton ſaith, *ſolent præſides in carcere continendos damnare, ut in vinculis contineantur, ſed hujuſmodi interdicta ſunt à lege, quia carcer ad continendos, non ad puniendos haberi debeat:* And in another place he ſaith, *Cum autem taliter captus coram juſtic. eſt producendus, produci non debet ligatis manibus, (quamvis interdum geſtans compedes propter evaſionis periculum,) et hoc ideo, ne videatur coactus ad aliquam purgationem ſuſcipiendam.*

Bract. lib. 3. fo. 105. a. Stanford 78. Bract. li. 3. f. 137. Note Shackells about the feet ought not to be, but for fear of eſcape.

Mirror, c. 2. §. 9.

[a] If felons come in judgement to anſwer, &c. they ſhall be out of irons, and all manner of bonds, ſo that their pain ſhall not take away any manner of reaſon, nor them conſtrain to anſwer, but at their free will. [b] And in another place he ſaith, and of priſoners we will that none ſhall be put in irons, but thoſe †, which ſhall be taken for felony, or treſpaſs in parks or vivaries, or which be found in arrerages upon account, and we defend that otherwiſe they ſhall not be puniſhed nor tormented. [c] *Omnes autem attachiabiles licet vicecomiti in priſona cuſtodire, &c. non tamen ad puniend', ſed ad cuſtodiend', &c.* [d] It is an abuſe that priſoners be charged with irons, or put to any pain before they be attainted.

[a] Brit. c. 5. fo. 14.
[b] Cap. 11. fo. 17. W. 2. c. 1. after judgement. Lib. 3. fo. 44. Lib. 8. fo. 100. 24 H. 8. Dier. 249. Pl. Com. 360. a.
[c] Fleta li. 1. ca. 26.
[d] Mirror c. 5. §. 1.

[e] *Quidam ſacerdos arraniatus de felonia poſuit ſe ſuper patriam, & ſtetit ad barram in ferris, ſed per præceptum juſtic. liberatur à ferris.* And there is no difference in law, as to a prieſt and a lay man, as to irons.

[e] S. E. 2. cor. 432.

[f] *Preſentat' quod ubi quidam Robertus Bayliens de Tauefby captus fuit, & in priſona caſtri Lincoln detentus pro quodam debito ſtatut. mercatorii in cuſtodia Tho. Boteler conſtabularii caſtride Lincoln ibi præd. Tho. le Boteler poſuit ipſum Robertum in profundo gaole inter lenones in vili priſona contra * formam ſtatut. &c. et eodem profundo detinuit, quouſque idem Robertus fecit finem cum eo de 40 s. quos ei ſolvit per extorſionem.*

[f] Tr. 7 E. 3. coram rege Rot. 44.

† [35]

* 1 E. 3. c. 7.

So as hereby it appeareth, that where the law requireth that a priſoner ſhould be kept in *ſalva & arcta cuſtodia*, yet that that muſt be without pain or torment to the priſoner.

Torturer, the rack, &c.

Hereupon two queſtions do ariſe, when and by whom the rack or brake in the Tower was brought in.

Rot. Pat. 26 H. 6. Rot. Parl. 28 H. 6. nu. 30.

To the firſt, John Holland earl of Huntingdon, was by king H. 6. created duke of Exeter, and anno 26 H. 6. the king granted to him the office of the conſtableſhip of the Tower: he and William de la Poole duke of Suffolk, and others, intended to have brought in the civill lawes. For a beginning whereof, the duke of Exeter being conſtable of the Tower firſt brought into the Tower the

the rack or brake allowed in many caſes by the civil law: and thereupon the rack is called the duke of Exeter's daughter, becauſe he firſt brought it thither.

Hollenſhed. pa. 670. &c.

To the ſecond upon this occaſion, Sir John Forteſcue chiefe juſtice of England, wrote his book in commendation of the lawes of England, and therein preferreth the ſame for the government of this countrey before the civill law; and particularly that all tortures and torments of parties accuſed were directly againſt the common lawes of England, and ſhewed the inconvenience thereof by fearfull example, to whom I refer you being worthy your reading. So as there is no law to warrant tortures in this land, nor can they be juſtified by any preſcription being ſo lately brought in.

Innocentem cogit mentiri dolor. Forteſcue. ca. 22. fo. 24.

And the poet in deſcribing the iniquity of Radamanthus, that cruell judge of hell, ſaith,

Caſtigatque, auditque dolos, ſubigitque fateri.

Virgil.

Firſt, he puniſhed before he heard, and when he had heard his deniall, he compelled the party accuſed by torture to confeſſe it. But far otherwiſe doth Almighty God proceed *poſtquam reus diffamatus eſt.* 1. *Vocat.* 2. *Interrogat.* 3. *Judicat.* To conclude this point, it is againſt Magna Carta, cap. 29. *Nullus liber homo, &c. aliquo modo deſtruatur, nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum, aut per legem terræ.* And accordingly all the ſaid ancient authors are againſt any paine, or torment to be put or inflicted upon the priſoner before attainder, nor after attainder, but according to the judgement. And there is no one opinion in our books, or judiciall record (that we have ſeen and remember) for the maintenance of tortures or torments, &c.

Luke 16. 1, 2. &c. John 7. 51. Nunquid lex noſtra judicat hominem niſi prius audierit ab ipſo?

And now, to conclude this chapter of treaſon. It appeareth in the holy ſcripture, that traytors never proſpered, what good ſoever they pretended, but were moſt ſeverely and exemplarily puniſhed: As [a] Corah, Dathan, and Abiram, by miracle: *dirupta eſt terra ſub pedibus eorum, et aperiens os ſuum devoravit illos, &c.* [b] Athalia the daughter of Amri, *interfecta eſt gladio.* [c] Bagatha and Thara againſt Aſſuerus, *appenſus eſt uterq; eorum in patibula.* [d] Abſolon againſt David. *Suſpenſus in arbore, et Joab infixit tres lanceas in corde ejus.* [e] Achitophel with Abſolon againſt David. *Suſpendio interiit,* he hanged himſelfe. [f] Abiathar the traiterous high prieſt againſt Solomon. *Abiathar ſacerdoti dixit rex, &c. Et quidem vir mortis es, ſed hodie te non interficiam, &c. Ejecit ergo Solomon Abiathar, ut non eſſet ſacerdos.* [g] Shemei againſt David, *gladio interfectus.* [h] Zimri againſt Ela, who burnt himſelfe. [i] Theudas *(qui occiſus eſt, et circiter 400 qui credebant ei, diſperſi ſunt et redacti ad nihilum)* and Judas Galilæus, *ipſe periit, et omnes quotquot conſenſerunt ei, diſperſi ſunt.* Laſtly, [k] Judas Iſcariot, *ſecundum nomen ejus vir occiſionis,* the traytor of traytors. *Et hic quidem poſſedit agrum de mercede iniquitatis ſuæ, & ſuſpenſus crepuit medius, & diffuſa ſunt omnia viſcera ejus.*

Proditor illudit verbis, dum verbera cudit.

[a] Numb. 16. 31, 32. & 27. 3.
[b] 2 Regum, 11. 16.
[c] Eſth. 12. 2,3.
[d] 2 Sam. 18. 9. 14.
[e] 2 Sam. 17. 23.

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[f] 1 Reg. 2. 26,27.
[g] 2. Sam. 16. 5,6. 1 Reg. 2. 8. &c. 46.
[h] 1 Regum 16. 9. &c. 18.
[i] Act. Apoſt. 5. 36,37.
[k] Act. Apoſt. 1. 18. Math. 27. 5. laqueo ſe ſuſpendit. *Qui molitur inſidias in patriam, id facit quod inſanus nauta perforans navem in qua ipſe vehitur.* * *Felix quem faciunt aliena pericula cautum.* Prov. 24. 21.

Peruſe over all our books, records, and hiſtories, and you ſhall finde a principle in law, a rule in reaſon, and a trial in experience, that treaſon doth ever produce fatal and final deſtruction to the offender, and never attaineth to the deſired end, (two incidents inſeparable thereunto.) * And therefore let all men abandon it, as the moſt poiſonous bait of the devill of Hell, and follow the precept in holy

holy ſcripture, Fear God, honour the king, and have no company with the ſedicious.

See more of treaſon in the next chapter of Miſpriſion, &c. and in Principall and Acceſſory, in the title of Judgement and Execution: and the chapter of *Monomachia*, Single Combat, &c. the reſidue of this act of 25 E. 3.

CAP. III.

OF MISPRISION OF TREASON.

Miſpriſio proditionis.

See Bract. lib. 3. fo. 118. b. & 119. a.

MISPRISIO commeth of the French word *meſpris* which properly ſignifieth neglect or contempt: for [*mes*] in compoſition in the French ſignifieth *mal* as *mis* doth in the Engliſh tongue: as miſchance, for an ill chance, and ſo *meſpriſe* is ill apprehended or known. In legall underſtanding it ſignifieth, when one knoweth of any treaſon or felony, and concealeth it, this is miſpriſion, ſo called, becauſe the knowledge of it is an ill knowledge to him, in reſpect of the ſevere puniſhment for not revealing of it: for in caſe of miſpriſion of high treaſon he is to be impriſoned during his life, to forfeit all his goods, debts, and duties for ever, and the profits of his lands during his life: and in caſe of felony, to be fined and impriſoned. And in this ſenſe doth the ſaid ſtatute of 1 & 2 Ph. and Mar. ſpeak, when it ſaith, Be it declared, and enacted, by the authority aforeſaid, that concealement or keeping ſecret of any high treaſon be deemed and taken only miſpriſion of treaſon, and the offenders therein to forfeit and ſuffer, as in caſes of miſpriſion of treaſon hath heretofore been uſed. * But by the common law concealment of high treaſon was treaſon, as it appeareth in the caſe of the lord Scrope, an. 3 H. 5. and by Bracton, lib. 3. fo. 118. b. and 119 a.

See hereafter ca. 65. of miſpriſions, &c.

See hereafter in Theftbote, ca. 61. 1 & 2 Ph. & Mar. Ubi ſupra. See 1 E. 6. c. 12. and 1 El. ca. 6. 25 H. 8. ca. 12.

* Hil. 14. El. cited by the lo. Dier in the lo. Lumley's caſe. MS.

[a] It is miſpriſion of high treaſon, for forging of money, which neither is the money of this realme of England, nor currant within the ſame.

[a] 14 El. ca. 3.

[b] Miſpriſion of high treaſon in concealing of a bull, &c. See the ſtatute.

[b] 13 El. ca. 2.

[c] It is ſaid in 2 R. 3. that every treaſon or felony includeth in it a miſpriſion of treaſon or felony. Therefore if any man knoweth of any high treaſon, he ought with as much ſpeed as conveniently he may to reveale the ſame to the king, or ſome of his privie councell, or any other magiſtrate. And miſpriſion in a large ſenſe is taken for many great offences which are neither treaſon nor felony, whereof we ſhall ſpeak more hereafter, being in this place reſtrained to miſpriſion of treaſon.

[c] 2 R. 3. fo. 9. Stanf. 57. c.

See John Coniers caſe, Dier 296. That the receiving of one that hath counterfeited the king's coine, and comforting of him knowing him to have counterfeited the king's coine, is but miſpriſion.

See more of Miſpriſion of Treaſon in the chapters of High Treaſon, and of Principall and Acceſſory.

CAP.

CAP. IV.

Felony by compaſſing or conſpiring to kill the King, or any Lord, or other of the King's Counſell.

NEXT hereunto we have thought good to ſpeak of the ſtatute of 3 H. 7. the letter of which law enſueth. 3 H. 7. cap. 14.

Item, FORASMUCH as by quarrels made to ſuch as have been in great authority, office, and of counſell with kings of this realme, hath enſued the deſtruction of kings, and the undoing of this realme; ſo as it hath appeared evidently, when compaſſing of the death of ſuch as were of the kings true ſubjects was had, the deſtruction of the prince was imagined thereby: and for the moſt part it hath growne, and been occaſioned by envie, and malice of the kings own houſhold-ſervants; as now of late ſuch a thing was likely to have enſued: * and for ſo much as by the law of this land, if actuall deeds be not had, there is no remedy for ſuch falſe compaſſings, imaginations, and confederacies had againſt any lord, or any of the kings counſell, or any of the kings great officers in his houſhold, as ſteward, treaſurer, and comptroller: and ſo great inconveniencies might enſue, if ſuch ungodly demeaning ſhould not be ſtraitly puniſhed before that actuall deed were done. Therefore it is ordained by the king, the lords ſpirituall and temporall, and the commons of the ſaid parliament aſſembled, and by authority of the ſame, That from hence forward, the ſteward, treaſurer, and comptroller of the kings houſe for the time being, or one of them, have full authority and power to enquire by twelve ſad men, and diſcreet perſons of the chequer roll of the kings honourable houſhold, if any ſervant admitted to be his ſervant ſworne, and his name put into the chequer roll of his houſhold, whatſoever he be, ſerving in any manner, office, or roome, reputed, had and taken, under the ſtate of a lord, make any confederacies, compaſſings, conſpiracies, or imaginations with any perſon or perſons, to deſtroy or murder the king, or any lord of this realme, or any other perſon ſworne to the kings counſell, ſteward, treaſurer, or comptroller of the kings houſe; that if it be found before the ſaid ſteward for the time being, by the ſaid twelve ſad men, that any ſuch of the kings ſervants as is aboveſaid, hath confederated, compaſſed, conſpired, or imagined, as is aboveſaid, that he ſo found by that inquiry, be put thereupon to anſwer. And the ſteward, treaſurer, and comptroller, or two of them have power to determine

* Nota.

termine the ſame matter according to the law. And if he put him in triall, that then it be tried by other twelve ſad men of the ſame houſhold: and that ſuch miſdoers have no challenge, but for malice. And if ſuch miſdoers be found guilty by confeſſion, or otherwiſe, that the ſaid offence be judged felony, and they to have judgement and execution as felons attainted ought to have by the common law.

[38] This act divideth itſelf into two generall parts, viz. the preamble, and the body of the act. In the preamble three things are to be obſerved.

1. That by quarrels made to ſuch, as are in great authority, office, and of counſell with the kings of the realm, have enſued the deſtruction of the kings, and the undoing of the realm, as in the records of parliament, and hiſtories of king E. 2. R. 2. king H. 6. &c. you may read. And as king William Rufus was ſlain in the new foreſt by the glance of an arrow, ſo the overthrow of the king, &c. hath followed by glances, and conſequents, when the tow of deſtruction hath been aimed at the overthrow of thoſe, who were in great authority neer about, and dear to the king, not daring in direct manner to aim at the king himſelf. Therefore, the firſt concluſion is, that when the compaſſing of the death of ſuch, as were of the king's true ſubjects was had, the deſtruction of the prince was imagined thereby.

2. That for the moſt part, it hath grown by envy and malice by the king's own houſhold ſervants: and the reaſon thereof is, for that they being of the kings houſhold, have greater and readier means either by night, or by day to deſtroy ſuch as be of great authority, and neer about the king: and ſuch an attempt and conſpiracy was before this parliament made by ſome of this kings houſhold ſervants, and great miſchief was like thereupon to have enſued, which was the cauſe of the making of this act.

See before in the chapt. of High Treaſon. Verb. Overt Act.

3. The concluſion of the preamble is, that by the law of the land, if actuall deeds be not had, there is no remedy for ſuch falſe compaſſings, &c. This is a true declaration: for the bare conſpiracy of the death of any lord or other of the king's councell, or of the ſteward, treaſurer, or comptroller, unleſſe they had been ſlain indeed, was no felony before this act, and ſo reſolved upon the contempt and conſpiracy aforeſaid.

In the body of this act, ſix things are enacted. Firſt, that the offender muſt have three qualities. 1. He muſt be the kings ſervant ſworn. 2. His name muſt be put in the cheque roll of the kings houſhold. 3. He muſt be under the ſtate of a lord: and if he conſpire with any other, that is not of the kings houſhold, yet is the conſpiracy within this act, but he of the king's houſhold is only the felon within the purview of this ſtatute, as it appeareth by the words of the ſtatute.

Secondly, againſt what perſons the offence made felony by this act is to be committed: and in number they be four. 1. To deſtroy or murder the king. By this act it expreſsly appeareth by the judgement of the whole parliament, that beſides the confederacy, compaſſing, conſpiracy, or imagination, there muſt be ſome other overt act or deed tending thereunto, to make it treaſon within the ſtatute of 25 E. 3. And therefore the bare confederacy, compaſſing,

See before in the chapt. of high treaſon. Ubi ſup.

conſpiracy, or imaginations by words only, is made felony by this act. But if the conſpirators doe provide any weapon, or other thing, to accompliſh their deviliſh intent; this and the like is an overt act to make it treaſon. 2. Any lord of this realme being ſworn of the kings councell: for by the purvien of this act, he muſt be alſo of the kings councell: this is underſtood of the kings privy councell, and ſo throughout the act. 3. Any other of the kings councell (that is, the kings privy councell) being under the degree of a lord. 4. The ſteward, treaſurer, and comptroller of the kings houſhold, being great officers, though they be not of the king's councell.

Thirdly, the third generall part expreſſeth the perſons to whom power is given to enquire and determine this felony. The ſteward, treaſurer, and comptroller, or any one of them may enquire. And they or two of them have power by this act to hear and determine the ſame: and though the words be for the inquiry, that they three, or any of them, &c. yet an indictment taken before two of them is good, becauſe it is for advancement of juſtice. And this act is in nature of a commiſſion to them, for other commiſſion they need not to have: and this you may ſee in divers other acts of parliament of like nature. If any the houſhold ſervants conſpire the death of the ſteward, treaſurer, and comptroller, yet by force of this act they are judges of the cauſe, and none other can be, and in that caſe, they will aſſiſt themſelves for their direction, with ſome grave and learned men in the laws. But if the death of any one of them be compaſſed, then it is more convenient that it be heard and determined before the other two. 18 E. 3. 1. 23 Aſſ. 17. 27 H. 6. 8. 27 H. 8. 13. [39]

Fourthly, the fourth part ſetteth forth, firſt, how the inquiry, and after, the trial ſhall be made, that is, that the inquiry muſt be made by twelve ſad men and diſcreet perſons of the cheque roll of the kings houſhold: and when the offender hath pleaded not guilty, the tryall ſhall be by the like perſons. And here though this act limiteth the inquiry to be by twelve, yet if it be inquired of by more than twelve, the preſentment is good, but the tryall muſt be by twelve only.

Fifthly, no challenge ſhall be made, but for malice.

Sixthly, by the context of the whole act, the conſpiracy, that is to be heard and determined by this act, muſt be plotted to be done within the kings houſhold. Vide lib. Plac. Coke fo. 482.

The offender againſt this ſtatute ſhall have the benefit of his clergy: for whenſoever felony is made by any ſtatute, and the benefit of clergy is not expreſsly taken away, the offender ſhall have his clergy.

See the ſtatute of 3 & 4 E. 6. whereby amongſt other things in ſome caſe it was high treaſon, and in ſome caſe felony, to intend, or goe about to kill, or impriſon any of the kings privy councell, &c. from which felony, the benefit of ſanctuary, and clergy was taken away: but theſe treaſons and felonies are repealed by the ſtatute of 1 Mar. 3 & 4 E. 6. ca. 5.

CAP.

CAP. V.

OF HERESIE.

CONCERNING hereſie five things fall into conſideration. Firſt, who be the judges of hereſie. Secondly, what ſhall be adjudged hereſie. Thirdly, what is the judgement upon a man convicted of hereſie. Fourthly, what the law alloweth him to ſave his life. Fifthly, what he ſhall forfeit by judgement againſt him.

Touching the firſt, an heretique may be convicted [a] before the archbiſhop and other biſhops, and other the clergy at a generall ſynod, or convocation, as it appeareth both by our books, and by hiſtory. See the ſtatute of 25 H. 8. cap. 19. revived by 1 El. cap. 1.

[b] And the biſhop of every dioces may convict any for hereſie, and ſo might he have done before the ſtatute of 2 H. 4. ca. 15. as it appeareth by the preamble of that act in theſe words.

[a] Bract. l. 3. fo. 123. & 124. in Conc' Oxon. Newburg. li. 2. ca. 13. 6 H. 3. Stow. Holl. 203. 2 H. 4. Rot. Parl. nu. 29 Sautries caſe.

Fitz. N. B. 269. a. 1 El. ca. 1. [b] Vid. 23 H. 8. ca. 9. F. N. B. Ubi ſupra. 5 El. ca. 23. 10 H. 7. 27. b. Doct. & Stud. lib. 2. ca. 29. Br. 2. Mar. tit. Hereſy 1.

> Whereas the dioceſans of the ſaid realme cannot by their juriſdiction ſpirituall, without aid of the ſaid royall majeſty, ſufficiently correct the ſaid falſe and perverſe people, (i. heretiques named before) becauſe the ſaid falſe and perverſe people doe goe from dioces to dioces, and will not appear before the ſaid dioceſans, but the ſame dioceſans and their juriſdiction ſpirituall, and the keys of the church with the cenſures of the ſame, doe utterly contemn and deſpiſe.

Now that ſtatute doth provide, that the dioceſan of the ſame place, ſuch perſon or perſons, &c. may cauſe to be arreſted, and under ſafe cuſtody in his priſons to be detained. From this act and other acts and authorities quoted in the margent, theſe two concluſions are to be gathered. Firſt, that the dioceſan hath juriſdiction of hereſy, and ſo it hath been put in ure in all queen Elizabeth's reign: and accordingly it was reſolved by Flemming chief juſtice, Tanfield chief baron, Williams, and Crook juſtices, Hil. 9. Ja. R. in the caſe of Legate the heretique, and that upon a conviction before the ordinary of hereſy, the writ of *de hæretico comburendo* doth lie. Secondly, that without the aid of that act of 2 H. 4. the dioceſan could impriſon no perſon accuſed of hereſy, but was to proceed againſt him by the cenſures of the church. And now ſeeing, that not only the ſaid act of 2 H. 4. but 25 H. 8. c. 14. are repealed, the dioceſan cannot impriſon any perſon accuſed of hereſy, but muſt proceed againſt him, as he might have done before thoſe ſtatutes, by the cenſures of the church, as it appeareth by the ſaid act of 2 H. 4. c. 15. Likewiſe the ſuppoſed ſtatute of 5 R. 2. c. 5. and the ſtatutes of 2 H. 5. c. 7. 25 H. 8. c. 14. 1 & 2 Ph. and Mar. c. 6. are all repealed, ſo as no ſtatute made againſt heretiques ſtandeth now in force;

[40]

Mat. Hammond Anno 21 El. Holl. 1579. Stowe. 1161. Hil. 9. Ja. Regis Legates caſe.

Vide 1. E. 6. c. 12. 1 El. c. 1.

force: and at this day no perſon can be indicted, or impeached for hereſy before any temporall judge, or other, that hath temporall juriſdiction, as upon peruſall of the ſaid ſtatutes appeareth.

Every archbiſhop of this realme may cite any perſon dwelling in any biſhops dioces within his province for cauſes of hereſy, if the biſhop, or other ordinary immediate thereunto conſent, or if that the ſame biſhop, or other immediate ordinary, or judge doe not his duty in puniſhment of the ſame. 23 H. 8. ca. 9.

2. Touching the ſecond point, if any perſon be charged with hereſy before the high commiſſioners, they have no authority to adjudge any matter or cauſe to be hereſy, but only ſuch, as hath been ſo adjudged by the authority of the canonicall ſcripture, or by the firſt four generall councells, or by any other generall councell, wherein the ſame was declared hereſie by the expreſſe and plain words of the canonicall ſcripture, or ſuch as ſhall hereafter be determined to be hereſy by parliament, with the aſſent of the convocation: for ſo it is expreſly provided by the ſaid act of 1 El. And albeit this proviſo extendeth only to the ſaid high commiſſioners, yet ſeeing in the high commiſſion, there be ſo many biſhops, and other divines, and learned men, it may ſerve for a good direction to others, eſpecially to the dioceſan, being a ſole judge in ſo weighty a cauſe.

No manner of order, act, or determination for any matter of religion, or cauſe eccleſiaſticall, had or made by the authority of the parliament in *anno* 1 El. ſhall be accepted, deemed, interpreted, or adjudged hereſy, ſchiſm, or ſchiſmaticall opinion, any order, decree, ſentence, conſtitution, or law (whatſoever the ſame be) notwithſtanding. 1 El. ca. 1.

There was a ſtatute ſuppoſed to be made in 5 R. 2. that commiſſions ſhould be by the lord chancellor made, and directed to ſherifs, and others, to arreſt ſuch as ſhould be certified into the chancery by the biſhops, and prelates, * maſters of divinity, to be preachers of hereſies, and notorious errors, their fautors, maintainers, and abetters, and to hold them in ſtrong priſon, until they will juſtifie themſelves to the law of holy church. By colour of this ſuppoſed act, [a] certaine perſons, that held, that images were not to be worſhipped, &c. were holden in ſtrong priſon, until they (to redeem their vexation) miſerably yeelded before theſe maſters of divinity to take an oath, and did ſwear to worſhip images, [b] which was againſt the morall and eternall law of Almighty God. We have ſaid (by colour of the ſaid ſuppoſed ſtatute, &c.) not only in reſpect of the ſaid opinion, but in reſpect alſo, that the ſaid ſuppoſed act, was in truth never any act of parliament, though it was entred in the rolls of the parliament, for that the commons never gave their conſent thereunto. And therefore in the [c] next parliament, the commons preferred a bill reciting the ſaid ſuppoſed act, and conſtantly affirmed, that they never aſſented thereunto, and therefore deſired that the ſaid ſuppoſed ſtatute might be aniented, and declared to be void: for they proteſted, that it was never their intent to be juſtified, and to bind themſelves and their ſucceſſors to the prelates, more then their anceſtors had done in times paſt: and hereunto the king gave his royall aſſent in theſe words, *Y pleiſt au roy*. And mark well the manner of the penning the act: for ſeeing the commons did not aſſent thereunto, the words of the act be,

5 R. 2. ſtat. 2. cap. 5. repealed by 1 E. 6. c. 12. & 1 Eliz. ca. 1.

* *In diebus illis* Maſters of divinity (and batcheiors of divinity) now doctors of divinity and batchelors.

[a] Rot. clauſ. 19 R. 2. m. 17. in Dorſ.

[b] Exod. 20. 4. Levit. 26. 1. Deut. 5. 8. & 16. 22. Pſal. 97. 7. 1 John 5. 21.

[c] Rot. Parl. 6 R. 2. nu. 62. *Vide* 7 H. 4. nu. 62. Rot. Parl.

[41]

It is ordained and aſſented in this preſent parliament, that, &c. And ſo it was, being but by the king and the lords.

It is to be known, that of ancient time, when any acts of parliament were made, to the end the ſame might be publiſhed, and underſtood, eſpecially before the uſe of printing came into England, the acts of parliament were ingroſſed into parchment, and bundled up together with a writ in the king's name, under the great ſeal to the ſherif of every county, ſometime in Latin, and ſometime in French, to command the ſherif to proclaim the ſaid ſtatutes within his bayliwick, as well within liberties, as without. And this was the courſe of parliamentary proceedings, before printing came in uſe in England, and yet it continued after we had the print, till the reign of H. 7.

Now at the parliament holden in 5 R. 2. John Braibrook biſhop of London being lord chancellor of England, cauſed the ſaid ordinance of the king and lords to be inſerted into the parliamentary writ of proclamation to be proclaimed amongſt the acts of parliament: which writ I have ſeen, the purcloſe of which writ, after the recitall of the acts directed to the ſherif of N. is in theſe words. *Nos volentes dictas concordias, ſive ordinationes in omnibus et ſingulis ſuis articulis inviolabiliter obſervari, tibi præcipimus quòd prædictas concordias, ſive ordinationes in locis infra ballivam tuam, ubi melius expedire volueris, tam infra libertates, quam extra, publicè proclamari, et teneri facias juxta formam præmotatam. Teſte rege apud Weſtm. 26 May, anno regni regis R. 2. 5.* But in the parliamentary proclamation of the acts paſſed in *anno* 6 R. 2. the ſaid act of 6 R. 2. whereby the ſaid ſuppoſed act of 5 R. 2. was declared to be void, is omitted: and afterwards the ſaid ſuppoſed act of 5 R. 2. was continually printed, and the ſaid act of 6 R. 2. hath by the prelates been ever from time to time kept from the print.

Coram Rege Hil. 1 H. 5. Rot. 4. & 5.

Certain men called Lollards were indicted for hereſy, upon the ſaid ſtatute of 2 H. 4. for theſe opinions, viz. *Quod non eſt meritorium ad Sanctum Thomam, nec ad Sanctam Mariam de Walſingham peregrinari. 2. Nec imagines crucifixi et aliorum ſanctorum adorare. 3. Nulli ſacerdoti confiteri niſi ſoli Deo, &c.* Which opinions were ſo far from hereſy, as the makers of the ſtatute of 1 Eliz. had great cauſe to limit what hereſy was.

Indictment generall.
Vide ſupra ca. 1. *Verbo, per overt fait. Lollardi et falſi hæretici.*

And afterwards they thought not good to contain theſe opinions in any indictment, but indicted them in general words, one of which indictments as to lollardry and hereſy followeth. *Jurati dicunt ſuper eorum ſacramentum, quod A. R. E. D. Lollardi et falſi hæretici die Jovis poſt hebdomadam Paſchæ, anno regni regis H. 6. poſt conqueſtum nono, apud Abendon in com' Berks infra virg. falſò et proditoriè ut communes proditores, et inſurrectores conſpiraverunt, imaginati fuerunt, et ad invicem confœderaverunt cum quamplurimis proditoribus illis aſſociatis, et felonibus de eorum comitiva, et eorum falſa malitia præcogitata, ut communes inſidiatores altarum viarum, ad fidem catholicam deſtruendam, et ibidem falſò et proditoriè ut communes proditores, et felones dicti d'ni regis fecerunt, et ſcripſerunt diverſas falſas billas, et ſcripturas ſcaitioſas, et nonnulla fidei et doctrinæ Chriſtianæ contraria continentes, et eas populo domini regis publicandas et credendas falſò, damnabiliter in diverſis locis, viz. in civitatibus London, Sarum, et villis de Coventria et Marleburgh, nequiter poſuerunt, fixerunt, et projecerunt, ac indies ſic ſcribere, affigere et projicere et ponere non ceſſant, nec formidant, in graviſſimam*

Communes inſidiatores viarum. *Vide* ſup. c. 1. f. 5. *Ad fidem catholicam deſtruendam. Diverſas falſas billas et ſcripturas, &c.*

nam majeſtatis, et coronæ dignitatis regis noſtri offenſam, et Chriſtianæ fidei ludibrium, et pacis dicti domini regis perturbationem, et omnium Chriſti fidelium injuriam et contemptum. Which generall indictment, and all other of like form were utterly inſufficient in law: for albeit the words of the ſtatute be generall, yet the indictment muſt contain certainty, whereunto the party indicted may have an anſwer. Alſo where the parties are indicted, *ut communes infidiatores viarum*, that alſo is inſufficient, as it appeareth by the ſtatute 4 H. 4. ca. 2.

[42]

John Keyſer was excommunicated by the greater excommunication before Thomas archbiſhop of Canterbury, and legate of the apoſtolique ſee, at the ſuit of another, for a reaſonable part of goods, and ſo remained eight months: the ſaid Keyſer openly affirmed that the ſaid ſentence was not to be feared, neither did he fear it. And albeit the archbiſhop, or his commiſſary hath excommunicated me, yet before God I am not excommunicated: and he ſaid that he ſpake nothing but the truth, and it ſo appeared; for that he the laſt harveſt ſtanding ſo excommunicate, had as great plenty of wheat, and other grain, as any of his neighbours, ſaying to them in ſcorn (as was urged againſt him) that a man excommunicate ſhould not have ſuch plenty of wheat. The archbiſhop denying theſe words to be within the ſaid act of 2 H. 4. did by his warrant in writing comprehending the ſaid cauſe, by pretext of the ſaid act commit the body of the ſaid Keyſer to the gaol at Maidſtone, for that (ſaith he) in reſpect of the publiſhing of the ſaid words, *dictum Johannem non immeritò habemus de hæreſi ſuſpectum.* By reaſon whereof the ſaid John Keyſer was impriſoned in Maidſtone gaol, and in priſon detained under the cuſtody of the keeper there, untill by his counſell he moved ſir John Markham then chief juſtice of England, and other the judges of the king's bench, to have an *Habeas corpus*, and thereupon (as it ought) an *Habeas corpus* was granted: upon which writ the gaoler returned the ſaid cauſe, and ſpeciall matter, and withall, according to the writ, had his body there. The court upon mature deliberation peruſing the ſaid ſtatute, (and upon conference with divines) reſolved, that upon the ſaid words Keyſer was not to be ſuſpect of hereſy, within the ſaid ſtatute, as the archbiſhop took it. And therefore the court firſt bayled him, and after he was delivered: for that the archbiſhop had no power by the ſaid act for thoſe words to commit him to priſon.

Mich. 5 E. 4. Rot. 143. Coram Rege. In rationabili parte bonorum.

Hillary Warner being an inhabitant within the pariſh of S. Dunſtans in the Weſt, held opinion and publiſhed there, and in divers other places, *quòd non tenebatur ſolvere aliquas decimas curatori ſive eccleſiæ parochiali ubi inhabitabat.* Whereupon Richard biſhop of London commanded Edward Vaughan and others to arreſt the ſaid Hillary Warner: by force whereof they did arreſt him, and detained him in priſon a day and a night, and then he eſcaped. Hillary Warner brought his action of falſe impriſonment againſt Edward Vaughan and others: in bar whereof the defendants pleaded the ſtatute of 2 H. 4 and that the plaintif held and publiſhed the opinion aforeſaid; which opinion was, *contra fidem catholicam, ſeu determinationem ſanctæ eccleſiæ*, and that the defendants, as ſervants to the ſaid biſhop, and by his commandment did arreſt the plaintif, and juſtified the impriſonment: whereupon Hillary Warner the plaintiff demurred in law, and after long and mature deli-

Mich. 11. H. 7. Rot. 327. In communi banco.

bertion it was by Brian chief juſtice, and the whole court of common pleas adjudged, that the ſaid opinion was not within the ſaid ſtatute of 2 H. 4. for that it was an error, but no hereſy. Which I have the rather reported, for that the reporter of this caſe did not only miſreport the time of the bringing of the action, but the ſtatute, which was the ground of the matter in law, and leaveth out the judgement. The record it ſelf is worthy the reading.

Hil. 10 H. 7. f. 17.

Upon that which hath been ſaid touching the ſaid ſtatute of 2 H. 4. four concluſions doe neceſſary follow. Firſt, that ſeeing, that many opinions were by the biſhops taken to be hereſy, which in troth had no ſhadow of hereſy, and ſo miſtaken, and unjuſtly extended by the biſhops further than the purvien, and true intention thereof, as by that which hath been, and might be ſaid, appeared, the makers of the ſaid act of parliament of 1 El. had great reaſon to limit (as hath been ſaid) what opinions ſhould be judged hereſy by authority of that commiſſion grounded upon that act. Secondly, that if any eccleſiaſticall judge or commiſſioner ſhall by pretext of any ſtatute, or other cauſe, commit any man to priſon, upon motion in court on the behalf of the party impriſoned, the judges of the common law ought to grant an *Habeas corpus* for him: upon the retorn of which writ, if it ſhall appear to the judges, that the impriſonment is well warranted by law, the party ſhall be remanded: and if the impriſonment be without warrant of law, then the party ought to be delivered. Thirdly, if the impriſonment be not warranted by law, the party impriſoned may have his action of falſe impriſonment, and recover his damages. Fourthly, that when an act of parliament is made concerning matter meerly ſpirituall, as hereſie, &c. yet that act being part of the lawes of the realm, the ſame ſhall be conſtrued and interpreted by the judges of the common lawes, who uſually confer with thoſe that are learned in that profeſſion. But let us now deſcend to the third point.

See in the ſecond part of the Inſtitutes, the expoſition upon the ſtatute of *Artic. Cleri*, the reſolution of all the judges of England to the 21 and 22 articles, or objections.

[43]

3. To the third. [a] It appeareth by Bracton, Britton, Fleta, Stanford, and all our books, that he that is duly convict of hereſie, ſhall be burnt to death.

[a] Mir. cap. 4. de Majeſtie. Bracton, ubi ſupra. Britton, cap. 9. Fleta lib. 1. ca. 35. Regiſter. F. N. B. 269.

4. To the fourth. [b] The eccleſiaſticall judge at this day cannot commit the perſon that is convict of hereſie to the ſheriffe, albeit he be preſent, to be burnt; but muſt have the king's writ *de hæretico comburendo*, according to the common law: for now all acts of parliament (as hath been ſaid before) againſt hereticks are repealed. And the reaſon wherefore hereſie is ſo extremely and fearfully puniſhed, is, for that *gravius eſt æternam, quam temporalem lædere majeſtatem*: and *hæreſis eſt lepra animæ*. [c] The party duly convicted of hereſie, may recall, and abjure his opinion, and thereby ſave his life, but a relapſe is fatall: for as in caſe of a diſeaſe of the body, after recovery, recidivation is extremely dangerous: ſo in caſe of hereſie (a diſeaſe of the ſoule) a relapſe is irrecoverable. And as he that is a leper of his body, is to be removed from the ſociety of men, leſt he ſhould infect them, by the king's writ *de leproſo amovendo*: ſo he that hath *lepram animæ*, that is, to be convicted of hereſie, ſhall be cut off, leſt he ſhould poyſon others, by the king's writ *de hæretico comburendo*. But if the heretick will not after conviction abjure, he may by force of the ſaid writ [d] *de hæretico comburendo* be burnt without abjuration.

[b] F. N. B. 269. Rot. Par. 2 H. 4. nu. 29. Sautryes caſe. Bre. de hæretico comburendo per regem & concilium in parliamento.

[c] 2 Mar. tit. hereſie, Br. 7.

[d] 2 Mar. ubi ſupra.

[e] Vid. Doct. et Stud. lib. 2. ca. 29.

3. As to the fifth. [e] The ſtatute made in the 2 year of H. 5. cap.

cap. 7. whereby the forfeiture of lands in fee-ſimple, and goods, and chattels was given in caſe of hereſie, ſtandeth repealed by the act of 1 Eliz. cap. 1. The books that ſpeak of this forfeiture are grounded upon the ſaid act of 2 H. 5. which then ſtood in force, ſaving 5 R 2. which was before that ſtatute: for there, though Belknap ſwore, *per ma foy ſi home ſoit miſcreant, ſa terre eſt forfeitable, et le ſeignior avera ceo p. wey deſcheate;* yet was his opinion never holden for law: for neither lands, nor goods [f] before the making of that ſtatute of 2 H. 5. were forfeited by the conviction of hereſie, becauſe the proceeding therein is meerely ſpirituall, *pro ſalute animæ*, and in a court that is no court of record. And therefore the conviction of hereſie worketh no forfeiture of any thing that is temporall, viz. of lands or goods. [g] For what cauſe the ſaid hereticks were called Lollards you may read in Caudries caſe, and Linwood thereto agreeth. * And it is to be obſerved, that in proceeding againſt Lollards, the prelats, beſides their opinions, did charge them with hainous offences: as conſpiracy with multitudes of people, inſurrection, rebellion, or ſome other treaſon, or great crimes.

We have ſpoken thus much of this argument, becauſe there be divers wandring opinions concerning ſome of theſe points, that are not agreeable to the law, as it ſtandeth at this day. See the fourth part of the Inſtitutes, cap. Chancery, in the articles againſt Cardinal Woolſey, artic. 44.

Br. tit. Forfeiture 112. Stan. pl. cor. 35. I. 2 Mar. Br. tit. Hereſie.

[f] Vid. hereafter in caſe of piracy.

[g] Lib. 5. Caudries caſe, fol. 25. b.

* 1 H. 5. fo. 6. 2. Rot. Parl. 5 H. 5. nu. 11. in the caſe of Sir *John Oldcaſtle*. Paſch. 9 H. 6. *John Sharps caſe*, &c. Rot. Parl. 7 H. 4. nu. 67. 11 H. 4. nu. 29. 3 H. 5. nu. 39. 1 H. 6. nu. 20.

CAP. VI.

Of Felony by Conjuration, Witchcraft, Sorcery, or Inchantment.

THE firſt act of parliament that made any of theſe offences felony, was the ſtatute [a] of 33 H. 8. which was repealed by the ſtatutes of 1 E. 6. cap. 12. and 1 Mariæ. But [b] before the conqueſt it was ſeverely puniſhed: ſometimes by death, ſometimes by exile, &c. [c] And after, it was made felony by the ſtatute of 5 Eliz. and againe by 1 Jac. which repealeth 5 Eliz.

[a] 33 H. 8. ca. 8. 1 E. 6. cap. 12.

[b] Inter leges Alveredi, fo. 23. Edwardi et Guthruni, cap. 11. Ethelſtani, ca. 6. Canuti, 4, 5.

[c] 5 Eliz. ca. 16. 1 Jac. cap. 12.

A conjurer is he that by the holy and powerfull names of Almighty God invokes and conjures the devill to conſult with him, or to do ſome act.

A conjurer deſcribed.

A witch is a perſon that hath conference with the devill, to conſult with him or to do ſome act.

A witch deſcribed.

An inchanter, *incantator*, is he, or ſhe *qui carminibus, aut cantiunculis dæmonem adjurat*. They were of ancient time called *carmina*, becauſe in thoſe dayes their charmes were in verſe.

An inchanter deſcribed.

Carminibus Circe ſocios mutavit Ulyſſis.
By charmes in rhyme (O cruell fates!)
Circe transform'd Ulyſſes mates.

And again. *Carmina de cœlo poſſunt detrudere lunam.*
By rhymes they can pul down full ſoon,
From lofty ſky the wandring moon.

* A ſorcerer, *ſortilegus, quia utitur ſortibus in cantationibus dæmonis.*

* A ſorcerer deſcribed.

Exod. cap. 22. 17. Deut. ca. 18. 10, 11, 12. Num. ca. 23. 23. 1 Reg. ca. 15. 23.

monit. Thou ſhalt not ſuffer a witch to live. *Non eſt augurium in Jacob, nec divinatio in Iſrael.* And the Holy Ghoſt hath compared the great offence of rebellion to the ſinne of witchcraft.

And here it juſtly may be demanded, what puniſhment was againſt theſe deviliſh and wicked offenders before theſe ſtatutes, which were made of very late time.

[d] Linwood de officio arch-preſb. § Ignorantia.

And it appeareth by our ancient [d] books that theſe horrible and deviliſh offenders, which left the everliving God, and ſacrificed to the devill, and thereby committed idolatry, in ſeeking advice and aide of him, were puniſhed by death. [*] The Mirror ſaith, *Que ſorcery et devinal ſont members de hereſie.* And there he deſcribeth hereſie. *Hereſie eſt un mauuaſe et faux creance ſurdant de error en la droit foy Chriſtien:* and after ſaith, *Le judgement de hereſie eſt dẽe arſe in cendre.* And herewith agreeth Britton: *Sorcerers, ſorcereſſes, &c. et miſcreants ſoient arſes.* And Fleta: *Chriſtiani autem apoſtatæ, ſortilegi, et hujuſmodi detractari debent, et comburi.* And burning then was, and yet is the puniſhment for hereticks. So as the conuſance of theſe offences, if they be branches of hereſie, (as the law was then taken) belonged (as to this day hereſie doth) to eccleſiaſticall judges. In which caſe when they have given ſentence, there lieth a writ *de hæretico comburendo.*

* Mir. cap. 1. §. 5. & cap. 2. § 12. & cap. 4. § De majeſtie. Brit. fo. 16 b. & 71. F. N. B. 269. b.

[e] Int. leges Edw. ca. 11. fo. 55. & Ethelſtani ca. 6. fo. 60 & Canuti cap. 5. fo. 5. 45 E. 3. 17. b.

I have ſeen a report of a caſe in an ancient Regiſter, that in October *anno* 20 H. 6. Margery Gurdeman of Eye, in the county of Suffolk, was for witchcraft and conſultation with the devill, after ſentence and a relapſe, burnt by the king's writ *de hæretico comburendo.* [e] And this agreeth with antiquity, for witches, &c. by the laws before the conqueſt were burnt to death.

*Some think that this ſhould be the oath of allegiance, *Que il ſerra foialle et liall, &c.* Vid. 25 E. 3. 42. B. Coron. 131. See hereafter ca. 74. of perjury, verb. That as well the judge, &c.

A man was taken in Southwark with a head and a face of a dead man, and with a book of ſorcery in his male, and was brought into the king's bench before Sir John Knevett then chief juſtice: but ſeeing no indictment was againſt him, the clerks did ſwear him, that from thenceforth * he ſhould not be a ſorcerer, and was delivered out of priſon, and the head of the dead man and the book of ſorcery were burnt at Tuthill at the coſts of the priſoner. So as the head and his book of ſorcery had the ſame puniſhment, that the ſorcerer ſhould have had by the ancient law, if he had by his ſorcery praied in aid of the devill.

[45]

1 Chron. chap. 10. v. 13, 14. 1 Reg 15. 23. * Nota. 1 Reg. 28. 8.

The holy hiſtory hath a moſt remarkable place concerning the reprobation and death of king Saul. *Mortuus eſt ergo Saul propter iniquitates ſuas, eò quòd prævaricatus ſit mandatum Domini, et non cuſtodierit illud, * ſed inſuper Pythoniſſam conſuluerit, nec ſperaverit in Domino, propter quod interfecit eum, et tranſtulit regnum ejus ad David filium Iſai.* So Saul died for his tranſgreſſion which he committed againſt the Lord, even againſt the word of the Lord which he kept not: and alſo for aſking counſell of one that had a familiar ſpirit, to enquire of it, and enquired not of the Lord; therefore he ſlew him, and turned the kingdome unto David the ſonne of Iſai.

Therefore it had been a great defect in government, if ſo great an abomination had paſſed with impunity. And this is the cauſe, that we have proved how and in what manner conjuration, witchcraft, &c. were puniſhed by death, &c. before the making of the ſaid late ſtatutes.

1 Jac. cap. 12.

But now let us peruſe the ſtatute made in the firſt year of king James,

James, which only ſtandeth in force, and divideth itſelf into five ſeverall branches.

1. If any perſon or perſons ſhall uſe, practiſe, or exerciſe any invocation or conjuration of any evill and wicked ſpirit.

Here the devill by the holy, and powerfull names of Almighty God is invoked (as hath been ſaid:) and this invocation, or conjuration of a wicked ſpirit is felony, without any other act or thing, ſave only the apparition of the ſpirit. See W. 1. cap. 41. in the oath of the champion, &c.

2. Or ſhall conſult, covenant with, entertaine, employ, feed, or reward, any evill or wicked ſpirit, to, or for any intent or purpoſe.

By this branch, if any conſult, &c. (howſoever the wicked ſpirit appeareth and commeth) theſe actions (here mentioned) with or to that wicked ſpirit, to or for any intent or purpoſe, is felony without any other act or thing.

3. Or take up any dead man, woman, or childe, out of his, her, or their grave, or any other place where the dead body reſteth, or the ſkin, bone, or any part of a dead perſon, to be imployed or uſed in any manner of witchcraft, ſorcery, charme, or inchantment.

Albeit the offender that commits theſe barbarous and inhumane dealings with the bodies of the dead, do not actually imploy or uſe them in witchcraft, ſorcery, charme, or inchantment: yet if he did them of purpoſe to uſe therein, it is felony, for the words of this branch be, [to be imployed or uſed in any manner of witchcraft, &c.]

4. Or ſhall uſe, practiſe, or exerciſe any witchcraft, inchantment, charme or ſorcery, whereby any perſon ſhall be killed, deſtroyed, waſted, conſumed, pined, or lamed, in his, or her bodie, or any part thereof.

By this branch, no other witchcraft, inchantment, charme, or ſorcery (then is before ſpecified) is felony, unleſſe by means thereof ſome perſon be killed, deſtroied, waſted, conſumed, pined or lamed, &c. Which words have reference only to this laſt generall clauſe.

5. That then every ſuch offender or offenders, their aiders, abetters, and counſellors, being of any the ſaid offences duly and lawfully convicted, and attainted, ſhall ſuffer paines of death, as a felon, or felons, and ſhall loſe the priviledge, and benefit of clergie, and ſanctuary.

Albeit acceſſories before be here ſpecially named, yet acceſſories after may be of this felony, as afterwards is ſaid upon the ſtatute of 3 H. 7. for taking away of women, and upon the ſtatute of 8 H. 6. for ſtealing of records.

The ſecond part of this act concerneth felony in a ſecond degree; and the branches thereof are alſo in number five.

[46] 1. If any perſon or perſons take upon him or them by witchcraft, inchantment, charme, or ſorcery, to tell or declare, in what place any treaſure of gold or ſilver ſhould or might be found, or had in the earth, or other ſecret places.

The miſchiefs before this part of the act was: That divers impoſtors, men and women would take upon them to tell, or do, theſe five things here ſpecified, in great deceipt of the people, and cheating and couſening them of their money, or other goods. Therefore was this part of the act made, wherein theſe words [take upon him or them] are very remarkable. For if they take upon them, &c. though in truth they do it not, nor can do it, yet are they in danger of this firſt branch.

2. Or where goods, or other things loſt, or ſtoln ſhould be found or become.

Herein they become offenders, if they take upon them as aforeſaid. And note, the taking upon them, to tell and declare, governe both theſe branches.

3. Or to the intent to provoke any perſon to unlawfull love.

Herein alſo they become offenders, by taking upon them, as is aforeſaid. Here is the change of a new verbe, viz. [to provoke] ſo as the ſenſe is, if any perſon or perſons ſhall take upon him or them by witchcraft, inchantment, charme or ſorcery, to the intent, to provoke any perſon to unlawfull love.

4. Or whereby any cattel or goods of any perſon ſhall be deſtroyed.

The letter of this branch is this: If any perſon ſhall take upon him by witchcraft, inchantment, charm, or ſorcery, whereby any cattell or goods of any perſon ſhould be deſtroyed. Although this be not ſententious, yet the meaning thereof is to be taken, by ſupplying theſe words after ſorcery [any thing] and not to turn [deſtroyed] into the infinitive mood, as the reſt be; for then it ſatisfied not the meaning of the makers: for a taking upon them to deſtroy cattel, &c. if they be not deſtroyed, is not within the danger of this act, and therefore muſt be ſupplied as is aforeſaid.

5. Or to hurt or deſtroy any perſon in his or her body, although the ſame be not effected or done.

As

As in the caſe of cattel or goods, the deſtruction muſt be (as is aforeſaid) effected and done: ſo in caſe of the perſon of man, woman, or childe, though the hurt be not effected, or done; yet is the taking upon him, &c. to hurt or deſtroy any perſon, &c. within this branch.

Being therefore lawfully convicted.

Here [convicted] is taken in a large ſenſe for attainted, and the rather, for that after in this act the words be [lawfully convicted and attainted, as is aforeſaid.]

Shall for the ſaid offence, &c.

Here are expreſſed the puniſhments inflicted upon theſe impoſtors, mountebanks, and cheating quackſalvers, viz. 1. To ſuffer impriſonment by the ſpace of a whole year without bail or mainprize. 2. Once every quarter of the year theſe mountebanks are to mount the pillory, and to ſtand thereupon in ſome market towne ſix houres, and there to confeſs his or her error, and offence.

And if any perſon being once convicted of the ſame offences, &c.

Here is alſo [convicted] taken for attainted, for he ſhall not be drawn in queſtion for the ſecond offence, to make it felony, till judgement be given againſt him for the firſt; for the indictment of felony recites the former attainder, and the ſecond offence muſt be committed after the judgement. And ſo it is in the caſe of forgery upon the ſtatute of 5 Eliz. and in caſe of conveighing of ſheep alive out of this realme, and ſome others.

5 Eliz. cap. 14. 8 Eliz. cap. 3.

Saving to the wife of ſuch perſon as ſhall offend in any thing contrary to this act, her title of dower, and alſo to the heire and ſucceſſor of every perſon, his or their titles of inheritance, ſucceſſion, and other rights, as though no ſuch attainder of the anceſtor or predeceſſor had been made.]

[47]

The judgement againſt a felon is, that he be hanged by the neck until he be dead: and albeit nothing elſe is expreſſed in the judgement, yet by the common law many things are therein implied; as the loſſe of his wives dower, the loſſe of his inheritance, corruption of his blood, forfeiture of his goods, &c. Now a ſaving will ſerve for any thing, that is implied in the judgement, as in this caſe for the wives dower, and alſo for the heirs inheritance, and for all the reſt of the things implied in the judgement. But a ſaving will not ſerve againſt the expreſſe judgement in caſe of felony, for that ſhould be repugnant; as ſaving the life of the offender ſhould be void, becauſe it is repugnant to the expreſſe judgement, viz. that he be hanged by the neck until he be dead. Alſo where the ſaving is to the heir, it is well ſaved by the name of the heir, becauſe notwithſtanding the forfeiture implied in the judgement, his inheritance is ſaved, and by conſequent the blood not corrupted, for if

See the 1. part of the Inſtitutes, ſect. 747.

Vide lib. 1. in the caſe of Alton Woods. fo.

if the blood were corrupted, he could not inherit as heir, but notwithſtanding this ſaving the lands are forfeited during his life.

5 El. cap. 14. The ſtatute of 5 Eliz. for preſervation of the wives dower, and the heirs inheritance, in caſe of forgery, is penned in this form. Provided alway, that ſuch attainder of felony ſhall not in any wiſe extend to take away the dower of the wife of any ſuch perſon attaint: nor to the corruption of blood, or diſheriſon of any heir or heirs of any ſuch perſon attaint.

8 El. ca. 3. The words of the ſtatute of 8 Eliz. be, Provided always that this act ſhall not extend to corruption of blood, or be prejudiciall or hurtfull to any woman claiming dower by or from any ſuch offender, &c. Wherein it is to be obſerved, that by the avoidance of corruption of blood, the inheritance is impliedly ſaved. See the

31 El. ca. 4. manner of the penning of the act of 31 Eliz. concerning this matter and divers others.

See the ſtatute of 3. Ja. ca. 4. And ſurely it is very convenient that when new felonies be made by act of parliament, that ſuch ſavings or proviſions be made both for the wives dower, and the heirs inheritance, as were had and made in theſe preſidents.

CAP. VII.

OF MURDER.

HAVING[a] now paſſed High Treaſon, Petit Treaſon, Miſpriſion of Treaſon, Felony by the ſtatute of 3 H. 7. Hereſy, and Conjuration, Witchcraft, &c. we are next in order to treat of felonies in general: and of all felonies, murder is the moſt hainous. *Inter leges Canuti*, ca. 61. fo. 118. *Cædes manifeſtæ numerantur inter ſcelera nullo humano jure expiabilia.* See here, ca. Pardon. And of all murders, murder by poyſoning is the moſt deteſtable. Therefore firſt of murder. *Murder* is derived of the Saxon word *mord.*

[a] See the 1. pt. of the Inſtit. for the word Murder, ſect. 287. and for Felony, ſect. 500 & 745. See the 2. part of Inſtit. Marlbr. ca. 25. Cuſt. de Norm. cap. 68.

[b] *The definition of murder.* Vid. devant. ca. Treaſon. verb. Quant home, &c. Bract. l. 3. fo. 120, 121, 134, 135. Brit. fo. 5. 18. Fleta, lib 1. cap. 23. & 30. Mirror, cap. 1. §. ca. 2. § 11. de Appeal de homicide. Tr. 32 E. 1. Coram Rege Rot. 15. 25 E. 3. 28. 26 Aſſ. p. 27. 3 E 3. cor. 3 the 3 H. 7. ca. 1. 3 H. 7. 2. 12. 21 H. 7. 31. E. 2. Coron. 389. 1 Ma. Dier, 104. b. See firſt part of the Inſtit. 104.

[b] Murder is when a man of found memory, and of the age of diſcretion, unlawfully killeth within any county of the realm any reaſonable creature *in rerum natura* under the king's peace, with malice fore-thought, either expreſſed by the party, or implied by law, ſo as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the ſame.

Hereof we will ſpeak, together with ſome things concerning the acceſſories to the ſame, and leave the reſidue to others, that have written thereof. Now let us examine the principal parts of this deſcription.

83.

[48] Tr. 31. E. 3. Coram rege. Rot. 54. per morſ. canis.

Killing.] As by poyſon, weapon ſharp or blunt, gun, croſs-bow, cruſhing, bruiſing, ſmothering, ſuffocating, ſtrangling, drowning, burning, burying, famiſhing, throwing down, inciting a dog,

a dog, or bear, &c. to bite, or hurt, &c. whereof death enſueth, laying a ſick man in the cold, &c.

Poyſon, *(Venenum, à venis, quia à venis permeat)* is, as hath been ſaid, the moſt deteſtable of all, becauſe it is moſt horrible, and fearfull to the nature of man, and of all others can be leaſt prevented, either by manhood, or providence: and that made Fleta to ſay, *Item nec per patriam ſe defendere debet quis de veneno dato, ſed tantum per corpus ſuum, eo quod initium facti non fuit tam publicum, quod ſciri potuit à patria, &c.* but that is not holden for law at this day.

Bract. l. 3. f. 121. Brit. fo. 14. See lib. Intr. Coke 25. lib. 4. fo. 44. Vauxes caſe. Lib. 9. fo. 81. Agnes Gores caſe.

[a] This offence was ſo odious, that by act of parliament it was made high treaſon, and inflicted a more grievous and lingring death then the common law preſcribeth, viz. That the offender ſhould be boyled to death in hot water: upon which ſtatute [b] Margaret Davy a young woman was attainted of high treaſon for poyſoning of her miſtris, and ſome others were boyled to death in Smithfield the 17 day of March in the ſame yeer. But this act was too ſevere to live long, and therefore was repealed by 1 E. 6. cap. 12. and 1 Mar. cap. 1.

Deut. 28. 24. Curſed is he that ſmiteth his neighbour ſecretly.

[a] 22 H. 8. ca. 9. Read the ſtatute. Dier, 33 H. 8. fol. 50. a. Saccombes caſe.

[b] Anno 33 H. 8.

All the ancient authors, *ubi ſupra*, of old time defined murder to be, *occulta hominis occiſio, &c.* when it was done in ſecret, ſo as the offender was not known: but now it is taken in a larger ſenſe.

Britton mentioneth another kind of murder (which is not holden for murder at this day) when he ſaith: *Ceux auxi que fauxement pur loüer, ou en auter manner ount aſcun home damne ou fait damner au mort, &c.* yet this is murder before God. And David killed Uriah with his pen, and theſe men with their tongue.

Britton, fo. 14.

Within any county of the realm.] [c] If two of the kings ſubjects goe over into a forain realm and fight there, and the one kill the other, this murder being done out of the realm, cannot be for want of triall heard and determined by the common law: [d] but it may be heard and determined before the conſtable and marſhall.

[c] 13 H. 4. 5 & 6. Stanf. pl. cor. 65. Mic. 25 & 26 El. ſo reſolved in Dowties caſe.

[d] 13 R. 2. ca. 2. 1 H. 4. c. 14. Rot. Parl. 8 H. 6. nu. 38.

If A. give B. a mortal wound in a forain country, B. commeth into England and dieth: this cannot be tried by the common law, becauſe the ſtroak was given there, where no *viſne* can come, but the ſame ſhall be heard and determined before the conſtable and marſhall: for the words of the ſtatute of 13 R. 2. be: To the conſtable it pertaineth to have conuſance of contracts, concerning deeds of arms, or of war out of the realm, and alſo of things that touch arms, or war within the realm, which cannot be determined or diſcuſſed by the common law.

13 R. 2. ca. 2.

If a man be ſtrucken upon the high ſea, and dieth of the ſame ſtroke upon the land, this cannot be inquired of by the common law, becauſe no *viſne* can come from the place, where the ſtroke was given (though it were within the ſea pertaining to the realm of England, and within the liegeance of the king) becauſe it is not within any of the counties of the realm. Neither can the admirall hear and determine this murder, becauſe though the ſtroke was within his juriſdiction, yet the death was *infra corpus comitatus*, whereof he cannot inquire: neither is it within the ſtatute of 28 H. 8. becauſe the murder was not committed on the ſea. But by the ſaid act of 13 R. 2. the conſtable and marſhall may hear and determine the ſame. And before the making of the ſtatute of 2 E. 6. if a man

Lib. 2. fo. 93. Tr. 25 Eliz. in Lacyes caſe. Forteſcue, ca. 32. fo. 38.

28 H 8. ca. 13.

2 E. 6. ca. 24.

a man had been feloniouſly ſtricken, or poyſoned in one county, and after had died in another county, no ſufficient indictment could thereof have been taken in either of the ſaid counties, becauſe by the law of the realm, the jurors of one county could not inquire of that, which was done in an other county. It is provided by that act that the indictment may be taken, and the appeal brought in that county, where the death doth happen. Before the making of this ſtatute, the appeal might have been brought in either of the ſaid counties, but the triall muſt have been out of both: but when both counties could not joyn, then both appeal and indictment failed at the common law.

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18 E. 3. 32.
9 H. 6. 63.
3 H. 7. 12.
4 H. 7. 18.
6 H. 7. 10.

But here be two things to be obſerved: firſt, that in caſe of treaſon or miſpriſion thereof, or of felony, or miſpriſion of the ſame within the realm, the party ought to be indicted within the ſame county, where the fact is done, and it cannot be alledged in any other county, then in truth where it was done. And therefore in the caſe above ſaid, neither the ſtroke, nor poyſoning, nor the death, though they be tranſitory, can be alledged in the indictment or appeal, but where in truth they were done. Secondly, the ſtatute of 2 E. 6. extendeth not where one is ſtricken or poyſoned on the ſea, or in any forain kingdome, and dieth in England, but where one is ſtricken or poyſoned in one county, and dieth in another.

This act extendeth, where the murder, or felony is done in one county, and another ſhall be acceſſory in another county: whereof you may read at large in the lord Sanchar's caſe.

Lib. 9. fo. 117, 118. &c.

Richard Weſton being Sir Thomas Overburies keeper in the Tower of London, did poyſon him in that part of the Tower which is within London. R. earl of S. and F. his wife, James Franklin and Anne Turner were acceſſories before the fact in the county of Midd. and Sir Gervaſe Helwys lieutenant of the Tower was acceſſory before the fact in London. Now upon this ſtatute of 2 E. 6. ca. 24. divers queſtions were reſolved: firſt, if the acceſſory be in Midd. where the kings bench ſit, and the principall is attainted in another county, the kings bench may try the acceſſory, as it was reſolved in the lord Sanchars caſe, *ubi ſupra*. 2. If the indictment of the acceſſory be taken in the kings bench, the juſtices ſhall not by force of the ſtatute of 2 E. 6. write in their own names, *quia placita ſunt coram rege, & non coram juſticiariis*, but remove the record by the kings writ of *certiorari*. 3. Divers preſidents were ſhewn, that where acceſſories before the fact were in Midd. where the kings bench did ſit, &c. and the attainder of the principall had been in another county, the juſtices of the kings bench have removed the attainder by writ of *certiorari* before them. See the lord Sanchars caſe, *ubi ſupra*, and another caſe where the principall was attainted in the county of Oxon, before juſtices of oier and terminer, and the acceſſory was in Midd. where the kings bench ſate. 4. Richard Weſton being attainted as principall in the city of London, proceeding was to be had againſt James Franklin and Anne Turner in the kings bench where they were indicted. The queſtion was, if the kings bench ſhould remove the record of the attainder of the principall by *certiorari* before them, and after the ſaid earl and his wife ſhould be tried by their peers before the lord ſteward, whether the Lord ſteward might write to the kings bench for the record of the attainder: for the words of 2 E. 6. be, Shall write to the *cuſtos rotulorum*, or keepers of the record where ſuch

Mich. 13 Jac. regis. Sir Thomas Overburies caſe. See hereafter, ca. 62. of Indictments more of this caſe.

ſuch principall ſhall hereafter be attainted or convict. And to prevent all doubts, a ſpeciall writ was directed according to the words of the act, to the commiſſioners of oier and terminer, to certifie whether the principall was attainted, convicted, or acquitted, and they made a particular certificate accordingly: ſo as the record of the attainder remained ſtill with the commiſſioners of oier and terminer in London. 5. It was reſolved upon conſideration had of the whole act, that the words of the act being, the juſtices of gaol delivery, or of oier and terminer, or other there authorized, ſhall proceed, &c. the ſame extend to the high ſteward to write. &c.

The indictment of Richard Weſton was, that he 9 *die Maii anno* 11 *regis Jacobi, &c.* gave to Sir Thomas Overbury a poyſon called roſeacre in broth, which Sir Thomas Overbury not knowing it, received, *et ut idem Ri. Weſton præfatum Thomam Overbury magis celeriter interficeret, et murdraret,* 1 *Junii anno* 11 *Jac. regis,* gave unto him another poyſon called white arſenick. And that Richard Weſton, 10 *Julii, anno* 11. *Jac. regis,* gave unto him poyſon, called mercury ſublimat, in tarts, &c. *ut præd. Thomam magis celeriter interficeret, & murdraret.* And that a perſon unknown, by the procurement, and in the preſence of Richard Weſton, 14 Septemb. 11. *ſupradicto,* gave to the ſaid Thomas a glyſter with poyſon in it, called mercury ſublimat, &c. *ut præd. Thomam magis celeriter interficeret et murdraret. Et prædict. Thomas Overbury de ſeparalibus venenis prædict. et operatione inde à prædict. ſeparalibus temporibus, &c. graviter languebat uſque* 15 *diem. Septemb. anno* 11. *ſupradicto, quo quidem* 15 *die Septembris, &c. prædictus Thomas de ſeparalibus venenis prædictis obiit venenatus.* And this was reſolved to be a good indictment by all the juſtices of the king's bench, although it doth not appeare in particular, of which of the ſaid poyſons he died. For the ſubſtance of the indictment was, whether he was poyſoned or no, by the ſaid Richard Weſton. And upon this indictment he was arraigned, pleaded not guilty, and had judgement given againſt him. And afterward Anne Turner, Sir Gervaſe Helwys lieutenant of the Tower, and Richard Franklin the phyſitian, were indicted as acceſſories before the fact, and arraigned, and pleaded not guilty: and it fell out in evidence, that Franklin had prepared divers other poyſons, then were contained in the indictment, as the powder of diamonds, the powder of ſpiders, lapis cauſticus, and cantharides, over and beſides the poyſons in the indictment. And it was reſolved, that any of theſe was ſufficient to prove the indictment; for the ſubſtance of the indictment was poyſoning, which (as hath been ſaid) is ſecret: ſee Machallis caſe *ubi ſupra,* and after verdict, judgement was given againſt all theſe acceſſories. And after, the ſaid earle and the counteſſe his wife were indicted as acceſſories before the fact, and were arraigned before the lord chancellor of England, and *hac vice,* lord high ſteward of England: and upon the arraignment of the counteſſe, ſhe confeſſed the indictment: and when the clerk of the crown did aſk her, What ſhe could ſay why judgement of death ſhould not be given againſt her? ſhe ſaid, That ſhe could ſay much againſt her ſelfe, but nothing for her ſelfe. And then the lord ſteward gave judgement of death againſt her, viz. That ſhe ſhould be hanged by the neck till ſhe were dead: and adjourned his commiſſion, (as it was reſolved he might do by law) untill the next day: and then

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the ſaid earle was arraigned, and pleaded not guilty, and put himſelf upon his peers, who found him guilty: and thereupon the lord ſteward gave the like judgement againſt him. Which caſe we have recited the more largely for two cauſes. Firſt, for that we remember not any of the nobility of this realm to have been attainted in former times for poyſoning of any. Secondly, for that it is the firſt caſe that fell out upon the ſaid act of 2 E. 6. in caſe of triall by peers of any that was noble, and the proceeding herein was by great adviſement. But now let us return where we left.

Reaſonable creature, in rerum natura.] As man, woman, childe, ſubject born, or alien, perſons outlawed, or otherwiſe attainted of treaſon, felony, or premunire, Chriſtian, Jew, Heathen, Turk, or other Infidel, being under the kings peace.

[a] A maſter of a ſhip and divers mariners, &c. were attainted of murder before juſtices in eire, for drowning of many Jewes within the county of Kent.

[a] Chro. de Dunſtable, Holl. 252. Coram Juſtic. Itiner. in Com. Kanc. 18 E. 1.

[b] If a woman be quick with childe, and by a potion or otherwiſe killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and ſhe is delivered of a dead childe, this is a great miſpriſion, and no murder: but if the childe be born alive, and dieth of the potion, battery, or other cauſe, this is murder: for in law it is accounted a reaſonable creature, *in rerum natura*, when it is born alive. And the [c] book in 1 E. 3. was never holden for law. And 3 Aſſ. p. 2. is but a repetition of that caſe. And ſo horrible an offence ſhould not go unpuniſhed. And ſo was the law holden [d] in Bractons time, *Si aliquis qui mulierem prægnantem percuſſerit, vel ei venenum dederit, per quod fecerit abortivum, ſi puerperium jam formatum fuerit; et maximè ſi fuerit animatum, facit homicidium.* And herewith agreeth Fleta: and herein the law is grounded upon the law of God, which ſaith, *Quicunque effuderit humanum ſanguinem, fundetur ſanguis illius, ad imaginem quippe Dei creatus eſt homo.* If a man counſell a woman to kill the childe within her wombe, when it ſhall be born, and after ſhe is delivered of the childe, ſhe killeth it; the councellor is an acceſſory to the murder, and yet at the time of the commandement, or councell, no murder could be committed of the childe *in utero matris*: the reaſon of which caſe proveth well the other caſe.

[b] 22 E. 3. Coron. 263. 8 E. 2. Cor. 418. Stan. p. cor. 21. c.

[c] 1 E. 3. 23, 24. 3 Aſſ. p. 2.

[d] Bract. li. 3. f. 21. Fleta, lib. ca. 23.

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Geneſis, c. 6. v. 6.

Malice prepenſed.] Firſt let us ſee what this malice is.

Malice prepenſed is, when one compaſſeth to kill, wound, or beat another, and doth it *ſedato animo*. This is ſaid in law to be malice forethought, prepenſed, *malitia præcogitata*. This malice is ſo odious in law, as though it be intended againſt one, it ſhall be extended towards another. * *Si quis unum percuſſerit, cum alium percutere vellet, in felonia tenetur.*

Dier. 3 Eliz. fol. 186.

Dier. 3 Mar. 128. Pl. Com. 474, 475, 476. Lib. 9. fol. 81. Agnes Gores caſe.

* Bracton, lib. 3. fol. 155.

Mandata recipiunt ſtrictam interpretationem, ſed illicita latam et extenſivam. But herein there is a diverſity between the principall and the acceſſory. For if A command B, to kill C, and B by miſtaking killeth D in ſtead of C, this is murder in B becauſe he did the act: and it ſprang out of the root of malice, and the law ſhall couple the event to the cauſe: but A is not acceſſory, becauſe his commandement was not purſued; and his conſent, which muſt make him acceſſory, cannot be drawne to it, for he never commanded the death of D. But where death enſueth upon that act which is commanded,

commanded, though death it ſelfe be not commanded, there he is acceſſory to it, for there the commandement is the cauſe of death. As if A command B to beat C, and he beat him, whereof he dieth: the commander is acceſſory, and therefore the diverſity is apparent, as to the acceſſory. Where death is purſuant, and followeth upon the act commanded, there the conſent of the commander may well be drawn to it, for that the commandement is the mean of the death. But where death enſueth upon another diſtinct cauſe, there the conſent of the acceſſory cannot be drawn to it, *et ſic de cæteris.*

Another diverſity there is, when the commandement extends expreſly to the killing of another, and for the better accompliſhment thereof preſcribeth a mean; that is, to kill him by poyſon, and he killeth him with a gun, he is acceſſory: for the commandement was to kill, which enſued, though the mean was not followed, *et finis rei attendendus eſt.* And the ſubſtance of the commandement, viz. [to kill] is purſued: and the ſame offence that was commanded, is committed. But otherwiſe it is, if the ſame offence which is commanded be not committed. As if one command one to rob the vintners man of plate, as he is to come to a gentlemans chamber to his ſupper with wine; and he breaketh the taverne in the night, and ſtealeth the plate there; the commander is not acceſſory to this burglary, for this is another offence then he commanded, and the conſent of the acceſſory muſt be drawn to the murder or felony committed.

2. It muſt be malice continuing untill the mortall wound, or the like be given. Albeit there had been malice between two, and after they are pacified and made friends, and after this upon a new occaſion fall out, and the one killeth the other; this is homicide, but no murder, becauſe the former malice continued not.

If A command B to kill C, and before the act be done, A repenteth and countermand his commandement, and charge B not to do it: if B after killeth him, A is not acceſſory to it: for the malicious minde of the acceſſory ought to continue to do ill untill the act done. Pl. Com. ubi ſup.

If two fall out upon a ſudden occaſion, and agree to fight in ſuch a field, and each of them go and fetch their weapon, and go into the field, and therein fight, the one killeth the other: here is no malice prepenſed, for the fetching of the weapon and going into the field, is but a continuance of the ſudden falling out, and the blood was never cooled. But if they appoint to fight the next day, that is malice prepenſed.

Malice implyed, is in three caſes.] Firſt, in reſpect of the manner of the deed. As if one killeth another without any provocation of the part of him, that is ſlain, the law implieth malice: whereof you may read lib. 9. fol. 67. Mackallyes caſe. Alſo the poyſoning of any man, whereof he dieth within the year, implieth malice, and is adjudged wilfull murder of malice prepenſed. One may be poyſoned four manner of ways: *guſtu* by taſte, that is by eating, or drinking, being infuſed into his meat or drink: *anhelitu*, by taking in of breath, as by a poyſonous perfume in a chamber, or other room: 3. *contactu*, by touching: and laſtly, *ſuppoſitu*, as by a glyſter or the like. Now for the better finding out of this horrible offence, there be divers kindes of poyſons, as the powder of diamonds, [52]

Lib. 9. fo. 67. b. in Mackallies caſe. 1 E. 6. c. 12.

diamonds, the powder of ſpiders, *lapis cauſticus*, (the chief ingredient whereof is ſoap) cantharides, mercury ſublimate, arſenick, roſeacre, &c.

Lib. 9. fo. 68. 2. In reſpect of the perſon ſlain. As if a magiſtrate or known officer, or any other, that hath lawfull warrant, and in doing, or offering to doe his office, or to execute his warrant, is ſlain, this is murder, by malice implied by law, as the ſherif, juſtice of the peace, underſherif, chief conſtable, petit conſtable, or any other miniſter of the king. If a man kill a watchman doing his office, it is murder: ſo it is, if any, that come in aid of the kings officer, &c. to doe his office, be ſlain, it is murder.

Mackallies caſe. Ubi ſupra. Lib. 4. fo. 40. b. 41. a. Youngs caſe.

Mackallies caſe. Ubi ſupra. 3. In reſpect of the perſon killing. If A aſſault B to rob him and in reſiſting A killeth B this is murder by malice implied, albeit he never ſaw or knew him before. If a priſoner by the dures of the gaoler, commeth to untimely death, this is murder in the gaoler, and the law implieth malice in reſpect of the cruelty. And this is the cauſe, that if any man dieth in priſon, the coroner ought to ſit upon his body, to the end it may be inquired of, whether he came to his death by the dures of the gaoler, or otherwiſe: all which appeareth in Britton: and this ſitting of the coroner continueth till this day.

Brit. ca. 11. De priſons fo. 18. a. See the Mirror cap. 2. §. 11. De homicide. 5 H. 6. 58. 27 Aſſ. p. 41.

If the ſherif, or other officer, where he ought to hang the party attainted, according to his judgement and his charge, will againſt the law, of his own wrong, burn or behead him, or *è converſo*; the law in this caſe implieth malice in him. Neither can the king by any warrant under the great ſeal alter the execution, otherwiſe then the judgement of law doth direct: for it is a maxime in law, *non alio modo puniatur quis, quam ſecundum quod ſe habeat condemnatio.*

Bract. l. 3. fo. 104.

And it is to be known, that in caſe of treaſon and felony, there is an expreſſe judgement, and an implied judgement: expreſſe, when upon appearance, &c. an expreſſe judgement is given againſt him, *quòd ſuſpendatur per collum.* Implied, when the offender makes default, and is outlawed, where the judgement is, *ideo utlagetur*; or in caſe of abjuration, *quia abjuravit regnum*: and yet the like execution ſhall be in caſe of outlawry or abjuration, as in caſe of an expreſſe judgement: and ſo it was adjudged in caſe of a perſon outlawed for felony, he ought to be hanged untill he be dead, and cannot be beheaded, * and the like is in caſe of abjuration. But in caſe of high treaſon, becauſe beheading is parcell of the judgement, the king may pardon all the reſidue of the execution except that: for ſeeing the king may pardon the whole execution, he may pardon any part, or all, ſaving part. If a lieutenant, or other that hath commiſſion of marſhall authority, in time of peace hang, or otherwiſe execute any man by colour of marſhall law, this is murder, for this is againſt Magna Charta cap. 29. and is done with ſuch power and ſtrength, as the party cannot defend himſelf; and here the law implieth malice. *Vide* Paſch. 14. E. 3. in Scaccario the abbot of Ramſeys caſe in a writ of error in part abridged by Fitzh. tit. Scire fac. 122. for time of peace.

See hereafter in the title of Sanctuary for Abjuration. Paſch. 20 R. 2. Coram Rege Linc. Ro. 58. * Mich. 1 R. 2. Coram Rege. Rot. 1. Bedf. See hereafter cap. Judgement and Execution.

a Paſch. 39 E. 3. Coram Rege Rot. 92. Wiltes. Simile Paſch. 28 E 3. Coram Rege Rot. 37. In caſe de Mortimer, who was put to death anno 1 E. 3. Vide Rot. Brevium anno 1 E. 3. part. 1.

* Thom. countee de Lancaſter being taken in an open inſurrection, was by judgement of marſhall law put to death, in *anno* 14 E. 4. This was adjudged to be unlawfull, *eò quòd non fuit arrainiatus*,

rainiatur, ſeu ad reſponſionem poſitus tempore pacis, eò quòd cancellaria, et aliæ curiæ regis fuerunt tunc apertæ, in quibus lex fiebat unicuique, prout fieri conſuevit, quòd contra cartam de libertatibus cum dictus Thomas fuit unus parium et magnatum regni non impriſonetur, &c. Nec dictus rex ſuper eum ibit, nec ſuper eum mittet, niſi per legale judicium parium ſuorum, &c. tamen tempore pacis abſque arrainiamento, ſeu reſponſione, ſeu legali judicio parium ſuorum, &c. adjudicatus eſt morti.

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Within a year and a day.] How this year and a day ſhall be accounted, is to be ſeen. If the ſtroke, or poyſon, &c. be given the firſt day of January, the year ſhall end the laſt day of December: for though the ſtroke, or poyſon, &c. were given in the afternoon of the firſt day of January, yet that ſhall be accounted a whole day, for regularly the law maketh no fraction of a day: and the day was added, that there might be a whole year at the leaſt after the ſtroke, or poyſon, &c. for if he die after that time, it cannot be diſcerned, as the law preſumes, whether he died of the ſtroke or poyſon, &c. or of a natural death; and in caſe of life the rule of law ought to be certain. But ſeeing the year and day in the caſe of murder and homicide, muſt be accounted *apres le fait*, after the deed, if a man be ſtricken or poyſoned, &c. the firſt of January, and he dieth of that ſtroke or poyſon the firſt day of May, whether ſhall the year and day be accounted after the ſtroke or poyſon given, or after the death? and it ſhall be accounted after the death, for then the man was murdered, and not after the ſtroke or poyſon given, &c. both in the indictment at the ſuit of the king, and in the appeal at the ſuit of the party. And ſo it hath been often adjudged contrary to the opinion of juſtice Stanford. A murderer half a year after the murder is received, and aided by another, this acceſſory may be indicted or appealed within the year after he became acceſſory, though it be after the year, that the murder was committed, and ſhall be tryed when the principall is attainted.

See the ſtatute of Glouceſt. 6 E. 1. ca. 9. 3 H. 7. ca. 1. 3 E. 3. Cor. 303. Lib. 5. fo. 1. in Cleytons caſe.

Lib. 4. fo. 41, 42. in Heydons caſe.

Stanf. Pl. Cor. 63. 26 Aſſ. p. 52.

If a murder be committed in the day time in a town not incloſed, and the murderer not apprehended, the townſhip ſhall be amerced, but if incloſed, whether the murder be in the night, or day, the town ſhall be amerced. They that are preſent when any man is ſlain, and doe not their beſt indeavour to apprehend the murderer, or manſlayer ſhal be fined and impriſoned. What judgment a felon attainted ſhall have, and what he ſhall forfeit; ſee the firſt part of the Inſtitutes, ſect. 747. and here, cap. Judgement and Execution.

3 H. 7. c. 1. ſtat. 1. 3 E. 3. cor. 299. 8 E. 2. cor. 395. Inter leges regis Edw. cap. 6. Ætheiſtani cap. 1. Ed.* cap. 6. &c.

* Nota that before the reign of H. 1. the judgement for felony was not always one, but king H. 1. ordained by parliament, that the judgement for all manner of felonies ſhould be, that the perſon attainted ſhould be hanged by the neck till he be dead, which continueth to this day. See more for murder in the chapter of Monomachia.

* 9 H. 1. Hovanden, anno 1108. Simon Dun. Rad. and Floren. Wigorn. Hollengſh. 45.

CAP. VIII.

OF HOMICIDE.

HOMICIDIUM ex vi termini comprehendeth petit treaſon, murder, and that which is commonly called manſlaughter: for *homicidium eſt hominis cædium*, and *homicidium eſt hominis occiſio ab homine facta*. Therefore the right diviſion of homicide is: that of homicides, or manſlaughter, ſome be voluntary, and of malice forethought; as petit treaſon, and murder of another, and murder of himſelf. Of the two former we have ſpoken; and of murder of himſelf we ſhall ſpeak hereafter. Of manſlaughters, ſome be voluntary, and not of malice forethought: of theſe ſome be felony (as ſhall be ſhewed hereafter) and ſome be no felony; of which, ſome be in reſpect of giving back inevitably in defence of himſelf, upon an aſſault of revenge: and ſome without any giving back; as upon the aſſault of a thief or robber upon a man in his houſe, or abroad: Some upon the aſſault of one, that is under cuſtody; as the ſherif, or gaoler aſſaulted by his priſoner. Some in reſpect that he is an officer or miniſter of juſtice, without any aſſault in execution of his office, or lawfull warrant. And laſtly, ſome homicides, that be no felony, be neither forethought, nor voluntary; as manſlaughter by miſadventure, *per infortunium*, or *caſu*. And ſome of theſe, that be no felony, are cauſes of forfeiture of a man's goods, and ſome be not: and of theſe ſeveral branches in their order. And firſt of murder of a man's ſelf, who commonly is called *felo de ſe*.

3 E. 3. cor. 290. 289. 312.

Britton cap. 7.

Felo de ſe.

Felo de ſe is a man, or woman, which being *compos mentis*, of ſound memory, and of the age of diſcretion, killeth himſelf, which being lawfully found by the oath of twelve men, all the goods and chattels of the party ſo offending are forfeited.

Regula.

Now let us peruſe the ſeverall branches of this deſcription, *majus eſt delictum ſeipſum occidere, quam alium.*

[a] Rot. Clauſ. 1 E. 1. m. 7. Rot. Clauſ. 6 E. 1. Alma filia Roberti de Keſton. 3 E. 3. cor. 324. Rot. Eſcheat. anno 47 E. 3. nu. 17. Ricus Algate.

Being compos mentis.] [a] If a man loſe his memory by the rage of ſickneſs or infirmity, or otherwiſe, and kill himſelf while he is not *compos mentis*, he is not *felo de ſe*: for, as he cannot commit murder upon another, ſo in that caſe he cannot commit murder upon himſelf. [b] If one during the time that he is *non compos mentis* give himſelf a mortall wound, whereof he, when he hath recovered his memory, dieth, he is not *felo de ſe*: becauſe, the ſtroke which was the cauſe of his death, was given when he was not *compos mentis: et actus non facit reum, niſi mens ſit rea.* If a man give himſelf a wound, intending to be *felo de ſe*, and dieth not within the year and day after the wound, he is not *felo de ſe*.

[b] 8 E. 2. cor. 412. 22 E. 3. cor. 244. Pl. Com. 260.

Of the age of diſcretion.] Hereof we have ſpoken before treating of murder.

[c] 44 E. 3. 44. 3 E. 3. cor. 286. & 297.

Kill himſelf.] [c] And this is often voluntary, and ſometime not voluntary. If A. give B. ſuch a ſtroke as he felleth him to the ground, B. draweth his knife, and holds it up for his own defence:

fence: A. in haſt meaning to fall upon B. to kill him, falleth upon the kniſe of B. whereby he is wounded to death, he is *felo de ſe:* for B. did nothing but that which was lawfull in his own defence.

Lawfully found.] [d] No goods be forfeited, untill it be lawfully found by the oath of twelve men, that he is *felo de ſe:* and this doth belong to the coroner *ſuper viſum corporis*, to inquire thereof; and if it be found before the coroner *ſuper viſum corporis*, that he was *felo de ſe*, [e] the executors or adminiſtrators of the dead ſhall have no traverſe thereunto. And this is the reaſon, that no man can preſcribe to have felons goods, becauſe they are not forfeited, until it be found of record, that he is *felo de ſe.*

[d] Pl. Com. 360. b.

[55]

[e] Stanf. pl. cor. 183. d.

[b] If a man be *felo de ſe*, and is caſt into the ſea, or otherwiſe ſo ſecretly hidden, as the coroner cannot have the view of the body, and by conſequence cannot inquire thereof: in this caſe it may be inquired thereof by the juſtices of peace of that county; for they have power by their commiſſion to inquire of all felonies. But if it be found before them, the executors or adminiſtrators of the dead may have a traverſe thereunto, but not to the indictment taken before the coroner *ſuper viſum corporis*, as before is ſaid: and ſo hath it been reſolved. And ſo in the caſe abovesaid may the kings bench enquire thereof, if the felony be committed in the county where the kings bench ſit, and the executors or adminiſtrators of the dead may traverſe the ſame.

[b] Hil. 37 Eliz. in the kings bench by the whole court, in the caſe of one Laughton of Cheſhire. See 8 E. 2. cor. 412. 3 E. 3. cor. 312. filē. Stanf. pl. cor. 184.

Are forfeited.] Albeit [c] Bracton was of opinion, that if a man that was *reus alicujus criminis captus ſit pro eodem, utpote pro morte hominis, vel cum furto manifeſto, vel quod utlegatus ſit, et metu pœnæ imminentis mortis mortem ſibi conſciverit, hæredem non habebit, quia ſic convincitur felonia priùs facta*, viz. *furtum, mors hominis, vel hujuſmodi, et conſcientiæ metus in reo pro confeſſo habetur. Aliud erit ſi non ſit in crimine deprehenſus, &c. non debet in aliquo caſu exhæredatio fieri, niſi præcedat crimen, propter quod periculum mortis vel membrorum ſuſtineri debet, &c.* But the law makes no ſuch diverſity: [d] for *felo de ſe*, whatſoever offence he hath committed (whereof he was not in his life time attainted) ſhall forfeit no lands, but his goods and chattels only. [e] And ſo ſaith Britton, *En caſe ou home eſt felon de ſoy meſme, ſoient ſes chateux judges nous come chateux de felon, le heritage ne quident remaine as heires.* For no man can forfeit his land without an attainder by courſe of law.

[c] 8 E. 2. cor. 426. 44 E. 3. 44. 22 E. 3. cor. 259. 3 E. 3. cor. 301. 3 E. 3. 3. cor. 362. 5 Mar. Dier. 160. 9 Eliz. Dier. 262. Bract. lib. 3. f. 150. Fleta, lib. 2. c. 34.

[d] Pl. com. 261. a. & b. per touts les juſtices.

[e] Britton, cap. 7. Cuſtum. de Norm. cap. 21.

A [f] villain giveth himſelfe a mortall wound, the lord ſeiſeth his goods, the villain after dieth of the wound within the year and the day, the goods are forfeit.

[f] Pl. com. 260. b.

And herein [g] there is a diverſity between chattels perſonels in action, and in poſſeſſion: for if a debt be owing to two, unleſſe it be in caſe of two joint merchants, and the one is *felo de ſe*, he doth forfeit the whole: but otherwiſe it is of goods in poſſeſſion, for there he forfeiteth but his part.

[g] 8 E. 4. 4. Pl. com. 259. b.

A leaſe [h] is made for years to the huſband and wife, the huſband drowneth himſelf, the leaſe is forfeited, as you may read at large in Plowdens Commentaries.

[h] Pl. com. 260. Dier, 2 Mar. 108.

Now let us purſue the branches into which bloody homicide did ſpend and empty itſelfe.

Some manſlaughters be voluntary, and not of malice forethought, upon ſome ſudden falling out. *Delinquens per iram provocatus*

vocatus puniri debet mitius. And this for diſtinction ſake is called manſlaughter. There is no difference between murder, and manſlaughter; but that the one is upon malice forethought, and the other upon a ſudden occaſion: and therefore is called chance-medley. As if two meet together, and ſtriving for the wall the one kill the other, this is manſlaughter and felony. And ſo it is, if they had upon that ſudden occaſion gone into the fields and fought, and the one had killed the other: this (as hath been ſaid) had been but manſlaughter, and no murder; becauſe all that followed, was but a continuance of the firſt ſudden occaſion, and the heat of the blood kindled by ire was never cooled, till the blow was given, *et ſic de ſimilibus.*

[f] Manſlaughter is felony, and hereof there may be acceſſories after the fact done: but of murder, there may be acceſſories, as well before, as after the fact.

Some be [k] voluntary, and yet being done upon an inevitable cauſe are no felony. As if A. be aſſaulted by B. and they fight together, and before any mortall blow given A. giveth back, untill he commeth unto a hedge, wall, or other ſtrait, beyond * which he cannot paſſe, and then in his own defence, and for ſafeguard of his owne life killeth the other: this is voluntary, and yet no felony, and the jury that finde, it was done *ſe defendendo*, ought to finde the ſpeciall matter. [x] And yet ſuch a precious regard the law hath of the life of man, though the cauſe was inevitable, [b] that at the common law he ſhould have ſuffered death: and though the ſtatute of Gloceſter ſave his life, yet he ſhall forfeit all his goods and chattels. [c] Hereof there can be no acceſſories, either before or after the fact, becauſe it is not done *felleo animo*, but upon inevitable neceſſity *ſe defendendo*. [d] If A. aſſault B. ſo fiercely and violently, and in ſuch a place, and in ſuch manner, as if B. ſhould give back, he ſhould be in danger of his life, he may in this caſe defend himſelfe; and if in that defence he killeth A, it is *ſe defendendo*, becauſe it is not done *felleo animo*: for the rule is, when he doth it in his own defence, upon any inevitable cauſe, *Quod quis ob tutelam corporis ſui fecerit, jure id feciſſe videtur.*

Some without any giving back to a wall, &c. or other inevitable cauſe. [d] As if a thiefe offer to rob or murder B. either abroad, or in his houſe, and thereupon aſſault him, and B. defend himſelfe without any giving back, and in his defence killeth the thief, this is no felony; for a man ſhall never give way to a thief, &c. neither ſhall he forfeit any thing. * And ſo it is declared by the ſtatute of 24 H. 8. Likewiſe [f] if a priſoner aſſault the gaoler, the gaoler is not by law inforced to give back: but if in defence of himſelfe he kill the priſoner, this is no felony.

[g] So if any officer, or miniſter of juſtice, that hath lawfull warrant, and the party aſſault the officer or, miniſter of juſtice, he is not bound by law to give back, but to carry him away: and if in execution of his office he cannot otherwiſe avoid it, but in ſtriving kill him, it is no felony. And in that caſe the officer or miniſter of juſtice ſhall forfeit nothing, but the party ſo aſſaulting or offering to flye away, and is killed, ſhall forfeit his goods and chattels.

[h] *Vicecomes ſeu balivus domini regis, qui interficit duos latrones non permittentes*

[f] Lib. 4. fol. 44. Bibithes caſe
[k] 15 E. 3. cor. 116.
15 Aſſ. p. 7.
43 Aſſ. 31. See the ſtat. of Glou. cap. 39.
3 E. 3. cor. 184. 286. & 297. 305. & 361.
See hereafter, ca. 101. of Judgement and Execution.
Verb. Of death of a man ſe defendendo.
* [56]
[x] 43 Aſſ. 31. Plot. Parl. 3 R. 2. nu. 18. John Imperials caſe.
[b] 21 E. 3. 17. Glou. cap. 9. 4 H. 7. 2.
[c] Lib. 4. fo. 44. Bibiths caſe. Bracton.
[d] Lib. 5. fo. 91. Semayns caſe. 26 Aſſ. p. 23. 32. 29 Aſſ. p. 23. 3 E. 3. cor. 305. & 330. 22 E. 3. cor. 261. 21 H. 7. 39.
[e] 24 H. 8. cap. 5.
[f] 22 Aſſ. p. 55.
[g] 3 E. 3. cor. 290. 22 E. 3. cor. 261. M. 22 E. 3. coram rege Rot. 181. Eborum. Rot. libert. anno 1 & 2 E. 1. m. 2.
[h] Paſch. 16 E. 3. Coram rege. Rot. 131. Norff.

permittentes ſe juſticiari in ſui defenſionem, et non ex felonia, ſeu malitia, acquietatur.

[l] If at a juſt or turnement, or at the play with ſword and buckler by the kings commandement, one doth kill another, this is no felony. [k] In the reigne of king H. 2. it was enacted, that if in ſuch caſe one was ſlaine, it ſhould be no felony, for that in friendly manner they contended to try their ſtrength, and to be able to doe the king ſervice in that kinde, as occaſion ſhould be offered.

[l] 11 H. 7. 22. Vid. hereafter. cap. Againſt riding and going armed.

[k] Mirror, cap. 1. § 13. Des adventures.

There is an homicide, that is neither forethought, nor voluntary. [l] As if a man kill another *per infortunium, ſeu caſu*, that is homicide by miſadventure. *De amputatore arborum, qui cum ramum projiceret, inſcius occidit tranſeuntem: aut cum quis pilam percuſſerit, &c. ex cujus ictu occiſus eſt, tales de homicidio non tenentur.* Homicide by miſadventure, is when a man doth an act, that is not unlawfull, which without any evill intent tendeth to a man's death.

[l] Bract. lib. 3. fo. 136. b. See the ſtat. of Gloc. ca. 9. Marl. cap. 25. Bract. lib. 3. 120. Britt. ca. 7. fo. 15. Fleta, lib. 1. ca. 30. Mir. ca. 1. § 9.

Unlawfull.] [m] If the act be unlawful it is murder. As if A. meaning to ſteale a deere in the park of B, ſhooteth at the deer, and by the glance of the arrow killeth a boy that is hidden in a buſh: this is murder, for that the act was unlawfull, although A. had no intent to hurt the boy, nor knew not of him. But if B. the owner of the park had ſhot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by miſadventure, and no felony.

[m] Bract. lib. 3. 120. b. Sed erit diſtinguendum utrum quis dederit operam rei illicitæ vel illicitæ, &c.

[n] So if one ſhoot at any wild fowle upon a tree, and the arrow killeth any reaſonable creature afar off, without any evill intent in him, this is *per infortunium*: for it was not unlawful to ſhoot at the wilde fowle: but if he had ſhot at a cock or hen, or any tame fowle of another mans, and the arrow by miſchance had killed a man, this had been murder, for the act was unlawfull.

[n] 3 E. 3. cor. 354. 2 H. 4. 18. 11 H. 7. 23. a.

Without any evil intent.] If a man knowing that many people come in the ſtreet from a ſermon, throw a ſtone over a wall, intending only to feare them, or to give them a light hurt, and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not to death, and though he knew not the party ſlaine. For the killing of any by miſadventure, or by chance, albeit it be not felony, *quia voluntas in delictis, non exitus ſpectatur*; yet he ſhall forfeit therefore all his goods and chattels, to the intent that men ſhould be wary ſo to direct their actions, as they tend not to the effuſion of mans blood,

[57]

Marlbr. ca. 25.

Nec veniam effuſo ſanguine caſus habet.

Nota, Homicide is called chancemedley, or chancemelle, for that it is done by chance (without premeditation) upon a ſudden brawle, ſhuffling, or contention; for meddle or melle (as ſome ſay) is an ancient French word, and ſignifieth brawle, or contention. But I take it that the French word is *meſle*, which ſignifying ſhuffling or contending, and by corruption we changing the S to D, doe call it *medle*, the S being not pronounced, whereof we have made *medletum*. So as killing of a man by chance-medle, is killing of a man upon a ſudden brawle or contention by chance, for the word [*medle* or *melle*,] whereof we have made a Latin word *medletum or melletum*, ſee Glanvill, lib. 1. cap. 2. *cognoſcere de medletis, de verberibus, de plagis*: that is, of brawling, or brabling, of battery,

De Medletis.

battery, of wounding: the firſt in words, the other two in ſtrokes, &c. in ancient time expreſſed by theſe two Saxon words, viz. *flit*, a *flitan*, to brawle; and *fiht*, which we retaine ſtill to fight when it proceeds to blowes. *Unde flitwit, flickwite, fightwite, &c.*

And thus much of homicide committed by man. See in the next chapter of deodands, of another kinde of killing of a man.

CAP. IX.

OF DEODANDS.

DEODANDS when any [a] moveable thing inanimate, or [b] beaſt animate, doe move to, or cauſe the untimely death of any reaſonable creature by miſchance [c] in any county of the realm (and not upon the ſea, or upon any ſalt water) without the will, offence, or fault of himſelf, or of any perſon. [d] They being ſo found by lawful inquiſition of twelve men, being *precium ſanguinis*, the price of blood, are forfeited to God, that is to the king, Gods lieutenant on earth, to be diſtributed in works of charity for the appeaſing of Gods wrath.

And it is to be obſerved, that there is a diverſity, as concerning the deodand, when the party ſlain is within the age of diſcretion, viz. of 14. years, and when he is above the age of diſcretion. For when he is ſlain by fall from a cart, horſe, mill, &c. and is within the age of diſcretion, there is no deodand, as it is adjudged [e] in 8 E. 2. tit. coron. 389. But otherwiſe it is, if an oxe, horſe, bull, or the like, doe kill any within the age of diſcretion, there the ſame are deodands.

And this law concerning deodands, is grounded upon the law of God, Exodus 2. verſ. 28. *Si bos cornu percuſſerit virum, aut mulierem, et mortui fuerint, lapidibus obruetur.* See juſtice Stanford, lib. 1. cap. 12. which need not here to be recited. If A. killeth a man with the ſword of B. the ſword ſhall be forfeit to the king [f] as a deodand, becauſe *movet ad mortem*, and for default of ſafe keeping of the ſame by the owner.

But now that we have cited, and referred you to our books of law already known, and publiſhed; let us caſt our eye upon ſome records of parliament concerning deodands, of, or out of ſhips or other veſſels upon rivers, or waters, freſh or ſalt, the law being clear, that in *aqua dulci* there may be deodands, but in the ſea, or in *aqua ſalſa*, being any arm of the ſea, though it be in the body of the county, there can be no deodand of the ſhip, or any part thereof, though any be drowned out of it; becauſe, though the arm of the ſea be within the body of the county, the ſhip or other veſſel is ſubject to ſuch dangers upon the raging waves in reſpect of the wind and tempeſt. And this diverſity doth notably appear in the parliament roll. Amongſt the petitions in parliament it is deſired, that if it happen any man, or boy to be drowned by a fall out of any ſhip, boat, or veſſel, they ſhall be no deodands. Whereunto the king upon great advice, and conference with his judges and

councell

[a] 8 E. 2. Cor. 403. 8 E. 2. Ibid. 189. A mill wheel. Fleta lib. 1. ca. 25. quicquid mobile ſit in malendino. Mirror c. 1. § 13. 12 R. 2. Cor. 20. a maſſe of earth in a mine.

[b] Brad. lib. 3. fo. 120. b. above, cane, &c.

[c] Bracton, lib. 3. fo. 122. a. Britton, fo. 6. 13. Mirror, cap. 1. § 3. Fleta, li. 1. ca. 25. 45 E. 3. 2. b. Vide 4 E. 1. ſtat. officium coron. 6 E. 6. Dier, 77. b. 61. a. Quæ movent ad mortem ſunt Deo danda. 2 Mar. ibid. 107. b. Kelway, 21 H. 7. fo 8.

[d] Lib. 5. fo. 110. b. Foxleys caſe accord. And this is the reaſon they cannot be claimed by preſcription. 45 E. 3. ubi ſupra. Fleta ubi ſup.

[e] 8 E. 2. cor. 389.

[f] Exod. 2. 28.

*[58]

Doct. & Stud. lib. 2. 156. b. Br. Forfeit. 112. All our ancient authors ubi ſupra Rot. Parl. 51 E. 3. nu. 73.

councell learned (as always the king doth to petitions in parliament) made anſwer, The ſhip, boat, or veſſel being upon * the ſea ſhall be adjudged no deodand, but being upon a freſh river, it is a deodand, but the king will ſhew favour.

* The arm of the ſea is included herein.

See the like petitions in other rolls of parliament *anno* 1 R. 2. nu. 106. 4 R. 2. nu. 33. 1 H. 5. nu. 35. &c. but never obtained more, then the common law gave in theſe caſes.

CAP. X.

Of BUGGERY, or SODOMY.

IF any perſon ſhall commit buggery with mankind, or beaſt; by authority of parliament this offence is adjudged felony without benefit of clergy. But it is to be known, (that I may obſerve it once for all) that the ſtatute of 25 H. 8. was repealed by the ſtatute of 1 Mar. whereby all offences made felony or premunire by any act of parliament made ſince 1 H. 8. were generally repealed, but 25 H. 8. is revived by 5 Eliz.

25 H. 8. ca. 6. 5 Eliz. ca. 17. 1 Mar. ubi ſup.

Buggery is a deteſtable, and abominable ſin, amongſt chriſtians not to be named, committed by carnall knowledge againſt the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beaſt, or by womankind with bruite beaſt.

Horrendum illud peccatum. 5 El. ca. 17.

Bugeria is an Italian word, and ſignifies ſo much, as is before deſcribed, *pæderaſtes* or *paidereſtes* is a Greek word, *amator puerorum*, which is but a ſpecies of buggery, and it was complained of in parliament, that the Lumbards had brought into the realm the ſhamefull ſin of ſodomy, that is not to be named, as there it is ſaid. Our ancient authors doe conclude, that it deſerveth death, *ultimum ſupplicium*, though they differ in the manner of the puniſhment. Britton ſaith, that ſodomites, and miſcreants ſhall be burnt, and ſo were the ſodomites by Almighty God. Fleta ſaith, *pecorantes et ſodomitæ in terra vivi confodiantur*: and therewith agreeth the Mirror, *pur le grand abhomination*, and in another place he ſaith, *Sodomie eſt crime de majeſtie, vers le roy celeſtre*. But (to ſay it once for all) the judgement in all caſes of felony, is, that the perſon attainted be hanged by the neck, untill he, or ſhe be dead. But in ancient times, in that caſe, the man was hanged, and the woman was drowned, whereof we have ſeen examples in the reign of R. 1. And this is the meaning of ancient franchiſes granted *de furca, et foſſa*, of the gallows, and the pit, for the hanging upon the one, and drowning in the other, but *foſſa* is taken away, and *furca* remains.

Rot. Parl. 50 E. 3. nu. 58.

Britton ca. 9. Gen. 19. 9. Rom. ca. 1. 17. F. N. B. 269. a. Fleta li. 1. ca. 37. Mirror ca. 4. §. de majeſty, ca. 1. § 15. & cap. 2. ſect. 11.

Cum maſculo non commiſcearis coitu fœmineo, quia abominatio eſt. Cum omni pecore non coibis, nec maculaberis cum eo: mulier non ſuccumbet jumento, nec miſcebitur ei, quia ſcelus eſt, &c.

[59]

Levit. 18. 22, 23. 1 Tim. 1. 10.

The act of 25 H. 8. hath adjudged it felony, and therefore the judgement for felony doth now belong to this offence, viz. to be hanged by the neck till he be dead. He that readeth the preamble

of this act, ſhall find how neceſſary the reading of our ancient authors is: the ſtatute doth take away the benefit of clergy from the delinquent. But now let us peruſe the words of the ſaid deſcription of buggery.

Deteſtable and abominable.] Thoſe juſt attributes are found in the act of 25 H. 8.

Amongſt Chriſtians not to be named.] Theſe words are in the uſuall indictment of this offence, and are in effect in the parliament roll of 50 E. 3. *ubi ſupra*, nu. 58.

By carnall knowledge, &c.] The words of the indictment be, *contra ordinationem creatoris, et naturæ ordinem, rem habuit venerean, dictumque puerem carnaliter* * *cognovit, &c.* So as there muſt be *penetratio*, that is, *res in re*, either with mankind, or with beaſt, but the leaſt penetration maketh it carnall knowledge. § See the indictment of Stafford, which was drawn by great advice for committing buggery with a boy, for which he was attainted and hanged.

[b] The ſodomites came to this abomination by four means, viz. by pride, exceſſe of diet, idleneſſe, and contempt of the poor. *Otioſus nihil cogitat, niſi de ventre et venere.* Both the agent and conſentient are felons: and this is conſonant to the law of God. § *Qui dormierit cum maſculo coitu fœmineo, uterque operatus eſt nefas, et morte moriatur.* And this accordeth with the ancient rule of law, *agentes et conſentientes pari pœna plectentur.*

Emiſſio ſeminis maketh it not buggery, but is an evidence in caſe of buggery of penetration: and ſo in rape the words be alſo, *carnaliter cognovit*, and therefore there muſt be penetration; and *emiſſio ſeminis* without penetration maketh no rape. *Vide* in the chapter of Rape. If the party buggered be within the age of diſcretion, it is no felony in him, but in the agent only. When any offence is felony either by the common law, or by ſtatute, all acceſſories both before and after, are incidently included. [d] So if any be preſent, abetting and aiding any to do the act, though the offence be perſonall, and to be done by one only, as to commit rape, not only he that doth the act is a principall, [e] but alſo they that be preſent, abetting, and aiding the miſdoer, are principalls alſo, which is a proof of the other caſe of Sodomy.

Or by woman.] This is within the purvien of this act of 25 H. 8. For the words be, if any perſon, &c. which extend as well to a woman, as to a man, and therefore if ſhe commit buggery with a beaſt, ſhe is a perſon that commits buggery with a beaſt, to which end this word [perſon] was uſed. And the rather, for that ſomewhat before the making of this act, a great lady had committed buggery with a baboon, and conceived by it, &c.

There be four ſins in holy ſcripture called *clamantia peccata*, crying ſins, whereof this deteſtable ſin is one, expreſſed in this diſtichon.

Sunt vox clamorum, vox ſanguinis, et ſodomorum,
Vox oppreſſorum, merces detenta laborum.

* This is grounded upon the word of God. viz. Gen. 19. 4, 5. Judges, 19. 22. Ut cognoſcamus eos,
§ Coke, lib. Intr. 352. Mich. 5 Ja. Coram rege.
[b] Ezek. 16. 49. Gen. 18. 29. Deut. 29. 23. Eſay, 13. 19. Jer. 23. 14. 49. 18. 50. 4. Luke, 17. 28, 29. 2 Pet. 2. 6. Jud. verſ. 7. Rom. 1. 26, 27. Sapient. 10. 6, 7.
[c] Levit. 20. 13. 1 Cor. c. 6. v. 10.
[d] 3 & 4 P. & Mar. juſtice Daliſons Reports. Stanf. Pl. cor. Pl. com. 97.
[e] 11 H. 4. 13. See the 2. part of the Inſtitutes in the expoſition upon the ſtatute of W. 1. ca. 13. and W. 2. ca. 34.

CAP. XI.

OF RAPE.

RAPE is felony by the common law, declared by parliament for the unlawfull and carnall knowledge and abuſe of any woman above the age of ten years againſt her will, or of a woman child under the age of ten years with her will, or againſt her will, and the offender ſhall not have the benefit of clergy. Deut. 22. 25. Interleges Alvredi, cap. 25. Canuti 49, 50. See W. 2. c. 34. W. 1. ca. 13. Rot. Parl. 8. E. 2. & Rot. Cauſ. 8 E. 2. m. 3. Quia in caſu quando aliquis, &c. 6 R. 2. ca. 6. 18 Eliz. cap. 6. Lib. 11. fo. 29. Alexander Poulters caſe.

What offence this was at the common law, and what acts of parliament have been enacted concerning the ſame; ſee in the ſecond part of the Inſtitutes in the expoſition upon the ſtatute of W. 1. ca. 13. and W. 2. ca. 34. and the firſt part of the Inſtitutes, ſect. 190. 7 H. 6. 2. 22 E. 4. 22. 6 H. 7. 4. b.

[a] The doubt that was made in 14 Eliz. at what age a woman child might be raviſhed, was the cauſe of the making of the [b] act of 18 Eliz. ca. 6. for plain declaration of the law. [That if any perſon ſhould unlawfully know and abuſe any woman-child under the age of ten years, every ſuch unlawful and carnall knowledge ſhould be felony, and the offender therein being duly convicted, ſhall ſuffer as a felon without allowance of clergy.]

[c] Although there be *emiſſio ſeminis*, yet if there be no penetration, that is, *res in re*, it is no rape, for the words of the indictment be, *carnaliter cognovit, &c.* See the 1. part of the Inſtitutes. ſect. 190. Mich. 19 E. 3. Coram rege. Rot. 159. London quod ipſam de puellagio ſuo felonicè et totaliter deſfloravit.

[d] In the parliament rolls we read what deteſtation hath been had of this hainous offence. At the petition of Iſabell late the wife of John Botiler of Beaufie in the county of Lancaſter knight, which Iſabell one William Pull of Wirrall in the county of Cheſter gent, ſhamefully did raviſh. It is enacted by authority of parliament, that if William Pull doe not yeeld himſelf after proclamation made againſt him, that he ſhall be taken as a traitor attainted. 7 H. 6. 2. 22 E. 4. 22. 6 H. 7. 4. b. [a] 18 El. f. 304. [b] 18 El. ca. 6.

[e] The ſame Iſabell by another petition ſhewed, how the ſaid William by dures and menace of impriſonment inforced her to marry him, and by colour thereof raviſhed her, for the which ſhe prayeth her appeal, which to her is granted. [c] See before in the next preceding chapter of buggery. [d] Rot. Parl. 15 H. 6. nu. 14.

[f] Margaret late the wife of ſir Thomas Malefant knight, made the like complaint againſt one Lewis Leyſon aliàs Gethey a Welchman. Againſt whom the like order is taken, as was for the ſaid Iſabell: onely where the rape was committed in Wales, it is enacted, that the ſame ſhall be tried in Somerſetſhire. [e] In the ſame roll nu. 15. [f] Rot. Parl. 18 H. 6. nu. 28.

[g] Upon complaint of Henry Beamont ſon and heir of ſir Henry Beamont knight, and Charles Vowell eſquire, &c. againſt one Edward Lancaſter of Skipton in Craven eſquire, for taking away dame Joan Beamont the late wife of the ſaid Sir Henry, being lawfully married to the ſaid Charles, and for that the ſaid Edward married the ſaid dame Joan againſt her will, and raviſhed her. Againſt Edward Lancaſter and others, remedy is given by appeal, and further [h] upon occaſions happening thereupon, the ſtatute [g] Rot. Parl. 31 H. 6. nu. 72. [h] 31 H. 6. ca. 9.

ſtatute of 31 H. 6. was made, which giveth remedy to a woman enforced to be bound by ſtatute or obligation, as by the act it appeareth.

It is read in ſtory, that chaſt Lucretia being raviſhed, ſhe was found in extreme heavineſſe, and it was demanded of her, *Salvan?* ſhe anſwered, *Quomodo mulier ſalva eſſe poteſt læſa pudicitia?* and yet thereof it is truly ſaid, *Duo fuerunt, et unus commiſit adulterium.*

Gen. 34. In the holy hiſtory you ſhall read, *Dinam cum vidiſſet Sichem filius Hemor Hevei princeps terræ illius, adamavit et rapuit, &c.* Obſerve well what followed thereupon. Likewiſe, *Ammon prevalens viribus*

2 Sam. 13. 14. 19. *ſuis oppreſſit Thamar ſororem ſuam, et cubavit cum ea, &c. quæ aſpergens cinerem capiti ſuo, ſciſſa talari tunica, impoſitis manibus ſuper caput ſuum ibat ingrediens et clamans &c.* And obſerve alſo the end of the offender.

[61]

CAP. XII.

Felony for carrying away a Woman againſt her Will, &c.

Exod. 21. 16. Deut. 24. 7. * 1 Tim. 1. 10. WE have thought good next after Buggery and Rape, to ſpeak of the ſtealing of women, becauſe the * apoſtle doth rank, after the ſodomite, him that is plagiarius, ſo called, becauſe *lege Flavia plagis damnaretur.* And we will begin with the ſtatute of 3 H. 7. cap. 2.

3 H. 7. c. 2. 39 El. cap. 9. Where women, as well maidens, as widows and wives, having ſubſtances, ſome in goods moveable, and ſome in lands and tenements, and ſome being heirs apparant unto their anceſtors, for the lucre of ſuch ſubſtances, been oftentimes taken by miſdoers, contrary to their will, and after married to ſuch miſdoers, or to other by their aſſent, or defoyled, to the great diſpleaſure of God, and contrary to the kings laws, and diſparagement of the ſaid women, and utter heavineſſe, and diſcomfort of their friends, and to the evill enſample of all other: it is therefore ordained, eſtabliſhed, and enacted by our ſoveraign lord the king, by the advice of the lords ſpirituall and temporall, and the commons in the ſaid parliament aſſembled, and by authority of the ſame, That what perſon or perſons from henceforth that taketh any woman ſo againſt her will unlawfully, that is to ſay, maid, widow, or wife, that ſuch taking, procuring, and abetting to the ſame, and alſo receiving wittingly the ſame woman ſo taken againſt her will, and knowing the ſame, be felony. And that ſuch miſdoers, takers, and procurators to the ſame, and receytors, knowing the ſaid

offence in form aforeſaid, be henceforth reputed and judged as principall felons. Provided alway that this act extend not to any perſon taking any woman, only claiming her as his ward, or bondwoman.

This act on the offenders part doth extend to all degrees, and to all perſons, but extendeth not to all women: for on the womans part four things are neceſſarily required to make the offence felony. Firſt, that the maid, wife, or widow have lands or tenements, or moveable goods, or be an heir apparent. Secondly, that ſhe be taken away againſt her will. Thirdly, that ſhe be married to the miſdoer, or to ſome other by his conſent, or be defiled, (that is, carnally known) for if theſe concurre not, the miſdoer is no felon within this ſtatute, but otherwiſe to be puniſhed. And ſo it was reſolved, 3 & 4 Ph. and Mar. And after reſolved by all the judges of England upon adviſed conſideration of this act of 3 H. 7. and upon conſultation, and conference between them, as the lord Dier hath reported under his own hand, which I have ſeen, but the report thereof is omitted in the print; and the indictments grounded upon this ſtatute, are according to this reſolution. Fourthly, that ſhe be not ward, or bondwoman to the perſon that taketh her, or cauſeth her to be taken only as his ward, or bondwoman.

3 & 4 Ph. and Mar. juſtice Daliſons report. Mich. 26 Eliz. Dier manuſcript. And ſo reſolved by parliament. in anno 39 El. cap. 9.

By this act, not only the takers, but the procurers, abetters of the felony, and receivers of the ſaid woman wittingly, knowing the ſame, be all adjudged as principall felons: the like whereof we finde not in any other ſtatute, that we remember. But by a conſtruction of the common law, they that receive the miſdoers, and not the woman, are acceſſories; for this act maketh the receivers of the woman, &c. principals.

Nota, quia rara.

[62]

For the odiouſneſſe of this offence, the benefit of clergie is taken away from all the offenders againſt the ſaid act. Vid. Kelway, and Stanford.

39 Eliz. cap. 2. Kelway, 81. b. Stanf. pl. cor. 37. b.

See a good and profitable ſtatute made for ſuch as take away maidens or women children, &c. within the age of ſixteene yeares (though it be not againſt their will) without conſent of parents, &c. and a penalty impoſed for deflowring, or contracting matrimony with ſuch maids or women-children; and further, the forfeiture which ſuch maid or woman-childe undergoe, which conſent to ſuch contract, &c. But becauſe we are now to ſpeak of felonies, whereunto that act extends not, we refer the reader to the ſtatute itſelfe. Only we will adde a caſe which we find in the parliament roll.

4 & 5 Ph. and Mar. cap. 8. Hil. 34. Eliz. lib. 3. fo. 37. Ratcliffes caſe.

The Lady Nevill of Eſſex complained in parliament, that John Brewſe and others brake her houſe at London, and violently took thereout Margerie the daughter of John Nierford her ſonne (by her firſt huſband) and carried the ſaid Margerie away to the houſe of Sir Robert Howard knight; and they kept away the ſaid Margerie, to the end ſhe ſhould not purſue in court chriſtian, for the annullation of a contract of matrimony, againſt the ſaid John Brewſe. This was holden ſo great an offence, as the ſaid Sir Robert was committed by the lords to the Tower of London, and he after found ſurety, and promiſed to do his uttermoſt to bring forth the ſaid Margery by a day prefixed, or elſe to yield himſelf priſoner to the

Rot. Parl. 2 R. 2. nu. 34.

Tower

Tower againe: but it ſeems the maid was reſtored to her mother againe, &c. for I find no further proſecution of that cauſe. See hereafter, cap. 45, *in fine*. 43 Eliz. cap. 13.

CAP. XIII.

Of Felonie for cutting out of Tongues, and putting out of Eyes, &c.

5 H. 4. ca. 5.

IF any man doe cut out the tongue, or put out the eyes of any of the kings lieges, of malice prepenſed, it is felony.

The miſchiefe before this ſtatute was, that when one had been beaten, wounded, maimed, or robbed, &c. the miſdoers, to the end that the party grieved might not be able to accuſe them, did cut out their tongues, or put out their eyes, pretending the ſame to be no felony: and therefore it is ordained and eſtabliſhed to be felony by this act.

Here it is to be obſerved, that where it doth appear by the preamble of this law, that this offence had been before this act daily done: this law did ſo terrifie offenders, as we remember not, that we have read in any book or record, any to be indicted, &c. upon this law, above one at the moſt. And of all ſtatutes theſe are to be preferred, which prevent offences before they be done, before thoſe which puniſh them after they be done. And therefore in the making of this law there was *ſalutaris ſeveritas, et beata ſecuritas.*

Malice prepenſed.] That is, voluntary and of ſet purpoſe, though it be done upon a ſudden occaſion: for if it be voluntary, the law implyeth malice.

Bract. lib. 3. fo. 144. b.

We read in Bracton, that the cutting off of a mans privie members was felony by the common law: for he ſaith, *Quid dicitur ſi quis alterius virilia abſciderit, et illum libidinis cauſa vel convitii caſtraverit? tenetur ſive hoc voluerit fecerit, vel invitus, et ſequitur pœna aliquando capitalis, aliquando perpetuum exilium cum omni bonorum ademptione.* And agreeable thereunto, I finde a record in Bracton's time to this effect: *Henricus Hail et A. uxor ejus capti et detenti ſunt in priſona de Evilcheſter, eò quòd reſtati fuerunt quòd ipſi abſciderunt virilia Johannis Monachi, quem idem Henricus deprehendit cum prædicta A. uxore ejus, &c.* Fleta ſaith, *Si quis caſtratus fuerit, talis pro mahemiato poterit adjudicari.* And, therewith agreeth old juſtice Sennal in the Mirror; and ſo is the law holden at this day. And in the Appeale and Indictment of Mayhem it is ſaid, *felonicè mayhemavit*: whereof we ſhall ſpeak more hereafter in his proper place. Cutting off of eares is no felony, as it appeareth by the ſtatute of 37 H. 8. Vid. Stanf. Pl. cor. 27. a. The offender ſhall have the benefit of his clergie.

Rot. Clauſ. anno 13 H. 3. m. 9.

[63]

Fleta, lib. 1. ca. 38. Mir. ca. 1. § 9. De homicidio. See hereafter ca. 53. of Mayhem. 37 H. 8. cap. 6. Mir. cap. 4. De artic. de Eire.

CAP. XIV.

OF BURGLARIE.

A BURGLAR (or the perſon that committeth burglary) is by the [a] common law a felon, that in the night breaketh and entreth into a manſion houſe of another, of intent to kill ſome reaſonable creature, or to commit ſome other felony within the ſame, whether his felonious intent be executed or not. We call it in Latin *burglaria:* and in *ſtatuto de officio coronat.* the offenders are called *raptores domorum.*

[a] Inter leg. Edm. cap. 6. fo. 76. 22 Deut. 2.

This word [b] *burglar*, is derived of theſe two words, viz. *burgh*, ſignifying an houſe, and *laron* ſignifying a thief, as it were an houſe-thiefe. [c] The Saxons called it hurbnec, *inter ſcelera inexpiabilia.* And aptly was it derived from *latro:* for,

[b] Lib. 4. fo. 39. Brooke's caſe.

[c] Inter leges. Canuti, fo. 118. cap. 61. Lamb.

[d] *Ut jugulent homines, furgunt de nocte latrones.*

[d] Horace lib. 1. epiſt.

[e] Britton calleth him a *burgeſſor*. Then let us peruſe the branches of this deſcription.

[e] Britton, fo. 17.

In the night.] [f] The word in the indictment or appeale, is, *noctanter, id eſt, noctu.* The natural day is divided *in lucem*, light, which is *dies ſolaris*, and *in tenebras*, which is night. [g] And therefore as long as the day-light continues, whereby a mans countenance may be diſcerned, it is called day: and when darkneſſe comes and day-light is paſt, ſo as by the light of day you cannot diſcerne the countenance of a man, then it is called night. [h] *Poſuiſti tenebras, et facta eſt nox, in qua pertranſeunt beſtiæ ſilvæ; ſol oritur et congregatæ ſunt, exit homo ad opus et operationem ſuam, et redit veſpere.* This doth aggravate the offence, ſith the night is the time wherein man is to reſt, and wherein beaſts runne about ſeeking their prey.

[f] 4 E. 6. Br. cor. 185. Stanf. pl. cor. fo. 30.

[g] 3 E. 3. cor. 293.

[h] Pſal. 164. Lib. 7. fo. 6. b. Milborns caſe.

In ancient records *crepuſculum* was ſignified, when it was ſaid *Inter canem et lupum:* for when the night begins, the dog ſleeps, and the wolf ſeeks his prey. For ſo we finde the entry oftentimes in the raigne of E. 1. as taking one example for many. [i] *Margeria filia Nicolai de Okele appellat Johannem Choſe pro raptu, et pace regis fracta, die Martis, &c. inter canem et lupum, id eſt, inter diem et noctem, vel in crepuſculo, Anglicè* twylight.

[i] Tr. 7 E. 1. coram rege, Rot. 12 Glocr.

[k] *In placito de domo combuſta malitioſè hora veſpertina, ſcilicet inter canem et lupum venerunt malefactores, &c. B. &c.*

[k] Placita corone apud novum caſtrum, anno 24 E. 1. Rot. 6. in dorſo.

[l] *Ignitegium, à tegendo ignem*, i. coverle fue, *hora octava poſt meridiem.*

[l] Hil. 3. R. 2. coram rege Rot. 8. London. John Imperials caſe.

[m] Bracton ſaith, *Si quis furem nocturnum occiderit, ita demum impune foret, ſi parcere ei ſine periculo ſuo non potuit; ſi autem potuit, aliter erit, in manibus enim regis ſunt vita et mors hominum, ſicut coram rege apud Windeſore de quodam homine de Cocham, coram Gulielmo de Ralegh tunc juſticiario, cui dominus rex in tali caſu perdonavit mortem.* Agreeable hereunto was the law of the Twelve Tables, *Si noctu furtum factum ſit, jure cæſus eſt.*

[m] Bract. lib. 3. fo. 144. b. Pardon.

Break

a Mar. Dier 99.

Break and enter.] The words of the indictment be, *Fregit et intravit:* and this is understood of an actuall breaking of the house, and not of a breaking in law: for every entry into the house by a trespasser, is a breaking in law: but in case of a burglary, every entry is not a breaking of the house, for the words of the indictment be, *Felonicè et burglariter fregit, &c.* As if the doore of a mansion house stand open, and the thief enter into the house with a purpose to steale, this is a breaking of the house in law, and yet no burglary, because there must be an actuall breaking. So it is if the window of the house be open, and a thiefe with a hook or other engine draweth out some of the goods of the owner: this is no burglary, because there is no actuall breaking of the house. But if the thiefe breaketh the glasse of the window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actuall breaking of the house. It is deemed an entry, when the thiefe breaketh the house, and his body, or any part thereof, as his foot, or his arme, is within any part of the house: or when he putteth a gun into a window which he hath broken, or into an hole of the house which he hath made, of intent to murder or kill; or as hath been said, a hook or other engine into any part of the house which he hath broken, of intent to steale: this being put by him into the house, is an entry and breaking of the house. But if he doth barely break the house without any such entry at all, that is no burglary, for it must be *fregit et intravit.*

Stanf. pl. cor. 30. a. Dier 1 Mar. 99. a. 22 Ass. p. 39. 95.

b 13 H. 4. 13.

b If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing neere to the doore, or about other parts of the house, or at a lanes end, or some orchard gate, or field gate, or the like, to watch that no help shall come to defend and aide the owner or dweller; this is burglary in all.

That which is done *in fraudem legis*, the law giveth no benefit thereof to the party. As if thieves come in the night with hue and cry, pretending that they be robbed, and shall require the constable to search for the felons, and whilest he goeth with them into some mans house, they binde and rob the constable, and dweller, this is burglary; for in judgement of law it is their act.

Into a mansion house.] The indictment saith, *Domus mansionalis*, a mansion or dwelling house.

c 2 E. 6. Br. cor. 180. Britton, fo. 17.

c *Domus mansionalis* is divided into two branches, viz. to inset edifices, as hall, parler, buttry, kitching, and lodging chambers, &c. and the outset buildings, as barnes, stables, cowhouses, dairies, &c. all these are parcels of the mansion-house, and will passe by the name of *domus mansionalis.* And albeit every mansion-house hath not all these buildings, yet every house for the dwelling and habitation of man is taken to be a mansion-house, wherein burglary may be committed.

d Lib. 4. fo. 40. in Brocks case. Hil. 38 Eliz. per les justices, ibid.

d If a man hath a mansion house, and upon some accident he and all his family some part of the night are out of the house, and in the mean time a thief break and enter into the house, of intent to steale; this is burglary, although neither the owner nor any of his family is in the house: for the indictment of burglary is, *domum mansionalem, &c. fregit, &c.* and this is *domus mansionalis.*

e 23 H. 8. cap. 1. 5 E. 6. cap. 9. See *inter leges Alvredi.* c. 6.

e See hereafter the statutes of 23 H. 8. and 5 E. 6.

If

[d] If a man do break and enter a church in the night, of intent to ſteale, &c. this is burglary, for *eccleſia eſt domus manſionalis omnipotentis Dei.* [e] *Fruſtra legis auxilium invocat, qui in legem committit.* [f] *Domus mea domus orationis vocabitur, vos autem feciſtis illam ſpeluncam latronum. Sacrilegium derivatur à ſacro et legere, id eſt, furari.*

[d] Britton. fo. 17. Dier, 1 Mar. 99. 22 E. 3. tit. cor. 264. 22 Aſſ. p. 95. 26 Aſſ. 19.

[e] 27 Aſſ. 42.

A tent or booth in fair or market, is not *domus manſionalis*, but of another name or kind; [g] but that is provided for by the ſtatute of 5 E. 6. cap. 9. whether the robbery be done in the night, or in the day, the owner, &c. being within the ſame, ſleeping or waking. But a ſhop wherein any perſon doth converſe being parcell of a manſion-houſe, or not parcell, is taken for a manſion-houſe.

20 E. 2. Cor. 283. 12 E. 3. Cor. 120. Rot. Clauſ. 3 E. 3. m. 2 & 18. the ordinary may allow clergy for ſacriledge. Lib. 11. fo. 29.

Likewiſe a chamber or room, be it upper or lower, wherein any perſon doth inhabit or dwell, is *domus manſionalis*, in law.

[65]

[f] Matth. 21. 23.

Our ancient authors and old records did expreſſe burglary under this word, *hamſuckne*, or *hamſokne*. The firſt is derived from two Saxon words, viz. of *ham*, that ſignifieth a manſion-houſe, *domus manſionalis*, which to this day we call our home: and *ſuckne* or *ſuccen*, that is, *ſeeken*, as much to ſay, as to ſeek a man in his houſe to ſlay or rob him.

[g] 5 E. 6. cap. 9.

It is to be noted that our ancient authors, nor our old bookcaſes do diſtinguiſh between the day and the night, when the offence ſhould be committed in the houſe, ſave only the Mirror.

Si quis hamſockne, *quæ dicitur invaſio domus contra pacem domini regis in domo ſua ſe defenderit, et invaſor occiſus eſt, imperſecutus et inultus remanebit, ſi ille quem invaſit aliter ſe defendere non potuit: dicitur enim quòd non eſt dignus habere pacem, qui non vult obſervare eam.* And the Mirror ſaith, *Hamſockne de auncient ordinance eſt peche mortel, car dròit eſt que cheſcun eyt quiet en ſon hoſtel, q. a la ley eſt.*

Bracton, lib. 3. fo. 144. b. Britton, fo. 33. Statut. Walliæ, fo. 6. ter. de Snoden. Mirr. cap. 1. § 11. de Hamſockne.

Others derive *hamſockne* from *ham*, which of both ſides is confeſſed to be a manſion-houſe, and *ſockne* which ſignifies a court, as much to ſay, as to have juriſdiction, or to hold plea of offences done to a man in his houſe.

Expoſit. vocab. inter ſtatuta. Fleta, lib. 1. ca. 42.

One was indicted, *Quod clauſum I. S. fregit, &c. ad ipſum interficiendum.* This is not felony without any act done, though it were *noctanter*: for the appeale and indictment of burglary is *quod domum manſionalem, &c. fregit et intravit.* So as neither cloſe nor any other place, but the manſion-houſe only is required to make burglary. But burglary may be committed as well in the outſet buildings, as in the inſet, for all are parts of the manſion-houſe, and he that breaketh any of the outſet buildings doth break *domum manſionalem*, as well as he that breaks the inſet.

13 H. 4. fol. 7. tit. cor. 229.

Of intent to kill.] If a man be indicted, that he in the night time did felonioufly break the houſe of I. S. *ad verberandum ipſum I. S.* this is no burglary, becauſe it was but to beat, and not to kill. But if it were *ad interficiendum I. S.* then it is burglary, though he never touched him; for the intent muſt be to commit felony, and not treſpaſſe, or other thing that is not felony, the words of the appeale or indictment being, *Quod felonicè et burglariter fregit, et intravit, &c.* ſo as there muſt be a felonious and burglarious intent.

13 H. 4. ubi ſup.

Or to commit ſome other felony.] They be burglers which break any houſe or church in the night, although they take away nothing:

22 E. 3. cor. 264. 22 Aſſ. 39. & 95.

thing: otherwiſe it is of robbery, as ſhall be ſaid hereafter. See Stanf. Pl. Cor. 30. b.

23 H. 8. cap. 1. 5 E. 6. ca. 9.

The ſtatutes of 23 H. 8. cap. 1. and 5 E. 6. cap. 9. do not define what burglary is, but take away the benefit of clergy from certaine kindes of burglary. As when an actuall robbery is done; and when the owner or dweller, &c. is put in fear, &c. or when the owner or dweller, &c. is ſleeping or waking within any place within the precinct of the ſame houſe; theſe circumſtances do aggravate the burglary: and therefore the makers of thoſe ſtatutes took away the benefit of clergie not in all caſes of burglary, but in thoſe particular caſes where a robbery is done, &c. But the ſtatute of 18 Eliz. cap. 6. hath taken away the benefit of clergie in all caſes of burglary: and hereby a good and equall proportion is kept in all caſes of this nature. And both acts of parliament, and the reſolution of judges do well agree together, which ſome not well obſerving have publiſhed manifeſt errours, which being in caſe of life are fit to be reformed.

Clergie. 18 Eliz. cap. 6.

39 Eliz. ca. 15.

If any man ſhall break a houſe by day, and take away thence money or goods to the value of five ſhillings or more, in any part of a dwelling houſe, or outhouſe belonging to the ſame, though no perſon be therein, for this felony he ſhall loſe the benefit of his clergy, ſo as for this offence the party ſhall ſuffer death, as in caſe of burglary.

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CAP. XV.

Of BURNING of HOUSES.

De Incendiariis inter leges Æthelſtani, cap. 6. fo. 61. Et Canuti, cap. 61. fo. 118. *Huſbærnet* numeratur inter ſcelera inexpiabilia.

HAVING now ſpoken of burglaries, and felonies concerning houſes, there reſteth one other of that kind, wherewith we will conclude this diviſion, and that is, Burners of houſes: which being a felony by the common law, let us ſee, what our ancient authors, and old parliaments, and records have left unto us thereof.

[a] Cap. Itineris.

[a] The ancient article of the eire was, *De incendiariis noſturnis vel diurnis, et combuſtionibus tempore pacis nequiter perpetratis.*

[b] Bract. l. 3. 146. b.

[b] Hereof Bracton ſaith, *Si quis turbata fedilione incendium fecerit nequiter et in felonia, vel ob inimicitiam, vel alia de cauſa, capitali ſententia punietur. Nequiter dico, quia incendia fortuita, vel per negligentiam facta, et non mala conſcientia, non ſic puniuntur, quia civiliter agitur contra tales.*

Brit. fo. 16.

Britton ſaith, *Soit inquiſe de ceux que felonieuſment en temps de peace aient auters blees, ou auters meaſons arſes, et ceux que ſerr' de ceo attaint, ſoient arſes, iſſint que ils ſoient punies per meſme le choſe dont ilz pecherent.*

Fleta li. 1. ca. 35. De combuſtionibus. Mirror ca. 1. § 8. De Ardours cap. 2. § 11. De Appeal darſon. & § 12. cap. 3. § Al arſon.

Fleta ſaith, *Si quis ædes alienas nequiter ob inimicitiam, vel prædæ cauſa tempore pacis combuſſerit, et inde convictus fuerit per appellum, vel ſine, capitali debet ſententia puniri.*

The Mirror, *Ardours ſont, que ardent citie, ville, maiſon home, maiſon beaſt, ou auters chateux, de lour felonie en temps de pace pur hame*

haine ou vengeance, &c. In Appeal *de arſon. Iſſint ieo diſe, &c. Que Sebright illonque eſt defamy, &c. de ceo que a tiel jour, &c. en tiel meaſon, * ou biens, miſt le feu, &c.* And afterwards *en reſpons al arſon, Al arſon poit il dire, que la venture avient de miſchance, et nient de felony purpenſe.*

* Ou biens. W. 1. ca. 15.

So hainous was this offence, that in anno 3 E. 1. it was declared by parliament, *Que ceux queux ſont priſes pur arſon filoniouſment fait, ne ſoient en aſcun manner repleviſables. Adjudicantur ſuſpendi, qui ex malitia præcogitata combuſſerunt magnam partem de Lynne in com. Norff.*

Hil. 7 E. 2. Coram rege Rot. 24. Norff. 8 H. 6. ca. 6. See 15 H. 6. nu. 23.

Upon diſperſing of bills, threatning burning of houſes, &c. was made high treaſon, whereof more hereafter: but that act is repealed by 1 E. 6. cap. 12. and 1 Mar. Now upon that which hath been ſaid, our purpoſe is to frame a deſcription of this felony, as may alſo be warranted by our year-books, and the common opinion and experience at this day.

Burning is a felony at the common law, committed by any that maliciouſly and voluntarily, in the night or day, burneth the houſe of another.

Now let us peruſe this deſcription, by all his materiall parts.

All the ancient authors.

Burning.] Putting of fire into any part of a houſe, whereby that part burneth. For it is neceſſary, that there be a burning, but it is not neceſſary, that all or any part be wholly burnt, nor that the fire hath any continuance, but the intent only ſufficeth not. As if one put fire into any part of a houſe, and it burneth not, this is no felony, for the words of the indictment be, *incendit, et combuſſit.* Again, if it doth burn, though it goeth out of it itſelf, it is felony.

3 H. 7. 10. 11 H. 7. 1. 23 H. 8. ca. 1. 25 H. 8. ca. 3. 5 & 6 E. 6. ca. 9. 4 & 5 Ph. & Mar. cap. 4. Lib. 11. fo. 35. Alexander Poulters caſe. 3 H. 7. ubi ſupra.

By the common law.] This is proved by all the ancient authors, acts of parliament, and books aforeſaid. And the reaſon thereof is, for that burning of houſes being an hoſtile action, is preſumed in law to be done maliciouſly for revenge, and as an enemy, to conſume the ſame by fire in time of peace. It was made in ſpeciall manner high treaſon, (as before is ſaid) viz. if any threatned by caſting of bils, to burn an houſe, if money be not laid in a certain place, and after did burn the houſe: but this treaſon is repealed by 1 E. 6. ca. 12. and 1 Mar. but yet the felony remaineth ſtill: for *in proditione* (as hath been ſaid) *implicatur felonia.*

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8 H. 6. ca. 6. 3 H. 7. 10. per Brian. High treaſon. Nota.

Maliciouſly and voluntarily. Proved alſo by the words of the indictment, which be, *voluntariè, ex malitia ſua præcogitata, et felonicè.* For if it be done by miſchance, or negligence, it is no felony, as before it appeareth.

The law doth ſometime imply, that the houſe was burnt maliciouſly and voluntarily. As if one intend to burn the houſe of A only, and not the houſe of B. and yet in burning the houſe of A. the houſe of B. is burnt; in this caſe the burning of the houſe of B. is felony, becauſe it proceeded of the malicious and voluntary burning of the houſe of A. and the event ſhall be coupled to the cauſe, which was voluntary, and malicious: and therefore in the indictment for the burning of the houſe of B. it ſhall be ſaid, *voluntariè ex malitia ſua præcogitata, et felonicè, &c.*

Pl. Com. fo. 475.

The houſe of another.] This is not only intended of inſet houſes, parcell of the manſion-houſe, but to the outſet alſo; as barn, ſtable,

cow-houſe, ſheephouſe, dairy houſe, millhouſe, and the like, par
cell of the manſion houſe: but burning of a barn, being no parce
Tr. 44 Eliz. Coram rege. Ro. 20. 229. Lib. Int. Coke, fo. 25. b. lib. 4. fo. 20. Barhams caſe. of a manſion houſe, is no felony: and yet if there be corn or ha within it, the burning thereof is felony, though the barn be no part of a manſion houſe. * But the offender is not ouſted of hi clergy, but where he burns ſome part of a manſion houſe, or a bar with corn.

* Pl. Com. 475. Note the ancient authors extended this felony, further ther houſes, viz. to ſtacks of corn, wayns or carts of cole, wood o other goods. And it is ſaid in 3 H. 7. *ubi ſupra, Certum eſt quòd crematio domorum felonicè fuit felonia per communem legem.*

3 & 4 E. 6. c. 5. The attempt to burn a ſtack of corn, was made felony by the ſtatute of 3 and 4 E. 6. but this is repealed by 1 Mariæ.

37 H. 8. ca. 6. Burning of the frame of a houſe, was made felony by the ſtatute of 37 H. 8. becauſe the frame of a houſe is no houſe: but that is repealed by 1 E. 6. ca. 12. and 1 Mariæ.

43 El. ca. 13. 43 El. ca. 13. It is felony if any within the counties of Cumberland, Northumberland, Weſtmerland, or the B. of Dureſme wilfully, and of malice burn or cauſe to be burnt any barn or ſtack of corn or grain, without benefit of clergy.

Bract. lib. 3. fo. 146. b. Note a diverſity between the indictment of burglary and burning; for the indictment of burglary muſt ſay (as hath been ſaid) *domum manſionalem*, but ſo need not the indictment of burning, but *domum*, viz, a barn, &c. malt houſe, or the like.

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CAP. XVI.

OF ROBBERY.

See the 1. part of the Inſtitutes. Sect. 501. Cuſtum. de Norm. cap. 71. ROBBERY is a felony by the common law, committed by a violent aſſault, upon the perſon of another, by putting him in fear, and taking from his perſon his money or other goods of any value whatſoever. [a] See *inter leges Canuti, apertæ compilationes numerantur inter ſcelera hominum inexpiabilia.*

[a] Int. leges Canu. cap. 61. fo. 118. Lamb.

[b] Bracton, li. 3. fo. 146. *Robbery.*] [b] It is derived *de la robe*, both becauſe in ancient times (as ſometime yet is done) they bereave the true man of ſome of his robes or garments, and alſo for that his money or other goods are taken from his perſon, that is, from or out of ſome part of his garment, or robe about his perſon. And is ranked in this place, for that it concerneth not only the goods, but the perſon of the owner. We call it, *roberia et rapina*, and the theef *raptor*.

Bracton, lib. 3. fo. 150. b. Britton, fo. 22. Fleta, lib. 1. ca. 37. Mirror cap. 1. §. 10. Britton & Fleta Ubi ſupra. 14 E. 3. cor. 115. Whereof Bracton ſaith, *Eſt enim quaſi furtum rapinæ, quæ idem eſt, quantum ad nos, quod roberia, et eſt genus contrectationis contra voluntatem domini, et ſimilis pœna ſequitur utrunque delictum, unde prædo dicitur fur improbus: quis enim magis contrectat rem alienam invito domino, quam ille qui rapit?*

Felony by the common law.] This is agreed of, of all, both ancient and late, without any queſtion. And it is deemed in law to be amongſt the moſt hainous felonies, *crimen improbiſſimum.*

Violent

Violent assault.] This agreeth with the indictment, *violenter et felonicè cepit, &c.* Bract. li. 3. fo. 150. b.

By putting him in fear.] This agreeth also with the indictment: and this circumstance maketh the difference between a robber and a cutpurse: both take it from the person, but this takes it *clam et secretè*, without assault or putting in fear, and the robber by violent assault, and putting in fear. If one cut a purse, with money in it above twelve pence, he shall be hanged, and the benefit of clergy is taken from him. But of ancient time the punishment was otherwise. *S. capius in London cum bursa quam scidit cum tribus solidis, et hoc non potuit dedicere, et ideo amittat dextrum pollicem.* Britton saith, *Des cinfors des burses, voylous que celuy que la burse coupa, si auter mavieſe ne eyt fait, eyt judgement de pillory; et filz eyent emble auter chyse meinder de 12 deniers, perdent un oraile, et si le chose passe 12 deniers, eyent judgment de mort.* 10 H. 3. cor. 434. Britton, fo. 24. b.

By taking.] The words of the indictment be, *violenter et felonicè cepit. Hic opus est interprete.* For it must be understood, that there is an actuall taking in deed, and a taking in law, and that may be, when a thief receiveth, &c. For example: if thieves rob a true man, and find but little about him, take it, this is an actuall taking; and by menace of death, compell him to swear upon a book to fetch them a greater sum, which he doth, and deliver it unto them, which they receive, this is a taking in law by them, and adjudged robbery: for fear made him to take the oath, and the oath, and fear continuing, made him bring the money, which amounteth to a taking in law, and in this case there need no speciall indictment, but the generall indictment (*quòd violenter et felonicè cepit,*) is sufficient. And so it is, if at the first, the true man for fear deliver his purse, &c. to the thief. 44 E. 3. 14. 4 H. 4. 2.

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This word [*cepit*] necessarily implieth, that the thief must be in possession of the thing stolen: for example, if the bag or purse of the true man be fastned to his girdle, &c. and the thief the more easily to take the bag or purse, doe cut the girdle, whereby the bag or purse falleth to the ground, this is no taking, for the thief had never any possession thereof, *et sic de similibus:* but if the thief had taken up the bag, or purse, and in striving had let it fall, and never took it again, this had been a taking, because he had it in his possession; for the continuance of his possession is not required by law.

From his person.] The words of the indictment be, *à persona, &c.* If the true man seeking to escape, for the safeguard of his mony, cast it into a bush, which the thief perceiving, takes it; this is a taking in law from the person, because it is done at one time. If the true man had cast off his surcote, or other uppermost garment, and the same lying in his presence, a thief assault him, &c. and take the surcote, this is robbery; for that which is taken in his presence, is in law taken from his person: and so it is of the horse of a true man, which stands by him, *et sic de similibus.* 14 E. 3. cor. 215.

In ancient authors and records, in pleas of the crown, you shall read of *sakebere, &c.* whom we will derive and explain. *Sakebere, sacbere,* or *sacburgh, sac,* or *sak* is an ancient French word, and signifieth a bag, purse, or powch. So that *sackbere* is he that did bear the bag, &c. and in legall understanding, is he that was robbed of his mony in his bag. And this agreeth with the interpretation there-

Bract. lib. 3. fo. 150. b.

of by Bracton, viz. *Furtū verò manifeſtū eſt, ubi latro deprehenſus eſt ſeiſitus de aliquo latrocinio, viz.* hondhabende, and bacberende, *et inſecutus fuerit per aliquē cujus res illa fuerit, qui dicitur* facaburth. And herewith agreeth Fleta, lib. 1. c. 42. § *Sunt autem*, &c. And Britton, fo. 22. b. & 72. b. agreeth herewith, and calleth him *ſakebere*; and ſo doth juſtice Stanford, Pl. Cor. fo. 28. term him, which (as we take it) is his right name derived of theſe two words, *ſac*, and *bere*, that is, he that did bear the bag, &c.

Fleta, l. 1. ca. 42. Britton fo. 22. b. & 72 b. Stanf. fo. 28.

Of what value ſoever.] Though it be under the value of twelve pence, that is taken; (as to the value of a penny or two pence) it is robbery, but ſomewhat muſt be taken, for the aſſault only to rob without taking ſome money or goods is no felony, and ſuch opinions, as ſeem to the contrary were maintained by that, which then was anciently holden, *Quòd voluntas reputabatur pro facto.* See before, cap. High Treaſon, fo. 5. *inſidiatur viarum.*

14 E. 3. cor. 115. 22 Aſſ. p. 39. 27 Aſſ. 38. 24 E. 3. 42. 13 H. 4. 7. 9 E. 4. 28.

CAP. XVII.

In what Caſes Breakers of Priſons are Felons.

In the ſecond part of the Inſtitutes upon the ſtatute of 1 E. 2. De frangentibus priſonam.

WE have ſpoken ſufficiently hereof in his proper place, in the expoſition of the ſtatute of 1 E. 2. *de frangentibus priſonam.* Only this is to be added, that in caſe of felony, the offender ſhall have the benefit of clergy, for the breach of priſon.

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CAP. XVIII.

Where Eſcape Voluntary is Felony.

WE have alſo ſpoken ſomewhat hereof in the expoſition of the ſaid act of 1 E. 2. And the voluntary eſcape can be no felony in the gaoler, unleſſe the priſoner be under cuſtody by lawfull warrant expreſſing the offence, which you may ſee there at large.

2. There muſt be a felony done at the time of the eſcape: for a relation which is but a fiction in law, ſhall never make a man a felon, as likewiſe there it appeareth. See Stanford, lib. 1. cap. 26, &c.

CAP. XIX.

Of Felonie by ſtealing, carrying away, withdrawing or avoiding of Records, &c.

SI aſcun record (1) *ou parcel dicel, breif, retorne, pannell, proces, ou garrant d'attorney* (2) *en les courts le roy* (3) *de chancery* (4) *eſchequer, lun banke, ou lauter, ou ſa treaſorie* (5) *ſoit voluntarement emblee, emport, retreit, ou avoide* (6) *per aſcun clerke ou auter perſon* (7), *a cauſe de quel aſcun iudgement* (8) *ſoit reverſe* (9): *que tiel embleor, emporter, retraher, et avoider, lour procurators, councellors, et abettors* (10) *ent endites* (11) *et ſur proces ſur ceo fait, ont duement convicts per lour proper confeſſion, ou per enqueſts prender des loiall homes, (dont la moitye ſoit des homes daſcun court* (12) *de meſme les courts, et lauter moitye des auters) ſoient adjudges pur felons, et encorgent la paine de felony, et que les iudges de les courts de lun banke, ou de lauter eyent power de oier et terminer, tielz defaults devant eux, et ent fait punition, come devant eſt dit* (13). 8 H. 6. cap. 12.

IF any record or parcell of the ſame, writ, retorne, panell, proceſſe or warrant of attorny in the kings courts of chancery, exchequer, the one bench or the other, or in his treaſury be willingly ſtolne, taken away, withdrawne, or avoided by any clerk, or by other perſon, becauſe whereof any judgement ſhall be reverſed: that ſuch ſtealer, taker away, withdrawer, or avoyder, their procurators, counſellors, and abettors, thereof indicted, and by proces thereupon made thereof duly convict, by their own confeſſion, or by inqueſt to be taken of lawfull men, (whereof the one halfe ſhall be of the men of any court of the ſame courts, and the other halfe of others) ſhall be judged for felons, and ſhall incurre the paine of felony. And that the judges of the ſaid courts, of the one bench or of the other, have power to hear and determine ſuch defaults before them, and thereof to make due puniſhment, as afore is ſaid. [71]

The miſchiefe before this ſtatute was, That whereas records are of ſuch high nature and credit, as they import in themſelves abſolute verity without contradiction; to the end, that there might be an end of contention and controverſie, and men might reſt in ſafety and repoſe, certaine clerks and other perſons did oftentimes imbeſell records, or ſome parcell of them, and ſometime a

writ, retorne, panell, proces, or warrant of attorney; or raſe or vitiate the ſame; by reaſon whereof divers judgements were avoided, or reverſed, whereby no man (as the ſtatute ſaith) had any thing in ſurety. This was a great miſpriſion, for the which the offenders therein might be puniſhed, either at the ſuit of the king by indictment, or at the ſuit of the party by an action upon his caſe. See the record concerning this matter following. *Placita coram juſticiariis de banco termino Trinitatis anno* 19 *E.* 1. *Rot.* 57. *indorſ.*

Radulphus de Greſhope communis attornatus de com. Weſtmerland malitioſe rotulum excurtavit et abſcid't, et ideo per annum et diem committitur turri London, poſtea anno 20 *E.* 3. *per mandatum regis liberatur et per juſticiarios ei eſt inhibitum ne de cætero in eadē curia de aliquibus negotiis ſe intromittat.*

Which remedie and puniſhment were thought too weak againſt clerks and other perſons, which (committing ſuch things) commonly were of ſmall ability: therefore this act, conſidering the danger of the offence, maketh the ſame felony, as by the letter thereof appeareth.

* See the firſt part of the Inſtitutes ſect. 117. for this word.

(1) *Si aſcun* * *record.*] A record is regularly a monument or act judiciall before a judge, or judges, in a court of record, entred in [a] parchment in the right roll. It is called a record, for that it recordeth or beareth witneſſe of the truth, and is derived of the verb *recordor*, whereof the poet ſpeaketh,

[a] 9 E. 4. 3. b. 16 Eliz. Dier, 330. 3.

Si rite audita recordor.

Virgil.

It hath this ſoveraigne priviledge, that it is proved by no other but by itſelfe. *Monumenta (quæ nos recorda vocamus) ſunt vetuſtatis et veritatis veſtigia.* And albeit the cauſe adjudged be particular, yet when it is entred of record, it is of great authority in law, and ſerves for perpetuall evidence, and therefore ought to be common to all, yea, though it be againſt the king: as it is declared by act of parliament in *anno* 46 E. 3. which you may reade in the preface to the third book of my reports.

Rot. Parl. 46 E. 3. 9 H. 7. 16. See the preface to the third book.

(2) *Breife, retorne, panel, proces, ou garr' d'attornie.*] All theſe are ſufficiently known, and yet have we treated of the ſame in the firſt part of the Inſtitutes.

(3) *En les courts le roy.*] Here are expreſsly named four of the kings courts, viz. the chancery, the exchequer, the kings bench, and the court of common pleas, and hereunto is added the kings treaſury: ſo as this act extendeth not to any other court or place, then is here named.

(4) *Chancery.*] This muſt be underſtood of the court of chancery, which proceedeth according to the courſe of the common law, as in caſe of priviledge, of *ſcire facias* upon recognizances, traverſes of offices, and the like: for as to theſe it is a court of record, but as to the proceeding by Engliſh bill in courſe of equity, it is no court of record, for thereupon no writ of error lieth, as in the other caſes.

37 H. 6. 14.

(5) *Ou ſa treaſorie.*] The kings treaſury is called *theſauraria regis*, the place where the kings treaſure is kept. This treaſure is twofold, viz. his money or coine: and another, that is far more precious and excellent, and thoſe be the ſacred judgements, records, and other judiciall proceedings under the ſafe cuſtody of the treaſurer,

treaſurer, and chamberlains of the exchequer. And this treaſury is partly in the exchequer, and partly in the towre of London: for there be ancient rolls of the treaſury remaining in the towre. And therefore this act intending to include both the one, and the other, ſaith generally, *en ſa treaſorie.* Regiſter. F. N. B. 244. d.

(6) *Soit voluntarement emblee, emport, retreit, ou avoide.*] In the indictment upon this ſtatute beſides *felonicè*, this word [*voluntariè*] muſt of neceſſity be uſed, to agree with this act. Here be four words uſed, *emblee* ſtolne, *emport* carried away, *retreit* withdrawne, *ou avoide* or avoided. So as the ſenſe is, if any record or part of it, writ, retorne, panell, proces, or warrant of attorney, &c. be ſtolne, carried away, withdrawn, or avoided, &c. And this word [avoided] is a large word, and doth include, raſing, or clipping, or cutting off of the ſide, or other part of the roll, or any other kind of avoiding the ſame. 2 R. 3. 10.

(7) *Per aſcun clerk ou autre perſon.*] This act doth not extend to any judge of the court; both becauſe it beginneth with a clerk, &c. and for that by the ſtatute of 8 R. 2. a penalty is inflicted upon a judge, &c. for making any falſe entry, raſing any roll, or changing any verdict. See the ſtatute; for it extendeth alſo to clerks. Only this is to be obſerved in that ſtatute, that where it is ſaid [the king and his councell,] it is intended of the court of juſtice where the matter dependeth: for the judges are the kings councell for judicature and proceedings according to law and juſtice. 2 R. 3. 10. 8 R. 2. cap. 4. 2 R. 3. 10.

Juſtice Ingham paid in the raigne of E. 1. eight hundred marks for a fine, for that a poore man being fined in an action of debt at thirteen ſhillings foure pence, the ſaid juſtice moved with pity cauſed the roll to be raſed, and made it ſix ſhillings eight pence. 2 R. 3. 10.

This caſe juſtice Southcot remembred, when Catlyn chiefe juſtice of the kings bench in the raigne of queen Elizabeth, would have ordered a raſure of a roll in the like caſe, which Southcot, one of the judges of that court, utterly denied to aſſent unto, and ſaid openly, that he meant not to build a clock-houſe: for (ſaid he) with the fine that Ingham paid for the like matter, the clock-houſe at Weſtminſter was builded, and furniſhed with a clock, which continueth to this day.

(8) *A cauſe de quel aſcun judgement ſoit revers.*] This act extendeth only to records, whereupon judgement is given. But whether judgement be given in cauſes criminall at the ſuit of the king upon an indictment, or at the ſuit of the party in an appeale, or in actions, reall, perſonall, or mixt, or of the like nature, this act extends thereunto, if judgement be afterwards given, and to outlawries, for there judgement is given *per juaicium coronatorum.* For it is not materiall whether the act be done againſt this ſtatute, either before or after judgement, ſo judgement be given. 2 R. 3. 19.

(9) *Revers*] is here taken, not only where the judgement is made erroneous, and to be reverſed by writ of error, but where the judgement is ſo annihilated, and made voide, as it bindeth not, or may be reverſed or avoided by plea. See the book in 2 R. 3. fol. 10. which expoundeth well this ſtatute.

(10) *Que tiel emblear, emporter, &c. lour procurers, counſellors et abettors, &c.*] This act expreſly extendeth to acceſſories before, and leaveth acceſſories after to the conſtruction of law, yet may

Vide 3 & 4 Ph. and Mar. Juſtice Daliſons Report, ubi ſup.

there be acceſſories after the fact: for whenſoever an offence is made a felony by act of parliament, there ſhall be acceſſories to it both before and after, as if it had been a felony by the common law, and therefore though this act expreſſeth acceſſories * before, yet it taketh not away acceſſories after, but leaveth them to the law, contrary to the opinion of juſtice Stanford. See before the expoſition of 3 H. 7. for taking away of women againſt their will.

Stanf. pl. cor. 44. b.

3 H. 7. cap 2.

2 R. 3. fo. 10.

(11) *Ent endites.*] If the acts that make this felony, be committed in two counties, the indictment faileth, as hath bin ſaid before upon the ſtatute of 2 & 3 E. 6. cap. 24. And this caſe of felony riſing in two counties, is not holden by any ſtatute yet made.

(12) *Dont la moity ſoit des hommes daſcun court.*] Here is a party jurie, the one halfe to be of the officers and clerks of the court, &c. for their knowledge, and for the better information of the others.

(13) *Et que les judges des dits courts de lun bank ou de lauter eyent power de oier et terminer tiels defaults devant eux, et ent faire punition, come eſt avant dit.*] This clauſe is in nature of a commiſſion to the juſtices of either bench, if the offence be committed in the county where the benches do ſit. And the juſtices of either bench have a concurrent authority, and which of them enquire firſt ſhall proceed: but if the felony be committed in another county, then where the benches ſit (as for example in Surry, Hertfordſhire, &c.) there the juſtices ought to have a commiſſion. But if the bench ſit in Middleſex, and the felony is done in London, in which caſe a commiſſion is requiſite, as is aforeſaid. But then ſome have ſaid, that by the charters of London confirmed by parliament, the major ought to be principall in the commiſſion, and the major is none of the judges authorized by this act to heare and determine this felony, but the juſtices of the one bench or the other: and therefore the ſtatute being penall, and to be taken ſtrictly, no proceeding can be. *Sed falſa res eſt:* for the charters of the city of London extend only to ſuch offences committed in London, whereof the major with others by commiſſion may enquire of, heare, and determine, and not to ſuch offences ſo annexed by authority of parliament to other perſons (as in this caſe to the juſtices of the one bench or the other) as the major is not warranted by the ſaid act to enquire, &c. And therefore a commiſſion in this caſe may be made to the juſtices of the one bench or the other, omitting the major, *ne curia regis deficeret in juſtitia exhibenda.*

2 R. 3. 10.

2 R. 3. 11.

4 H. 7. cap. 13. 22 H. 7. cap. ult.

And albeit this kinde of felony is an heinous offence, yet may the offenders therein have their clergy; for untill the raign of H. 7. (that we may note it once for all) the benefit of clergy was not taken away by any act of parliament in caſe of felony. As for the ſtatute of *bigamis* made in 4 E. 1. it was but an expoſition and allowance of the conſtitution made at the generall councell at Lyons concerning the ſame, as before hath been ſaid. But (as we remember) the firſt ſtatute making a new felony that took away the benefit of clergy was the ſtatute of 7 H. 7, concerning ſouldiers. *Vide* lib. 8. fol. 160. & lib. 11. fol. 11.

7 H. 7. cap. 1.

CAP.

CAP. XX.

Of Felony in ſuch as uſe the Craft of Multiplication.

NONE from henceforth ſhall uſe to multiply gold or ſilver, or uſe the craft of multiplication (1): and if any the ſame doe, he ſhall incur the pain of felony. 5 H. 4. c. 4.

This is the ſhorteſt act of parliament that we remember; before the making whereof, divers of the nobility, gentry, and others did waſt and conſume a great part of their inheritance, and wealth, about the art of multiplication, by the ſubtile and ſiniſter perſwaſion of certain impoſtors, and deceivers, which took upon them to be ſkilfull therein, and to be able to multiply gold and ſilver, being themſelves for the moſt part very poor and indigent perſons, of whom it was ſaid, *Quòd pollicentur aliis ingentes divitias, et ipſi petunt parvas drachmas.* See Chaucer our Engliſh poet, who wrote about the time of the making of this act, in the tale of the Channons Yeoman, fo. 63. *(in libro meo,)* that the end of this ſliding and curſed craft (ſo full of impoſture and deceit) is extream beggery: he is worth the reading, for he diſcovereth the ſecrets of this craft, as our act tearms it.

Now ſeeing the end of this feigned art of multiplication is meer deceit, and tendeth to the undoing of many; at this parliament the uſe of this craft of multiplication is made felony. For the better underſtanding of that which ſhall be ſaid, it is to be known, that there are ſix kinds of metalls, viz. *aurum, argentū, æs, ſive cuprum (quia inventum fuit in Cypro) ſtannum, plumbum, et ferrum.* That is to ſay, gold, ſilver, copper, tynne, lead, and iron; for *chalybs* ſteel is but the harder part of iron, and *orichalcum, aurichalcum*, viz. lattyn or braſſe, is compounded of copper and other things.

(1) *The craft of multiplication.*] That is, to change other metals into very gold or ſilver. And this they pretend to doe by a *quint eſſence*, or a fifth eſſence. Four eſſences, or elements we know, fire, aire, water, and earth, but ſay they, this *quint eſſence* is a certain ſubtill, and ſpirituall ſubſtance extracted out of things by ſeparation from the four elements, differing really from their eſſence, as *aqua vitæ*, the ſpirit of wine, or the like, and this is called *elixar*, or the philoſophers ſtone, and it is part of alchemie, or chemie, in Latine *ars chemica*. The offenders therein are called multipliers, chemiſts, alchemiſts, &c. There * may be acceſſories to this new felony, both before and after. King Henry the ſixth, by his letters patents, *de conciliĭ ſui deliberatione deputavit Willm. Cautelo et alios cives civitatis London ad inveſtigandam veritatem ſuper his quæ in ſcriptis erunt eis monſtrata, pro multiplicatione nuniſmatis,*

* 7 E. 6. Dier 88 Rot. Pat. 3 H. 6. m. 13.

nunismatis, tam de auro, quam argento, et quicquid in præmissis egerint, cum eorum opinione referrent in scriptis regi et concilio suo.

The like [a] letters patents *anno* 35 H. 6. *pro Thoma Hærvie et aliis.* *Rex* [b] *ex sua regali prærogativa, &c. dedit licentiam Johanni Faceby et aliis ad investigandum, prosequendum et perficiendum quandam preciosissimam medicinam, quintam essentiam, lapidem philosophorum nuncupatum, nec non potestatem faciendi et exercendi transmutationes metallorum in verum aurum, et argentum,* with a *non obstante* of this statute of 5 H. 4. By these letters patents this act is more explained, then by any record we have seen.

How these several kinds of metalls, as is supposed, proceed originally from sulphur * and quicksilver, as from their father and mother, and other things concerning the same, you may at your leisure read in George Agricola, lib. 10. ca. 1. Encelms, li. 1. ca. 1. Pl. Com. 359.

Almighty God in the fourth day created the earth, and no mention is made of metals, for that they were as parts of the earth.

The fatall end of these five are beggery; this kind of alchemist, the monopolist, the concealer, the informer, and poet-asters.

Sæpe pater dixit, studium quid inutile tentas?
Mæonides nullas ipse reliquit opes.

I could give examples (of mine own observation) of all these, if it were pertinent to our purpose.

Ro. Pat. 35 . 6.

Ro. Pat. 34 . 6. m. 7.

[a] Hanc artem sophisticam imposturam nominat *Selden ibon.* sentiendi et dendi artem. *etrarch. Eras.* Colloquio emonis præstias. *Peucerus baucer* ubi apra. The cursed and sliding raft. *Vertitur fumum quicuid ineptus agit.* ee *Pancirollus.* nt. nova reperta it. 7. fo. 357.

[b] Vide Stanf. pl. or. 37. b.

Gen. c. 1. v. 9. ap. 2. v. 11.

* [75]

CAP. XXI.

Of Felony in Hunters in the Night, or with painted Faces, in any Forest, Park, or Warren.

H. 7. ca. 1.

AT every such time as information shall be made of any unlawfull huntings in any forest, park, or warren (3) by night, or with painted faces (1) to any of the kings councell (4) or any the justices of the kings peace (5) in the county where any such hunting shall be had, of any person to be suspected (2) thereof, it shall be lawfull to any of the same councell, or justices of peace, to whom any such information shall be made, to make a warrant (6) to the sherif of such county, or to any constable, bailif, or other officer within the same county, to take and arrest the same person and persons of whom such informations shall be made, and to have him, or them before the maker of the same warrant, or any other (7) of the kings said councell, or his justices of peace of the same county. And that the said counsellor or justice of peace, before whom such person, or persons shall be brought, by his discretion have power to examine him or them so brought, of the

the ſaid hunting, and of the ſaid doers in that behalf (8): and if the ſame perſon * wilfully conceal the ſame huntings, or any perſon with him defective therein (9), that then the ſame concealment be againſt every ſuch perſon ſo concealing felony, and the ſame felony to be enquired of and determined, as other felonies within this realm have uſed to be: and if he then confeſſe the truth, and all that he ſhall be examined of, and knoweth in that behalf (10), that then the ſaid offences of huntings by him done, be againſt the king our ſoveraigne lord, but treſpaſſe finable, by reaſon of the ſame confeſſion, at the next generall ſeſſions of the peace to be holden in the ſame county, by the kings juſtices of the ſame ſeſſions, there to be ſeſſed. And if any reſcous, or diſobeiſance be made to any perſon having authority to doe execution, or juſtice by any ſuch warrant, by any perſon, the which ſo ſhould be arreſted, ſo that the execution of the ſame warrant thereby be not had, that then the ſame reſcous and diſobeytance be felony (11), inquirable and determinable, as is aforeſaid. And over this, it is enacted and ſtabliſhed, that if any perſon or perſons hereafter be convict of any ſuch huntings with painted faces, viſors, or otherwiſe diſguiſed, to the intent they ſhould not be known, or of unlawfull hunting in time of night, that then the ſame perſon or perſons ſo convict, to have like punition, as he or they ſhould have, if he or they were convict of felony (12).

* See the expoſition of this word [conceal] hereafter in this chap.

[76]

Now let us peruſe the words of this new and ill penned law.

(1) *By night, or with painted faces.*] That is to ſay, either by night, or in the day with painted faces, for that doth equall the caſe of the night, in reſpect the offenders cannot be known, or diſcerned, in regard of ſuch diſguiſings. And albeit the body of the act ſpeaketh only of painted faces, yet it extendeth to viſors and other diſguiſings, for thoſe words are in the preamble rehearſing the miſchief, and the remedy muſt be appliable thereunto, and the laſt branch of this act doth make this point clear.

(2) *As information ſhall be made, &c. of any perſon to be ſuſpect.*] Hereby it appeareth, that a bare information without ſhewing juſt cauſe of ſuſpition at the leaſt, is not ſufficient to ground a warrant according to this act, for the words be, [of any perſon to be ſuſpected.] And this act is generall, and extends to all perſons of what eſtate or degree ſoever, and as well to women, as to men: for the words be [if any perſon] and *generalia verba ſunt generaliter intelligenda.* And it is neceſſary for him that taketh the information, to take it in writing, becauſe it is the ground of his warrant.

(3) *Of any unlawfull huntings in any foreſt, park, or warren.*] This act doth not extend to any chaſe of the king, or of any other perſon, neither doth it extend to any foreſts, parks, or warrens in uſe or reputation, and which are not foreſts, parks, or warrens in law. See the 1. part of the Inſtitutes, ſect. 378. what a foreſt, a chaſe, and a park, &c. is.

21 E. 1. tit. Foreſts. Raſt. 19.

(4) *To any of the kings councell.*] This is underſtood of the kings privy councell; and any one will ſerve, but he muſt be dwelling in the county where ſuch offence is committed.

(5) *Or*

(5) *Or to any the juſtices of the kings peace, &c.*] And likewiſe any one juſtice of the peace will ſerve.

(6) *Warrant.*] This warrant ought to be in writing under the ſeal of him that maketh it.

(7) *Before the maker of the ſame warrant, or any other, &c.*] So as the officer may carry the party arreſted before any privy counſellor, or juſtice of peace within that county, and to that effect muſt the warrant be made.

(8) *By his diſcretion have power to examine him or them ſo brought of the ſaid hunting, and of the doers in that behalf.*] So as the examination muſt conſiſt upon two parts. Firſt, of the hunting by the party himſelf. Secondly, of other doers in that behalf.

D. Haward tempore H. 1. fo. 24. Vide Holl. 10 R. 1. 153. Vide Camden Brit. 210.

(9) *And if the ſaid perſon wilfully conceal the ſaid hunting, or any perſon with him defective therein.*] This branch being in the diſjunctive, if he conceal either his own offence, or of the other miſdoers with him therein, the letter of this act is that it is felony, but by conſtruction * upon the whole ſtatute, it is no felony: and a hunting without killing of any game, is within the danger of this ſtatute.

*[77]

This act is to be taken ſtrictly; for it is the firſt law that was made for the making of any hunting felony, againſt that excellent and equall branch of *carta de foreſta. Nullus de cætero vitam vel membra pro venatione noſtra, &c.* See the ſtatutes of 21 E. 1. 1 E. 3. ſtat. 1. cap. 8. 7 R. 2. ca. 4. Weſtm. ca. 8. Regiſt. fol. 9. F. N. B. fo. 67. Vet. N. B. 41. 45 E. 3. 7. 33 H. 8. Dier. 50.

Cart. de Foreſt. cap. 10.

The old ſtatutes concerning the foreſts are called the good old laws, and cuſtomes, and commanded to be obſerved; and therefore this new act of H. 7. is too ſevere for beaſts that be *feræ naturæ*, whereof there can be no felony by the common law, and that in caſe of the foreſts, parks, &c. of ſubjects, which never was before: and therefore the judges have made a favourable conſtruction, as hereafter in this chapter you ſhall find.

Rot. Parl. 9 H. 4. nu. 40.

(10) *And if he confeſs the truth, and all that he ſhall be examined of, and knoweth in that behalf.*] That is of his own guiltineſſe, and of other miſdoers with him, then this act makes it no felony, but treſpaſſe finable, as it was before: but it muſt be a wilfull concealment; therefore if he knew not the names of the other miſdoers, or knew not whether they were there or no, it is no offence, for the concealment muſt be wilfull. And ſeeing there is no time limited by this act, and the concealment ought to be wilfull, it were reaſon, that the information ſhould be made in convenient time after the fact done.

(11) *And if any reſcous or diſobeiſance be made to any perſon having authority to do execution of juſtice by any ſuch warrant by any perſon, the which ſo ſhould be arreſted, ſo that execution of the ſame warrant be not had, that then the ſame reſcous and diſobediance be felony.*] Here it is to be obſerved that the hunting being as yet no felony, the reſcous could not be felony, if this branch had not been. Herein two things are to be conſidered; firſt, that it extendeth not but to the reſcous, or diſobeyſance, that is committed by the party himſelf, that is to be arreſted, and not to any other. Secondly, that if the party reſcue himſelf, yet if he be purſued and taken, ſo as execution of the warrant be had, it is no felony, as it is manifeſt by the letter of this branch.

(12) *And*

(12) *And over this be it enacted, &c. That if any perſon or perſons hereafter to be convict of any ſuch huntings with painted faces, viſors, or otherwiſe diſguiſed, &c. or of unlawfull hunting in the night, * that then the ſame perſon or perſons ſo convict, to have like punition, as he or they ſhould have, as if they were convict of felony.*]

* Nota [that the] &c. So as before ſuch conviction there is no felony.

Gerrard the queens attorney general (who was a grave and reverend man) ſaid openly in the kings bench, that it had been reſolved by the juſtices upon this ſtatute, that if a man in the night, or by day with painted face doe hunt, &c. and being examined according to the act and concealeth it, this is (upon the conſtruction of the whole act) no felony; for the firſt clauſe concerning concealment, and this clauſe which now we handle, muſt be coupled or joyned by conſtruction together, viz. if any perſon be convict of ſuch hunting with painted face, or of unlawfull hunting in the night, this conviction muſt be upon not guilty pleaded, which the juſtices expounded to be the * concealment intended in the firſt branch, for they held that it ought to be a judiciall concealment, and not an extrajudiciall concealment, before one of the privy councell, or a juſtice of peace which may lie in averment, ſo as before it be felony, he muſt be convicted of ſuch hunting, &c. upon not guilty pleaded firſt: and after ſuch conviction then muſt he be indicted again, *ſuper tota materia*, that he *felonicè* did conceal, &c. againſt the form of the ſtatute: and if the offender upon the firſt indictment confeſſeth the indictment, then it is ſuch a judiciall confeſſion as this act intendeth, and no felony within this ſtatute. And this we heard the attorney report, and then obſerved it, which concurring with our own opinion we thought good to publiſh, and the rather for that in maſter Lambards book of Juſtice of Peace amongſt his precedents of indictments an erroneous precedent of an indictment is of felony for the concealment, &c. upon examination before juſtices of peace.

Mic. 19 & 20 El. In the kings bench a report of the reſolution of the juſtices upon this branch.

* Concealment expounded.

[78]

It is ſaid in 33 H. 8. that chaſing in parks is made felony, (intending this ſtatute) notwithſtanding it may be made treſpaſſe at the pleaſure of the party, which we think is the cleareſt way.

Dier, 33 H. 8. fol. 50. a.

Now what time ſhall be adjudged night, ſee before in the chapter of Burglary. For this felony the delinquent may have his clergy: ſee Stanford, 37. b.

CAP.

CAP. XXII.

Of Felony for imbeſiling the Kings Armour, Ordnance, &c. or Victuall, to the Value of Twenty Shillings, provided for Souldiers,

31 El. cap. 4.

BE it enacted by the authority of this preſent parliament, that if any perſon, or perſons, having at any time hereafter the charge or cuſtody of any armour, ordnance (1), munition, ſhot, powder or habillements of war (2) of the queens majeſties, her heirs, or ſucceſſors, or of any victuals provided for the victualling of any ſouldiers, gunners, mariners, or pioners, ſhall for any lucre, or gain, or wittingly, adviſedly, and of purpoſe to hinder or impeach her majeſties ſervice, imbeſill, purloin, or convey away any the ſame armour, ordnance, munition, ſhot, or powder, habillements of war, or * victualls, to the value of twenty ſhillings, at one or ſeverall times: that then every ſuch offence ſhall be judged felony, and the offender and offenders therein to be tried, proceeded on, and ſuffer as in caſe of felony. Provided always, and be it enacted by the authority aforeſaid, that none ſhall be impeached for any offence againſt this ſtatute, unleſſe the ſame impeachment be proſecuted or begun within the year next after the offence done. And that this act, nor any thing therein contained, nor any attainder nor attainders of any perſon or perſons for any offence made felony by this act, ſhall in any wiſe extend, or be adjudged, interpreted, or expounded to make the offender or offenders to forfeit, or loſe any lands, tenements, or hereditaments any longer, then during his or their life or lives, or to make any corruption of blood to any the heir or heirs, of any ſuch offender or offenders, or to make the wife of any ſuch offender to loſe or forfeit her dower, or title of dower of or in any lands tenements, or hereditaments, or her action or intereſt to the ſame: any thing in this act contained, or any attainder or attainders hereafter to be had for any offence made felony by this act to the contrary notwithſtanding. And that ſuch perſon and perſons, as ſhall be impeached for any offence made felony by this ſtatute, ſhall by vertue of this act be received, and admitted to make any lawfull proofe that he can, by lawfull witneſſe or otherwiſe, for his diſcharge and defence in that behalfe, any law to the contrary notwithſtanding.

* Nota for victualls.

[79]

This is a neceſſary law, and ſo penned, as it requireth no curious expoſition.

(1) *Ordnance.*] That is guns or artillerie ſo called, of an order, or

or ordinance anciently made, of what bore, ſize, or bulk the ſame ſhould be. And albeit the ordinance (that we can finde) is not extant, yet the name remaineth.

(2) *Habillements of warre.*] Habillement is properly apparell or clothing: but in legall underſtanding it doth not only extend to harneſſe and armour, but to all utenſils that belong to war, without which men have not ability to maintain war.

This act making a new felony, hath five excellent proviſions, worthy to be imitated in all like caſes of new felonies. Firſt, that none ſhall be impeached for this new felony, but within a year after the offence done. Secondly, that the offender ſhould not loſe his lands any longer than during his life. Thirdly, this act makes not any corruption of blood, but that his heire ſhall inherit. Fourthly, not to make the wife loſe her dower. Fifthly, that ſuch perſons as ſhall be impeached for any offence made felony by this act, ſhall be admitted to make any lawfull proofe [a] by witneſſe, or otherwiſe for his diſcharge and defence in that behalfe.

Bonum eſt ſcire et ſequi.

Vid. hereafter, cap. of felony for any having a plague fore a more ſpeciall proviſion.

[a] Nota.

In the ſtatute of 4 *Jacobi regis*, there is alſo a good preſident, viz. [All which trials (viz. in caſes of felony in that act before mentioned) [b] firſt for the better diſcovery of the truth, and ſecondly, for the better information of the conſciences of the jurie and juſtices, there ſhall be allowed to the party ſo arraigned the benefit of ſuch witneſſes only to be examined upon oath, that can be produced, for his better clearing and juſtification]: that as witneſſes are produced and ſworne againſt him, ſo he may have witneſſes produced and ſworne for him, for *jurato creditur in judicio*. And to ſay the truth, we never read in any act of parliament, ancient author, book caſe, or record, that in criminall caſes the party accuſed ſhould not have witneſſes ſworne for him; and therefore there is not ſo much as *ſcintilla juris* againſt it. And I well remember when the lord treaſurer Burleigh told queen Elizabeth, Madame, here is your attorney generall (I being ſent for) *qui pro domina regina ſequitur*, ſhe ſaid ſhe would have the forme of the records altered; for it ſhould be *attornatus generalis qui pro domina veritate ſequitur*. And when the fault is denied, truth cannot appear without witneſſes.

4 Jac. regis cap. 1.

[b] Nota, two excellent means for advancement of juſtice.

Hobelarius (*id eſt*, a light-horſeman) *electus in Scotiam recepit armaturas et denarios, ibidem ſerviturus, poſtea non proficiſcitur per mandatum regis, et recuſavit reddere armaturas, et denarios, &c. per juratores eſt culp. et committitur mareſchallo, et finivit regi* 10 *li. et invenit ſecuritatem ad armaturas redeliberandas, &c.*

Hil. 16 E. 3. coram rege. Rot. 129. Norff.

CAP.

(1) *Every ſubject of this realme.*] This branch extends to all perſons of what eſtate, degree, or profeſſion ſoever.

(2) *To ſerve.*] Albeit the party did not ſerve, yet if the offender went or paſſed over to ſervé without taking the oath, he is in danger of this ſtatute. And this extendeth to any kind of ſervice, either in campe or army, or in houſe or otherwiſe.

(3) *Any foraine prince.*] [*Princeps*] Prince is here taken for the perſon that is *primus*, i. e. *Qui primum locum, et gradum obtinet*, whether he be king, or any other that hath ſoveraigne authority, by what name or title ſoever. The word hath other ſignifications, but not pertinent to the expoſition of this act. Prince. [81]

(4) *State.*] The former word [prince] includeth any, that is a monarch, or in nature of a monarch, or an abſolute prince. This word [ſtate] extends to any ſtate, either ariſtocraticall, where few be in authority, or democraticall, where the people have the chiefe government without any ſuperiour, ſaving ſuch as they elect and chooſe. State.

(5) *Potentate.*] This is a large word, and extendeth to potentates, as well eccleſiaſticall as temporall. Potentate.

(6) *Or ſhall paſſe, &c. and there ſhall voluntarily ſerve.*] Although he went not over of purpoſe to ſerve, but upon ſome other occaſion: yet if he after voluntarily ſerve any ſuch foraine prince, ſtate, or potentate, and have not taken the oath, he is a felon.

(7) *The oath of obedience.*] This is particularly ſet downe in the ſaid act.

And that if any * gentleman or perſon of higher degree, or any perſon or perſons, which have borne, or ſhall beare any office or place of captaine, lieutenant, or any other place, charge, or office in campe, army, or company of ſouldiers, or conducter of ſouldiers, ſhall after goe or paſſe voluntarily out of this realme to ſerve any ſuch foraine prince, ſtate, or potentate, or ſhall voluntarily ſerve any ſuch prince, ſtate, or potentate, before he and they ſhall become bound by obligation with two ſuch ſureties, as ſhall be allowed by the officers, &c. ſhall be a felon.

* Vid. hereafter cap. 34. in fine. Second part of the Inſtitutes. The ſtatute of additions. 1 H. 5. cap. 5.

By this branch, if he be a gentleman, or of higher degree, or any ſuch military man, as here is deſcribed; becauſe he is able to do more harme, if he be ſo diſpoſed, he muſt not only take the oath by the former branch, but he muſt become bound by this branch with two ſureties, &c. The forme of the obligation is ſet downe in this act. The expoſition of the former branch giveth light to the underſtanding of the reſidue of this clauſe.

There is a proviſo, that no attainder of felony, made felony by this act, ſhall take away dower, nor make, or work, any corruption of blood, or diſheriſon to the heire. The offenders in any of the ſaid caſes of felony may have the benefit of their clergie.

CAP. XXIII.

Of Felonie in ſuch as paſſe the Sea to ſerve Forain Princes, &c. or do ſerve Forain Princes, &c. without taking the Oath of Obedience.

3 Jac. cap. 4.

EVERY ſubject of this realm (1) that ſhall goe or paſſe out of this realm to ſerve (2) any foraign prince (3), ſtate (4), or potentate (5), or ſhall paſſe over the ſeas, and there ſhall voluntarily ſerve (6) any ſuch foraine prince, ſtate, or potentate, not having before his or their going or paſſing, as aforeſaid, taken the oath of obedience (7) (preſcribed by that act) before the cuſtomer and controller of the port, haven, or creek, or one of them, or their or either of their deputy or deputies, ſhall be a felon.

Some have objected, that the going or paſſing out of this realm, to ſerve, &c. cannot be tried; for that offences done out of the realme, cannot without a ſpeciall proviſion be tried within the realme. And it is a ſure rule, that in criminall cauſes concerning life or member, *ubi deliquit, ibi punietur*: the offence is locall, and cannot be tried, but where it is committed, nor cannot be alleaged to be in any other place then where in truth it was done. To this it is anſwered, that by a latter clauſe in this act, this felony ſhall be tried in the town wherein the haven or port is, wherein he went or paſſed over; which clauſe is, And be it further enacted, that all and every offence to be committed or done againſt this preſent act, ſhall and may be inquired of, heard, and determined before the juſtices of the kings bench, juſtices of aſſize and gaole-delivery in their ſeveral aſſiſes; and all offences, other than treaſon, ſhall be inquired of, heard, and determined before the juſtices of peace in their quarter ſeſſions, to be holden within the ſhire, diviſion, limit, or liberty, where ſuch offence ſhall happen. So as by the purvien and meaning of the makers of this act, this felony muſt be tried in the county where he went or paſſed over, and conſequently in that town where part of the act was done. And theſe words [and wherein ſuch offence ſhall be committed] muſt be conſtrued in this caſe, where part of the offence is committed. For *ſic interpretandum eſt, ut verba accipiantur cum effectu*: and by the expreſſe words, all and every offence to be committed or done againſt this preſent act muſt be inquired of, heard, and determined, &c. And therefore the felony cannot paſſe away with impunity, and that which is done out of the realme ſhall be proved to the jury in evidence. Note where a forain treaſon by this act is made, it is enacted to be tryed where the offender is taken.

See 33 H. 8. ca. 7. Simile.

(1) *Every*

CAP. XXIV.

Of Felonie in Purveyors.

See in the fourth part of the Inſtitutes, cap. Chancery. Articles againſt Cardinal Wooſey, Artic. 33, 35, 36.

SEE the ſtatutes of Artic. ſuper Cartas, anno 28 E. 1. cap. 2. 18 E. 2. ca. ult. 5 E. 3. cap. 2. 25 E. 3. cap. 1. & 15. 27 E. 3. cap. 1. 36 E. 3. cap. 2. And before in the ſecond part of the Inſtitutes, in the expoſition of the ſtatute of Artic. ſuper Cartas, cap. 2. you ſhall finde in what caſe a purveyor may be charged with felony, which briefly may be reduced to theſe four heads. Firſt, [a] if any that take upon him to be a purveyor, or his deputy or ſervant make purveyance of any thing above twelve pence without warrant. Secondly, [b] or make purveyance of any thing above twelve pence without teſtimony and appriſement of the conſtable, and four honeſt men, and without delivery of tales. Thirdly, [c] or take any ſheep with their woolles between Eaſter and Midſummer, and carry them to his own houſe and ſheer them. Fourthly, [d] or make any takings or buyings, or take any carriage in other manner then is contained in their commiſſions, they ſhall have puniſhment of life and member: and this act remains ſtill in force without alteration. The offenders may have the benefit of their clergie.

[a] Artic. ſup. Cart. cap. 2. 18 E. 2. cap. ult. 5 E. 3. cap. 4.

[b] 5 E. 3. cap. 2. 25 E. 3. cap. 1.

[c] 25 E. 3. cap. 15.

[d] 36 E. 3. cap. 2. Vid. Staunf. pl. cor. 37. b.

[c] By this ſtatute it is enacted, that purveyors aſſigned by commiſſion ſhall make purveyance of victuals, corne, and other things, as well within liberties and franchiſes, as without, any grant, allowance, or other thing to the contrary, or let thereof notwithſtanding: but the purveyors ſhall obſerve the ſtatutes for them provided in every behalfe, as by that act appeareth. [f] Upon this act it was holden, that if the diſcharge of purveyance were by letters patents, this act makes it of no force: but if the diſcharge were by ſtatute, then the purveyor is bound to obſerve the ſtatute, as by the ſtatute of 14 E. 3. cap. 1. *pro clero*, eccleſiaſticall perſons are diſcharged by ſtatute, which the purveyor is bound to obſerve. See the ſtatutes of 25 E. 3. ſtatut. 5. cap. 21. & 43 E. 3. cap. 3. in what manner and in what time the kings butler or his lieutenant ſhall take wines, &c.

[f] Trin. 40. Eliz. coram rege. In a quo warrant. the lord Darcies caſe.

See more of purveyors in the fourth part of the Inſtitutes cap. of the Counting houſe or Green cloth.

See lib. 8. fo. 45, 46. in Evans caſe, a commiſſion for taking up of boyes for the kings chappell, the generall words well expounded.

Rot. Parl. anno 28 E. 3. nu. 34.

By an act of parliament not in print, it is enacted that no purveyor arreſted for any miſdemeanour ſhall have any privy ſeal, to cauſe ſuch as arreſted him to come before the councell to anſwer to the king, but have his remedy by the common law.

At a parliament holden 4 Jacobi regis.

Upon a grievous complaint made at the parliament holden in the fourth year of our late ſoveraign lord king James, by the commons of the realm concerning many grievances ſuffered by his ſubjects in the execution of a commiſſion granted to certain perſons for getting of ſalt-peter, his majeſties anſwer (amongſt other things) was,

was, that he had never an intention to make any application of his prerogative therein, further then might ſtand with the lawfull, and neceſſary uſe thereof. And further his majeſty was pleaſed out of his gracious care, and goodneſſe to revoke and annull all commiſſions, or grants made to any perſon or perſons, for and concerning digging, and working of ſalt-peter, intending to conſider of ſuch a courſe afterwards, as the ſame might be made without any juſt cauſe of complaint, as by the ſaid royall anſwer (amongſt other things) more at large appeareth. In purſuance whereof, by the ſaid kings commandment, Popham chief juſtice, and all the juſtices of England, and barons of the exchequer, were aſſembled at Serjeants-Inne in Fleetſtreet, in December, in the ſaid fourth year, to reſolve and certifie, what prerogative the king had for digging, and taking of ſalt-peter in the houſes, buildings, or grounds of his ſubjects, that thereupon a new commiſſion might be made accordingly, who upon often conferences, and mature conſideration reſolved as followeth.

Salt peter, *quaſi*, ſalis petræ, colligitur aut ex materia quam veteres muri, rupes, et ſaxa exſudant, aut ex terra falſuginoſa et puta, quæ in ſtabulis animalium diuinam ad multos annos excepit, Latine *nitrum*.

[83]

Firſt, where it was objected, that gunpowder was invented in Germany, within time of memory, in the reign of king E. 3. ſo as the king could not claim it by preſcription: and that before the 31 year of the reign of queen Eliz. (which was the yeer after the Spaniſh invaſion) we, as yet, find not any commiſſion or licence granted by any king or queen of this realm to any for the digging or taking of ſalt-petre: and in the ſaid 31 year of the ſaid late queen, two commiſſions or licences were granted, the one particular, to George Conſtable eſquire, to dig, open, and work during the ſpace of eleven years for ſalt-peter within the counties of York, Nottingham, Lancaſter, Northumberland, Cumberland, and the biſhoprick of Durham, as well within our own lands, grounds, and poſſeſſions, as alſo within the lands, grounds, and poſſeſſions of any of our loving ſubjects within the counties aforeſaid; and the conſideration of the grant was, that he ſhould deliver a great quantity of powder to be made by the ſaid George Conſtable, and provided for the ſtore of the queens majeſty at a lower rate, then was paid for it before, with this further clauſe; [And further our will and pleaſure is, that the ſaid George Conſtable ſhall at his own proper coſts and charges erect, make up, and lay all mud walls, ſtables, and grounds whatſoever ſo digged up;] whereupon it was inferred that no other buildings could be digged up by force of that commiſſion, but only ſtables. The other commiſſion was generall, made unto George Evelyn, Richard Hils, and John Evelyn, and extended throughout the realms of England and Ireland, and all other the dominions of the ſame, as well within our own proper lands, grounds, and poſſeſſions, as alſo within the lands, grounds, and poſſeſſions of any of our ſubjects, with the like clauſe of the erection and reparation, as is aforeſaid, without naming of manſion houſes by expreſſe words, and without any prohibition to the ſubject to dig for ſalt-peter in their own buildings or grounds.

In the accounts, &c. from the 21 of April 18 E. 3 for one year following anno Domini 1344. under the title of artificers and workmen (inter alios.) Gunners 6. And of their wages and ſtipends per diem, it is ſaid (amongſt others) gunners ſix pence. *Latine* bombardæ, tormenta, ſclopi.

Paſch. 49 E. 3. Coram rege rot. 27. Oxon. diverſi malefactores venerunt ad manerium, &c. cum arcubus, fagittis, baliſcis et goons.

Vide Rot. Parl. 1 R. 2. nu. 38. William captain of the caſtle of Catherick, being charged for delivering it to the enemy, in the reign of E. 3. without commiſſion, anſwered (inter alia) that the enemies brought to battery thereof nine peeces des groſſes cannons.

Hollingſh. fo. 453.

Walſing. 10 R. 2. 1366.

Pol. Virg. De invent' rerum. fo. 2. ca. 11.

Pancerollus Nova reperta. Tit. 18. pag. 679. anno Domini 1378.

John More, pag. 196. anno Domini 1382.

Purveyance of ſalt-peter. See the 1. part of the Inſtitutes. Magna Carta cap. 22.

As to the firſt, it was reſolved by all, that foraſmuch as the taking of ſalt-peter, was for the neceſſary defence, and ſafety of the realm that the king had a right of purveyance of it; and ſhould not be driven to buy it in forain parts, which forain princes might reſtrain, and ſo this realm might want ſufficient for the defence thereof, to the great perill, and hazard of the ſame: but the king was to take it, for the neceſſary defence of the realm, according to the limitations hereafter expreſſed; and it is no prejudice to the owners of the ſoyl, for the place that is digged muſt be made up
2. again, and repaired in as good plight as it was beefore. Secondly, that this taking of ſalt-peter in the buildings or grounds of the ſubject, being a purveyance as is aforeſaid, is an incident inſeparable to the crown, and cannot be granted, demiſed, or transferred to any other, but ought to be taken only by the kings miniſters, as other purveyances ought, and cannot be converted to any other uſe, then for the defence and ſafety of the realm, for which purpoſe only the law doth give to the king this prerogative; and it is not like to a mine of gold or ſilver in the ground of the ſubject, for there the king hath an intereſt in thoſe metals, and not purveyance only. And if the powder which is ſo made by the kings miniſters begin to decay, as it will doe within two or three years, then this either ought to be changed for other, or ſold, and the money thereof comming to be employed for powder for the defence of the realm, and the kings miniſters ought to make great proviſion of ſalt-peter, for that will laſt a long time, and when
[84] need is to make thereof gun-powder, which will be made before the navy can be put in readineſſe, &c. Thirdly, the miniſters of
3. the king cannot in digging for ſalt-peter undermine, weaken, or impair any of the walls or foundations of any of the houſes of the ſubject, be they manſion houſes, or out-houſes, as barns, ſtables, dove-houſes, mills, or the like, neither can they dig the floor of any manſion-houſe, which ſerves for the habitation of man, becauſe his manſion is the ſafeſt place of refuge, and ſafety of himſelf and his family, as well in ſickneſſe, as in health, and his defence, as well in the night, as in the day, againſt felons, and miſdoers, neither can the kings miniſters dig the floor of any barn of the ſubject employed for the ſafe keeping of corn, hay, &c. for the floor of a barn cannot be made dry, or ſerviceable again in a long time, but they may dig in the floors of ſtables, and oxehouſes, ſo that they leave ſufficient room there for the horſes, and other beaſts of the owner, and ſo that they repair the ſame again in convenient time, as well as it was before. They may alſo dig in the floors of cellers, and vaults, ſo that the wine, beer, or other neceſſary proviſion of the owner be not removed, or in any ſort impaired: and they may dig any mud wals, which be not the wals of any manſion houſe, and in the ruines and decayes of any houſes which be not preſerved for the
4. neceſſary habitation of man. Fourthly, they ought to make the places as well, and commodious for the owner, as they were be-
5. fore. Fifthly, they ought not to work in the poſſeſſions of the ſubject, but between the riſing of the ſun, and the going down of the ſame, ſo as the owner may make faſt the doors of his houſe,
6. and put it in defence againſt miſdoers. Sixthly, they ought not to place or fix any furnace, veſſell or other neceſſaries in any houſe or building of the ſubject, without his conſent, nor ſo neer any manſion as he by it may receive any prejudice or diſquiet. Seventhly,

venthly, they ought not to continue in one place above a convenient time, nor return thither but after a long time. Laſtly, that the owner of the ſoyle cannot be reſtrained from digging, or taking of ſalt-peter, for the property thereof is in the owner of the ſoyl, and the king hath but the purveyance thereof, and that every man might work that would, and then there ſhould be more plenty of powder, and at a cheaper rate. And theſe reſolutions are agreeable with that maxime, * That the common law hath ſo admeaſured the prerogatives of the king, that they ſhould neither take away nor prejudice the inheritance of any. And theſe monopolies being *malum in ſe*, and againſt the common laws, are conſequently againſt the prerogative of the king, for * the prerogative of the king is given to him by the common law, and is part of the laws of the realm. Which reſolutions were delivered in writing by Popham chief juſtice unto the kings privy councell, as the unanimous reſolution of all the judges, and barons of the exchequer, and were by his majeſties privy councell well allowed of, and approved, as Popham chief juſtice reported. Upon theſe reſolutions theſe conſequents do follow. Firſt, if a man of his own authority, or by colour of any commiſſion, licence, or grant, doth take upon him to take any ſalt peter in the buildings, or grounds of any other ſubject to make thereof gunpowder, in any ſort to his own uſe, albeit he covenanteth, or agreeth to ſerve the king of ſo many laſts of powder: yet ſeeing it is but a purveyance, he cannot ſell any powder thereof made to any of the kings ſubjects, or make any private benefit thereof; and if he doe, he may be indicted of digging, and taking of the ſalt-peter at the kings ſuit, and be grievouſly fined and impriſoned, for that it is a grand treſpas with an high hand. Secondly, the party grieved may have his action of treſpaſſe, and recover damages for the treſpaſſe, &c. according to the quality of the treſpaſſe. 7. 8. * Pl. Com. 256. * Stanf. Pl. Cor. 162. a. Stanf. Prer. 5. b.

[a] Complaints made againſt purveyours in parliament. [b] By the ſtatute of 9 R. 2. all ſtatutes made concerning purveyors be confirmed, and to be put in execution, and that juſtices of peace have power to hear and determine their offences. See the fourth part of the Inſtitutes, cap. 8. art. 33. 35. 36. againſt cardinall Woolſey. [a] Rot. Parl. 4 H. 4. nu. 111. Eodem anno 81. 9 H. 4. 15. [b] Rot. Parl. anno 9 R. 2. nu 31. not in print

CAP. XXV. [85]

Of Felony in wandring Souldiers and Mariners.

1. ALL idle and wandring ſouldiers or mariners, or idle perſons wandring as ſouldiers or mariners, ſhall be reputed felons, and ſuffer as in caſe of felony. 39 El. ca. 17.

So as not only he that is a ſouldier, or mariner in deed, but he that is an idle wanderer, and takes upon him to be a ſouldier or

or mariner, though in troth he be none, is in danger of this law; for, as the preamble ſaith, they abuſe the name of that honourable profeſſion.

2. Every idle, and wandring ſouldier or mariner, which comming from his captain from the ſeas, or from beyond the ſeas, that ſhall not have a teſtimoniall under the hand of ſome one juſtice of peace of, or neer the place where he landed, ſetting down therein the time and place when, and where he landed, and the place of his dwelling and birth, unto which he is to paſſe, and a convenient time therein limited for his paſſage, is by this act adjudged a felon.

3. Or if he hath ſuch a teſtimoniall, and ſhall exceed the time therein limited above fourteen days, he is by this act a felon, unleſſe he fall ſick by the way, ſo as after his recovery he ſetleth himſelf in ſome lawfull courſe of life, or reſort to the place where he was born, or was laſt abiding: but in both theſe two caſes he muſt be a ſouldier or mariner in deed.

4. If any ſuch idle, and wandring ſouldier, or mariner, or other idle perſon wandring as ſouldier or mariner, ſhall forge or counterfeit ſuch teſtimoniall, he is by this act a felon.

5. Or if he ſhall have with him or them any ſuch teſtimoniall forged or counterfeit, knowing the ſame to be counterfeit or forged, he is alſo by this act a felon. And in both theſe laſt caſes, as well he that is a ſouldier or mariner in deed, as he that is none, is in danger of this act.

And the offender againſt any of the articles of this ſtatute ſhall not have the benefit of his clergie.

Juſtices of aſſiſe, juſtices of gaole delivery, and juſtices of peace, have power by this act to heare and determine the ſaid felonies.

But if ſome honeſt perſon valued in the laſt ſubſidie to ten pounds in goods, or forty ſhillings in lands, or ſome honeſt freeholder, as by the ſaid juſtices ſhall be allowed, will be contented before ſuch juſtices to take him or them into his ſervice for one whole yeare, and will become bound by recognizance, as the ſtatute doth appoint, then they ſhall not proceed any further againſt him, unleſſe ſuch perſon retained depart within the year, without the licence of him, that ſo retained him; and then he is to be indicted, tried, and judged as a felon, and not to have the benefit of his clergie.

CAP.

CAP. XXVI.

Of Felonie in Souldiers that depart from their Captaines without Licenſe.

THIS ſtatute is become of little force or uſe: for the ancient manner of retainer of ſouldiers whereunto that act referreth, is utterly altered: for then knights or gentlemen expert in war, and of great revenues and livelihood in their countrey, covenanted with the king to ſerve him in his war for ſuch a time with ſuch a number of men: and the ſouldiers made their covenant with their leaders or maſters, and then they were muſtered before the kings commiſſioners, and entred of record before them; and that was certified into the * exchequer, and thereupon they took their wages of the king, as it appeareth by many preſidents of the exchequer, and may be gathered by the preamble and body of the act, and by the Regiſter, where it appeareth, that a writ was framed upon that ſtatute directed to a ſerjeant at armes *ad capiend' conductos ad proficiſcend' in obſequium, &c.* And this was thought an excellent military policy, that the ſouldiers, (part whereof were of their own tenants) ſhould be choſen and led by knights and gentlemen of quality of their owne countrey, with whom they muſt fight in war, and live withall in peace, when they returned into their countrey, in reſpect whereof, the ſouldier would the more cheerfully and obediently follow his leader, and the leader would the more reſpectfully and lovingly uſe his ſouldier when he is abroad. See the ancient forme of commiſſions for arraying and muſtering of men in 5 H. 4.

18 H. 6. cap. 19. 5 Eliz. cap. 5. extendeth it to mariners and gunners.

* By the ſtatute of 5 R. 2. cap. 11.

See the writ in the Regiſter 191, directed to the ſerjeant at armes. 5 R. 2. cap. 10. Rot. Parl. 5 H. 4. nu. 29. the like for keeping of caſtles and forts.

Rot. Parl. 5 H. 4. nu. 24, 25.

By this act the benefit of clergie was not taken away from the delinquent.

The ſtatute of 2 E. 6. cap. 2. extendeth only when the ſouldier departs after that he hath ſerved the king in his war: and ſuch an offender ſhall not enjoy the benefit of his clergie.

2 E. 6. cap. 2. renued 4. & 5 Ph. and Mar. cap. 3. 1 Ja. cap. 25.

If any ſoldier being no captain, immediately retained with the king, which ſhall be in wages and retained, or take any preſt to ſerve the king upon the ſea, or upon the land beyond the ſea, depart out of the kings ſervice without licence of his captain (1), that ſuch departing be taken, deemed, and adjudged felony. And that all the juſtices in every ſhire of England, where any ſuch offenders be taken (2), have power to enquire of the ſaid offences, and the ſame to hear, and determine, as they doe and may doe of felony, &c. expreſſed in the kings commiſſion to them made, as though the ſame offences were done in the ſame ſhire; and alſo that the departing of ſuch ſoldiers, and alſo their retainers, if it be traverſed, be tried

7 H. 7. cap. 1. 3 H. 8. cap. 5.

tried in the ſame ſhire, where they be for ſuch a cauſe arreſted, and arraigned.

Lib. 6. fo. 27. Caſe de ſouldiers. Pier 4 Eliz. 211.

Both theſe acts of 7 H. 7. and 3 H. 8. are perpetuall acts, for this word [king] includeth all his ſucceſſion.

(1) *Without licence of his captain.*] The ſtatute of 3 H. 8. is without licence of the kings lieutenant there.

(2) *That all the juſtices in every ſhire of England, where any ſuch offenders be taken, &c.*] This act of 7 H. 7. extends to all the kings juſtices in every ſhire, viz. juſtices of aſſiſe, gaol delivery, oier and terminer, and of the peace. And if the offender be taken in the county where the kings bench ſet, he may be indicted, &c. there: but this clauſe in 3 H. 8. is reſtrained to juſtices of peace. This clauſe in both the ſaid ſtatutes is cumulative, and for more ſpeedy proceeding with the offender. But admit the offender be never taken, yet may he be indicted of felony in the county where the departure was, and if he appear not, he may be outlawed, for by the firſt clauſe, the offence is made felony, and the ſecond clauſe is affirmative, and not privative.

[87]

See Stanf. Pl. cor. fo. 168. c.

He or they ſo offending ſhall not enjoy the benefit of his clergy.

This branch in the act of 7 H. 7. is generall, but in the act of 3 H. 8. there is an exception out of the like branch, viz. of men being within orders of holy church. So as it differeth much, whether he be indicted upon the one ſtatute, or the other.

But obſerve what puniſhment the ancient law of England inflicted upon the ſouldier that departed from the kings hoſt, both before, and ſince the conqueſt. *Item qui fugiet à domino, vel ſecio ſuo pro timiditate belli, vel mortis, in conductione heretochii ſui in expeditione navali, vel terreſtri, perdat omne quod ſuum eſt, et ſuam ipſius vitam, et manus mittat dominus ad terram quam ei antea dederat.* For the expoſition of *Heretochius* and *Hereſlite*, ſee the fourth part of the Inſtitutes, cap. *Court de Chivalry.*

Lamb. Inter. leges Edovardi fo. 136. Hoven. Annal. 35. Pœna Hereſlitæ.

Now concerning armour, arms, charges of ſouldiers, muſtering of them, &c. See the ſtatutes in print of Confirmat. Cart. 25 E. 1. Vet. Magna Cart. 2. parte, fol. 35. 1 E. 3. cap. 5. 18 E. 3. ca. 7. 25 E. 3. cap. 8. 4 H. 4. cap. 13. 11 H. 7. cap. 7. and 3 H. 8. ca. 5. and 4 & 5 Ph. & Mar. cap. 3. for appearing at muſters, &c. But 4 & 5 Ph. and Mar. cap. 2. an act for having of horſe, armour, and weapon is repealed by the ſtatute of 1 Ja. ca. 25.

An act not in print, Rot. Parl. *anno* 5 H. 4. nu. 24, 25. for arraying and muſtering of men, for watching of beacons, &c.

Records of parliament, 4 H. 4. nu. 48. 7 H. 4. nu. 124. 1 H. 5. nu. 17.

Book caſes. 48 E. 3. 3, 4. 21 E. 4. 17. per Cateſby. 9 E. 4. 26. lib. 7. fo. 7, 8.

See the ſecond part of the Inſtitutes, Confirmat. Cart. cap. 5. *ubi ſupra.*

Vide Paſch. 16 E. 2. Phelip Maſter del Hoſpit. de S. Katherins caſe, *in libro meo*, fo. 83. b.

CAP.

CAP. XXVII.

Of Felony to marry a ſecond Huſband or Wife, the former Huſband or Wife living.

IF any perſon (1), or perſons within his majeſties dominions of England and Wales, being married (2), doe at any time after marry any (3) perſon or perſons, the former huſband or wife being alive, that then every ſuch offence ſhall be felony, &c. 1. Ja. cap. 11.

This is the firſt act of parliament that was made againſt polygamy. *Polygamia eſt plurium ſimul virorum, uxorumve connubium.*

The difference between bigamy, or trigamy, &c. and polygamy is, *quia bigamus ſeu trigamus, &c. eſt qui diverſis temporibus, et ſucceſſive duas, ſeu tres, &c. uxores habuit. Polygamus, qui duas vel plures ſimul duxit uxores.*

(1) *If any perſon.*] This law is generall, and extendeth to all perſons, of what eſtate, or degree ſoever.

If the man be above the age of fourteen, which is his age of conſent, and the woman above the age of twelve, which is her age of conſent, though they be within the age of one and twenty, are within the danger of this law, which appeareth by this, that this act extendeth not to a former marriage made within the age of conſent, as hereafter ſhall appear. See the 1. part of the Inſtitutes. ſect. 104.

Being married, &c.] This extendeth to a marriage *de facto*, or voydable by reaſon of a precontract, or of conſanguinity, or of affinity, or the like: for it is a marriage in judgement of law untill it be avoided, and therefore though neither marriage be *de jure*, yet they are within this ſtatute.

(3) *Doe at any time marry.*] This ſecond marriage is meerly void, and yet it maketh the offender a felon.

And the party and parties ſo offending, ſhall receive ſuch and the like proceeding, triall and execution in ſuch county, where ſuch perſon or perſons ſhall be apprehended, as if the offence had been committed in ſuch county, where ſuch perſon or perſons ſhall be taken or apprehended.

See before the expoſition of the ſtatutes of 7 H. 7. and 3 H. 8. concerning departing of ſouldiers, &c.

Out of the generality of this law, there be five exceptions: Firſt, it extendeth not to any perſon or perſons, whoſe huſband or wife be continually remaining beyond the ſeas, by the ſpace of ſeven years together. By this branch notice is not materiall, in reſpect of the commorancy beyond ſea. See 22 E. 4. Conſultation. 5. The opinion of the doctors. Pains caſe lib. 9. fo. 72.

Secondly, it extends not, when the huſband or wife ſhall abſent him or herſelf, the one from the other, by the ſpace of ſeven years in any parts within his majeſties dominions, the one of them not knowing

knowing the other to be living within that time. Here notice is materiall, in reſpect the commorance is within the realm.

* Thirdly, nor to any perſon or perſons, that at the time of ſuch marriage be divorced by any ſentence had in the eccleſiaſticall court.

There be two kinds of divorces, the one that diſſolveth the marriage *à vinculo matrimonii*; as for precontract, conſanguinity, &c. and the other *à menſa et thoro*; as for adultery, becauſe that divorce by reaſon of adultery, cannot diſſolve the marriage *à vinculo matrimonii*, for that the offence is after the juſt and lawfull marriage. This branch in reſpect of the generality of the words, priviledge the offender from being a felon, as well in the caſe of the divorce *à menſa et thoro*, as where it is *à vinculo matrimonii*, and yet in the caſe of the divorce *à menſa et thoro*, the ſecond marriage is void, living the former wife or huſband. And if there be a divorce *à vinculo matrimonii*, and the adverſe party appeal, which is a continuance of the former marriage, and ſuſpend the ſentence, yet after ſuch a divorce, the party marrying is no felon within this ſtatute, in reſpect of the generality of this branch, although the marriage be not lawfull.

Fourthly, nor to any perſon or perſons, where the former marriage is by ſentence in the eccleſiaſticall court declared to be void and of no effect.

Fifthly, nor to any perſon or perſons, for or by reaſon of any former marriage made within age of conſent: hereby it appeareth that the makers of the law intended that this act ſhould extend to every perſon above the age of conſent.

If the man be above fourteen, and the wife under twelve, or if the wife be above twelve, and the man under fourteen, yet may the huſband or wife ſo above the age of conſent, diſagree to the eſpowſals, as well as the party that is under the age of conſent; for the advantage of diſagreement muſt be reciprocal. And ſo it was reſolved by the judges and civilians, Trin. 42 Eliz. in the kings bench, in a writ of error between Babington and Warner. So as if either party be within age of conſent, it is no former marriage within this act.

Trin. 42 Eliz. Coram rege. Inter Babington and Warner.

The offender againſt this ſtatute may have the benefit of his clergy.

If he be a nobleman and lord of parliament, he ſhall be tried by his peers, albeit there be no proviſion ſpeciall for it: for of common right, (that we may ſay it once for all) in caſe of treaſon, felony, and miſpriſion of treaſon or of felony (as hath been ſaid before) he is to be tried by his peers.

I find that by the ancient law of England, that if any Chriſtian man did marry with a woman that was a Jew, or a Chriſtian woman that married with a Jew, it was felony, and the party ſo offending ſhould be burnt alive.

Marriage in ſome ſort felony by the common law.

Contrahentes cum Judæis, Judæabus, pecorantes, et ſodomitæ in terra vivi confodiantur, &c. Fleta lib. 1. ca. 35. §. *Contrahentes.*

CAP.

CAP. XXVIII.

Of Felony for any having a Plague ſore upon him, contrary to Commandment goeth abroad, &c.

IF any perſon infected with the plague, commanded (by ſuch perſons as are appointed by the act) to keep houſe, ſhall contrary to ſuch commandment wilfully and contemptuouſly goe abroad, and ſhall converſe in company, having any infectious ſore upon him uncured, ſuch perſon ſhall be adjudged a felon. 1 Jac. ca. 31.

This is felony, albeit no other perſon by ſuch means be infected, for this ſtatute was made to prevent the moſt horrid and fearfull infection of the plague. The law was generall, and extended to all eſtates and degrees whatſoever, and was grounded upon the law of God: and the reaſon of the law of the realme is, that the infectious ſick ſhould be removed from the whole. The party offending might have had the benefit of his clergy. Levit. cap. 13. Numb. cap. 5. Regiſt. F. N. B. 234. Bre. de leproſo amovendo Bract. lib. 5. f. 421. a. Brit. fo. 39. 88. Fleta, li. 6. ca. 39. 22 E. 3. Rot. Clauſ. 2. parte, nu. 14.

Here is a rare proviſo, That no attainder of felony by vertue of this act, ſhall extend to any attainder, or corruption of blood, or forfeiture of goods, chattels, lands, tenements, or hereditaments.

In this proviſo theſe things are to be obſerved: firſt, that by the avoyding of the corruption of blood, the wives dower is impliedly ſaved: for where the heir ſhall inherit, the wife ſhall be endowed againſt the heir. Secondly, that there ſhall be * no forfeiture of goods, or chattels, which is rare, and the like we have not obſerved before, and by conſequent the offender may make his will and teſtament, and if he doe not, the ordinary ought to grant adminiſtration of the goods and chattels, as he ought to doe in other caſes. * Nota.

Theſe words [to any attainder or] muſt be omitted, and the ſenſe to be, to any corruption of blood, for (as it is printed) it is, that no attainder of felony ſhall extend to any attainder, &c.

This act is become of no force for want of continuance, and is expired ſince we wrote this chapter, therefore to be put out of the charge of the juſtices of peace.

CAP. XXIX.

Of Felonie in Jaylers by Dures of Impriſonment, &c. by Statute, and by the Common Law.

14 E. 3. ca. 10. Geol in French is a priſon. Geolier a keeper of a priſon. Anglice, a jayl, or jayler.

IF it happen that the keeper of the priſon, or underkeeper (1) by too great dures of impriſonment (2), and by pain make any priſoner that he hath in his ward to become an * appellor (3), againſt his will (4), and thereof be attainted, he ſhall have judgement of life and member (5).

* An approver. 3 E. 3. Cor. 295.

Before the making of this ſtatute, if a jayler had by dures of impriſonment made his priſoner become an approver, to appeal honeſt men for his own private, of intent to have of their goods, when they were committed to his cuſtody, and to retain them in priſon without being let to mainpriſe, and the appellees upon his appeal be hanged: this is felony in the jayler by the common law: but if the appellees were acquitted, then it was no felony, but a great miſpriſion in the jayler, which was one of the cauſes of the making of this act: for by this act, if the priſoner become an approver againſt his will, whether the appellees be acquited, or attainted, or after the approvement not proceeded with, and whether the approvement be true or falſe, ſo it be by dures of impriſonment, and againſt the will of the priſoner, it is felony. * For it is not lawfull for any man to excite or ſtir any other to a juſt accuſation, complaint or lawfull ſuit, for *culpa eſt ſe immiſcere rei ad ſe non pertinenti*; (and ſo was [a] it reſolved Mich. 7. Ja. in the ſtar-chamber, in ſir John Hollis his caſe, by the whole court) much more to doe it by dures of impriſonment, moſt of all by a jayler, who hath the cuſtody of the priſoner committed to him, to enforce him by dures to become an approver. And therefore this law hath made it felony in the jayler or under-jayler.

28 E. 3. Cor. 272.

* 1 E. 3. ca. 14. 20 E. 3. cap. 5. 1 R. 2. ca. 4. W. 1. cap. 36. 11 H. 4. 2. 91. 22 E. 3. 15. See the expoſition of W. 1. c. 28.

[a] Mich. 7 Jacobi in curia ſtellat. Sir John Hollis caſe.

(1) *Keeper of the priſon, or under-keeper.*] If he be keeper, or under-keeper, *de jure*, or *de facto*, by right or by wrong, he is within the purvien of this ſtatute.

11 H. 4. 73. ſimile. 13 E. 3. bar. 253. ſimile.

(2) *By too great dures of impriſonment.*] Every impriſonment is taken and deemed in law *duritia, dures*: a little addition to it by the jayler is too great dures in this caſe.

* W. 2. cap. 34. 28 E. 3 ca. 3. 13 R. 2. ſtat. 2. cap. 3.

(3) *To become an appellor.*] That is an approver.

1 E. 2. Defrang. priſonam.

(4) *Againſt his will.*] That is, when the priſoner never would have done it of his own will, if the jayler, or under-jayler had not enforced him thereunto.

9 E. 4. fo. 26. Br. Cor. 203.

(5) *Judgement of life or member.*] * Theſe words doe imply felony. For this offence, the offender ſhall have the benefit of his clergy.

[b] If the jayler keep the priſoner more ſtraitly then he ought of right, whereof the priſoner dyeth, this is felony in the jayler by the

[b] Britton, fo. 18. Fleta, lib. 1, c. 26. verſus finem. Mirror cap. 1. §. 9 De homicidio.

the common law. And this is the cauſe, (as before hath been ſaid) that if a priſoner die in priſon, the coroner ought to ſit upon him. See before cap. Petit Treaſon, fo. 34. how priſoners are to be demeaned.

How gaoles are rejoyned and united to the office of ſherifs, ſee this ſtatute of 14 E. 3. ca. 10. 19 H. 7. ca. 10. lib. 4. fo. 34. Muttons caſe. Adde thereunto Rot. Parl. 18 E. 3. nu. 43. and ſo was it decreed in Forteſcues caſe, in the exchequer chamber, *anno* 2. Car. regis. [92]

14 E. 3. ca. 10.
19 H. 7. c. 10.
Li. 4. fo. 34. Muttons caſe.
Parl. 18 E. 3. nu. 43. 2 Car. Regis in the exchequer chamber, Forteſcues caſe.

CAP. XXX.

Of Felony by bringing in, Payment, or Receipt of certaine Money.

IT is felony to make, coin, buy, or bring in, and put in payment, &c. any galley half pence, ſuſkyn, or dotkyn.

3 H. 5. cap. 1. Stat. 1. Raſt. Abb. tit. Money nu. 27.

The reaſon of this law was, for that theſe moneys were baſe, and not of the allay of ſterling, which was (amongſt others) the cauſe of the making of the generall law of 9 H. 5. cap. 6. ſtat. 2.

9 H. 5. c. 6. Stat. 2.

It is felony to pay, or receive for payment any money called blanks. For the better underſtanding of this ſtatute, it is to be known, that theſe blanks were white money coyned by king H. 5. in France after his victory at Agincourt, and league with France, whoſe ſtyle then was, *rex Angliæ, regens et hæres Franciæ.* And they were called blanks or whites in reſpect of the colour, becauſe at the ſame time he coyned alſo a ſalus in gold, the ſalus, being of the value of twenty two ſhillings, was of the allay of ſterling: but the blanks, which were much more common, being each of them valued at eight pence, were not of the allay of ſterling, and therefore they only were decried by the ſaid act of 2 H. 6.

2 H. 6. ca. 9.

See the ſecond part of the Inſtitutes. Artic. ſuper Cartas cap. 20.

For either of theſe offences of felony the offender may have his clergy.

CAP.

CAP. XXXI.

Of Felony for Tranſportation of Silver, or Importation of falſe or evill Money, &c.

Mirror, c. 1. §. 3. Inter les articles de viels roys ordeins.
Rot. Parl. 17 E. 3. nu. 15. not printed.

DEFENDUE fuit que nul argent ſerra tranſport hors del realm.

This was the ancient law of England long before the conqueſt.

At the parliament holden *anno* 17 E. 3. as well the tranſportation of ſilver, as the importation of falſe and evill money, is enacted by authority of that parliament to be felony. And alſo if the ſearchers mentioned in the act be aſſenting to the bringing in of falſe money, or willingly ſuffering ſilver or money to be tranſported, it is alſo made felony. But becauſe this act was never printed nor tranſlated into Engliſh, and for that there be other things obſervable, enacted thereby, worthy to be known, we will tranſcribe the ſame, *de verbo in verbum in proprio idiomate.*

* See Britton cap. 5. fo. 10. b. Ceſt allay eſt ſolonque le forme et uſage del realm.
Mirror, ca. 1 §. 3. before the conqueſt.
& cap. 1. §. 6.
& cap. 5. §. 2.
See inter leges Æthelſtani. c. 14. Canuti ca. 8. Fleta, lib. 1. ca. 22. Glanv. li. 14. c. 7. Of what weight and allay the kings money ſhall be.
25 E. 3. ca. 13. 9 H. 5. ca. 11.
See before cap. Treaſon. Verb. *Sa monye.*
See the ſecond part of the Inſtitutes. Artic. ſuper cartas cap. 20.

* Le parliament tenus a Weſtm. a la quinzeme de Paſch. du raign noſtre ſeignior le roy Edward tiers apres le conqueſt dys et ſeptiſme.

*ITEM accorde eſt de faire une monoie des bones eſterlings en Engleterre du pois et del * alay del auncient eſterling, que avera ſon cours en Engleterre entre les grandz et la comune de la terre, et la quele ne ſerra portes hors du royalme dengleterre en nulle manere, ne pur quecunque cauſe que ceo ſoit. Et en caſe que les Flemings voillent faire bone monoie dargent groſſes ou autres accordant en alay es bones eſterlings, que tiel monoie eit cours en Engleterre entre merchand et merchand et autres qi la vodroient reſceuire de lour bone gree, iſſint que nul argent ſoit portes hors du roialme.*

Item eſt accordes et aſſentus, que bones gents et loialx ſoient aſſignes es ports de miere, et ailours, ou mieſter ſerra, de faire la ſerche que nul argent ſoit portes hors du roialme en monoie n'autrement, forſpris que les grandz quant ils vont per dela qils pensent aver veſſeals dargent pur ſervir lour hoſtels: Et que nul ſoit cy hardy [b] *de porter fauſſe et malvois monoie en roialme, ſur paine de forfeiture de vie et de membre, et a faire eſchanges a ceux qi paſſeront la miere d'or pur lour tones Eſterlings a la value.*

Item aſſentus eſt et accordes, que les dits ſercheours, per cauſe qils ſerront lour offices plus diligement et plus loialment, [c] *ils eient la tierce partie de tote lā fauxe monie, qils purront trover portee*

[b] This is felony. See the like in the ſecond part of the Inſtitutes. 1 E. 2. De frangentibus priſonam. 14 E. 3. 30. &c.
[c] The reward of the ſearchers if they be diligent, &c.

portee deins le roialm a lour proffit demeen : et en meſme la manere eient la tierce partie de la bone monoie quele ilz troveront en la miere paſſent hors de la terre. Et en caſe qils ſoient troves negligents ou rebealx a tieux ſerches faire, [d] *que lour terres et tenements, biens et chateux ſoient ſeiſes en la main le roy, et lour corps pris, et detenus tanque ils eient fait fine au roy pur lour diſobeiſance. Et en caſe quils ſoient* [e] *aſſentants de porter tiels fauxe monoie, et de ſueffrire ſachantement largent ou monoie autrement, (forſpris que les grandz quant ilz vont per dela qils penſent aver veſſeals dargent pur ſervir lour hoſtels come de ſuis eſt dit) eſtre meſnes hors du roialme, eient judgement de vie et de membre.*

[d] the puniſhment of them if they be negligent, &c.

[e] Their aſſent to the bringing in of falſe money, or wittingly to ſuffer ſilver, or money, &c. to be tranſported, is felony.

Item, IT is accorded to make money of good ſterling in England of the weight and allay of the ancient ſterling, which ſhall be currant in England between the great men and commons of the land, and the which ſhall not be carried out of the realm of England in any manner, nor for any cauſe whatſoever. And in caſe, that the Flemings will make good money of ſilver groſſe or other, according, in allay of good ſterling, that ſuch money ſhall be currant in England between merchant and merchant, and others, who of their own accord will receive the ſame, ſo that no ſilver be carried out of the realm.

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Item, It is accorded and aſſented, That good and lawfull men be aſſigned in the ports of the ſea, and elſewhere, where need ſhall be, to make ſearch, that no ſilver be carried out of the realm in money or otherwiſe, (except that the great men may when they goe out of the realm, have ſilver veſſels to ſerve their houſes) and that none be ſo hardy to bring falſe and ill money into the realm upon pain of forfeiture of life and member, and to make exchanges with them, that ſhall paſſe the ſea, of gold for their good ſterling to the value.

Item, It is aſſented and accorded, that the ſaid ſearchers, becauſe they may doe their offices more diligently and more lawfully, ſhall have the third part of all the falſe money that they can find to be brought into the realme for their own benefit; and in the ſame manner they ſhall have the third part of the good money which they ſhall find upon the ſea paſſing out of the realm. And in caſe they ſhall be found negligent or diſobedient in making ſuch ſearches, that their lands and tenements, goods and chattels ſhall be ſeiſed into the kings hands, and their bodies taken and detained untill they have made fine to the king for their diſobedience. And in caſe they ſhall be aſſenting to the bringing in of ſuch falſe money, or wittingly ſhall ſuffer ſilver or money (except veſſels of ſilver for the great men when they goe out of the kingdome to ſerve in their houſes, as before is ſaid) to be tranſported out

out of the realme, they ſhall have judgement of life and member.

The offenders in caſe of felony made by this act may have the benefit of their clergy.

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CAP. XXXII.

Of Felonie for carrying of Wooll, Woolfels, Leather, or Leade out of the Realme.

27 E. 3. cap. 3. the ſtatute of the Staple.

NO merchant, Engliſh, Welch, or Iriſh, ſhall carry any manner of wools, leather, woolfels or lead, out of the ſaid realme and lands, upon paine of forfeiture of life and member, nor ſhall tranſport any of the ſaid wares or merchandizes in the name of merchant ſtrangers, nor ſhall ſend or hold their ſervants, &c. in the parts beyond the ſea to ſurvey the ſale of the ſaid wares or merchandizes, or to receive the money coming of the ſale of the ſame, nor take payment of gold or ſilver, nor of any other thing in recompence or commutation, or in the name of payment in the parts beyond the ſea out of the realme and lands aboveſaid of merchandizes ſold in England, Ireland, or Wales, touching the ſtaple, but that all ſuch payment ſhall be made in gold or ſilver, or merchandizes in England, Ireland, or Wales, where the contract was made, upon paine of life and member.

Mirror, cap. 1. § 3. Inter les artic. per vieles royes ordeins. Defendu que nul de ameſnalt leyne hors del realme.

Cap. 11. That no merchant privie nor ſtranger, nor any other, of what condition that he be, go by land or by water towards wines, or other wares or merchandizes coming into our ſaid realme or lands, in the ſea, nor elſewhere to foreſtall or buy the ſame, or in other manner to give earneſt upon them, before that they come to the ſtaple, or to the port where they ſhall be diſcharged; nor enter into the ſhips for ſuch cauſe, till the merchandizes be ſet to land to be ſold, upon paine of loſſe of life and member.

Cap. 12. No merchant privie, ſtranger, or other ſhall carry out of our realme of England, wools, leather, or woolfels to Barwick upon Twede, nor elſewhere, nor into Scotland upon the like paine, nor that any merchant, nor any other ſell his wools, woolfels, or leather, to any of Scotland, nor to any other to carry into Scotland: upon the like paine.

Cap. 13. If the merchants or other people of Ireland or Wales, after they be in the ſea with their merchandizes, do paſſe to any place, other then to the ſtaples in England: it is felony.

No

No merchant, or other ſhall make any conſpiracie, confederacy, &c. or ill device in any point, that may turn to the impeachment, diſturbance, defeating, or decay of the ſtaples, &c. and if any do, and be thereof attainted before the major and miniſters of the ſtaple, or other whom the king ſhall aſſigne, he ſhall incurre the paine of loſſe of life and member. Cap. 25.

Item, *ou auterfoitz fuit orden en * leſtatuts de leſtaple que nul Englois paſſera la mere ove leynes, quire, pealtz lanuts, ne per auter, ſur peine de forfeiture de vie et member, terres et tenements, biens et chateux: eſt accord que la forfeiture de vie et member ſoit ouſte de tout en leſtatute de leſtaple, et que nul home ſoit impeach por tiel forfeiture de vie et member, cibien in temps paſſe come avenir, la forfeiture des terres et tenements, biens et chateux eſteant en ſa force.* The ſame in Engliſh. 38 E. 3. cap 6. 27 E. 3. ca. 3. &c. ſtat. Staplæ.

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Alſo, where heretofore it was ordained in the ſtatutes of the ſtaple, that no Engliſh man ſhould paſſe the ſea with wools, leather, woolfels, nor by other, upon paine of forfeiture of life and member, lands and tenements, goods and chattels. It is accorded that the forfeiture of life and member be ouſted in the whole in the ſtatute of the ſtaple, and that no man be impeached by ſuch forfeiture of life and member, as well in times paſt, as to come, the forfeiture of the lands and tenements, goods and chattels, being in his force.

By the expreſſe letter of the body of this law, the forfeiture of life and member is ouſted *de tout* in the ſtatute: therefore it is holden, that the felony is taken away throughout the ſtatute, but the forfeiture of lands and goods remaineth by the expreſſe letter of this act.

By the ſtatute of 18 H. 6. no man ſhall carry wool, or woolfels, out of this realme to other places, then to the ſtaple at Callice, without the kings licenſe, upon paine of felony, &c. And that as well commiſſioners aſſigned, as the juſtices in every county where ſuch wools and woolfels ſhall be ſo carried out, have power and authority to enquire of the premiſes, and them to hear, and determine, &c. 18 H. 6. cap. 15. Staaf. Pl. Cor. 37. b.

But this act extendeth not to wools which ſhall paſſe the ſtrait of Marroke. And this is a perpetuall law, and cannot be expired, as it is ſuppoſed in the laſt impreſſion of the ſtatutes at large, but it extendeth only to wools and woolfels. The offender herein may have his clergie.

And for the better underſtanding of ancient ſtatutes and records concerning wools, it is neceſſary to explaine certaine words and termes. By the ſtatute of 25 E. 3. cap. 9. a ſack of wool containes but twenty ſix ſtone, and every ſtone fourteen pound, where before it was [a] twenty eight ſtone.

Pochet of wool, *unde poshettum*, that is, a little poke or ſack containing halfe a ſack of wool. Sarpler, *unde ſarpleia*, is alſo halfe a ſack, and is derived from the French word *ſarpillier*, which ſignifieth

[a] Compoſ. de ponderibus vet. Mag. Carta, 2 part. fo. 31. Saccus lanæ. Rot. Parl. 27 E. 3. nu. 53.

nifieth a wrapper, within which wrapper halfe a ſack is contained.

[b] Compoſit. de ponderibus, ubi ſupra.

[b] A weigh of wool, *unde waga*, is halfe a ſack.

A tod or toit of wool, *unde toddum lanæ*, containeth two ſtone, and is derived from the French word *toilet*, which is a wrapper, within which by uſage two ſtone of wooll is foulded: ſome fetch it from the Flemmiſh word *dodderem*, which ſignifieth *nectere*, to weave, becauſe it is woven into cloth. *Petra lanæ* is a ſtone of wooll, ſo called, becauſe the weight, being a ſtone, containes fourteen pound.

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CAP. XXXIII.

Againſt Tranſportation of Iron, Braſſe, Copper, Latten, Bell-metall, Pan-metall, Gun-metall, or Shroofe-metall, (Tinne and Lead only excepted.)

28 E. 3. cap. 5. 31 H. 8. cap. 7. 2 E. 6. cap. 37. See the penalties in the ſtatutes themſelves, which are thought to be too weak. Ferrum a feriendo. Timber is a Saxon word, in old French, Marem, unde Maremium, Latine, ligni materia, vel lignum ædificatorium. [*] Terra fullonica.

THE tranſportation of theſe are prohibited by divers acts of parliament upon the penalties therein expreſſed. And hereby is prohibited the tranſportation of any gunnes whatſoever, a neceſſary law, and worthy of due execution.

And we have obſerved, that God hath bleſſed this realme with things for the defence of the ſame, and maintenance of trade and traffick, that no other part of the Chriſtian world hath the like: viz. Iron to make gunnes, &c. more ſerviceable and perdurable then any other. Secondly, timber for the making and repairing of our navie, and eſpecially of the knees of the ſhips, better then any other. Thirdly, * our fullers earth is better for the falling of our cloth, then any other. Fourthly, our wooll makes better cloth, and more laſting and defenſible againſt winde and weather, then the wooll in any nation out of the kings dominions; and many other ſpeciall gifts of God.

But here will we ſtay, and pray, that none of theſe may be tranſported for many inconveniencies, that will follow thereupon.

CAP. XXXIV.

Of Felony for ſtealing of a Faulcon.

37 E. 3. cap. 19.

EVERY perſon (1) that findeth (2) any falcon (3), tercelet (4), launner, or laneret (5), or any other falcon, that is loſt of his lords (6), that forthwith he ſhall bring it to the ſherif of the county, and that the ſherif make proclamation (7), &c. and if any ſteal any hawk (8), and the ſame carry

carry away not doing the ordinance aforeſaid, it ſhall be done of him as of a thief that ſtealeth a horſe (9) or other thing.

The ſtatute of 34 E. 3. inflicted the penalty for the concealing and taking away of the hawk, two years impriſonment, and the price of the hawk to the lord, if he hath wherewith, and if not, he ſhall the longer abide in priſon. This act of 37 E. 3. maketh the offence felony. 34 E. 3. cap. 22.

The new printed book of the ſtatutes at large, in ſtead of theſe words, (or any other falcon) hath, or any other hawk. Printed for the ſociety of ſtationers, 1618.

I have ſeen ſome manuſcripts (in theſe words) in the original tongue, wherein the ſtatute was publiſhed. *Que quecunque perſon que trove faucon, tercelet, lanier, ou lanyret, auſtor ou auter faucon.* And both theſe differ from the truth of this law. For the firſt extendeth this act to any hawk whatſoever. And the manuſcript to *auſtor* or *autor*, a goſhawk, whereas in truth, this law extendeth only to ſuch as be of the kinde of faulcons, being long winged hawks, which many times by flying far off are loſt, and not to any ſhort-winged hawk, as the goſhawk, the tercel of the goſhawk, the ſparhawk, &c. And in the body of the act this word (faulcon) is ever uſed, and not this word (hawk) as hereafter appeareth. We would have been glad to have cleared this point by the record of the parliament roll, but the roll of this act is not to be found, and yet being a generall law, the judges are to take notice thereof: and that which I have ſet down, as the words of the law, agreeth with the firſt impreſſion thereof, and with all ſucceeding impreſſions ſaving the laſt. See hereafter, cap. Larceny, verb. Perſonall goods, &c. [98] Lib. 8. fo. 27, 28. In caſu principis.

(1) *Every perſon.*] This is a generall law, and extendeth to all perſons of what degree or ſex ſoever.

(2) *That findeth.*] Note by the common law the felonious taking of any hawk long-winged, or ſhort-winged, from the peark, &c. or from the perſon of any man, with a mind to ſteal her, is robbery: but the finding of a faulcon, though he concealed, denied, or ſold her, was no felony, but by this act.

(3) *Any faulcon.*] By this and the laſt words, or any other faulcon, it appeareth that only faulcons are within this law, as beſides thoſe that are here named, the gerfaulcon, *girofalco*, or *ardeanius*, and the tercell, which is called a jerkin; and the lanner is called *falcunculus*. But the merlyn, which is called *æſalo*, and the hobby which is called *alaudaria*, though they be long-winged hawks, yet being not of the kind of faulcons they are not within this ſtatute, neither is any ſhort-winged hawk, as the goſhawk, the tercell of the goſhawk, or the ſparhawk, &c. as has been ſaid, within this act.

(4) *Tercelet.*] This is the tercell of the faulcon, called a tercell gentill, the male of the faulcon called *terciolus, quia tertia parte minor ſit femella*, becauſe the tercell is a third part leſſe then the female.

(5) *Lanner and laneret.*] Theſe (as hath been ſaid) are of the kind of faulcons, which appeareth not only by the name *falcunculus*, but by the words of the act, for having named the lanner and laneret, it is ſaid, or any other faulcon.

Albeit theſe hawks, that ſhall be ſo loſt, have no vervels, yet

must the finder carry them to the sherif, for vervels are not required by this act. The only thing that the finder is to doe, to save himself from felony, is forthwith (the word in the originall is *maintenant*) after his finding to carry the hawk to the sherif.

(6) *That is lost of his lords.*] Lords are taken here for the owners, the word in the original is *seignior*, which signifieth as well a proprietary, as a lord.

10 E. 4. 1. 7 R. 2. barre 241. Lib. 5. fo. 108. Sir Hen. Constables case.

(7) *To prove reasonably.*] This is not intended according to the generall sense of this word (proof) that is, by a jury of twelve men, but (reasonably,) that is, by vervels, or by marks, or by other proof to the sherif.

(8) *And if any steal any hawk, &c.*] The concealing and carrying away of the hawk, not bringing the same to the sherif according to this ordinance, is adjudged a stealing by this act. And yet if a man finde goods, and conceal or deny them, it is no felony.

14 El. Dier, 307. Fines case. Lib. 7. fo. 17. in case de Swans.

(9) *As of a thief that stealeth a horse.*] But yet by the common law one hath not as good and absolute a property in hawks, being *ferae naturae*, and reclaimed for delight and pleasure (for they may become wild again, and return to their naturall liberty) as in a horse, or any other thing of profit: but the concealing and carrying away of the hawk reclaimed, being found was no felony before this statute, no more then any thing of profit, because the party came to the hawk by finding. See more hereof in the chapter of larceny. A hawk that is not reclaimed is *nullius in bonis*, but *occupanti conceditur*, and he that first getteth the hawk enjoyeth it.

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In this act four things are to be observed. First, that the sherif must make proclamation in all the good towns of the county that he hath such a faulcon in keeping. Secondly, if none come to challenge the faulcon within four months, if the finder be under the degree * of a gentleman (which here is called *un simple home*) the sherif shall have the falcon, paying reasonable costs, &c. Thirdly, if the finder be a gentleman, and no challenge by the owner within four months, then he shall have the faulcon, paying reasonable costs, &c. Fourthly, it is to be observed, that in these two latter branches, the last printed book hath this word (hawk:) but in the originall, and all the other printed books, the word is (falcon) under which word, all the rest mentioned in this act are included.

* Who shall be accounted in law a gentleman; see the second part of the Institutes the statute of Additions. 1 H. 5. c. 5. See before c. 23. 3 Jac. ca. 4. verb. And that if any gent.

For this offence of felony the offender shall have the benefit of his clergy, for at the time of the making of this act he that had stolen a horse should have had his clergy. See Stanf. Pl. Coron. fo. 37.

CAP.

CAP. XXXV.

Congregations, &c. by Maſons in their generall Chapters, &c.

IT is ordained and eſtabliſhed that no congregations and confederacies ſhall be made by maſons in their generall chapters and aſſemblies, whereby the good courſe and effects of the ſtatutes of labourers are violated and broken, in ſubverſion of law; and if any be, they that cauſe ſuch chapters and congregations to be aſſembled and holden, ſhall be adjudged felons. 3 H. 6. ca. 1.

The cauſe wherefore this offence was made felony, is, for that the good courſe and effect of the ſtatutes of labourers were thereby violated and broken. Now all the ſtatutes concerning labourers before this act, and whereunto this act doth refer are repealed by the ſtatute of 5 Eliz. cap. 4. whereby the cauſe and end of the making of this act is taken away, and conſequently this act is become of no force or effect: *ceſſante ratione legis, ceſſat ipſa lex.* And the indictment of felony upon this ſtatute muſt contain, that thoſe chapters and congregations were to the violating and breaking of the good courſe and effect of thoſe ſtatutes of labourers, which now cannot be ſo alledged, becauſe thoſe ſtatutes be repealed. Therefore this would be put out of the charge of juſtices of peace written by * maſter Lambard.

2 E. 3 de ſervientibus, ca. 1. &c. 25 E. 3. De ſervientibus c. 1. &c. 5 El. ca. 4.

Ceſſante cauſa ſeu ratione legis ceſſat ipſa lex. 14 H. 7. 31. Per Fineux ſimile. 27 H. 8. 4. b. Aide ſimile 10 E. 3. 8. Account per Shard. 26 H. 6. Examination 14.

* Lambard, page 227. vide Stanf. 37. b.

CAP. XXXVI. [100]

Of Felony by bringing in of Buls of Excommunication, &c.

IF any man (1) bring or ſend into this realm, or the kings power, any ſommons, ſentence, or excommunication (2) againſt any perſon of what condition that he be, for the cauſe of making motion, aſſent, or execution of the ſtatute of proviſors (3), he ſhall be taken, arreſted, and put in priſon, and forfeit all his lands and tenements, goods and chattels for ever, and incur the pain of life and member (4). And if any prelate make execution (5) of ſuch ſommons, ſentence, or excommunication, that his temporalties be taken, and abide in the kings hand till due redreſſe and correction be thereof made.

13 R. 2. Stat. 2. cap. 3.

And if any perſon of leſſe eſtate then a prelate, &c. make ſuch execution, he ſhall be taken, arreſted, and put in priſon, and have impriſonment, and make fine and ranſome by the diſcretion of the kings councell.

By the common law when any perſon, either eccleſiaſticall or temporall, ſhould by pretext of forain power impugne or attempt to fruſtrate any of the laws of the realm, there lieth a writ called *ad jura regia:* if it were by an eccleſiaſticall perſon beneficed within this realm, then the writ is.

Regiſt. fo. 61. b. *Rex, &c. ſalutem. Turbamur, nec immerito, et movemur dum illos qui ſub noſtro degunt dominio, et ibidem beneficiis et redditibus honorantur, quo prætextu in defenſione, et tuitione jurium regiæ coronæ noſtræ ipſos nos aſſiſtere contigerit, eadem jura erectis contra nos cervicibus conſpicimus fatagentes pro viribus impugnare, &c.*

Ibidem, 60. b. The general writ is, *Rex, &c. ad jura coronæ noſtræ integra et illæſa pro viribus conſervanda, eo amplius curam et operam adhibere nos convenit ſtudioſam quòd ad hoc eſt debito aſtringimur vinculo juramenti, et alios conſpicimus, ad ipſorum jurium enervationem anhelare:* and particularly againſt proviſions. So as proviſions, &c. were, as by theſe writs it appeareth, againſt the common law of the realm, but ſufficient puniſhment was not thereby inflicted: therefore this, and other ſtatutes were made.

Ibid. 61. b. & 62.

And here it is worthy of conſideration, how the laws of England are not derived from any forain law, either cannon, civil, or other, but a ſpecial law appropriated to this kingdome, and moſt accommodate and apt for the good government thereof, under which it hath wonderfully flouriſhed, when this law hath been put in due execution: and therefore as by ſituation, ſo by law it is truly ſaid,

*Et penitus toto * divisos orbe Britannos.*

* Diſ- { orbe & vitos { legibus.

(1) *If any man.*] Though theſe words be generall, yet they extend not to eccleſiaſticall perſons, becauſe there is ſpeciall proviſion for them after in the act.

(2) *Any ſommons, ſentence, or excommunication.*] Hereby are prohibited the popes buls of any ſentence or excommunication, &c. and proces of ſummons.

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It appeareth by our books that the bringing of any bull of excommunication into the realme againſt a ſubject, was againſt the common law of England, in reſpect it gave way to foraine authority. And ſo it was holden in the time of E. 1. and E. 3. &c. long before this act, and ever ſince.

11 E. 3. Certif. 6. 30 Aſſ. p. 3. 19 E. 3. Quare non admiſit. 7. Brook. Premunire 10. 11 H. 4. 69. 76. 14 H. 4. 14. 7 E. 4. 14. 20 H. 6. 1. 35 H. 6. 42. F. N. B. 64. f. Lib. 5. fo. 12. in Caudries caſe. 2 W. 2. cap. 24. 1 E. 2. de frang. priſonam. 25 E. 3. cap. 3. 13 R. 2. ſtat. 2. ca. 3. 9 E. 4. 26. Br. Cor. 203.

(3) *Or execution of the ſaid ſtatute of proviſors.*] viz. 25 E. 3. *de proviſoribus.* See 25 E. 3. cap. 22. 27 E. 3. cap. 1. 38 E. 3. ſtat. 2. cap. 1 & 4.

(4) *Incurre the paine of life and member.*] * That is, of felony as hath been often ſaid before. This puniſhment is altered by the ſtatute of 13 Eliz. cap. 2. as hereafter in this chapter ſhall appeare.

(5) *And if any prelate make execution, &c.*] This and the next following branch extend to eccleſiaſticall perſons. The puniſhment in both theſe branches, and in the former alſo is altered by the ſtatute of 13 Eliz. cap. 2. For thereby this offence is made high treaſon,

ſon, [b] as well in perſons eccleſiaſticall, as temporall: which act, and the cauſe of the making thereof you may reade in the caſe *de jure regis eccleſiaſtico, ubi ſupra.*

[b] Lib. 5. f. 35, 36, &c. De jure regis eccleſ.

CAP. XXXVII.

Of Felony in receiving a Jeſuite, Seminary Prieſt, &c.

EVERY perſon which ſhall wittingly and willingly receive, relieve, comfort, or maintaine any jeſuite, ſeminary prieſt, or other prieſt, deacon, or religious, or eccleſiaſticall perſon (made by authority from the ſee of Rome ſince the feaſt of Saint John Baptiſt, an. 1 Eliz. borne within this realme) being at liberty and out of hold, knowing him to be a jeſuite, &c. ſhall for ſuch offence be adjudged a felon without benefit of clergie. 27 Eliz. cap. 2. Clergie taken away.

The cauſe of the making of this ſtatute of 27 Eliz. againſt jeſuites and ſeminary prieſts, &c. and their receivers, you may reade at large, lib. 5. fol. 38, 39, in the caſe *De jure regis eccleſiaſtico.*

CAP. XXXVIII. [102]

Of Felony in Recuſants concerning Abjuration.

IF any recuſant) other then a Popiſh recuſant or a feme covert) which by the tenor and intent of this act is to be abjured, ſhall refuſe to make abjuration, or after ſuch abjuration made ſhall not goe to ſuch haven, and within ſuch time, as is by this act appointed, and from thence depart out of the realme, according to this preſent act, or after his departure ſhall returne into any of her majeſties realmes or dominions, without her majeſties ſpecial licenſe in that behalfe firſt obtained; that then every ſuch perſon ſo offending, ſhall be adjudged a felon. 35 Eliz. cap. 1.

If any offender againſt this act before he or they be required to make abjuration, repaire to ſome pariſh church, on ſome Sunday or feſtivall day, and then and there heare divine ſervice, and make ſuch ſubmiſſion as by the act is preſcribed: then the ſaid offender is cleerly to be diſcharged.

The offender ſhall forfeit his goods and chattels, and his lands during his life only, the offence ſhall work no loſſe of dower or corruption of blood, and the heire to inherit. The offender ſhall not have the benefit of his clergie.

CAP. XXXIX.

Of Felonie in Egyptians, &c.

1 & 2 Ph. and Mar. cap. 4. 5 Eliz. cap. 20.

IF any outlandiſh people, calling themſelves, or being called Egyptians, ſhall remaine in this realme, or in Wales, one moneth, at one or ſeverall times: and if any perſon being fourteene yeares old, which hath been ſeen or found in the fellowſhip of ſuch Egyptians, or which hath diſguiſed him or herſelfe like to them, ſhall remaine here or in Wales by the ſpace of one moneth, either at one or ſeverall times, it is felony.

The offender ſhall not have the benefit of his clergie.

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CAP. XL.

Of Felonie in dangerous Rogues.

39 Eliz. cap. 4. 1 Jac. cap. 7. 25.

IF any dangerous rogue that was baniſhed the realme or adjudged perpetually to the gallies, have returned into the realme without lawfull licenſe or warrant, it is felony: the felony to be tried where the offender is apprehended.

The offender may have the benefit of his clergie.

39 Eliz. cap. 4. 1 Jac. cap. 7.

If any rogue after he hath been branded in open ſeſſions with a Roman R. upon the left ſhoulder, or ſent to the place of his dwelling where he laſt dwelt by the ſpace of a yeare, or the place of his birth, to be placed in labour, have offended againe in begging, or wandering contrary to the ſaid ſtatutes, it is felony, to be tried in the county where the offender ſhall be taken.

The offender againſt this branch ſhall not have the benefit of his clergie.

Deut. ca. 15. v. 4. Mirr. cap. 1. § 3. Inter les Art. per viels royes ordeins.

Mendicus non erit inter vos, there ſhall be no begger among you.

Ordeine fuit que les povres fuiſſent ſuſteinus per les parſons, rectors, et les parochians cy que nul ne moruſt per default de ſuſteinance.

See

See an ancient ordinance in 50 E. 3. concerning ribauds and ſturdy beggers, that they be driven to their occupations or ſervices, or to the place from whence they came. Rot. Par. 50 E. 3. nu. 61. Brit. 49. b.

CAP. XLI.

Of Felonie by Forgerie in the ſecond Degree.

IF any perſon or perſons being once condemned of any of the forgeries mentioned in the act, ſhall after ſuch his, or their condemnation, eft-ſoones commit or perpetrate any of the ſaid offences in forme in the ſaid act mentioned, that then every ſuch ſecond offence ſhall be adjudged felony. But no attainder of this felony ſhall extend to take away dower, nor to corruption of blood, or diſheriſon of the heire. 5 Eliz. cap. 14.

In 43 Eliz. Markham was attainted of felony upon this branch in the kings bench for a ſecond forgery of many of the mannors and lands late of Sir Thomas Greſham knight, and was executed therefore. Markhams caſe coram rege. 43 Eliz.

* This felony is to be heard and determined before juſtices of oier and terminer, and juſtices of aſſiſe in their circuit. And albeit that juſtices of peace have power to heare and determine felonies, treſpaſſe, &c. yet are they not included under the name of juſtices of oier and terminer: for juſtices of oier and terminer are known by one diſtinct name, and juſtices of peace by another. But the juſtices of the kings bench are juſtices of oier and terminer within this ſtatute. Hil. 30 Eliz. coram rege. Lib. 9. fo. 118. b. Smiths caſe. 3 Mar. Br. tit. Oier & Term. 8.

The offender ſhall not have the benefit of his clergie.

See hereafter in the expoſition of this ſtatute for the firſt offence, where incidently there ſhall be more ſaid concerning the ſecond offence.

CAP. XLII. [104]

Of Felony for conveying of any Sheep alive out of the Realm in a ſecond Degree.

NO manner of perſon ſhall bring, deliver, ſend, receive, or take, or procure to be brought, delivered, ſent, or received into any ſhip, or bottome any rams, ſheep, or lambs, or any other ſheep alive, to be carried and conveyed out of this realm of England, Wales, or Ireland, or out of any of the queens dominions, upon pain that every ſuch perſon, their aiders, abetters, procurers, and comforters, ſhall for his 8 El. cap. 3. See the ſtatute of 3 H. 6. cap. 2.

his and their firſt offence, forfeit all his goods, and ſuffer imprisonment one whole year without bayl or mainprise; and at the years end in ſome market town in the fulneſſe of the market, have his left hand cut off, &c. And that every perſon eft-ſoons offending againſt this ſtatute ſhall be adjudged a felon, &c.

His left hand cut off.

But this act ſhall not extend to any corruption of blood, or loſſe of dower. This felony is to be heard and determined before juſtices of oier and terminer, juſtices of gaol-delivery, and juſtices of peace. And the offender may have the benefit of his clergy, as well in caſe of the cutting off his hand as in caſe of felony. See Stanford, 37. b.

CAP. XLIII.

Of Felony in Servants that imbeſill their Maſters Goods after their Deceaſe.

33 H. 6. cap. 1.

IF any of the houſhold ſervants of any perſon ſhall after the deceaſe of their lord or maſter violently and riotouſly take and ſpoil the goods which were their ſaid lords or maſters, and the ſame diſtribute amongſt them, that upon full information [a] to the chancelour of England for the time being by the [b] executors or two of them, of ſuch riot, taking, or ſpoil made, the chancelour by the advice of the chief juſtices, and chief baron, or two of them, ſhall have power to make ſo many and ſuch writs to be directed to ſuch ſherifs, as to them ſhall ſeem neceſſary, to make open proclamation in ſuch ſort, as by the act is preſcribed, to appear in the kings bench, &c. and if any ſuch writ be returned, &c. then if the ſaid perſon or perſons make default, then he or they making default ſhall be [c] attainted of felony.

[a] This extends to the lord keeper of the great ſeal.
[b] This extends to the adminiſtrators, and alſo, if there be but one executor or adminiſtrator.
[c] Attainted by force of this act of parliament upon default. See the like many times in the parliament rolls. Rot. Parl. 15 H. 6. nu. 14. & 15. Rot. Parl. 18 H. 6. num. 28.

The offenders ſhall have the benefit of their clergy.

CAP.

CAP. XLIV.

Of Felony in Servants that imbeſill their Maſters Goods committed to their Truſt above Forty Shillings.

EVERY ſervant to whom any caſkets, jewels, money, goods, or cattels of his or their maſter, or miſtris, ſhall be delivered to keep, that if any ſuch ſervant or ſervants withdraw him or them from their ſaid maſters or miſtriſſes (1), and goe away with the ſaid caſkets, jewels, money, goods, or cattels, or any part thereof to the intent to ſteal the ſame, contrary to the truſt and confidence in him or them put, &c. Or elſe being in ſervice of his ſaid maſter or miſtris, without the aſſent and commandment of his maſter or miſtris, imbeſill the ſame or any part thereof, or otherwiſe convert the ſame to his own uſe, with like purpoſe to ſteal it: if the caſkets, jewels, money, goods or cattels be of the value of forty ſhillings or above, ſhall be deemed and adjudged felony. 21 H. 8. ca. 7. 27 H. 8. ca. 17. 28 H. 8. ca. 2. 1 E. 6. ca. 12. 5 El. ca. 10.

Concerning the value, (to ſpeak it once for all) *tantum bona valent, quantum vendi poſſunt.*

This act extendeth not to any apprentice or apprentices, nor to any ſervant within the age of eighteen years, at the time of the offence committed.

Vide Dier, 25 H. 8. fol. 5. Dier, 25 H. 8. f. 5.

By the ſtatute of 27 H. 8. the offender was ouſted of his clergy, but that act is repealed by 1 E. 6. cap. 12. So as at this day the offender may have the benefit of his clergy. 1 E. 6. ca. 12.

(1) *Shall be delivered by his or their maſter or miſtris.*] If the maſter deliver an obligation to his ſervant to receive the money thereby due, and the ſervant receive the money of the obligee, and goeth away with the ſame with intent to ſteal the ſame, this is no offence within this ſtatute, becauſe he had not the money of the delivery of his maſter: and if he had gone with the obligation with intent, *ut ſupra*, it had been alſo out of this act, becauſe it was a choſe in action. So if the maſter deliver to his ſervant wares or merchandiſes to ſell, and ſelleth the ſame and goeth away with the money as before, this is no offence within this ſtatute for the cauſe aforeſaid. See Stanford, 37. b. Dier, 26 H. 8. fo. 5. a. & b. See the form of the indictment upon this ſtat. Lamb. inter Præſidentes.

CAP.

CAP. XLV.

Of Felony to cut down or break up the Powdike in Marſhland in Norff.

22 H. 8. ca. 11. 2 & 3 Ph. and Mar. cap. 19.

EVERY perverſe and malitious cutting down and breaking up of any part of the new dike called the Powdike in Marſhland in the county of Norff. or of the broken dike called Oldfield Dike by Marſhland in the Iſle of Ely in the county of Cambridge, or of any other bank being parcell of the Rinde, and uttermoſt part of the ſaid country is adjudged felony.

The juſtices of peace have power to enquire of, and to hear and determine this felony. The offender may have the benefit of his clergy.

Some ſay that this is a private act, but it is *publicum in privato*, for the danger is publike though the place be private, and doth concern multitudes of people, and the ſea is ſuch an immenſe creature, as who can withſtand it without length of time, infinite dammage, and loſſe, and extream charge and coſt.

43 El. cap. 13. * See before cap. 12. fo. 61, 62. 3 H. 7. cap. 2. Vide 1 Fl. 5. c. 6. ſimile de Gales. * Blackmail is explained by the act it ſelf.

See the ſtatute of 43 El. cap. 13. whereby in the counties of Cumberland, Northumberland, Weſtmerland and the B. of Dureſme * carrying away or detaining of any perſon againſt his will, or impriſoning him or them to ranſome them or to ſpoil them, upon deadly feud or otherwiſe, or ſhall receive or carry * blackmail, or give black mail for protection, &c. is made felony without benefit of clergy.

CAP. XLVI.

Of one of the Grand Enqueſt being one of the Indictors of any Perſon or Perſons of Treaſon or Felony, and diſcover openly what Perſons were ſo indicted, &c.

THIS by ſome opinion in our books was holden for treaſon, or felony, and hereof divers reaſons were yeelded.

Stanf. fo. 36. a.

Firſt, that ſuch diſcovery was againſt his oath, but that could not be the reaſon, for perjury was neither treaſon nor felony.

Secondly, others did hold, that by this diſcovery the parties indicted of treaſon or felony might flee, or eſcape, but that can be no reaſon;

reaſon; for this diſcovery without more, can neither make him principall nor acceſſory.

Thirdly, others that endeavour to confeſſe and avoid the authorities in this caſe in law, are of opinion, that in thoſe times the intent of a man, *in criminalibus*, was much reſpected, in as much as *in criminalibus voluntas reputabatur pro facto*, and that by this open diſcovery, &c. his intent appeared, that they might flee or eſcape. And now it is agreed on all parts, that at this day ſuch diſcovery is neither treaſon nor felony: and the rather, for that no perſon ever died for ſuch diſcovery. In Georges caſe, in *anno* 27 lib. Aſſ. upon his indictment he was acquited. But certaine it is, that ſuch diſcovery is accompanied with perjury, and a great miſpriſion to be puniſhed by fine and impriſonment.

18 E. 3. Cor. 272. 27 Aſſ. p. 63. Georges caſe.

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CAP. XLVII.

Of Larceny or Theft by the Common Law.

HAVING thus far proceeded, we are now come to larceny, which commeth from *latrocinium*, and from *latrocinie*, by contraction, or rather abuſe, to larceny.

The Mirror firſt deſcribeth larceny, and then explaineth it. *Larcine eſt priſe d'autre moeble corporelle trecherouſment contre la volunt de celuy a q. il eſt p. male egaigne de la poſſeſſion, ou del uſe.* Then doth he explaine and ſhew the reaſon of the principall words thereof.

Mirror, cap. 1. § 10. De Larcenie.

Priſe eſt dit, car baile neſt my title de laroun, ne livery en le caſe.

Moeble corporelle eſt dit pur cco q. en biens nient moebles, ou nient corporels, ſicome de tre', rents, et des advowſons de eſgliſes, ne ſe fait nul larcenie.

Trecherouſment eſt dit pur cco q. ſi leſloignour entende les biens eſtre ſiens, et que il les poet bien prender, en tiel caſe ne ſe fait my ceſte peche, nec en caſe ou len prent l'autrui p. la ou len entend, que il pleiſt al ſeigniour des biens, que il les prendera, mes a cco covient enſeigner apparant preſumption et evidence.

Et ſciendum, quod furtum eſt, ſecundum leges, contrectatio rei alienæ fraudulenta, cum animo furandi, invito illo domino, cujus res illa fuerat. And then he alſo explaineth it. *Cum animo dico, quia ſine animo furandi non committitur.* Bracton uſeth not the word *latrocinium*, but *furtum*, and ſo doth Granvile. See Britton a whole chapter *de Larcyns*. And Fleta hath it thus, *Eſt autem furtum contrectatio rei alienæ fraudulenta cum animo furandi invito dno. cujus res illa fuerit*, following Bracton *totidem verbis*. Theſe deſcriptions are generally of theft, comprehending robbery, burglary, when any thing is taken, and all other latrocinies. But here larceny for diſtinction ſake is taken in a narrower ſenſe, viz. for ſingle theft or thievery, and may be deſcribed thus.

Bracton, lib. 3. fol. 150.

Glanvil. lib. 7. c. 17. & lib. 10. cap. 15. Britton, cap. 15. de Larcyns. fo. 22. Fleta, lib. 1. ca. 36.

Larceny, by the common law, is the felonious and fraudulent taking and carrying away by any man or woman, of the meere perſonall goods of another, neither from the perſon, nor by night in the houſe of the owner.

Larceny defined.

Now

Now let us perúſe the principall parts of this deſcription.

See tit. Piracy, &c. Butlers caſe, 28 Eliz.

Felonious taking.] Firſt it muſt be felonious, *id eſt, cum animo furandi*, as hath been ſaid. *Actus non facit reum, niſi mens ſit rea.* And this intent to ſteale muſt be when it cometh to his hands or poſſeſſions: for if he hath the poſſeſſion of it once lawfully, though he hath *animum furandi* afterward, and carrieth it away, it is no larceny: but this receiveth ſome diſtinction, as hereafter ſhall appeare.

2 E. 3. 1.

Secondly, it muſt be an actuall taking: for an indictment, *quod felonice abduxit equum*, is not good, becauſe it wanteth, *cepit*. By taking, and not bailment or delivery, for that is a receipt, and not a taking: and therewith agreeth Glanvil. *Furtum non eſt ubi initium habet detentionis per dominum rei.*

Glanvil. lib. 10. cap. 13. 13 E. 4. 9.

But herein the law doth diſtinguiſh. For if a bale or pack of merchandize be delivered to carry to one to a certaine place, and he goeth away with the whole pack, this is no felony: but if he open the pack, and take any thing out *animo furandi*, this is larceny. Likewiſe if the carrier carry it to the place appointed, and after take the whole pack *animo furandi*, this is larceny alſo: for the delivery had taken his effect, and the privity of the bailement is determined. And ſo it is of a tun of wine, or the like, *mutatis mutandis.*

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Charge.

3 H. 7. 12. 21 H. 7. 15.

Alſo there is a diverſity betweene a poſſeſſion, and a charge; for when I deliver goods to a man, he hath the poſſeſſion of the goods, and may have an action of treſpaſſe, or an appeale, if they be taken or ſtolne out of his poſſeſſion. But my butler or cook, that in my houſe hath charge of my veſſel or plate, hath no poſſeſſion of them, nor ſhall have an action of treſpaſſe or an appeale, as the bailee ſhall: and therefore if they ſteale the plate or veſſel, it is larceny. And ſo it is of a ſhepherd, for theſe things be *in onere, et non in poſſeſſione promi, coci, paſtoris*, &c.

13 E. 4. 9.

Speciall uſe.

If a taverner ſet a piece of plate before a man to drink in it, and he carry it away, &c. this is larceny: for it is no bailement, but a ſpeciall uſe to a ſpeciall purpoſe.

22 Aſſ. pl. 99. 22 E. 3. cor. 265.

Thirdly, nor by trover or finding. If one loſe his goods, and another finde them, though he convert them, *animo furandi*, to his own uſe, yet is it no larceny, for the firſt taking is lawfull. So if one finde treaſure trove, or waife, or ſtray, and convert them *ut ſupra*, it is no larceny, both in reſpect of the finding, and alſo for that *dominus rerum non apparet.*

See cap. de Treaſon. Verb. quant. home, &c. Et cap. Murder. 27 Aſſ. 40. 2 E. 3. cor. 160. Lex Inæ cap. 50. accord. Stanf. 26. c. 15 E. 2. Cor. 383. Mic. 37 E. 3. coram rege. Rot. 83 Lincolne.

Felonious implyeth, that though the taking be actuall, yet muſt it be done by ſuch perſons as may commit felony. A mad man that is *non compos mentis*, or an infant that is under the age of diſcretion, cannot commit larceny, as in another place we have ſaid.

A feme covert committeth not larceny, if it be done by the coertion of her huſband: but a feme covert may commit larceny, if ſhe doth it without the coertion of her huſband: and there it appeareth, that a man may be acceſſary to his wife, but the wife cannot be acceſſary to her huſband, though ſhe know that he committed larceny, and relieve him, and diſcover it not: for by the law divine, ſhe is not bound to diſcover the offence of her huſband.

Felons came to the houſe of Richard Dey, and Margery his wife; the wife knew them to be felons, but the huſband did not, and both of them received them, and entertained them, but the wife conſented not to the felony. And it was adjudged, that this made not the wife acceſſary, *Quia ipſa in vita mariti ſui de aliquo receptamento*

ceptamento in præſentia viri ſui, cui contradicere non potuit, occaſionari non debet.

Uxor furi deſponſata non tenebitur ex facto viri, quia virum accuſare non debet, nec detegere furtum ſuum, nec feloniam, cum ipſa ſui poteſtatem non habet, ſed vir. Bracton, lib. 3. fol. 151. b.

La feme nequedent al felon poit dire q. tout ſcavoit ele del mauvaſte ſon baron, pur ceo ne le poet ele my encuſer, ne devoit, tant come ele fuit de luy covert, &c. Briton. cap. 24. fo. 47.

Uxor autem furis non teneatur pro delicto viri, pœna enim ſuos debet tenere authores, uxor autem virum accuſare non debet, nec feloniæ ſuæ conſentire, &c. Fleta, lib. 1. ca. 36.

Felonious and fraudulent taking.] If a man ſeeing the horſe of B. in his paſture, and having a minde to ſteale him commeth to the ſheriffe, and pretending the horſe to be his, obtaineth the horſe to be delivered unto him by a replevyn, yet this is a felonious and fraudulent taking, as it was reſolved by the judges, as Catlin chiefe juſtice reported in the kings bench, Paſch. 15 Eliz. for the Replevyn was obtained *in fraudem legis.* Paſch. 15 Eliz. Vide ſtatutum.

Carrying away.] For the indictment ſaith, *felonice cepit et aſportavit.* The removing of the things taken, though he carry not them quite away, ſatisfieth this word *aſportavit.* As if a gueſt take the coverlet or ſheets of his bed, and riſing before day, take the coverlet or ſheets out of the chamber, where he lay, into the hall, to the intent to ſteal them, and went to the ſtable to fetch his horſe, and the oſtler apprehended him, and this was adjudged larceny: and the coverlet or ſheets were carried away being removed from the chamber to the hall, albeit they were ſtill in the houſe of the owner. 22 Aſſ. pl. 39.

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So if a mans horſe be in his cloſe, and one taketh him, and as he is carrying him away, he is apprehended, before he getteth out of the cloſe, yet this is ſufficient to make it larceny. Juſtice Dalizons Report.

Of mere perſonall goods.] It is ſaid (mere) for though they be perſonall goods, yet if they ſavour any thing of the realty, no larceny can be committed of them; as any kind of corn or grain growing upon the ground is a perſonall chattell, and the executors of the owner ſhall have them, though they be not ſevered, but yet no larceny can be committed of them, becauſe they are annexed to the realty. So it is of graſſe ſtanding on the ground, or of apples, or any other fruits upon trees, or buſhes, or of woods growing; but if the owner cut the graſſe, or gather the fruit, or cut the wood, then larceny may be committed of them. 12 E. 3. Cor. 199. 22 E. 3. Ibid. 256. lib. 4. fo. 19.

So it is of a box or cheſt with charters, no larceny can be committed of them, becauſe the charters concern the realty, and the box or cheſt though it be of great value, yet ſhall it be of the ſame nature the charters be of: *et omne majus dignum trahit ad ſe minus.* 10 E. 4. 14. lib. 8. fo. 33. b. Caleys caſe.

No larceny can be committed by taking, and carrying away of a ward, or of a villain, becauſe they are in the realty.

It appeareth by all our ancient authors *ubi ſupra*, and by the ſtatute of W. 1. that there is grand larceny, and petit larceny, diſtinguiſhed ſo by the value: for if the perſonall goods ſtoln amount to above the value of twelve pence, then is it grand larceny, and if it be under the value of twelve pence, then it is petit larcency, for which W. 1. ca. 15. See the expoſition thereof. 27 H. 8. 22. Coriũ foris facere or perdere Sax. *tholiæ, bi hide* is to be

whipt. Mirror ca. 4. §. De crime de robbery.

which he ſhall forfeit all his goods, and ſuffer ſome corporall puniſhment, as whipping, &c.

And this was the ancient law before the conqueſt, for the Mirror ſaith, *Et tout ſoit que la ley ne eyt regard forſque al ceures des peuchers nequident limit le quantitie del robbery et larceny en ceſt manner, ceſtaſſavoir que nul ad judgement de la mort, ſi non larceny, &c. ne paſſont 12 deniers de ſterlings.*

Lib. 7. fo. 18. In caſe de Swans.

A man hath a mere property in ſome things that are tame by nature, and yet in reſpect of the baſeneſs of their nature, a man ſhall not commit any larceny, great or ſmall, though he ſteal them, as of maſtifs, bloud-hounds, or of other kind, dogs or of cats, nor of ſome things that be [a] wild by nature, and made tame, as bears, foxes, apes, monkies, polcats, ferrets, and the like, and yet no manner of felony can be committed on them, in reſpect of their wild and ſavage nature, and therefore no perſon ſhall die for them: and likewiſe it is of their whelps, or calves, or young; for it is a rule in law, that if no felony can be committed of any thing that is *ferœ naturæ*, and of age being reclaimed, or made tame, that no felony can be of the young in the neſt, kennell or den.

[a] Vide verb (of another) next following. 12 H. 8. 39. 14 H. 8. 3. 4. 18 H. 8. 2. 2 E. 2. diſtres 20 leveret. 2 E. 2. Avowry. 182. ferret. 38 E. 3. 10. 47 E. 3. 10. 5 H. 5. 1. 9 H. 6. 2. F. N. B. 87. a. and 88. I. 86. l.

[b] So as a man may have property in many things, and yet in reſpect of their nature there can be no felony of them. On the other ſide, of ſome things that be *ferœ naturæ*, being reclaimed, felony may be committed in reſpect of their noble and generous nature and courage, ſerving *ob vitæ ſolatium* of princes, and of noble, and generous perſons, to make them fitter for great employments: As all kind of faulcons, and other hawks, if the party, that ſteals them know they be reclaimed.

[b] Mirror c. 1. § 10. Dier 14 El. 306, 307. 18 E. 4. 8. 16 E. 4. 11. 14 H. 8. 4. Vide before. 37 E. 3. fo. 37. F. N. B. 86. l.

Of another.] [c] No larceny can be committed of wild beaſts, or of fowls that be wild, or of fiſhes that be at their naturall liberty in rivers, or great waters, becauſe theſe be *nullius in bonis*: but larceny may be committed of young pigeons in dovehouſes, or of young hawks in the neſt. But if any perſon upon the ground of any other, doe take the egs of any faulcon, goſhawk, lanner, or ſwan out of the neſt, this is not felony, [d] but he ſhall be impriſoned by the ſpace of a year and a day, and fined at the kings will, the one half to the king, and the other to the owner of the ground. But larceny may be committed of the egs of ſuch as be *domitæ naturæ*, as of hens, turkies, pehens, and the like. [a] And larceny may be committed of fiſhes in a trunk or pond, becauſe they are not at their naturall liberty, but as it were beaſts in a pownd.

[c] 18 H. 8. 2. b. Doct. & Stu. 9. b. Britton, 74, 75. Bract. l. 2. fo. 9. 8 E. 4. 5. [d] 11 H. 7. ca. 17. 31 H. 8. ca. 12.

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[a] Stanf. 25. c. 12 E. 4. 4. 18 E. 4. 8. 22 H. 6. 59. 43 E. 3. 24. Vide before, verb. (Of meer perſonall goods) 3 H. 6. 55. lib. 5. fo. 104. b. lib. 7. fo. 16, 17.

[b] But if ſuch as be wild, that ſerve for the food of man, be made tame, as deer, wild bore, conies, cranes, pheſant, partridge, or the like, larceny may be committed of them, ſo as he that ſtealeth them know that they be tame. But the deer, &c. being wild, yet when he is killed larceny may be committed of the fleſh, and ſo of pheſant, partridge, or the like: and ſo note a diverſity between ſuch beaſts as be *ferœ naturæ*, and being made tame, ſerve for pleaſure only, and ſuch as be made tame and ſerve for food, &c. which diverſity being not obſerved, hath made many men to erre.

[b] 10 E. 4. 14.

7 E. 4. 14. Stanf. 25.

A man may be indicted, *Quare bona capellæ in cuſtodia, &c.* and ſo in time of vacation, *bona domus eccleſiæ.*

At

At the aſſiſes at Leiceſter, in Lent, *anno* 10 Jac. the caſe was this, one William Hain had in the night digged up the graves of divers ſeverall men, and of one woman, and took the winding ſheets from the bodies, and buried the bodies again: and I adviſing hereupon for the rareneſſe of the caſe, conſulted with the judges at Serjeants Inne in Fleetſtreet; where we all reſolved, that the property of the ſheets was in the executors, adminiſtrators or other owner of them, for the dead body is not capable of any property, and the property of the ſheets muſt be in ſome body: and according to this reſolution, he was indicted of felony at the next aſſiſes, but the jury found it but petit larceny, for which he was whipped, as he well deſerved. 10 Jac. regis. Hains caſe. Furtum inauditum.

Nota. A felonious taking muſt be of the poſſeſſion, and not of the property removed from the poſſeſſion.

If a man doth bail, or lend his goods to another, although he hath the generall property of them, yet may he commit larceny of them, by the felonious taking and carrying them away, and in judgement of law he is ſaid in this caſe to take the goods of another: for the bailer hath *jus proprietatis*, and the bailee hath *jus poſſeſſionis*, or a ſpeciall property. 7 H. 6. 43.

The wife cannot ſteal the goods of her huſband, for they be not the goods of another, for the huſband and wife are one perſon in law, *duæ animæ in carne una.* 21 H. 6. Cor. 455. Abbridgdaſſ. 63.

Vide Stanf. Pl. Coron. fo. 24, 25.

To ſpeak it here once for all, if any perſon be indicted of treaſon, or of felony, or larcency, and plead not guilty, and thereupon a jury is returned, and ſworn, their verdict muſt be heard, and they cannot be diſcharged, neither can the jurors in thoſe caſes give a privy verdict, but ought to give their verdict openly in court.

Macegriefs, fleſhmongers, ſuch as buy and ſell ſtollen fleſh, knowing the ſame to be ſtollen. Vide *Lamb. inter leges Edw. regis* fol. 140. b. *De Macbecariis* derived of *mace* an old word for fleſh, and *grief*, wrong or injury. Britton, fo. 71.

CAP. XLVIII. [111]

De Anno Die et Vaſto.

Of the Year Day and Waſt.

HEREOF we have treated at large, in the ſecond part of the Inſtitutes in his proper place upon the expoſition of Magna Carta, cap. 22. where it appeareth, that at this day the king ſhall have but the profits for a year and a day in lieu and ſatisfaction of the waſt which the common law gave to the king in deſpite and deteſtation of the offence, as there you may read at large: and there it appeareth how neceſſary it is, ancient authors to be read, all which need not here to be rehearſed: * and Mirror, cap. 1. §. 3. and cap. 4. §. *Et le roy in remembrance*, &c. Lege quia optime, Glanv. li. 7. cap. 17. Bracton, lib. 3. fo. 129. 137. Britton, c. 5. Regiſt. 765.

f. 14. Fleta, lib. 1, c. 28. § *Cauſa vero*, &c. 17 E. 2. Prær. Regis cap. ultimo. Mag. Cart. cap. 22. 3 E. 3. Cor. 356. 377. 310. 290. * 42 E. 3. ca. 1.

that if any ſtatute be made to the contrary of Magna Carta, it ſhall be holden for none. And therefore if *prærogativa regis anno* 17 E. 2. cap. *ultimo*, be contrary thereunto, it is repealed as to the waſt.

CAP. XLIX.

Of Piracy, Felonies, Robberies, Murders, and Confederacies committed in or upon the Sea, &c.

HAVING now treated of felonies, &c. that are committed and done upon the land, we will conſider of piracies, and felonies, &c. done on the ſea, which by an act of parliament are to be enquired of, heard, and determined according to the courſe of the common law, as if they had been done upon the land.

Rot. Parl. 8 H. 6. nu. 42.

28 H. 8. ca. 15.

All treaſons (2), felonies, robberies, murders and confederacies committed in or upon the ſea, or in any other haven, river, creek, or place, where the admirall hath, or pretends to have power, authority, or juriſdiction (3), ſhall be enquired, tried, heard, determined, and judged in ſuch ſhires, and places in the realm, as ſhall be limited by the kings commiſſion under the great ſeal in like form and condition, as if any ſuch offence had been committed upon the land (5), to be directed to the lord admirall, or to his lieutenant, deputy, or deputies, and to three or four ſuch other ſubſtantiall perſons, as ſhall be named by the lord chancellour of England (4), for the time being, &c.

Vid. 27 E. 3. c. 13. del ſtaple. 31 H. 6 cap. 4. Vide 2 R. 3. fo. 2. Vide Palaches caſe.

And ſuch as ſhall be convict of any ſuch offence by verdict, confeſſion, or proces by authority of any ſuch commiſſion, ſhall have and ſuffer ſuch pains of death, loſſes of lands, goods and chattels, as if they had been attainted of any treaſon, felony, robbery, or other the ſaid offences done upon the land.

See before in the chap. of Herefy.

The offenders not to be admitted to have the benefit of clergy.

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The miſchief before this ſtatute was (as it appeareth by the preamble) that traitors, pirates (1), thiefs, robbers, murderers, and confederators upon the ſea many times eſcaped unpuniſhed, becauſe the common law of this realm extended not to theſe offences, but were judged, and determined before the admirall, &c. after the courſe of the civill laws, the nature whereof is, that before any judgement of death be given againſt the offenders, either they muſt plainly confeſſe their offences (which they never will do without torture or pains) or

See 40 Aſſ. pl. 25.

or by * witneſſe indifferent, ſuch as ſaw their offences committed, &c. which in theſe caſes cannot be gotten but by chance, or very rarely: for this cauſe, the commons petitioned in * parliament in 8 H. 6. that the juſtices of peace might enquire of all piracies: but the kings anſwer was, That he would be adviſed.

* Concerning treaſon, ſee before cap. 2. verb. *All trials*, fo. 25. 1 E. 6. ca. 12. 5 E. 6. ca. 11. &c.

This ſtatute requires a conſiderate and juſt interpretation, wherein, for that it concerneth the life of man, the ſafeſt way is, to follow the reſolutions of all the judges formerly had upon due conſideration of all the parts of this act, and upon divers conferences, and in the end, when I was atturney generall, reſolved by them unanimouſly as followeth:

* Rot. Par. 8 H. 6 nu. 42. Hil. 2. Ja. regis, at Serjeants Inne in Fleetſtreet, the reſolution of the juſtices.

Where divers did in the reign of the late queen Elizabeth commit piracy and robbery upon the high ſea, of divers merchants of Venice, in amity with the ſaid queen, and after the pirats, being not known, obtained a pardon, granted at the coronation of king James, whereby the king pardoned them all felonies *(inter alia)* Firſt, that before this ſtatute piracy, or robbery on the high ſea was no felony, whereof the common law took any knowledge, for that it could not be tried, being out of all towns and counties, but was only puniſhable by the civill law, as by the preamble it appeareth; the attainder by which law wrought no forfeiture of lands, or corruption of bloud. Secondly, that this ſtatute did not alter the offence, or make the offence felony, but leaveth the offence as it was before this act, viz. felony only by the civil law, but giveth a mean of triall by the common law, and inflicteth ſuch pains of death, as if they had been attainted of any felony, &c. done upon the land. But yet (as hath been ſaid) the offence is not altered, for in the indictment upon this ſtatute, the offence muſt be alledged upon the ſea; ſo as this act inflicteth puniſhment for that, which is a felony by the civill law, and no felony, whereof the common law taketh knowledge. Thirdly, although the king may pardon this offence, yet being no felony in the eye of the law of the realm, but only by the civill law, the pardon of all felonies generally extendeth not to it, for this is a ſpeciall offence, and ought to be ſpecially mentioned.

Three points reſolved.

Vide ſimilia. 19 E. 3. Cor. 124. 8 H. 4. 2 9 E. 4. 28.

Upon this reſolution theſe conſequents do follow. 1. That by the attainder upon this act, though there be forfeiture of lands, and goods, yet there is no corruption of blood. 2. Seeing the offence is not made felony by the laws of this realm, there can be no acceſſory of any felony by the laws of the realm in this caſe, either before or after the offence, becauſe the principall is no felon by our law, neither doth this act ſpeak of any acceſſory. 3. If there be an acceſſory upon the ſea to a piracy, that acceſſory may be puniſhed by the civill law before the lord admirall, but cannot be puniſhed by this act, becauſe it extendeth not to acceſſories, nor makes the offence felony. * Laſtly, the ſtatute of 35 H. 8. ca. 2. taketh not away this ſtatute for treaſons done upon the ſea for the cauſe aforeſaid. Which reſolution I have thought good to report, becauſe it openeth the windows of this ſtatute.

* See the fourt part of the Inſtitute, cap. High Treaſon. 5 El. cap. 5. Vide ſupra, cap. High Treaſon. Verbo *Ou per ailurs*, f. 11.

In Trin. 18 Eliz. in lord Dier's manuſcript, there is a quære made, what offence it is to lodge and entertain upon the land a pirat, knowing him to be a pirat, and whether this acceſſory upon the land ſhall be tried by this ſtatute, which is only of principalls in piracy. And it was thought by the two chief juſtices, that the ſureſt way, was to have the commiſſion in the county where the

acceſſory offended, and there both the principall and the acceſſory may be indicted, and tried, *ut per ſtatutum, anno* 5 & 6 E. 6. quære. *Hæc * ille.* So as this quære is now cleared by the reſolution of the judges: and queſtionleſſe the ſtatute (intended of 2 & 3 E. 6. for there is none ſuch in 5 & 6 E. 6.) extendeth only, when a murder or felony is committed in one countie, and another perſon is acceſſorie in another countie (as hath been ſaid before:) but in that caſe the offence was committed upon the ſea, and not in any countie, and ſo out of that ſtatute: and therefore this part of the manuſcript of the lord Dier was not thought fit to be printed.

2 & 3 E. 6. ca. 24.

Vid. lib. 2. fo. 93. Binghams caſe. See the lord Sancars caſe, lib. 9. 117, 118.

Anno 28 Eliz. Butlers caſe.

Butler and other pirats in ſummer vacation robbed divers of her majeſties ſubjects, upon the coaſt of Northfolk, upon the high ſea; and brought divers of the goods ſo taken into the county of Northfolke, and there were apprehended with the goods: The queſtion moved to Wray chiefe juſtice, and juſtice Peryam, juſtices of aſſiſe in Northfolk, was, whether they might be indicted of felony in Northfolk, as if one ſteale goods in one county and carry them into another county, he may be indicted in either county? and it was reſolved by them, that they could not be indicted for felony in Northfolk; becauſe the originall taking was no felony; whereof the common law took conuſance, becauſe it was done upon the ſea, out of the reach of the common law: and therefore not like the caſe, where one ſtealeth in one county and carrieth the goods into another, for there the originall act was felony whereof the law took conuſance.

But now let us peruſe the words of the ſtatute.

(1) *Where traytors, pirats.*] This word pirat, in Latine *pirata*, is derived from the Greek word πειράτης, which againe is fetched from πειρᾶι, *à tranſeundo mare*, of roving upon the ſea: and therefore in Engliſh, a pirat is called a rover and a robber upon the ſea.

(2) *Treaſon, &c.*] Note, treaſon done out of the realme, is declared to be treaſon by the ſtatute of 25 E. 3. and yet at the making of this act of 28 H. 8. it wanted triall, (as by the preamble of this ſtatute it is rehearſed) at the common law. And therefore to eſtabliſh a certainty therein, the ſtatute of 35 H. 8. was made, as is aforeſaid in the expoſition of the ſtatute of 25 E. 3. See Paſch. 43 Eliz. lib. 5. fo. 107. Sir Henry Conſtables caſe.

25 E. 3. cap. 1. 40 Aſſ. p. 25.

Before the ſtatute of 25 E. 3. if a ſubject had committed piracie upon another (for ſo is the book to be intended upon a fact done before 25 E. 3.) this was holden to be petit treaſon, for which he was to be drawne and hanged: becauſe *pirata eſt hoſtis humani generis*, and it was *contra ligeanciæ ſuæ debitum*: but if an alien, as one of the Normans, who had revolted in the reigne of king John, had committed piracy upon a ſubject, this offence could be no treaſon, for though he were *hoſtis humani generis*, yet the crime was not *contra ligeanciæ ſuæ debitum*, becauſe the offender was no ſubject, but ſince the ſtatute of 25 E. 3. this is no treaſon in the caſe of a ſubject.

(3) *Upon the ſea, or in any other haven, river, creek, or other place, where the admirall hath, or pretends to have power, authority, or juriſdiction.*] Theſe words [or pretends to have, &c.] are thus to be underſtood, between the high-water-mark, and the low-water-mark: for though the land be *infra corpus comitatus*, at the reflow; yet

yet when the ſea is full, the admirall hath juriſdiction *ſuper aquam* as long as the ſea flowes: ſo as of one place there is *diviſum imperium* at ſeverall times: but extend not to any haven, river, creek, or other place, that is *infra corpus comitatus*: for offences there committed were triable by the common law, and out of the miſchiefe and purview of this ſtatute: for in the preamble, the ſea is only mentioned, and in the body of the act it is ſaid, in like forme and condition, as if any ſuch offence had been committed upon the land.

8 E. 2. cor. 399. 46 E. 3. Conuſance 36. Stanf. pl. coron. 51. k. Regiſt. 129. 13 R. 2. ca. 5. 2 H 4. cap. 11. Pl. com. 37. 2 R. 3. fo. 12. 19 H. 6. 7. 30 H. 6. 6. per Priſot. Forteſcue, ca. 32. 5 Eliz. cap. 18.

(4) *As ſhall be named by the lord chancellor of England.*] A nomination by the lord keeper of the great ſeale of England was taken to be * within this act by the greater opinion of the juſtices: but the ſtatute of 5 Eliz. hath made a declaration of the common law concerning the power and authority of the lord keeper of the great ſeale, which hath cleared that, and all other like queſtions.

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(5) *To heare and determine ſuch offences after the common courſe of the lawes of this land uſed for treaſons, felonies, &c. done and committed upon the land.*] If the offender upon his arraignment before commiſſioners by force of this ſtatute ſtand mute, he ſhall have judgement *de peyne fort et dure*, by force of this generall branch, but it is out of the latter words of the act, viz. and ſuch as ſhall be convict of any ſuch offence by verdict, confeſſion, or proces. For he that ſtandeth mute is not convict of the offence, but ſuffereth for his contumacy. Alſo it is neither by verdict, confeſſion, or proces.

Trin. 7 Eliz. Dier 241. the caſe of Brooke *alias* Cobham.

For *peine fort et dure*: ſee in the ſecond part of the Inſtitutes, in the expoſition upon the ſtatute of W. 1. cap. 12.

CAP. L.

OF CLERGIE.

Lib. 11. fo. 29, 30, &c. Alexander Poulters caſe. Lib. 5. 26, 27. in Caudries caſe. Vid. lib. 5. fo. 50. Biggens caſe, & fo. 110. Heſtons caſe. 18 Eliz. cap. 6.

WHAT perſon ſhall have his clergie, for what offences, in what ſuits, who is judge thereof, and at what time clergie is to be demanded, you may reade at large in Alexander Poulters caſe in the eleventh part of my reports: where alſo is reſolved the diverſity betweene a clerk convict, and a clerk attaint; what a clerk convict which hath his clergie ſhall forfeit, and at what time; and that none that hath his clergie allowed ought to make any purgation at this day; and that the king may pardon the burning of the hand, as well in an appeale, as upon an indictment.

[a] If the principall hath his clergie before attainder, the acceſſory either before or after ought to be diſcharged.

[b] You may adde to the former report a record in rot. Clauſ. an. 3 E. 3. m. 2. & 18. That for ſacriledge the ordinary may allow clergie. So as it is in the election of the ordinary, either to allow or diſallow clergie in that caſe.

[c] See a notable record Trin. 21 E. 3. coram rege, Rot. 173. Hertford, that *privilegium clericale non competit ſeditioſo equitanti cum armis platis, et coteermuris, per leges Angliæ.*

[a] Lib. 4. fo. 43, 44. Syers caſe. ib. Bibiths caſe. 2 E. 3. 27. 22 E. 3. cor. 260. 7 H. 4. 16. 10 H. 4. 5. 3 H. 7. 1. 3 H. 7. cor. 53. 4 E. 6. Br. cor. 184. 3 Aſſ. 14. 5 Aſſ. 5. 11 H. 4. 93.

[b] Rot. cl. 3 E. 3. m. 2. 18.

[c] Tr. 21 E. 3. cor. rege, Rot. 173. Hertford.

[d] 25 H. 8. cap. 3. 32 H 8 cap. 3. Vid. 1 E. 6. ca. 12. 5 E. 6. cv. 10.

[d] It is provided by the ſtatute of 25 H. 8. that if any perſon be indicted of felony for ſtealing of any goods or chattels in any county, and thereupon arraigned, and be found guilty, or ſtand mute, or challenge peremptory above the number of twenty perſons, &c. they ſhall loſe the benefit of their clergie, in like manner as they ſhould have done, if they had been indicted and arraigned, and found guilty in the ſame county, where the ſame robbery or burglary was done or committed, if it ſhall appear to the juſtices, &c. by evidence given before them, or by examination, that for ſuch robbery or burglary in the ſame ſhire where they were committed or done, they ſhould have loſt the benefit of their clergie by force of the ſaid ſtatute, viz. of 23 H. 8. cap. 1.

Any perſon indicted.] This act extendeth not to appeales by writ or bill, nor to the appeales of the approvors.

[e] Poulters caſe. Ubi ſupra fo. 31.

Or by examination.] [e] By theſe words though the offender confeſſe the indictment, or ſtand mute, or challenge above twenty, &c. yet if by examination before the juſtices, the truth of the caſe appeareth, he may be put from his clergie.

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By force of the ſaid ſtatute.] Viz. 23 H. 8. ſo as if for any burglary or robbery in one county he were not ouſted of his clergy by the ſtatute of 23 H. 8. but ſome later ſtatute, then the delinquent ſhall have his clergie in the county where the goods are carried: for example, if the robbery be done in a dwelling houſe, the owner or dweller, his wife, his children, or ſervants then being within the houſe, and put in feare and dread by the ſame, and the goods be carried into another county, he ſhall not have his clergy: but if the robbery in the dwelling houſe be not done with all the circumſtances mentioned in this act of 23 H. 8. (which circumſtances are not required by the ſtatute of 5 E. 6. cap. 9.) he ſhall not be ouſted of his clergie in the other county. And ſo of all like caſes.

Vid. Stanf. pl. cor. fo. 123, &c. De Clergie.

See 1 Jac. cap. 8. clergie taken from him which do ſlab another that hath not drawne a weapon, nor ſtricken firſt.

CAP. LI.

Of Abjuration and Sanctuary.

Conſt. de Norm. cap. 24 & 8. Inter leges Inæ. cap. 5.

ABJURATION by the courſe of the common law may be thus deſcribed. When a man or a woman had committed felony, and the offender for ſafeguard of his or her life had fled to the ſanctuary of a church or churchyard, and there before the coroner of that place within forty dayes had confeſſed the felony, and took an oath for his or her perpetuall baniſhment out of the realm into a foraine countrey, chooſing rather *perdere patriam, quam vitam.* But that foraine countrey, into which he was to be exiled, muſt not be amongſt infidels. And this was the ancient law of this realme, which was, *prohibemus autem ne Chriſtiana fide tinctus quiſpiam à regno procul amandetur, neve ad eos qui nondum Chriſto fidem adjunxerunt relegetur, ne eorum aliquando fiat animorum jactura, quos propria Chriſtus vita redemit.*

Inter leges Canuti, fo. 105. ca. 3.

The foundation of the abjuration was the ſanctuary of the church or church-yard. For he or ſhe, that was not capable of this ſanctuary, could not have the benefit of abjuration. [a] And therefore it is ſaid, that he that committed ſacriledge, becauſe he could not take the priviledge of ſanctuary, could not abjure. For the forme of abjuration ſee the ſtatute of abjuration, Vet. Magna Carta, part 1. fol. 167. b. The [b] common law herein was very ancient, and had ſaved the life of many a man; and continued without change untill an act made in the twenty ſecond year of H. 8. cap. 14. whereby it was provided, that the party abjured ſhould not be baniſhed out of the realm, but to ſome other ſanctuary within this kingdom: [c] and to ſay the troth, abjuration was exceedingly intricated and perplexed by the ſaid act of 22 H. 8. cap. 14. and other ſtatutes: for which cauſes all ſtatutes made before the thirty fifth yeare of queen Elizabeth, concerning abjured perſons, ſtand repealed by the ſtatute of 1 Jac. cap. 25. whereby the ancient common law concerning abjuration for felony was revived.

[d] But by an act made in the twenty firſt year of king James it is enacted, that no ſanctuary or priviledge of ſanctuary ſhould be admitted or allowed in any caſe. By which act, ſuch abjuration as was at the common law, founded (as hath been ſaid) upon the priviledge of ſanctuary, is wholly taken away: and the writ in the Regiſter 69. a. *De reſtitutione extracti ab eccleſia* is become of no uſe.

[e] And yet the abjuration by force of the ſtatute of 35 Eliz. ca. 1. before juſtices * of peace, or juſtices of aſſize, or by force of an act made at the ſame parliament, cap. 2. before two juſtices of peace or the coroner by a recuſant, remaineth ſtill; becauſe ſuch abjuration hath no dependancie upon any ſanctuary. Which being ſufficient to ſhew how the law ſtandeth at this day, both concerning ſanctuary and abjuration, might ſuffice.

But yet he that is deſirous to reade the generall learning of abjuration the branch, and of ſanctuarie the root, let him reade the Mirror, ca. 1. §. 13. & cap. 5. §. 1. where he may reade the right uſe of abjuration by the ancient law of England. Et inter leges Edwardi, nu. 10. Cuſtum. de Normandie, cap. 24. Officium coronatorum, tit. Abjuration, Raſt. pl. 2. Bracton, li. 3. fo. 135. & 136. Britton, cap. Abjuration, fo. 24. & cap. Coroners, fo. 7. And Fleta, lib. 1. cap. 29. 8 E. 2. ubi ſupra. 3 E. 3. Coron. 313. 335. 21 E. 3. 17. 29 Aſſ. p. 34. Rot. Pat. 25 E. 3. part. 3. m. 16. Hil. 43 E. 3. Rot. 10. Coram Rege Buck. Hil. 26 E. 3. Coram Rege Rot. 29. *Quando aliquis abjuravit regnum, crux ei deliberat' fuit in manu ſua portanda in itinere ſuo per ſemitas ſuas, et vocatur vexillum ſanctæ eccleſiæ.* Rot. Parl. 2 R. 2. nu. 28. the right uſe of ſanctuary. 6 H. 4. 2. 8 H. 4. 2. 11 H. 4. 40. 7 H. 6. 8. 27 H. 6. 7. 2 E. 4. 17. 21. 9 E. 4. 29. 12 E. 4. 1, 2. 3 H. 7. Coron. Fitz. 54. 1 H. 7. 23. 25. 8 H. 8. Kelway. 188, 189. 199, 191. Fitz. Juſtice of Peace, fol. 202. Stanf. pl. cor. cap. Abjuration, fo. 116, 117, &c. *et ibidem* Sanctuary, cap. 38. Dier, 13 Eliz. fo. 296. lib. 5. fo. 12. 26. lib. 6. fo. 9. lib. Intrat. tit. Abjuration and Sanctuary.

[a] 8 E. 2. cor. 420.

[b] Sir Thomas Weyland Chief Juſtice of the Common Pleas, anno 17 E. 1. Vid. inter placita parl. an. 19 E. 1. apud Athring in Cro. Epiphaniæ.

[c] 50 E. 3. cap. Artic. Cleri, 9 E. 2. c. 10. 1 R. 2 cap. 9. 7 H. 7. cap. 7. 21 H. 8. cap. 2. 22 H. 8. ca. 14. 26 H. 8. ca. 13. 28 H. 8. cap. 7. 33 H. 8. cap. 15. 1 E. 6. cap. 12. 2 E. 6. ca. 2. & 33. 5 E. 6. cap. 10 13 Eliz. ca. 7. 1 Jac. ca. 25.

[d] 21 Jac. in the continuance of ſtatutes, &c.

[e] 35 El. ca. 1. & 2.

* [116]

CAP. LII.

De Hutesio et Clamore.

Of HUE and CRY.

THE one being an expreſſion of the other. For *huer* in French *(unde hutesium)* is to hoot or ſhoute; in Engliſh to crie.

There be two kindes of hues and cries, the one by the common law, and the other by ſtatute. Thereupon there are two purſuits, the one for the king, the other for the party by private ſuit.

Hue and cry by the common law, or for the king, is, when any felony is committed, or any perſon grievouſly and dangerouſly wounded, or any perſon aſſaulted and offered to be robbed either in the day or night; the party grieved, or any other may reſort to the [a] conſtable of the town, and acquaint him with the cauſes, deſcribing the party, and telling which way the offender is gone, and require him to raiſe hue and cry. And the duty of the conſtable is, to raiſe the power of the towne, [b] as well in the night as in the day, for the proſecution of the offender, and if he be not found there, to give the next conſtable warning, and he the next, untill the offender be found, and this was the law before the conqueſt. [c] *Si quis latroni obviam dederit eumque nullo edito clamore abire permiſerit, quanticunque fuerit latronis vita æſtimata extremum ſolvat denariolum, aut pleno, perfectoque jurejurando de facinore ſe nihil habuiſſe cegniti confirmato. Sin quis proclamantem exaudierit, neque vero fuerit inſequutus, ſuæ in regem contumaciæ (ni omnem criminis ſuſpicionem diluerit) pœnas dato.*

In antiquo M. S. ſi quis furi obviaverit, et ſine vociferatione gratis eum dimiſit, emendet ſecundum weram ipſius furis, vel plena lada ſe adlegiet, quòd cum eo falſum neſcivit: ſi quis audito clamore ſuperſedit, reddat overſameſſa regis aut plene ſe laidiet. Bracton who wrote before any act of parliament concerning hue and cry, ſaith, *omnes tammilites, quam alii qui ſunt* 15 *annorum* † *et amplius, jurare debent quòd utlagatos, murditores, robbatores, et burglatores non recipient, &c. Et ſi hutesium vel clamorem de talibus audiverint, ſtatim audito clamore ſequantur cum familia, &c.* and herewith agreeth Britton.

The ſtatute of W. 1. cap. 9. being in affirmance of the common law, provideth, *Que touts communement ſoient preſts a les ſomons des viſcounts, et ou crie de pais de fuer et arreſter felons, quant miſter ſerra, auxibiens deins franchiſes come dehors.*

And the ſtatute of 4 E. 1. declareth the law *ſimiliter de omnibus homicidiis, burglar', occiſis, ſeu* * *periclitantibus levetur hutesium, &c. et omnes ſequantur hutesium, et veſtigium ſi fieri poteſt: et qui non fecerit, et ſuper hoc convictus fuerit, attachietur quòd ſit coram juſticiariis de gaola, &c.* And by that act it appeareth that ſo it is in caſe of rape, and therewith agreeth, [a] Bracton alſo.

The life of hue and cry is freſh ſuit.

[b] Thamar the daughter of king David being violently raviſhed by her brother Amnon, the text ſaith of her, *quæ aſpergens cinerem capiti*

[a] Rot. Parl. an. 6 E. 3. num. 6. Conſtable of the town to make hue and cry.
[b] 2 E. 4. 8. b. & 9 a.

[c] Inter leges Canuti, fo. 110. ca. 26. See inter leges Edw. Conf. ca. 21.

For Overſameſſa, See lib. Rub. c. p. 36. Bracton, li. 3. fo.

†[117] Britton, fo. 15. & 19 Fleta, li. 1. c. 24. See the 2. part of the Inſtitutes. W. 1. ca. 9. 4 E. 1. de officio coroantoris. See the ſtatute of Winch. 13 Ed. 1.

* 7 E. 3. fo. 16. 22 Aſſ. 57. 38 E. 3. fo 6. aſſaulted to be robbed. 9 E. 4. 26. See the Cuſtom' of Norm. ca. 24.

[a] Bracton, li. 2, fo. 28 E. 3. ca. 17.

[b] 2 Regum, c. 13. verſ. 19.

capiti ſuo, ſciſſa talari tunica, impoſitiſque manibus ſuper caput ſuum ibat ingrediens, et clamans.

[c] They which levy not hue and cry, or purſue not upon hue and cry, ſhall be puniſhed by fine and impriſonment. [d] Alſo if a man be preſent when a man is murdred, or robbed, and doth not endeavour to attach the offender, nor levy hue and cry, he ſhall be fined and impriſoned.

[c] Bract. li. 3. fo. 118. b. Ca. Itin. m. c. 155, 3 E. 3. cor. 333.

[d] See 8 E. 2. cor. 395.

Of hue and cry by force of acts of parliament in five caſes. [e] Firſt, if a watchman doth arreſt a night walker, and he diſobey and fly, the watchman may make hue and cry.

[e] Stat. de Winc. watch. 4 H. 7. fo. 2. 18.

2. [f] *Si quis foreſtarius, parcarius, aut warrennarius in baliva ſua malefactores aliquos invenerit vagantes ad damnum ibidem faciend', et qui ſe foreſtariis aut warennariis illis poſt clamorem et huteſium levatum ad pacem regis ad ſtandum recte reddere noluerint, immo ad malitiam ſuam exequend' et continuand' et pacem regis diffugiend' fugam fecerit, et vi et armis ſe defenderint, licet foreſtarii, parcarii et warrennarii illi, aut alii quicunque ad pacem domini regis exiſtentes in comitativa foreſtariorum, parcariorum, aut warrennariorum illorum venientes ad tales malefactores ſic inventos arreſtand' ſeu capiend', aliquem ſeu aliquos hujuſmodi malefactorum interfecerint, non propter hoc occaſionentur coram domino rege, et juſticiariis quibuſcunque aut aliis balivis domini regis, aut aliorum quorumcunque infra libertatem aut extra: nec propter hoc amittant vitam, aut membrum, aut alium pœnam ſubeant, immo firmam pacem domini regis inde habeant. Sed bene caveant foreſtarii, parcarii, warrennarii, et alii quicunque, ne occaſione contentionis, diſcordiæ, contumeliæ, aut alicujus malevolentiæ, ſeu odii præhabit' aliquibus per balivas ſuas tranſeund' malitioſe imponant, quod occaſione malefaciendi in balivis ſuis intrant, cum hoc non fecerint, nec ipſos vagantes ut malefaciant, nec malefacientes invenerint, nec cauſam malefaciendi quærentes, et ſic eos occidant. Quod ſi fecerint, et de hoc fuerint convicti, fiat de morte ſic interfectorum, prout aliorum ad pacem domini regis exiſtentium, et prout de jure et ſecundum conſuetudinem regni fuerit faciend.*

[f] Statutum de anno 21 E. 1. Magna Cart. fo. 118. Foreſters.

3. Welſhmen outlawed, or indicted of treaſon or felony, that fly into Herefordſhire, ſhall be apprehended, &c. or elſe purſued by hue and cry, and a forfeiture upon thoſe that do not purſue.

23 H. 6. ca. 5. Vid. 17 H. 8. c. 26. Welſhmen.

4. Hue and cry ſhall be levied upon takers of carriage within the vierge of the ſtaple of that which pertaineth to the ſtaple.

27 E. 3. ca. 4. ſtaple.

5. Where a man is robbed: upon hue and cry, &c. what remedy he ſhall have againſt the hundred, &c. and how and in what manner the hue and cry ſhall be made in that caſe, ſee the ſtatutes, and lib. 7. fo. 6. & 7. the ſtatutes well expounded. And this robbery muſt be done in the day time, and not in the night, otherwiſe the party grieved ſhall not have his action. And ſo note a diverſity between a hue and cry at the common law, or for the king, and a hue and cry by ſtatute where the party grieved is to have his remedy by private action. Note alſo a diverſity in the proſecution at the common law, or for the king, and by the ſtatutes which give the party remedy, for a proſecution to the next conſtable is good by the common law, but ſo it is not by the ſaid ſtatutes which give the party grieved his action. See lib. 7. fo. 7. & 8. 22 El. Dier, 370. So the proſecution at the common law is a good excuſe upon an indictment at the kings ſuit, but note that it is no bar to the parties action.

Winch. 13 E. 1. 28 E. 3. c. 11. 27 El. c. 13. 38 El. ca. 25.

Lib. 7. fo. 7, 8. 22 El. Dier 370.

Where hue and cry either by the common law, or by force of any ſtatute is levied upon any perſon, the arreſt of ſuch perſon is lawfull,

29 E. 3. 9. 38 E. 3. 6. See 5 H. 7. 5. a. 21 H. 7. 28. a.

lawfull, although the cauſe of the hue and cry be feigned, and if the cauſe be feigned, he that levy the ſame ſhall alſo be arreſted, and ſhall be fined and impriſoned. But common fame and voice is not ſufficient to arreſt a man in caſe of felony, unleſſe a felony be done in deed.

Stat. de 18 E. 2. It is an article of the leet, to enquire of hues and cries levied and not purſued.

De civitate London capienda in manum regis pro hutesio non levato. Rot. Clauſ. 30 H. 3. m. 5. *Mandatum eſt Guilielmo de Haverhull theſaurario regis, quòd civitatem London capiat in manum regis, eo quòd cives ejuſdem civitatis non levaverunt hutesium et clamorem pro morte magiſtri Guidonis de Arretio et aliorum interfectorum ſecundum legem et conſuetudinem regni. Teſte rege apud Windeſtok 22 die Auguſti.*

CAP. LIII.

OF MAYHEM.

OF mayhem you may read at large in the [a] firſt part of the Inſtitutes ſect. 194. & 502. and in juſtice Stanford. And where (as it is there cited) he ſaith, *Caſtratio verò, quam vis latens fit, adjudicatur mahemium.* Hereof we find an example.

[b] *H. Hull indictatus fuit de mayhemio, eo quòd abſcidit virilia Johannis monachi, &c. quem idem H. deprehendit, &c. cum A. uxore ſua,* Of the like accident you may read in Camden.

[c] *Dominus Robertus Nevil (cum numeroſam prolem ex uxore ſuſcepiſſet) ignotus in adulterio deprehenſus, et ab adulteræ marito in vindictam genitalibus mutulatus, brevi vi doloris expiravit.*

Vide inter leges Alvaredi. cap. 49 *de vulneribus, fo.* 43.

[d] By the ancient law of England, he that maimed any man, whereby he loſt any part of his body, the delinquent ſhould loſe the like part, as he that took away another mans life, ſhould loſe his own.

And it is truly ſaid, that *duellum eſt mahemium inceptum*, and *mahemium eſt homicidium inchoatum.* And therefore in the appeal or indictment it is ſaid *felonice mayhemavit.*

[a] Firſt part Inſtitutes §. 194. 502. Stanf. Pl. Cor. 38. b. Cuſt. de Norm. ca. 79. Mehaimus. Bracton, lib. 3. 144, 145. Fleta, li. 1. ca. 38.

[b] Rot. Clauſ. anno 13 H. 3. nu. 9.

See before, ca. 23. for cutting out of tongues, &c.

[c] Camden Brit. page 593.

[d] Br. ft. lib. 3, fo. 148. nu. 4. Mirror, cap. 4. §. De paine in divers manners. Brit. fo. 48. b. Fleta, li. 1. ca. 38. Membrum pro membro. 28 E. 3. 20. 2. Vide 28 E. 3. fo, 94. 8 H. 4. 20, 21. Coron. 458.

CAP.

CAP. LIV.

OF PREMUNIRE.

PRIMERMENT pur ceo que monſtre eſt a noſtre ſeigniour le roy per grevouſes et clamouſes pleints des grandees et communes avant ditz, coment pluſors gents ſont, et ount eſtre treits hors de realme a reſponder des choſes dount la conuſans apperteint a la court noſtre ſeigniour le roy; et auxint que les judgements rendus in meſme le court ſont empeache en autre court, in prejudice et diſheriſon noſtre dit ſeigniour le roy et de ſa corone, et de tout le people de ſon dit realme, et in defeaſance et anientiſment de la common ley de meſme le realme uſe de touts temps. Sur quoy ewe bone deliberation ove les grandees et auters de dit councell, aſſentus eſt et accord per noſtre dit ſeigniour le roy, et les grandees et communes ſuiſditz. Que touts gents de la ligeance le roy, de quel conditione que ilz ſont, que trahent nulluy hors de realme (1) en plea dont le conuſance appertient a la court le roy, ou des choſes dont judgement ſoit rendus (2) en le court le roy; ou que ſuent en autri court a defaire ou impeacher les judgements rendue in le court le roy (3) eient jour, &c. (4) In Engliſh thus.

27 E. 3. cap. 1. The print being examined agreeth with the record. See the firſt part of the Inſtitutes, ſect. 199.

The ſtatute of 16 R. 2. cap. 5. ſaith, In curia Romana, vel alibi.

FIRST becauſe it is ſhewed to our lord the king by the grievous and clamorous complaints of the great men and commons aforeſaid, how that divers of the people be, and have been drawne out of the realme to anſwer of things, whereof the cogniſance pertaineth to the kings court: and alſo that the judgements given in the ſaid court be impeached in another court in prejudice and diſheriſon of our lord the king, and of his crowne, and of all the people of his ſaid realme; and to the undoing and deſtruction of the common law of the ſame realme at all times uſed. Whereupon, upon good deliberation had with the great men and other of his ſaid councell, it is aſſented and accorded by our lord the king, and the great men and commons aforeſaid, that all the people of the kings ligeance, of what condition that they be, which ſhall draw any out of the realme in plea, whereof the cogniſance pertaineth to the kings court, or of things whereof judgement is given in the kings court, or which doe ſue in any other court to defeat or impeach the judgements given in the kings court, ſhall have day, &c.

The effect of the ſtatute of 16 R. 2. is, if any purſue or cauſe to be purſued in the court of Rome, or elſewhere, any thing which toucheth the king, againſt him, his crowne and regality, or his 16 R. 2. cap. 5.

his realme, their notaries, procurators, &c. fautors, &c. ſhall be out of the kings protection.

Fourth part of the Inſtitutes, cap. 8. artic. 1. Die Decemb. anno 21 H. 8. againſt cardinall Woolſey. Vet. N. B. 243.

*In this act is declared the ſoveraignty, prerogative, and freedome of the crowne of England, and the firſt article exhibited by the lords of the councell, (whereof ſir Thomas More chancellor was one) and the principall judges concerning this matter, is worth your reading.

This offence is called a premunire of the words of the writ, grounded upon this and other ſtatutes for puniſhment thereof. For the words of the writ be, *Rex vicecomiti, &c. Præmunire fac.* A. B. &c. And rightly it is ſo called, for he that is *præmonitus* is *præmunitus*.

Before the making of this ſtatute of 27 E. 3. there were three great miſchiefs. Firſt, that the kings ſubjects have been drawn out of the realme, to the anſwer of things, whereof the conuſance pertained to the kings court. Secondly, of things whereof judgements have been given in the kings courts. And thirdly, that after judgements given in the kings courts of the common law, of matters determinable by the common law, ſuits were commenced in other courts within the realme, to defeat or impeach thoſe judgements. And theſe three miſchiefs had three unſufferable effects; firſt, the prejudice and diſheriſon of the king and of his crowne. Secondly, the diſheriſon of all his ſubjects. And thirdly, the undoing and deſtruction of the common law of this realm: all which appeare in the preamble of this act.

They are called (other courts,) either becauſe they proceed by the rules of other lawes, as by the canon or civill law, &c. or by other trials, then the common law doth warrant. For the triall warranted by the law of England for matters of fact, is by verdict of twelve men before the judges of the common law of matters pertaining to the common law; and not upon examination of witneſſes in any court of equity: ſo as *alia curia*, is either that which is governed *per aliam legem*, or which draweth the party *ad aliud examen*. For if the freehold and inheritances, goods, and chattels, debts, and duties, wherein the king or ſubject hath right or property by the common law, ſhould be judged *per aliam legem*, or be drawne *ad aliud examen*, the three miſchiefs aforeſaid expreſſed in the preamble and in this act ſhould follow, viz. diſheriſon of the king and of his crowne, the diſheriſon of all his people, and the undoing and deſtruction of the common law at all times uſed: by which words of this act it appeareth, that all theſe miſchiefs were againſt the ancient common lawes at all times uſed. And that alſo appeareth by the ancient writs of the common law, called *ad jura regia*, whereof ſome touch hath been given before, and which are worthy the reading: and alſo by divers acts of parliament; as the ſtatute of Carliſle, *anno* 35 E. 1. whereof we have treated before in the ſecond part of the Inſtitutes: and by the ſtatute of 25 E. 3. *De proviſoribus*. And it is obſerved, that in 29 E. 3. within two yeares after the ſaid act of 27 E. 3. that they that were called in queſtion upon the ſtatute of premunire, *invenerunt manucaptores ſufficientes, et ſacramentum præſtiterunt, quòd non attemptabunt, citra mare vel ultra, quod in præjudicium regis, legum, ſeu coronæ, ſeu judiciorum in curia regis reddit', tendere valeat quoquo modo, &c.* Whereby, and many other like records it appeareth, that judgements

Regiſt. 61, 62, &c.

Mic. 29 E. 3. coram regs. Rot. 44. Cornub. V. 46 E. 3. 13, 14. Nota, citra mare.

judgements ought not to be queſtioned *citra mare*, in any court, unleſſe it be according to the courſe of the lawes of the realme.

By the ſtatute of 4 H. 4. cap. 23. it is ordained and ſtabliſhed, that after judgement given in the courts of our lord the king, the parties and their heirs ſhall be thereof in peace, untill the judgement be undone by attaint, or by error, if there be error, as hath been uſed by the lawes in the times of the kings progenitors. 4 H. 4. ca. 23.

[a] Alſo that which hath been ſaid appeareth by our books and ancient records, as hereafter ſhall appeare. [a] 10 H. 4. 1, 2. 18 H. 6. 6. b.

[b] 5 E. 4. fol. 6 where the ſtatute of 16 R. 2. cap. 5. ſaith, *In curia Romana vel alibi*, eccleſiaſticall courts within the realme are within this word [*alibi.*] [b] 5 E. 4. 6. b. 44 E. 3. 36.

[c] Mich. 11 H. 7. it was adjudged by the whole court, that a ſuit in the eccleſiaſticall court within the realme for a temporall cauſe, was in caſe of premunire. [c] 11 H. 7. Premunire. Fitz. 15 H. 7. 9. acc'. lib. Intr. Raſt. 468.

[d] A preſident of a premunire, for ſuing in the eccleſiaſticall court for a debt. [121] [d] Raſt. pl. 429. b. & 430.

[e] It was reſolved, that he that ſued in the eccleſiaſticall court for the forgery of a laſt will and teſtament, incurred the danger of a premunire, becauſe the party grieved might have his remedy by the common law. And in the ſame year of 17 H. 7. juſtice Spilman alſo reporteth, that one Turbervile, as well as for the king, as for himſelfe, did ſue a premunire againſt a perſon for ſuing for tithes in the eccleſiaſticall court, alledging the ſame to be ſevered from the nine parts, and judgement given againſt the defendant. [e] 17 H. 7. of the report of juſtice Spilman.

Alſo it appeareth that the admirals court is within this word [*alibi*] if he hold plea of any thing, which is not done *ſuper altum mare*, but *infra corpus comitatus*.

[f] Richard Beuchampe eſquire and Thomas Pauncefoot eſquire, and others, are charged with the offence of premunire, for that they ſued John Creſſey eſq; before Henry duke of Exeter admirall of England, for taking away a croſſe of gold and other goods, ſuppoſing the ſame to be taken *ſuper altum mare*, where in truth they were taken at Stratford in the county of Eſſex; where the ſtatute of 16 R. 2. is recited, that none ſhould ſue *in curia Romana ſeu alibi, &c.* and that the conuſance of this plea belonged to the common law, and not to the court of the admirall. And ſo it is of the conſtable and marſhall, if they hold plea of a matter determinable by the common law. [f] Mic. 38. H. 6. coram rege.

[g] Iſabel Winnington exhibited a bill of premunire againſt William Powdich upon the ſtatute of 16 R. 2. cap. 5. for ſuing in the admirall court before John earle of Huntington, admirall of England, for a cauſe which belonged to the common law, whereunto the defendant pleaded not guilty. [g] Mic. 9 H. 7. coram rege. Raſt. pl. 23. but this cauſe is entred. Trin. 9 H. 7. Rot. 37. coram rege.

And the reaſon of all theſe caſes is, becauſe they draw matters triable by the common law, *ad aliud examen*, and to be diſcuſſed *per aliam legem*.

But ſome have made a queſtion, whether ſince the eccleſiaſticall juriſdiction was acknowledged to be in the crowne, an eccleſiaſticall judge holding plea of a temporall matter belonging to the common law, doth incurre the danger of a premunire. Though hereof there is no queſtion at all, yet leſt any man might be led into an errour in a caſe ſo dangerous, we will clear this point by reaſon, preſident,

preſident, and authority. The reaſon holdeth ſtill to draw the matter *ad aliud examen, &c.* And the like queſtion might be made for the admirall court, which is, and ever was, the kings court, but governed *per aliam legem:* and ſo likewiſe of the court of the conſtable and marſhall.

At a convocation holden *anno* 22 H. 8. by a publick inſtrument made by all the biſhops and the whole clergie of England, the king was acknowledged to be ſupreame head of the church of England.

[h] 24 H. 8. tit. premunire, Brook 26.

[h] After this, viz. 24 H. 8. it appeareth that the ſtatute of premunire remained in force againſt eccleſiaſticall judges, for holding of pleas meerly determinable by the common law.

Hil. 25 H. 8. coram rege, Rot. Rich. Nick Biſhop of Norwich his caſe.

In 25 H. 8. Richard Nick biſhop of Norwich was attainted in a premunire at the kings ſuit, and his caſe was this. Within the towne of Thetford there then was a cuſtome, that all eccleſiaſticall cauſes ariſing within the ſaid towne ſhould be determined before the deane there, having a peculiar eccleſiaſticall juriſdiction, and that no inhabitant of the ſame town ſhould be drawn before any other eccleſiaſticall judge, and that every perſon ſuing contrary to that cuſtome, the ſame being preſented before the maior of Thetford, ſhould forfeit ſix ſhillings eight pence; and that an inhabitant of Thetford for an eccleſiaſtical cauſe riſing within Thetford, ſued another before the biſhop of Norwich within his conſiſtory court at Norwich: and this was preſented before the maior of Thetford according to the cuſtome, whereby he forfeited ſix ſhillings eight pence. The ſaid biſhop cited the ſaid maior for taking of the ſaid preſentment *pro ſalute animæ* to appear before him at his houſe at Hoxon in Suffolke, where the maior appeared, and there the biſhop *ore tenus* injoyned him, upon pain of excommunication to adnull the ſaid preſentment before a day. And for this offence he was attainted in a premunire upon his confeſſion before Fitz James chief juſtice, and the court of kings bench, upon the ſtatute of 16 R. 2. the record whereof we have ſeen. By which judgement two points are cleared: firſt, that the ſtatute of premunire extends to eccleſiaſticall courts within the realme. Secondly, that after the king was in poſſeſſion of his ſupremacy, the biſhops incurred the danger of premunire.

[122]

Trin. 36 H. 8. coram rege. Rot. 9. the B. of Bangors caſe.

The biſhop of Bangor was attainted in a premunire for holding plea of an advowſion, and of tithes ſevered from the nine parts.

D. & St. lib. 2. ca. 24. fo. 106. b. Lib. 2. ca. 23.

Saint Germin in his book of Doctor and Student, who wrote after 26 H. 8. holdeth: that if a man maketh a promiſe for a temporall thing, and ſwear to perform it, and doth it not; if he be ſued for perjury in the ſpirituall court, a prohibition or a premunire lyeth in that caſe. Alſo he ſaith; if a man be excommunicate in the ſpirituall court for treſpaſſe, or ſuch other thing, as belongs to the kings crown and his royall dignity, &c. the party, if he will, may have a premunire fac. againſt him.

Br. tit. Premunire. 21. Temps. E. 6.

Brook reporteth, that Barlow biſhop of Bath and Wels, in the reign of king E. 6. deprived the dean of Wels, which deanry was a donative: and thereby incurred the danger of a premunire.

1 Eliz. cap.

By the ſtatute of 1 Eliz. (which reſtoreth the ancient juriſdiction eccleſiaſticall to the crown) the act of 1 & 2 Ph. and Mar. cap. 8. is repealed. But there is a ſpeciall proviſo in that act of 1 Eliz. that it ſhould not extend to repeale any clauſe, matter, or ſentence contained or ſpecified in the ſaid act of 1 & 2 Ph. and Mar. which doth

doth concerne matter of premunire, but that ſo much of that which concerneth any matter or cauſe of premunire, ſhould ſtand in force and effect. And that clauſe of the ſtatute of 1 and 2 Ph. and Mar. is this. That whoſoever ſhall by any proces obtained out of any eccleſiaſticall court, within the realme or without, by pretence of any ſpirituall juriſdiction, or otherwiſe, contrary to the lawes of the realme, inquiet or moleſt any perſon, &c. for any mannors, &c. parcell of the poſſeſſions of any religious houſe, &c. ſhall incurre the danger of the act of premunire, in *anno* 16 R. 2.

See the ſtatute of 25 H. 8. which alſo hath reference to the ſaid act of premunire, and is revived by 1 Eliz. 25 H. 8. ca. 20.

Thomas Stoughton parſon of N. in Suffolke, brought a writ of premunire againſt R. T. upon this ſtatute of 27 E. 3. for ſuing in the court of audience of the archbiſhop of Canterbury, to impeach a judgement given in a *quare impedit*, before the juſtices of aſſize in the county of Suffolk, &c. the defendant pleaded not guilty, &c. And this (omitting many other things for this matter) ſhall ſuffice. And now let us peruſe the body of the act. Trin. 29 Eliz. in communi banco Rot. 747. Tho. Stoughtons caſe

(1) *Trahe nulluy hors de realme.*] Of this there is no queſtion, being againſt the ancient law of the realme always in uſe; as by this act appeareth. And this was a remedie for the firſt miſchiefe.

(2) *Ou des choſes dont judgements fuer' rendus, &c.*] This branch prohibiteth all forain ſuits, viz. in the court of Rome, &c. for any thing whereof judgement was given in the kings court. And this was a remedie for the ſecond miſchiefe.

(3) *Ou que ſuont en autre court a defaire ou impeacher les judgements rendue in le court le roy.*] This is a remedy for the third miſchief. For having by the ſecond branch provided againſt forain ſuits to undoe, or impeach judgements in the kings court, this branch doth (as hath been ſaid) extend to all courts, which proceed by the rule of another law, or draw the party *ad aliud examen*, and therefore this branch doth extend to eccleſiaſticall courts, to the court of the conſtable, and marſhall, to the court of the admiralty, and to the court of equity proceeding in courſe of equity: for it had been to no effect to have provided againſt forain ſuits, which were troubleſome, tedious, and chargeable, and to have ſuffered the party to have attempted and proſecuted any thing at home within this realm, to the prejudice and diſheriſon of the king, and his crown, [123] and all his ſubjects, and to the ſubverſion of the common law. And firſt we will ſpeak of the court of equity. This court cannot proceed in courſe of equity after judgement at the common law, for three reaſons. Firſt, for that it draweth the matter triable, and determinable by the common law, *ad aliud examen*, viz. to a triall by witneſſes, which (as hath been ſaid) is contrary to the ancient law of the realm, and againſt the purvien of this ſtatute. Secondly, after judgment the parties ought to be at peace and quiet, for *judicia ſunt tanquam juris dicta*, and if the party againſt whom judgement is given, might after judgement given againſt him at the common law, goe into court of equity for matter in equity, there either ſhould be no end of ſuits, or every plaintif would leave the common law, and begin in the court of equity, whither in the end he muſt be brought, and that ſhould tend to the utter ſubverſion of the common law, as it is ſaid in the act. Thirdly, the court of equity in the proceeding in courſe of equity is no court of record, 37 H. 6. 14.

cord, and therefore it cannot hold plea of any thing, whereof judgement is given, which is a judiciall matter of record. And this is the ancient law at all times uſed, as this act ſpeaketh. As taking ſome few examples for many, both before, and after this ſtatute.

Anno 6 E. 1. the earl of Cornwals caſe. Lanceſton in Theſaur.

In the caſe of Edmond earl of Cornwall in *anno* 6 E. 1. it appeareth, that after judgement given before Roger Loveday and Walter Winborn juſtices of oier and terminer, againſt Walter biſhop of Exeter and his tenants, the ſaid biſhop procured the biſhop of Landaff in the pariſh churches of Cornwall and Devonſhire to pronounce ſentence of excommunication by the ſentence of the archbiſhop of Canterbury (which ſentence was had by the procurement of the ſaid biſhop of Exeter) againſt all perſons of what eſtate, degrees or dignity ſoever, that dealt in the proceedings, &c. againſt the ſaid biſhop and his tenants before the ſaid juſtices: and in this part of the record being in French, it is ſaid *La corone, et la dignity noſtre ſeigniour le roy ne doit per autre eſtre juſtice ne guyne, &c. Et les choſes que ſont paſſes en ſa court per judgement, ou en auter manner, ne devient eſtre en autri court recreccees, &c.* Out of this record we may obſerve three things. Firſt, what the ancient law of this realm was, before the making of this act. Secondly, that [*en autri court*] which are the words of this act, was taken to be another court within the realm. Thirdly, that the miſchief before this act, was for ſuits in other courts within this realm, after judgements given in the kings courts. Read the whole record, which beginneth thus. *Cornub. dominus rex mandat, &c.*

Mich. 13 E. 3. In communi banco. Rot. 40. Inter Johannem de Dingle and Mich. de Englia Breif.

And in 13 E. 3. there was a ſuit in the court of Rome after judgement in the kings court, and in that record it is ſaid, *In regi contemptum, et coronæ ſuæ præjudicium, ac judicii prædicti enervationē manifeſtam, &c. Ac quòd judicia in curia regis rite reddita fruſtra redderentur, niſi debitum ſortirentur effectum.*

[a] Fleta who wrote before this ſtatute, ſaith, *Judicia debent rata permanere, et firma conſiſtere, uſque ad condignam ſatisfactionem inviolabiliter obſerventur.*

[a] Fleta li. 6. ca. 36. Trin. 19 E. 3. Rot. 50. Coram rege John Boltons caſe. Mich. 19 E. 3. Rot. 16 & Rot. 29. Alan de Coneſberghs caſe. F. N. B. 169. f. 20 E. 3. eſſoin. 24. 21 E. 3. 40. b.

And as a maxime of the common law in the judiciall Regiſter, fo. 12. 35. 41, &c. it is often ſaid, *Ea quæ in curia domini regis rite acta ſunt, debitæ executioni demandari debent.*

Now let us ſee what hath been done ſince the act. [b] The ſtatute of 4 H. 4. cap. 23. hath been recited before, which is a judgement of parliament. [c] A judgement was obtained by covin and practice againſt all equity and conſcience in the kings bench: for the plaintif retained by colluſion an attorney for the defendant, (without the knowledge of the defendant, then being beyond ſea) the attorny confeſſeth the action, whereupon judgment was given; [d] the defendant fought his remedy in parliament, and by authority of parliament power was given to the lord chancellor by adviſe of two of the judges to hear, and order the caſe according to equity: which proveth that the chancellour could not do it of himſelf without higher authority.

[b] 4 H. 4. ca. 23.
[c] Paſc. 5 E. 4. Coram rege inter Cobbe and Nore.
[d] Rot. Parl. ſimile. 3 H. 5. nu. 44. & 3 H. 6. nu. 22.

[e] No injunction after verdict at the common law is to be granted in chancery, and if the lord chancellor ſhould grant an injunction in that caſe the judges ſaid, that if the chancelor impriſoned the party

[e] 22 E. 4. 37.

party for breach of the injunction, they would grant an *habeas corpus* and deliver him.

Amongſt the articles preferred to the king by Sir Thomas Moore lord chancellor of England, and all the privy councel, and by Fitz James chief juſtice, and juſtice Fitz-Herbert againſt cardinall Woolſey, one is in theſe words, [And the ſaid lord cardinall hath examined divers and many matters in the chancery, after judgement thereof given at the common law, in ſubverſion of your laws, and made ſome perſons to reſtore again to the other party condemned that, that they had in execution by vertue of the judgement of the common law] which I have ſeen in parchment under all their hands, and is yet to be ſeen. 1 Decemb. 21 H. 8. Art. 20.

If judgements given in the kings courts ſhould be examined in chancery, before the kings councell, or any other place, the plaintif or demandant ſhould ſeldome come to the effect of their ſuit, nor the law ſhould never have end, &c. See the Diverſity of Courts ca. Chancery. Doct. and Stud. ca. 18. the book of Diverſity of Courts.

Ralph Heydon gent. was indicted of a premunire upon the ſtatute of 27 E. 3. for procuring of Sir Nicholas Bacon lord keeper of the great ſeal, to grant an injunction in chancery after judgement given in an *ejectione firme* of lands in Hertfordſhire. And the record ſaith, *Quod predictus Radus machinatus eſt antiquas leges, et conſuetudines regni ſubvertere.* Mich. 8 & 9 El. in the kings bench.

A writ of premunire upon the ſaid ſtatute of 27 E. 3. by Richard Beans againſt Richard Lloyd, for ſuing before the preſident and councell in Wales, after judgement given in the court of common pleas, in an action of debt for forty and two pound ten ſhillings, *in ſubverſionem legum antiquarum, &c.* Trin. 21 El. in communi banco Rot. 319.

Peter Dewſe was indicted for procuring of Sir Thomas Bromly then lord chancelor, to grant an injunction in the chancery after a judgement given in an *ejectione firme.* Paſch. 27 El. in the kings bench.

John Heal of the Inner Temple London eſquire, was indicted of a premunire, for procuring a ſuit in chancery after a judgment given at the common law, contrary to the ſtatute of 27 E. 3. And the councell of Heal took two exceptions, one, that the court of chancery was not within the ſtatute of 27 E. 3. another, that one of the parties to the ſuit in chancery was named in one place by one name of baptiſme, and in another part of it by another. The court reſolved that the court of chancery was within the ſtatute of 27 E. 3. but found the other exception concerning miſnaming to be true. And therefore they quaſhed the indictment, but made a memorandum indorſed upon the back of the indictment, that it was overthrown for miſtaking a name, and not for the matter. Trin. 30. El. in the kings bench. Diverſity of Courts, ca. Chancery.

Thomas Throckmorton exhibited a bill in the chancery againſt Sir Moyl Finch after judgement given againſt him in the court of exchequer upon apparent matter of equity. Upon which bill the defendant demurred in law, and for that Sir Thomas Egerton then lord keeper inclined to rule over the demurrer, ſaying that he would not meddle with the judgement, but puniſh the corrupt conſcience of the defendant, in relieving the plaintif in equity: upon a petition to queen Eliz. (who ever favoured the due proceeding of her laws,) ſhe referred the conſideration of the demurrer to all the judges of England, who hearing councell learned on both Mich. 39 & 40 El. See the fourth part of the Inſt. cap. Court of Chancery.

both parts, and upon view of preſidents in the time of H. 8. and ſince of injunctions granted after judgements, and finding very few of them to warrant that which had been affirmed, and none of them to be done by the advice of any of the judges, they all after divers hearings, and conferences, and conſideration had of the laws and ſtatutes of the realm, unanimouſly reſolved, that the lord keeper could not after judgement given relieve the party in equity, although it appeared to them, that there was apparant matter in equity. And amongſt others, the judges gave this reaſon, that if the party againſt whom judgement was given, might after judgement given againſt him at the common law, draw the matter into the chancery, it would tend to the ſubverſion of the common law, for that no [125] man would ſue at the common law, but originally begin in chancery, ſeeing at the laſt he might be brought thither, after he had recovered by the common law, and thereupon they all certified, that the demurrer was good, and that Sir Moyl Finch the defendant ought not to anſwer.

Hil. 12. Ja. regis coram rege.

An information upon this ſtatute of 27 E. 3. againſt Sir Anthony Mildmay, for that he and other commiſſioners of ſewers did impeach a judgement in the kings bench: he purchaſed a pardon from the king, and pleaded it.

See a privy ſeal bearing teſte 18 Julii, anno domini 1616, to the contrary, obtained by the importunity of the then lord chancellor being vehemently affraid: *ſed judicandum eſt legibus*, and no preſident can prevail againſt an act of parliament. And beſides, the ſuppoſed preſidents (which we have ſeen) are not authenticall, being moſt of them in torn papers, and the reſt of no credit.

44 E. 3. 7. 36. 39 E. 3. 7. 7 E. 4. 2. 27 H. 6. 5. 36 H. 6. 30. * 43 E. 3. 6. 42 E. 3. 7. 2 R. 3. 17. 27 H. 6. 5. 22 H. 8. tit. Præm. Br. 1. Tr. 39 E. 3. Rot. 95. Coram rege. 39 E. 3. 37. 30 E. 3. 11. 44 E. 3. 36. Forebys caſe. * 8 H. 4. 6. Lib. 11. fo. 34. b. in Alex. Poulters caſe.

(4) *Eient jour contenant le ſpace de 2 moys per garniſhment a faire a eux, &c.*] By this it appeareth that a premunire lyeth as well for the party, as for the king, and they both may join in one writ.

* If the defendant come not at the day, &c. by the expreſſe letter of the law judgement ſhall be given againſt him according to this act. This ſuit need not be againſt them by originall writ, but if the defendant be *in cuſtodia mareſchalli*, the ſuit may be againſt him by bill, becauſe the end of the giving of the two months was, that they ſhould have notice, which is ſatisfied, and therewith agreeth the preſidents; and the defendant cannot be ſued in any other court, when they are *in cuſtodia mareſchalli*. See the ſtatute of 18 El. cap. 5. but that ſtatute extends to common informers, and not when the ſuit is commenced by the party grieved.

* But if the defendant appear and plead, and the iſſue be found againſt him, or if he demur in law, &c. judgement ſhall be given againſt him, that he ſhall be out of protection, &c. And ſo hath this ſtatute been interpreted, and judgement given accordingly. Peruſe well the words of this act for this point, and ſee the book in 8 H. 4. 6.

39 E. 3. 7. 9 E. 4. 2. 15 H. 7. 9. F. N. B. 26. m.

By the ſtatute of 38 E. 3. cap. 2. the defendant ought to appear in perſon, and therefore he cannot appear by attorny without a ſpeciall writ out of the chancery: and this act doth bind as well thoſe that are lords of parliament as others.

27 H. 6. 5. 2 H. 5. 10.

Avant le roy et ſon councell.] Here councell cannot be taken, as moſt commonly it is, for his judges of his courts of juſtice, who are ſaid to be of his councell for proceedings in courts of juſtice, becauſe the courts of juſtice are hereafter in this act named: neither

ther doth it intend the kings privy councell, but the king, and the lords of parliament in parliament, which is a court of juſtice.

See the firſt part of the Inſtitutes, ſect. 164. *Veigne les burgeſſes al parlement.* There is *commune concilium, magnum concilium, privatum ſeu continuum concilium,* and *concilium juſticiariorum, le councel des juſtices.* The king is armed with divers councells.

Ils, lour procurators, attornies, executors, notaries, et mainteynors.] Note by this act the procurers, attornies, executors, notaries, and maintainers ſhall have the ſame puniſhment, that the principall ſhall have. Note in the ſtatute of 2 R. 2. this word (fautors) crept in, a word (derived *à favendo*) of a large extent, as it was conſtrued in the reign of H. 8.

The plaintif may chooſe whether he will make them all principals, or the one principall, and the other acceſſories, but the damages ſhall be ſeverally taxed. Stanf. pl. cor. 44. f. 44 E. 3. 7. 36 H. 6. 30. 42 E. 3. 7.

He that procures one to ſue to the court chriſtian, ſhall forfeit as much as he that ſueth, and is principall as well as the other, and are in equall degree of premunire: but if they both be indicted, the one of the act, and the other of the procurement, and he that is charged with the procurement is found guilty, and the other by an other enqueſt is found not guilty, judgement ſhall never be given againſt him, which was indicted of the procurement, becauſe he cannot be an offender, but in reſpect of the offence of the other. 8 R. 2. Prem. 12. 8 H. 4. 6. pl. com. 97. b.

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Hors de la protection le roy.] By theſe words the perſons attainted in a writ of premunire are diſabled to have any action or remedy by the kings law, or the kings writs; for the law and the kings writs are the things whereby a man is protected and aided, ſo as he that is out of the kings protection, is out of the aid and protection of the law. See Littleton ſect. 199. and the 1. part of the Inſtitutes the ſame ſect. Lib. 7. fo. 14. in Calvins caſe.

But by the ſtatute of 25 E. 3. it is provided, that he that purchaſeth proviſions to abbies, or priories ſhall be out of the kings protection, and that a man may do with him, as with the enemies of the king and his realm, and that he, that ſhall commit any thing againſt ſuch proviſors in body or goods, or other poſſeſſions, ſhall be excuſed againſt all people. 25 E. 3. ca. 2. See 5 El. ca. 1.

Et lour terres, biens, et chateux forfait au roy.] This is intended of the lands that he hath in fee-ſimple, or for life, which the delinquent might lawfully forfeit, and not lands in tail: for tenant in tail ſhall forfeit only for term of his life, for that was all he could lawfully forfeit at the making of this ſtatute, either in caſe of treaſon or felony. And ſo it was reſolved by the judges in the caſe of Trudgyn of Devonſhire, who was attainted of a premunire upon the ſtatute of 13 El. cap. 2. 34 H. 8. forfeit. Br. 101. Paſch. 21 El. reſolution of the judges in Trudgyns caſe. Dier, manuſcript. Vide before. 25 E. 3. Verb. Et ſoit aſſavoir.

Nota, this is a new kind of forfeiture given by this law, and is penall, and cannot by equity extend further then the records, and therefore this act extendeth not to the forfeiture of fairs, markets, rents charges, rent ſeck, warrens, annuities, or any other hereditament that is not within this word (*terre.*)

Lour corps impriſon, et rents al volunt le roy.] The greatneſſe of theſe puniſhments doe ſhew the greatneſſe of the offence.

It is to be obſerved, that the ſaid ſtatute of 16 R. 2. is ſtrictly penned 16 R. 2. ca. 5.

Examples of theſe are quoted before.

penned againſt offenders. For firſt it extendeth to all perſons of what quality, or ſex ſoever, the words be [if any]. 2. To all courts of what juriſdiction ſoever, and whether holden by right or wrong, *in curia Romana, ſeu alibi*, which word (*alibi*) is a word of a large extent, as before it appeareth. 3. To all things whatſoever. [Where any thing,] which words be as generall as can be. 4. Not only againſt the king, his crown and dignity, but againſt the kingdome alſo: againſt the king, his crown, and regalty, or realm. 5. This act extendeth not only to procurers, abetters, maintainers, counſellors, &c. which are known words in law, but to favourers, *fautores*, which word was largely extended in the reign of H. 8. whereby it is to be obſerved how dangerous it is to bring new or unuſuall words into any act of parliament, eſpecially into ſuch as be ſo penned: for there it appeareth that Cliff being a parſon of a church granted to the cardinall an annuity, ſo long as he ſhould be legate, *ut decentius et ſublimius ſe gereret in autheritate ſua legantina*, which the cardinall had by bull, and paid to him ten marks in name of ſeaſon, and he was adjudged a *fautor*. But ſuch evaſions were found out of this and other ſtatutes, as were made againſt uſurpations and incrochments upon the good and ancient common law, as divers and many ſtatutes were made from time to time to meet with ſuch evaſions, which being many, (and others which concern the offence of premunire) we will but name, and leave the reader to peruſe the ſame at large, wherein (as we conceive it) he ſhall find a great light, by that which hath been ſaid, viz. 25 E. 3. ca. 22. 25 E. 3. Statut. de proviſoribus. 38 E. 3. ca. 1, 2, 3, 4. 3 R. 2. cap. 3. 7 R. 2. ca. 12. 12 R. 2. ca. 15. 13 R. 2. Stat. 2. ca. 2. 16 R. 2. cap. 5. 2 H. 4. cap. 3. & 4. 6 H. 4. cap. 1. 7 H. 4. ca. 6. & 8. 9 H. 4. ca. 8. 3 H. 5. cap. 4. 24 H. 8. ca. 12. 25 H. 8. ca. 19, 20, 21. 26 H. 8. cap. 15. 28 H. 8. cap. 10. 35 H. 8. ca. 1. Note, queen Mary repealed all offences made to be in the caſe of premunire ſince the firſt day of the firſt year of H. 8. but ſome of them are revived by the ſtatute of 1 El. ca. 1. But in all queen Maries time, the ſtatutes made concerning the offences of premunire before the reign of H. 8. were neither repealed nor altered, but (as hath been ſaid) allowed of in queen Maries time. 1 & 2 Ph. and Mar. ca. 8. 1 El. ca. 1. 5 El. ca. 1. 13 El. cap. 1, 2. 8. 27 El. ca. 2. 21 Jac. ca. 3.

Vide juſtice Spilmans Report. Mich. 21. H. 8. Cliffs caſe.

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1 Mar. ca. 1.

And where the ſtatute of 25 E. 3. de proviſoribus provideth, that certain offenders againſt that act, ſhall before they be delivered, make full renunciation, &c. becauſe we deſire that our ſtudent may in all things underſtand what he reads: it is to be known, that as well before that ſtatute, viz. in the reigns of E. 1. and E. 2. as after, the form of renunciation was to this effect. I renounce all the words compriſed in the popes bull to me made of the biſhoprick of A. (or the like) the which be contrary, or prejudiciall to the king our ſoveraign lord, and to his crown, and of that I put my ſelf humbly in his grace, praying to have reſtitution of the temporalties of my ſaid church, &c. Whereby it may appear what the law was in that caſe before 25 E. 3. And albeit theſe laws be very ſevere, eſpecially againſt the buls, &c. of the pope, and forain juriſdiction, and though queen Mary reſtored his ſupremacy in ſuch ſort as hereafter appeareth, yet would ſhe not repeal the ſaid ſta-

Dier manuſcrip. Hil. 1 El. le caſe de Chriſtoforſon Eveſque de Chicheſter.

tutes

tutes of proviſion and premunire, but provided that they ſhould ſtand in force. See the ſtatute of 1 & 2 Ph. and Mar. whereby it is enacted, That whoſoever ſhould by any proces obtained out of any eccleſiaſticall court within this realm, or without, or by pretence of any ſpiritual juriſdiction, * or otherwiſe, contrary to the laws of this realm, inquiet, or moleſt any perſon, &c. ſhould incur the danger of the act of premunire made in the ſixteenth year of the reign of king R. 2. &c. And by another branch in the ſame act it is enacted, That all buls, diſpenſations, and privileges not containing matter contrary, or prejudiciall to the authority, dignity or preheminence royall of the realm, or to the laws of this realm now being in force, and not in this preſent parliament repealed, may be put in execution. And laſtly, by the ſame act, it is declared and enacted, That neither any thing contained in the body of the ſaid ſtatute, or in the preamble thereof, ſhall be conſtrued, or expounded to diminiſh, or take away any of the liberties, priviledges, prerogatives, preheminences, authorities or juriſdictions which were in the imperiall crown of this realm, or belonged to the ſame before the twentieth year of H. 8. and the popes holines to have ſuch authority, preheminence, and juriſdiction, as his holineſſe uſed, or might lawfully have uſed by authority of his ſupremacy the ſaid twentieth year of H. 8. within this realm of England, without diminution or enlargement of the ſame, and none other. Whereby it appeareth how carefull the ſtate was in queen Maries time to preſerve the prerogative of the crown, and the ancient laws of the realm, and did at that time ſo cautiouſly reſtore the ſupremacy of the pope, *ſecundum quid*, but not *ſimpliciter*, and bounded his ſupremacy within ſtrait and legall limitations, as by the ſaid act appeareth.

1 & 2 Ph. and Mar. ca. 8.

* Nota.

See the ſtatutes which inflict the puniſhment of premunire, viz. 2 R. 2. c. 12. 3 R. 2. ca. 3. 7 R. 2. ca. 12. 24 H. 8. ca. 12. 25 H. 8. ca. 19, 20. 1 El. cap. 1. 26 H. 8. cap. 15. 28 H. 8. ca. 16. 1 & 2 Ph. and Mar. cap. 1. 8 El. cap. 1. 5 El. ca. 1. 13 El. ca. 2. 8. 39 El. ca. 18. 27 El. ca. 2. See the fourth part of the Inſtitutes, cap. Chancery, the articles at large againſt Cardinall Woolſey, artic. 7.

We have been the longer concerning caſes of premunire. Firſt, for that they be matters of great weight, and neceſſary to be known, and we wiſh that the offence may never be committed. And ſecondly, for that maſter Stanford hath in effect but named a premunire.

Stan. pl. cor. 44. f.