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COMMENTARIES

ON THE

LAWS

OF

ENGLAND.

BOOK THE FOURTH.

BY

WILLIAM BLACKSTONE, Esq.

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CONTENTS.

BOOK IV.

Of PUBLIC WRONGS.

CHAP. I.

Of the NATURE *of* CRIMES; *and their* PUNISHMENT. Page 1.

CHAP. II.

Of the PERSONS CAPABLE *of committing* CRIMES. 20.

CHAP. III.

Of PRINCIPALS *and* ACCESSORIES. 34.

CHAP. IV.

Of OFFENCES *againſt* GOD *and* RELIGION. 41.

CHAP. V.

Of OFFENCES *againſt the* LAW *of* NATIONS. 66.

CONTENTS.

CHAP. VI.

Of HIGH TREASON. 74.

CHAP. VII.

Of FELONIES, *injurious to the* KING's PREROGATIVE. 94.

CHAP. VIII.

Of PRAEMUNIRE. 102.

CHAP. IX.

Of MISPRISIONS *and* CONTEMPTS *affecting the* KING *and* GOVERNMENT. 119.

CHAP. X.

Of OFFENCES *againſt* PUBLIC JUSTICE. 127.

CHAP. XI.

Of OFFENCES *againſt the* PUBLIC PEACE. 142.

CHAP. XII.

Of OFFENCES *againſt* PUBLIC TRADE. 154.

CHAP. XIII.

Of OFFENCES *againſt the* PUBLIC HEALTH, *and the* PUBLIC POLICE *or* OECONOMY. 161.

CHAP.

CONTENTS.

CHAP. XIV.

Of HOMICIDE. 176.

CHAP. XV.

Of OFFENCES *againſt the* PERSONS *of* INDIVIDUALS. 205.

CHAP. XVI.

Of OFFENCES *againſt the* HABITATIONS *of* INDIVIDUALS. 220.

CHAP. XVII.

Of OFFENCES *againſt* PRIVATE PROPERTY. 229.

CHAP. XVIII.

Of the means of PREVENTING *offences.* 248.

CHAP. XIX.

Of COURTS *of a* CRIMINAL JURISDICTION. 255.

CHAP. XX.

Of SUMMARY CONVICTIONS. 277.

CHAP. XXI.

Of ARRESTS. 286.

CHAP.

CONTENTS.

CHAP. XXII.

Of COMMITMENT *and* BAIL. 293.

CHAP. XXIII.

Of the ſeveral MODES *of* PROSECUTION. 298.

CHAP. XXIV.

Of PROCESS *upon an* INDICTMENT. 313.

CHAP. XXV.

Of ARRAIGNMENT, *and it's* INCIDENTS. 317.

CHAP. XXVI.

Of PLEA, *and* ISSUE. 326.

CHAP. XXVII.

Of TRIAL, *and* CONVICTION. 336.

CHAP. XXVIII.

Of the BENEFIT *of* CLERGY. 358.

CHAP. XXIX.

Of JUDGMENT, *and it's* CONSEQUENCES. 368.

CHAP. XXX.

Of REVERSAL *of* JUDGMENT. 383.

CHAP.

CONTENTS.

CHAP. XXXI.

Of REPRIEVE, *and* PARDON. 387.

CHAP. XXXII.

Of EXECUTION. 396.

CHAP. XXXIII.

Of the RISE, PROGRESS, *and gradual* IMPROVEMENTS, *of the* LAWS *of* ENGLAND. 400.

APPENDIX.

§. 1. RECORD *of an Indictment and Conviction of* MURDER, *at the Assises.* Page i.

§. 2. *Conviction of* Manslaughter. iv.

§. 3. *Entry of a Trial* instanter *in the Court of King's Bench, upon a collateral Issue; and Rule of Court for Execution thereon.* v.

§. 4. *Warrant of Execution on Judgment of Death, at the general Gaol-delivery in* London *and* Middlesex. vi.

§. 5. *Writ of Execution upon a judgment of* Murder, *before the* King *in* Parliament. vii.

INDEX.

COMMENTARIES
ON THE
LAWS OF ENGLAND.

BOOK THE FOURTH.

OF PUBLIC WRONGS.

CHAPTER THE FIRST.

OF THE NATURE OF CRIMES; AND THEIR PUNISHMENT.

WE are now arrived at the fourth and laſt branch of theſe commentaries; which treats of *public wrongs*, or *crimes* and *miſdemeſnors*. For we may remember that, in the beginning of the preceding volume [a], wrongs were divided into two ſorts or ſpecies; the one *private*, and the other *public*. Private wrongs, which are frequently termed civil injuries, were the ſubject of that entire book: we are now therefore, laſtly, to proceed to the conſideration of public wrongs, or crimes and miſdemeſnors; with the means of their prevention and puniſhment. In the purſuit of which ſubject I ſhall conſider, in the firſt place, the general nature of crimes and puniſhments; ſecondly, the perſons capable of committing crimes; thirdly, their ſeveral degrees of guilt,

[a] Book III. ch. 1.

as principals or acceſſories; fourthly, the ſeveral ſpecies of crimes, with the puniſhment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and, ſixthly, the method of inflicting thoſe puniſhments, which the law has annexed to each ſeveral crime and miſdemeſnor.

FIRST, as to the general nature of crimes and their puniſhment: the diſcuſſion and admeaſurement of which forms in every country the code of criminal law; or, as it is more uſually denominated with us in England, the doctrine of the *pleas of the crown:* ſo called, becauſe the king, in whom centers the majeſty of the whole community, is ſuppoſed by the law to be the perſon injured by every infraction of the public rights belonging to that community, and is therefore in all caſes the proper proſecutor for every public offence [b].

THE knowlege of this branch of juriſprudence, which teaches the nature, extent, and degrees of every crime, and adjuſts to it it's adequate and neceſſary penalty, is of the utmoſt importance to every individual in the ſtate. For (as a very great maſter of the crown law [c] has obſerved upon a ſimilar occaſion) no rank or elevation in life, no uprightneſs of heart, no prudence or circumſpection of conduct, ſhould tempt a man to conclude, that he may not at ſome time or other be deeply intereſted in theſe reſearches. The infirmities of the beſt among us, the vices and ungovernable paſſions of others, the inſtability of all human affairs, and the numberleſs unforeſeen events, which the compaſs of a day may bring forth, will teach us (upon a moment's reflection) that to know with preciſion what the laws of our country have forbidden, and the deplorable conſequences to which a wilful diſobedience may expoſe us, is a matter of univerſal concern.

IN proportion to the importance of the criminal law, ought alſo to be the care and attention of the legiſlature in properly

[b] See Vol. I. p. 268.

[c] Sir Michael Foſter. pref. to rep.

forming

forming and enforcing it. It ſhould be founded upon principles that are permanent, uniform, and univerſal; and always conformable to the dictates of truth and juſtice, the feelings of humanity, and the indelible rights of mankind: though it ſometimes (provided there be no tranſgreſſion of theſe eternal boundaries) may be modified, narrowed, or enlarged, according to the local or occaſional neceſſities of the ſtate which it is meant to govern. And yet, either from a want of attention to theſe principles in the firſt concoction of the laws, and adopting in their ſtead the impetuous dictates of avarice, ambition, and revenge; from retaining the diſcordant political regulations, which ſucceſſive conquerors or factions have eſtabliſhed, in the various revolutions of government; from giving a laſting efficacy to ſanctions that were intended to be temporary, and made (as lord Bacon expreſſes it) merely upon the ſpur of the occaſion; or from, laſtly, too haſtily employing ſuch means as are greatly diſproportionate to their end, in order to check the progreſs of ſome very prevalent offence; from ſome, or from all, of theſe cauſes it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I ſhall not here enter into any minute enquiries concerning the local conſtitutions of other nations; the inhumanity and miſtaken policy of which have been ſufficiently pointed out by ingenious writers of their own [d]. But even with us in England, where our crown-law is with juſtice ſuppoſed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties leſs uncertain and arbitrary; where all our accuſations are public, and our trials in the face of the world; where torture is unknown, and every delinquent is judged by ſuch of his equals, againſt whom he can form no exception nor even a perſonal diſlike;---even here we ſhall occaſionally find room to remark ſome particulars, that ſeem to want reviſion and amendment. Theſe have chiefly ariſen from too ſcrupulous an adherence to ſome rules of the antient common law, when the reaſons have ceaſed upon which thoſe rules were founded; from not repeal-

[d] Baron Monteſquieu, marquis Beccaria, &c.

ing ſuch of the old penal laws as are either obſolete or abſurd; and from too little care and attention in framing and paſſing new ones. The enacting of penalties, to which a whole nation ſhall be ſubject, ought not to be left as a matter of indifference to the paſſions or intereſts of a few, who upon temporary motives may prefer or ſupport ſuch a bill; but be calmly and maturely conſidered by perſons, who know what proviſion the laws has already made to remedy the miſchief complained of, who can from experience foreſee the probable conſequences of thoſe which are now propoſed, and who will judge without paſſion or prejudice how adequate they are to the evil. It is never uſual in the houſe of peers even to read a private bill, which may affect the property of an individual, without firſt referring it to ſome of the learned judges, and hearing their report thereon [e]. And ſurely equal precaution is neceſſary, when laws are to be eſtabliſhed, which may affect the property, the liberty, and perhaps even the lives, of thouſands. Had ſuch a reference taken place, it is impoſſible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciouſly) the mound of a fiſhpond, whereby any fiſh ſhall eſcape; or to cut down a cherry tree in an orchard [f]. Were even a committee appointed but once in an hundred years to reviſe the criminal law, it could not have continued to this hour a felony without benefit of clergy, to be ſeen for one month in the company of perſons who call themſelves, or are called, Egyptians [g].

IT is true, that theſe outrageous penalties, being ſeldom or never inflicted, are hardly known to be law by the public: but that rather aggravates the miſchief, by laying a ſnare for the unwary. Yet they cannot but occur to the obſervation of any one, who hath undertaken the taſk of examining the great outlines of the Engliſh law, and tracing them up to their principles: and it is the duty of ſuch a one to hint them with

[e] See Vol II. p. 345.
[f] Stat. 9 Geo. I. c. 22. 31 Geo. II. c. 42.
[g] Stat. 5. Eliz. c. 20.

decency

decency to thoſe, whoſe abilities and ſtations enable them to apply the remedy. Having therefore premiſed this apology for ſome of the enſuing remarks, which might otherwiſe ſeem to ſavour of arrogance, I proceed now to conſider (in the firſt place) the general nature of *crimes*.

I. A CRIME, or miſdemeſnor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and miſdemeſnors; which, properly ſpeaking, are mere ſynonymous terms: though, in common uſage, the word "crimes" is made to denote ſuch offences as are of a deeper and more atrocious dye; while ſmaller faults, and omiſſions of leſs conſequence, are comprized under the gentler name of "miſdemeſnors" only.

THE diſtinction of public wrongs from private, of crimes and miſdemeſnors from civil injuries, ſeems principally to conſiſt in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, conſidered merely as individuals; public wrongs, or crimes and miſdemeſnors, are a breach and violation of the public rights and duties, due to the whole community, conſidered as a community, in it's ſocial aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public, which of us is in poſſeſſion of the land: but treaſon, murder, and robbery are properly ranked among crimes; ſince, beſides the injury done to individuals, they ſtrike at the very being of ſociety; which cannot poſſibly ſubſiſt, where actions of this ſort are ſuffered to eſcape with impunity.

IN all caſes the crime includes an injury: every public offence is alſo a private wrong, and ſomewhat more; it affects the individual, and it likewiſe affects the community. Thus treaſon

treaſon in imagining the king's death involves in it conſpiracy againſt an individual, which is alſo a civil injury: but as this ſpecies of treaſon in it's conſequences principally tends to the diſſolution of government, and the deſtruction thereby of the order and peace of ſociety, this denominates it a crime of the higheſt magnitude. Murder is an injury to the life of an individual; but the law of ſociety conſiders principally the loſs which the ſtate ſuſtains by being deprived of a member, and the pernicious example thereby ſet, for others to do the like. Robbery may be conſidered in the ſame view: it is an injury to *private* property; but, were that all, a civil ſatisfaction in damages might atone for it: the *public* miſchief is the thing, for the prevention of which our laws have made it a capital offence. In theſe groſs and atrocious injuries the private wrong is ſwallowed up in the public: we ſeldom hear any mention made of ſatisfaction to the individual; the ſatisfaction to the community being ſo very great. And indeed, as the public crime is not otherwiſe avenged than by forfeiture of life and property, it is impoſſible afterwards to make any reparation for the private wrong; which can only be had from the body or goods of the aggreſſor. But there are crimes of an inferior nature, in which the public puniſhment is not ſo ſevere, but it affords room for a private compenſation alſo: and herein the diſtinction of crimes from civil injuries is very apparent. For inſtance; in the caſe of battery, or beating another, the aggreſſor may be indicted for this at the ſuit of the king, for diſturbing the public peace, and be puniſhed criminally by fine and impriſonment: and the party beaten may alſo have his private remedy by action of treſpaſs for the injury, which he in particular ſuſtains, and recover a civil ſatisfaction in damages. So alſo, in caſe of a public nuſance, as digging a ditch acroſs a highway, this is puniſhable by indictment, as a common offence to the whole kingdom and all his majeſty's ſubjects: but if any individual ſuſtains any ſpecial damage thereby, as laming his horſe, breaking his carriage, or the like, the offender may be compelled to make

make ample ſatisfaction, as well for the private injury, as for the public wrong.

UPON the whole we may obſerve, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view: *viz.* not only to redreſs the party injured, by either reſtoring to him his right, if poſſible; or by giving him an equivalent; the manner of doing which was the object of our enquiries in the preceding book of theſe commentaries: but alſo to ſecure to the public the benefit of ſociety, by preventing or puniſhing every breach and violation of thoſe laws, which the ſovereign power has thought proper to eſtabliſh, for the government and tranquillity of the whole. What thoſe breaches are, and how prevented or puniſhed, are to be conſidered in the preſent book.

II. THE nature of *crimes and miſdemeſnors* in general being thus aſcertained and diſtinguiſhed, I proceed in the next place to conſider the general nature of *puniſhments:* which are evils or inconveniencies conſequent upon crimes and miſdemeſnors; being deviſed, denounced, and inflicted by human laws, in conſequence of diſobedience or miſbehaviour in thoſe, to regulate whoſe conduct ſuch laws were reſpectively made. And herein we will briefly conſider the *power*, the *end*, and the *meaſure* of human puniſhment.

1. AS to the *power* of human puniſhment, or the right of the temporal legiſlator to inflict diſcretionary penalties for crimes and miſdemeſnors[h]. It is clear, that the right of puniſhing crimes againſt the law of nature, as murder and the like, is in a ſtate of mere nature veſted in every individual. For it muſt be veſted in ſomebody; otherwiſe the laws of nature would be vain and fruitleſs, if none were empowered to put them in execution: and if that power is veſted in any *one*, it muſt alſo be veſted in *all* mankind; ſince all are by nature equal. Whereof

[h] See Grotius, *de j. b. & p. l.* 2. *c.* 20. Puffendorf, L. of Nat. and N. b. 8. c. 3.

the

the firſt murderer Cain was ſo ſenſible, that we find him[i] expreſſing his apprehenſions, that *whoever* ſhould find him would ſlay him. In a ſtate of ſociety this right is transferred from individuals to the ſovereign power; whereby men are prevented from being judges in their own cauſes, which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of puniſhing offences againſt the law of nature, that is now veſted in the magiſtrate alone; who bears the ſword of juſtice by the conſent of the whole community. And to this precedent natural power of individuals muſt be referred that right, which ſome have argued to belong to every ſtate, (though, in fact, never exerciſed by any) of puniſhing not only their own ſubjects, but alſo foreign embaſſadors, even with death itſelf; in caſe they have offended, not indeed againſt the municipal laws of the country, but againſt the divine laws of nature, and become liable thereby to forfeit their lives for their guilt[k].

AS to offences merely againſt the laws of ſociety, which are only *mala prohibita*, and not *mala in ſe*; the temporal magiſtrate is alſo empowered to inflict coercive penalties for ſuch tranſgreſſions: and this by the conſent of individuals; who, in forming ſocieties, did either tacitly or expreſſly inveſt the ſovereign power with a right of making laws, and of enforcing obedience to them when made, by exerciſing, upon their non-obſervance, ſeverities adequate to the evil. The lawfulneſs therefore of puniſhing ſuch criminals is founded upon this principle, that the law by which they ſuffer was made by their own conſent; it is a part of the original contract into which they entered, when firſt they engaged in ſociety; it was calculated for, and has long contributed to, their own ſecurity.

THIS right therefore, being thus conferred by univerſal conſent, gives to the ſtate exactly the ſame power, and no more, over all it's members, as each individual member had naturally

[i] Gen. iv. 14.

[k] See vol. I. pag. 254.

over

over himſelf or others. Which has occaſioned ſome to doubt, how far a human legiſlature ought to inflict capital puniſhments for *poſitive* offences; offences againſt the municipal law only, and not againſt the law of nature; ſince no individual has, naturally, a power of inflicting death upon himſelf or others for actions in themſelves indifferent. With regard to offences *mala in ſe*, capital puniſhments are in ſome inſtances inflicted by the immediate *command* of God himſelf to all mankind; as, in the caſe of murder, by the precept delivered to Noah, their common anceſtor and repreſentative [l], "whoſo ſheddeth man's blood, "by man ſhall his blood be ſhed." In other inſtances they are inflicted after the *example* of the creator, in his poſitive code of laws for the regulation of the Jewiſh republic; as in the caſe of the crime againſt nature. But they are ſometimes inflicted without ſuch expreſs warrant or example, at the will and diſcretion of the human legiſlature; as for forgery, for theft, and ſometimes for offences of a lighter kind. Of theſe we are principally to ſpeak: as theſe crimes are, none of them, offences againſt natural, but only againſt ſocial, rights; not even theft itſelf, unleſs it be accompanied with violence to one's houſe or perſon: all others being an infringement of that right of property, which, as we have formerly ſeen [m], owes it's origin not to the law of nature, but merely to civil ſociety.

THE practice of inflicting capital puniſhments, for offences of human inſtitution, is thus juſtified by that great and good man, ſir Matthew Hale [n]: "when offences grow enormous, frequent, "and dangerous to a kingdom or ſtate, deſtructive or highly "pernicious to civil ſocieties, and to the great inſecurity and "danger of the kingdom or it's inhabitants, ſevere puniſhment "and even death itſelf is neceſſary to be annexed to laws in "many caſes by the prudence of lawgivers." It is therefore the enormity, or dangerous tendency, of the crime, that alone can warrant any earthly legiſlature in putting him to death that

[l] Gen. ix. 6.
[m] Book II. ch. 1.
[n] 1 Hal. P. C. 13.

commits it. It is not it's frequency only, or the difficulty of otherwiſe preventing it, that will excuſe our attempting to prevent it by a wanton effuſion of human blood. For, though the end of puniſhment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means; ſince there may be unlawful methods of enforcing obedience even to the juſteſt laws. Every humane legiſlator will be therefore extremely cautious of eſtabliſhing laws that inflict the penalty of death, eſpecially for ſlight offences, or ſuch as are merely poſitive. He will expect a better reaſon for his ſo doing, than that looſe one which generally is given; that it is found by former experience that no lighter penalty will be effectual. For is it found upon farther experience, that capital puniſhments are more effectual? Was the vaſt territory of all the Ruſſias worſe regulated under the late empreſs Elizabeth, than under her more ſanguinary predeceſſors? Is it now, under Catherine II, leſs civilized, leſs ſocial, leſs ſecure? And yet we are aſſured, that neither of theſe illuſtrious princeſſes have, throughout their whole adminiſtration, inflicted the penalty of death: and the latter has, upon full perſuaſion of it's being uſeleſs, nay even pernicious, given orders for aboliſhing it entirely throughout her extenſive dominions *. But indeed, were capital puniſhments proved by experience to be a ſure and effectual remedy, that would not prove the neceſſity (upon which the juſtice and propriety depend) of inflicting them upon all occaſions when other expedients fail. I fear this reaſoning would extend a great deal too far. For inſtance, the damage done to our public roads by loaded waggons is univerſally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow, that it would be juſt for the legiſlature to inflict death upon every obſtinate carrier, who defeats or eludes the proviſions of former ſtatutes. Where the evil to be prevented is not adequate to the violence of the preventive, a ſovereign that thinks ſeriouſly can never juſtify

* Grand inſtructions for framing a new code of laws for the Ruſſian empire. §. 210.

ſuch

ſuch a law to the dictates of conſcience and humanity. To ſhed the blood of our fellow creature is a matter that requires the greateſt deliberation, and the fulleſt conviction of our own authority: for life is the immediate gift of God to man; which neither he can reſign, nor can it be taken from him, unleſs by the command or permiſſion of him who gave it; either expreſſly revealed, or collected from the laws of nature or ſociety by clear and indiſputable demonſtration.

I WOULD not be underſtood to *deny* the right of the legiſlature in any country to inforce it's own laws by the death of the tranſgreſſor, though perſons of ſome abilities have *doubted* it; but only to ſuggeſt a few hints for the conſideration of ſuch as are, or may hereafter become, legiſlators. When a queſtion ariſes, whether death may be lawfully inflicted for this or that tranſgreſſion, the wiſdom of the laws muſt decide it: and to this public judgment or deciſion all private judgments muſt ſubmit; elſe there is an end of the firſt principle of all ſociety and government. The guilt of blood, if any, muſt lie at their doors, who miſinterpret the extent of their warrant; and not at the doors of the ſubject, who is bound to receive the interpretations, that are given by the ſovereign power.

2. AS to the *end*, or final cauſe of human puniſhments. This is not by way of atonement or expiation for the crime committed; for that muſt be left to the juſt determination of the ſupreme being: but as a precaution againſt future offences of the ſame kind. This is effected three ways: either by the amendment of the offender himſelf; for which purpoſe all corporal puniſhments, fines, and temporary exile or impriſonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, "*ut poena* (as Tully[p] "expreſſes it) *ad paucos, metus ad omnes perveniat*;" which gives riſe to all ignominious puniſhments, and to ſuch executions of juſtice as are open and public: or, laſtly, by depriving

[p] *pro Cluentio.* 46.

the party injuring of the power to do future miſchief; which is effected by either putting him to death, or condemning him to perpetual confinement, ſlavery, or exile. The ſame one end, of preventing future crimes, is endeavoured to be anſwered by each of theſe three ſpecies of puniſhment. The public gains equal ſecurity, whether the offender himſelf be amended by wholſome correction, or whether he be diſabled from doing any farther harm: and if the penalty fails of both theſe effects, as it may do, ſtill the terror of his example remains as a warning to other citizens. The method however of inflicting puniſhment ought always to be proportioned to the particular purpoſe it is meant to ſerve, and by no means to exceed it: therefore the pains of death, and perpetual diſability by exile, ſlavery, or impriſonment, ought never to be inflicted, but when the offender appears *incorrigible:* which may be collected either from a repetition of minuter offences; or from the perpetration of ſome one crime of deep malignity, which of itſelf demonſtrates a diſpoſition without hope or probability of amendment: and in ſuch caſes it would be cruelty to the public, to defer the puniſhment of ſuch a criminal, till he had an opportunity of repeating perhaps the worſt of villanies.

3. As to the *meaſure* of human puniſhments. From what has been obſerved in the former articles we may collect, that the quantity of puniſhment can never be abſolutely determined by any ſtanding invariable rule; but it muſt be left to the arbitration of the legiſlature to inflict ſuch penalties as are warranted by the laws of nature and ſociety, and ſuch as appear to be the beſt calculated to anſwer the end of precaution againſt future offences.

HENCE it will be evident, that what ſome have ſo highly extolled for its equity, the *lex talionis* or law of retaliation, can never be in all caſes an adequate or permanent rule of puniſhment. In ſome caſes indeed it ſeems to be dictated by natural reaſon; as in the caſe of conſpiracies to do an injury, or falſe accuſations

accuſations of the innocent: to which we may add that law of the Jews and Egyptians, mentioned by Joſephus and Diodorus Siculus, that whoever without ſufficient cauſe was found with any mortal poiſon in his cuſtody, ſhould himſelf be obliged to take it. But, in general, the difference of perſons, place, time, provocation, or other circumſtances, may enhance or mitigate the offence; and in ſuch caſes retaliation can never be a proper meaſure of juſtice. If a nobleman ſtrikes a peaſant, all mankind will ſee, that if a court of juſtice awards a return of the blow, it is more than a juſt compenſation. On the other hand, retaliation may ſometimes be too eaſy a ſentence; as, if a man maliciouſly ſhould put out the remaining eye of him who had loſt one before, it is too ſlight a puniſhment for the maimer to loſe only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this inſtance judiciouſly altered; by decreeing, in imitation of Solon's laws [q], that he who ſtruck out the eye of a one-eyed man, ſhould loſe both his own in return. Beſides, there are very many crimes, that will in no ſhape admit of theſe penalties, without manifeſt abſurdity and wickedneſs. Theft cannot be puniſhed by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And we may add, that thoſe inſtances, wherein retaliation appears to be uſed, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the ſame hurt he has done to his neighbour, and no more; but this correſpondence between the crime and puniſhment is barely a conſequence from ſome other principle. Death is ordered to be puniſhed with death; not becauſe one is equivalent to the other, for that would be expiation, and not puniſhment: Nor is death always an equivalent for death: the execution of a needy decrepid aſſaſſin is a poor ſatisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune. But the reaſon upon which this ſentence is grounded ſeems to be, that this is the higheſt penalty that man can inflict,

[q] Pott. Ant. b. 1. c. 26.

and

and tends moſt to the ſecurity of the world; by removing one murderer from the earth, and ſetting a dreadful example to deter others: ſo that even this grand inſtance proceeds upon other principles than thoſe of retaliation. And truly, if any meaſure of puniſhment is to be taken from the damage ſuſtained by the ſufferer, the puniſhment ought rather to exceed than equal the injury: ſince it ſeems contrary to reaſon and equity, that the guilty (if convicted) ſhould ſuffer no more than the innocent has done before him; eſpecially as the ſuffering of the innocent is paſt and irrevocable, that of the guilty is future, contingent, and liable to be eſcaped or evaded. With regard indeed to crimes that are incomplete, which conſiſt merely in the intention, and are not yet carried into act, as conſpiracies and the like; the innocent has a chance to fruſtrate or avoid the villany, as the conſpirator has alſo a chance to eſcape his puniſhment: and this may be one reaſon why the *lex talionis* is more proper to be inflicted, if at all, for crimes that conſiſt in intention, than for ſuch as are carried into act. It ſeems indeed conſonant to natural reaſon, and has therefore been adopted as a maxim by ſeveral theoretical writers [r], that the puniſhment, due to the crime of which one falſely accuſes another, ſhould be inflicted on the perjured informer. Accordingly, when it was once attempted to introduce into England the law of retaliation, it was intended as a puniſhment for ſuch only as preferred malicious accuſations againſt others; it being enacted by ſtatute 37 Edw. III. c. 18. that ſuch as preferred any ſuggeſtions to the king's great council ſhould put in ſureties of taliation; that is, to incur the ſame pain that the other ſhould have had, in caſe the ſuggeſtion were found untrue. But, after one year's experience, this puniſhment of taliation was rejected, and impriſonment adopted in it's ſtead [s].

BUT though from what has been ſaid it appears, that there cannot be any regular or determinate method of rating the

[r] Beccar. c. 15.

[s] Stat. 38. Edw. III. c. 9.

quantity

quantity of puniſhments for crimes, by any one uniform rule; but they muſt be referred to the will and diſcretion of the legiſlative power: yet there are ſome general principles, drawn from the nature and circumſtances of the crime, that may be of ſome aſſiſtance in allotting it an adequate puniſhment.

As, firſt, with regard to the *object* of it: for the greater and more exalted the object of an injury is, the more care ſhould be taken to prevent that injury, and of courſe under this aggravation the puniſhment ſhould be more ſevere. Therefore treaſon in conſpiring the *king*'s death is by the Engliſh law puniſhed with greater rigour than even actually killing any private ſubject. And yet, generally, a deſign to tranſgreſs is not ſo flagrant an enormity, as the actual completion of that deſign. For evil, the nearer we approach it, is the more diſagreeable and ſhocking; ſo that it requires more obſtinacy in wickedneſs to perpetrate an unlawful action, than barely to entertain the thought of it: and it is an encouragement to repentance and remorſe, even till the laſt ſtage of any crime, that it never is too late to retract; and that if a man ſtops even here, it is better for him than if he proceeds: for which reaſons an attempt to rob, to raviſh, or to kill, is far leſs penal than the actual robbery, rape, or murder. But in the caſe of a treaſonable conſpiracy, the object whereof is the king's majeſty, the bare intention will deſerve the higheſt degree of ſeverity: not becauſe the intention is equivalent to the act itſelf; but becauſe the greateſt rigour is no more than adequate to a treaſonable purpoſe of the heart, and there is no greater left to inflict upon the actual execution itſelf.

AGAIN: the violence of paſſion, or temptation, may ſometimes alleviate a crime; as theft, in caſe of hunger, is far more worthy of compaſſion, than when committed through avarice, or to ſupply one in luxurious exceſſes. To kill a man upon ſudden and violent reſentment is leſs penal, than upon cool deliberate malice. The age, education, and character of the offender; the repetition (or otherwiſe) of the offence; the time, the

the place, the company wherein it was committed; all theſe, and a thouſand other incidents, may aggravate or extenuate the crime[t].

FARTHER: as puniſhments are chiefly intended for the prevention of future crimes, it is but reaſonable that among crimes of different natures thoſe ſhould be moſt ſeverely puniſhed, which are the moſt deſtructive of the public ſafety and happineſs[v]: and, among crimes of an equal malignity, thoſe which a man has the moſt frequent and eaſy opportunities of committing, which cannot be ſo eaſily guarded againſt as others, and which therefore the offender has the ſtrongeſt inducement to commit: according to what Cicero obſerves[u], "*ea ſunt animadvertenda peccata maxime, quae difficillime praecaventur.*" Hence it is, that for a ſervant to rob his maſter is in more caſes capital, than for a ſtranger: if a ſervant kills his maſter, it is a ſpecies of treaſon; in another it is only murder: to ſteal a handkerchief, or other trifle of above the value of twelvepence, privately from one's perſon, is made capital; but to carry off a load of corn from an open field, though of fifty times greater value, is puniſhed with tranſportation only. And, in the iſland of Man, this rule was formerly carried ſo far, that to take away an horſe or an ox was there no felony, but a treſpaſs; becauſe of the difficulty in that little territory to conceal them or carry them off: but to ſteal a pig or a fowl, which is eaſily done, was a capital miſdemeſnor, and the offender was puniſhed with death[w].

LASTLY, as a concluſion to the whole, we may obſerve that puniſhments of unreaſonable ſeverity, eſpecially when indiſcriminately inflicted, have leſs effect in preventing crimes, and amending the manners of a people, than ſuch as are more merciful in general, yet properly intermixed with due diſtinctions

[t] Thus Demoſthenes (in his oration againſt Midias) finely works up the aggravations of the inſult he had received. "I was abuſed, "ſays he, by my enemy, in cold blood, out "of malice, not by heat of wine, in the "morning, publicly, before ſtrangers as well "as citizens; and that in the temple, whi-"ther the duty of my office called me."

[v] Beccar. c. 6.

[u] *pro Sexto Roſcio*, 40.

[w] 4 Inſt. 285.

of

of ſeverity. It is the ſentiment of an ingenious writer, who ſeems to have well ſtudied the ſprings of human action[x], that crimes are more effectually prevented by the *certainty*, than by the *ſeverity*, of puniſhment. For the exceſſive ſeverity of laws (ſays Monteſquieu[y]) hinders their execution: when the puniſhment ſurpaſſes all meaſure, the public will frequently out of humanity prefer impunity to it. Thus alſo the ſtatute 1 Mar. ſt. 1. c. 1. recites in it's preamble, "that the ſtate of every king conſiſts more "aſſuredly in the love of the ſubject towards their prince, than "in the dread of laws made with rigorous pains; and that laws "made for the preſervation of the commonwealth without "great penalties are more often obeyed and kept, than laws "made with extreme puniſhments." Happy had it been for the nation, if the ſubſequent practice of that deluded princeſs in matters of religion, had been correſpondent to theſe ſentiments of herſelf and parliament, in matters of ſtate and government! We may farther obſerve that ſanguinary laws are a bad ſymptom of the diſtemper of any ſtate, or at leaſt of it's weak conſtitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel puniſhments: the Porcian law, which exempted all citizens from ſentence of death, ſilently abrogated them all. In this period the republic flouriſhed: under the emperors ſevere puniſhments were revived; and then the empire fell.

IT is moreover abſurd and impolitic to apply the ſame puniſhment to crimes of different malignity. A multitude of ſanguinary laws (beſides the doubt that may be entertained concerning the right of making them) do likewiſe prove a manifeſt defect either in the wiſdom of the legiſlative, or the ſtrength of the executive power. It is a kind of quackery in government, and argues a want of ſolid ſkill, to apply the ſame univerſal remedy, the *ultimum ſupplicium*, to every caſe of difficulty. It is, it muſt be owned, much *eaſier* to extirpate than to amend mankind:

[x] Beccar. c. 7. [y] Sp. L. b. 6. c. 13.

yet that magiſtrate muſt be eſteemed both a weak and a cruel ſurgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniouſly propoſed [z], that in every ſtate a ſcale of crimes ſhould be formed, with a correſponding ſcale of puniſhments, deſcending from the greateſt to the leaſt: but, if that be too romantic an idea, yet at leaſt a wiſe legiſlator will mark the principal diviſions, and not aſſign penalties of the firſt degree to offences of an inferior rank. Where men ſee no diſtinction made in the nature and gradations of puniſhment, the generality will be led to conclude there is no diſtinction in the guilt. Thus in France the puniſhment of robbery, either with or without murder, is the ſame [a]: hence it is, that though perhaps they are therefore ſubject to fewer robberies, yet they never rob but they alſo murder. In China murderers are cut to pieces, and robbers not: hence in that country they never murder on the highway, though they often rob. And in England, beſides the additional terrors of a ſpeedy execution, and a ſubſequent expoſure or diſſection, robbers have a hope of tranſportation, which ſeldom is extended to murderers. This has the ſame effect here as in China; in preventing frequent aſſaſſination and ſlaughter.

YET, though in this inſtance we may glory in the wiſdom of the Engliſh law, we ſhall find it more difficult to juſtify the frequency of capital puniſhment to be found therein; inflicted (perhaps inattentively) by a multitude of ſucceſſive independent ſtatutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no leſs than an hundred and ſixty have been declared by act of parliament [b] to be felonies without benefit of clergy; or, in other words, to be worthy of inſtant death. So dreadful a liſt, inſtead of diminiſhing, increaſes the number of

[z] Beccar. c. 6.

[a] Sp. L. b. 6. c. 16.

[b] See Ruffhead's index to the ſtatutes (tit. felony) and the acts which have ſince been made.

offenders

offenders. The injured, through compaſſion, will often forbear to proſecute: juries, through compaſſion, will ſometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence: and judges, through compaſſion, will reſpite one half of the convicts, and recommend them to the royal mercy. Among ſo many chances of eſcaping, the needy and hardened offender overlooks the multitude that ſuffer; he boldly engages in ſome deſperate attempt, to relieve his wants or ſupply his vices; and, if unexpectedly the hand of juſtice overtakes him, he deems himſelf peculiarly unfortunate, in falling at laſt a ſacrifice to thoſe laws, which long impunity has taught him to contemn.

CHAPTER THE SECOND.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

HAVING, in the preceding chapter, conſidered in general the nature of crimes, and puniſhments, we are next led, in the order of our diſtribution, to enquire what perſons are, or are not, *capable* of committing crimes; or, which is all one, who are exempted from the cenſures of the law upon the commiſſion of thoſe acts, which in other perſons would be ſeverely puniſhed. In the proceſs of which enquiry, we muſt have recourſe to particular and ſpecial exceptions: for the general rule is, that no perſon ſhall be excuſed from puniſhment for diſobedience to the laws of his country, excepting ſuch as are expreſſly defined and exempted by the laws themſelves.

ALL the ſeveral pleas and excuſes, which protect the committer of a forbidden act from the puniſhment which is otherwiſe annexed thereto, may be reduced to this ſingle conſideration, the want or defect of *will*. An involuntary act, as it has no claim to merit, ſo neither can it induce any guilt: the concurrence of the will, when it has it's choice either to do or to avoid the fact in queſtion, being the only thing that renders human

human actions either praiſeworthy or culpable. Indeed, to make a complete crime, cognizable by human laws, there muſt be both a will and an act. For though, *in foro conſcientiae*, a fixed deſign or will to do an unlawful act is almoſt as heinous as the commiſſion of it, yet, as no temporal tribunal can ſearch the heart, or fathom the intentions of the mind, otherwiſe than as they are demonſtrated by outward actions, it therefore cannot puniſh for what it cannot know. For which reaſon in all temporal juriſdictions an *overt* act, or ſome open evidence of an intended crime, is neceſſary, in order to demonſtrate the depravity of the will, before the man is liable to puniſhment. And, as a vitious will without a vitious act is no civil crime, ſo, on the other hand, an unwarrantable act without a vitious will is no crime at all. So that to conſtitute a crime againſt human laws, there muſt be, firſt, a vitious will; and, ſecondly, an unlawful act conſequent upon ſuch vitious will.

Now there are three caſes, in which the will does not join with the act: 1. Where there is a defect of underſtanding. For where there is no diſcernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing elſe but a determination of one's choice, to do or to abſtain from a particular action: he therefore, that has no underſtanding, can have no will to guide his conduct. 2. Where there is underſtanding and will ſufficient, reſiding in the party; but not called forth and exerted at the time of the action done: which is the caſe of all offences committed by chance or ignorance. Here the will ſits neuter; and neither concurs with the act, nor diſagrees to it. 3. Where the action is conſtrained by ſome outward force and violence. Here the will counteracts the deed; and is ſo far from concurring with, that it loaths and diſagrees to, what the man is obliged to perform. It will be the buſineſs of the preſent chapter briefly to conſider all the ſeveral ſpecies of defect in will, as they fall under ſome one or other of theſe general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the firſt claſs; misfortune, and ignorance,

ignorance, which may be referred to the ſecond; and compulſion or neceſſity, which may properly rank in the third.

I. FIRST, we will conſider the caſe of *infancy*, or nonage; which is a defect of the underſtanding. Infants, under the age of diſcretion, ought not to be puniſhed by any criminal proſecution whatever[a]. What the age of diſcretion is, in various nations is matter of ſome variety. The civil law diſtinguiſhed the age of minors, or thoſe under twenty five years old, into three ſtages: *infantia*, from the birth till ſeven years of age; *pueritia*, from ſeven to fourteen; and *pubertas* from fourteen upwards. The period of *pueritia*, or childhood, was again ſubdivided into two equal parts; from ſeven to ten and an half was *aetas infantiae proxima*; from ten and an half to fourteen was *aetas pubertati proxima*. During the firſt ſtage of infancy, and the next half ſtage of childhood, *infantiae proxima*, they were not puniſhable for any crime[b]. During the other half ſtage of childhood, approaching to puberty, from ten and an half to fourteen, they were indeed puniſhable, if found to be *doli capaces*, or capable of miſchief; but with many mitigations, and not with the utmoſt rigor of the law. During the laſt ſtage (at the age of puberty, and afterwards) minors were liable to be puniſhed, as well capitally, as otherwiſe.

THE law of England does in ſome caſes privilege an infant, under the age of twenty one, as to common miſdemeſnors; ſo as to eſcape fine, impriſonment, and the like: and particularly in caſes of omiſſion, as not repairing a bridge, or a highway, and other ſimilar offences[c]: for, not having the command of his fortune till twenty one, he wants the capacity to do thoſe things, which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at leaſt as liable as others to

[a] 1 Hawk. P. C. 2.
[b] *Inſt.* 3. 20. 10.
[c] 1 Hal. P. C. 20, 21, 22.

commit)

commit) for theſe an infant, above the age of fourteen, is equally liable to ſuffer, as a perſon of the full age of twenty one.

WITH regard to capital crimes, the law is ſtill more minute and circumſpect; diſtinguiſhing with greater nicety the ſeveral degrees of age and diſcretion. By the antient Saxon law, the age of twelve years was eſtabliſhed for the age of poſſible diſcretion, when firſt the underſtanding might open [d]: and from thence till the offender was fourteen, it was *aetas pubertati proxima*, in which he might, or might not, be guilty of a crime, according to his natural capacity or incapacity. This was the dubious ſtage of diſcretion: but, under twelve, it was held that he could not be guilty in will, neither after fourteen could he be ſuppoſed innocent, of any capital crime which he in fact committed. But by the law, as it now ſtands, and has ſtood at leaſt ever ſince the time of Edward the third, the capacity of doing ill, or contracting guilt, is not ſo much meaſured by years and days, as by the ſtrength of the delinquent's underſtanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in theſe caſes our maxim is, that "*malitia ſupplet aetatem.*" Under ſeven years of age indeed an infant cannot be guilty of felony [e]; for then a felonious diſcretion is almoſt an impoſſibility in nature: but at eight years old he may be guilty of felony [f]. Alſo, under fourteen, though an infant ſhall be *prima facie* adjudged to be *doli incapax*; yet if it appear to the court and jury, that he was *doli capax*, and could diſcern between good and evil, he may be convicted and ſuffer death. Thus a girl of thirteen has been burnt for killing her miſtreſs: and one boy of ten, and another of nine years old, who had killed their companions, have been ſentenced to death, and he of ten years actually hanged; becauſe it appeared upon their trials, that the one hid himſelf, and the other hid the body he had killed; which hiding manifeſted a conſciouſneſs of guilt, and a diſcretion to diſcern be-

[d] *LL. Athelſtan.* Wilk. 65.
[e] Mirr. c. 4. §. 16. 1 Hal. P. C. 27.
[f] Dalt. Juſt. c. 147.

tween

tween good and evil [g]. And there was an inſtance in the laſt century, where a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly [h]. Thus alſo, in very modern times, a boy of ten years old was convicted on his own confeſſion of murdering his bedfellow; there appearing in his whole behaviour plain tokens of a miſchievous diſcretion: and, as the ſparing this boy merely on account of his tender years might be of dangerous conſequence to the public, by propagating a notion that children might commit ſuch atrocious crimes with impunity, it was unanimouſly agreed by all the judges that he was a proper ſubject of capital puniſhment [i]. But, in all ſuch caſes, the evidence of that malice, which is to ſupply age, ought to be ſtrong and clear beyond all doubt and contradiction.

II. THE ſecond caſe of a deficiency in will, which excuſes from the guilt of crimes, ariſes alſo from a defective or vitiated underſtanding, *viz.* in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may eaſily be adapted alſo to the former, is, that "*furioſus furore ſolum punitur.*" In criminal caſes therefore idiots and lunatics are not chargeable for their own acts, if committed when under theſe incapacities: no, not even for treaſon itſelf [k]. Alſo, if a man in his ſound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; becauſe he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the priſoner becomes mad, he ſhall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loſes his ſenſes before judgment, judgment ſhall not be pronounced; and if, after judgment, he becomes of nonſane memory, execution ſhall be ſtayed: for peradventure, ſays the humanity of the Engliſh law, had the priſoner been of ſound memory, he might have alleged ſome-

[g] 1 Hal. P. C. 26, 27.
[h] Emlyn on 1 Hal. P. C. 25.
[i] Foſter. 72.
[k] 3 Inſt. 6.

thing

thing in ſtay of judgment or execution[l]. Indeed, in the bloody reign of Henry the eighth, a ſtatute was made[m], which enacted, that if a perſon, being *compos mentis*, ſhould commit high treaſon, and after fall into madneſs, he might be tried in his abſence, and ſhould ſuffer death, as if he were of perfect memory. But this ſavage and inhuman law was repealed by the ſtatute 1 & 2 Ph. & M. c. 10. For, as is obſerved by ſir Edward Coke[n], "the execution of an offender is for example, *ut poena* "*ad paucos, metus ad omnes perveniat:* but ſo it is not when "a madman is executed; but ſhould be a miſerable ſpectacle, "both againſt law, and of extreme inhumanity and cruelty, "and can be no example to others." But if there be any doubt, whether the party be *compos* or not, this ſhall be tried by a jury. And if he be ſo found, a total idiocy, or abſolute inſanity, excuſes from the guilt, and of courſe from the puniſhment, of any criminal action committed under ſuch deprivation of the ſenſes: but, if a lunatic hath lucid intervals of underſtanding, he ſhall anſwer for what he does in thoſe intervals, as if he had no deficiency[o]. Yet, in the caſe of abſolute madmen, as they are not anſwerable for their actions, they ſhould not be permitted the liberty of acting unleſs under proper control; and, in particular, they ought not to be ſuffered to go looſe, to the terror of the king's ſubjects. It was the doctrine of our antient law, that perſons deprived of their reaſon might be confined till they recovered their ſenſes[p], without waiting for the forms of a commiſſion or other ſpecial authority from the crown: and now, by the vagrant acts[q], a method is chalked out for impriſoning, chaining, and ſending them to their proper homes.

III. THIRDLY; as to artificial, voluntarily contracted madneſs, by *drunkenneſs* or intoxication, which, depriving men of their reaſon, puts them in a temporary phrenzy; our law looks upon this as an aggravation of the offence, rather than as an

[l] 1 Hal. P. C. 34.
[m] 33 Hen. VIII. c. 20.
[n] 3 Inſt. 6.
[o] 1 Hal. P. C. 31.
[p] Bro. *Abr. tit. corone.* 101.
[q] 17 Geo. II. c. 5.

excuſe for any criminal miſbehaviour. A drunkard, ſays ſir Edward Coke[r], who is *voluntarius daemon*, hath no privilege thereby; but what hurt or ill ſoever he doth, his drunkenneſs doth aggravate it: *nam omne crimen ebrietas, et incendit, et detegit.* It hath been obſerved, that the real uſe of ſtrong liquors, and the abuſe of them by drinking to exceſs, depend much upon the temperature of the climate in which we live. The ſame indulgence, which may be neceſſary to make the blood move in Norway, would make an Italian mad. A German therefore, ſays the preſident Monteſquieu[s], drinks through cuſtom, founded upon conſtitutional neceſſity; a Spaniard drinks through choice, or out of the mere wantonneſs of luxury: and drunkenneſs, he adds, ought to be more ſeverely puniſhed, where it makes men miſchievous and mad, as in Spain and Italy, than where it only renders them ſtupid and heavy, as in Germany and more northern countries. And accordingly, in the warmer climate of Greece, a law of Pittacus enacted, "that he who "committed a crime, when drunk, ſhould receive a double pu-"niſhment;" one for the crime itſelf, and the other for the ebriety which prompted him to commit it[t]. The Roman law indeed made great allowances for this vice: "*per vinum delapſis* "*capitalis poena remittitur*[u]. But the law of England, conſidering how eaſy it is to counterfeit this excuſe, and how weak an excuſe it is, (though real) will not ſuffer any man thus to privilege one crime by another[w].

IV. A FOURTH deficiency of will, is where a man commits an unlawful act by *misfortune* or *chance*, and not by deſign. Here the will obſerves a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we ſhall find more occaſion to ſpeak hereafter; at preſent only obſerving, that if any accidental miſchief happens to follow from the per-

[r] 1 Inſt. 247.
[s] Sp. L. b. 14. c. 10.
[t] Puff. L. of N. b. 8. c. 3.
[u] *Ff.* 49. 16. 6.
[w] Plowd. 19.

formance

formance of a *lawful* act, the party ſtands excuſed from all guilt: but if a man be doing any thing *unlawful*, and a conſequence enſues which he did not foreſee or intend, as the death of a man or the like, his want of foreſight ſhall be no excuſe; for, being guilty of one offence, in doing antecedently what is in itſelf unlawful, he is criminally guilty of whatever conſequence may follow the firſt miſbehaviour[x].

V. FIFTHLY, *ignorance* or *miſtake* is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting ſeparately, there is not that conjunction between them, which is neceſſary to form a criminal act. But this muſt be an ignorance or miſtake of fact, and not an error in point of law. As if a man, intending to kill a thief or houſebreaker in his own houſe, by miſtake kills one of his own family, this is no criminal action[y]: but if a man thinks he has a right to kill a perſon excommunicated or outlawed, wherever he meets him, and does ſo; this is wilful murder. For a miſtake in point of law, which every perſon of diſcretion not only may, but is bound and preſumed to know, is in criminal caſes no ſort of defence. *Ignorantia juris, quod quiſque tenetur ſcire, neminem excuſat*, is as well the maxim of our own law[z], as it was of the Roman[a].

VI. A SIXTH ſpecies of defect of will is that ariſing from *compulſion* and inevitable *neceſſity*. Theſe are a conſtraint upon the will, whereby a man is urged to do that which his judgment diſapproves; and which, it is to be preſumed, his will (if left to itſelf) would reject. As puniſhments are therefore only inflicted for the abuſe of that free-will, which God has given to man, it is highly juſt and equitable that a man ſhould be excuſed for thoſe acts, which are done through unavoidable force and compulſion.

[x] 1 Hal. P. C. 39.
[y] Cro. Car. 538.
[z] Plowd. 343.
[a] *Ff.* 22. 6. 9.

1. OF this nature, in the firſt place, is the obligation of *civil ſubjection*, whereby the inferior is conſtrained by the ſuperior to act contrary to what his own reaſon and inclination would ſuggeſt: as when a legiſlator eſtabliſhes iniquity by a law, and commands the ſubject to do an act contrary to religion or ſound morality. How far this excuſe will be admitted *in foro conſcientiae*, or whether the inferior in this caſe is not bound to obey the divine, rather than the human law, it is not my buſineſs to decide; though the queſtion I believe, among the caſuiſts, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a ſufficient extenuation of civil guilt before the municipal tribunal. The ſheriff, who burnt Latimer and Ridley, in the bigotted days of queen Mary, was not liable to puniſhment from Elizabeth, for executing ſo horrid an office; being juſtified by the commands of that magiſtracy, which endeavoured to reſtore ſuperſtition under the holy auſpices of it's mercileſs ſiſter, perſecution.

AS to perſons in private relations; the principal caſe, where conſtraint of a ſuperior is allowed as an excuſe for criminal miſconduct, is with regard to the matrimonial ſubjection of the wife to her huſband[b]: for neither a ſon or a ſervant are excuſed for the commiſſion of any crime, whether capital or otherwiſe, by the command or coercion of the parent or maſter[b]; though in ſome caſes the command or authority of the huſband, either expreſs or implied, will privilege the wife from puniſhment, even for capital offences. And therefore if a woman commit theft, burglary, or other civil offences againſt the laws of ſociety, by the coercion of her huſband; or merely by his command, which the law conſtrues a coercion; or even in his company, his example being equivalent to a command; ſhe is not guilty of any crime: being conſidered as acting by compulſion and not of her own will[c]. Which doctrine is at leaſt a thouſand years old in this kingdom, being to be found among the laws of

[b] 1 Hawk. P. C. 3. [c] 1 Hal. P. C. 45.

king

king Ina the Weſt Saxon[d]. And it appears that, among the northern nations on the continent, this privilege extended to any woman tranſgreſſing in concert with a man, and to any ſervant that committed a joint offence with a freeman: the male or freeman only was puniſhed, the female or ſlave diſmiſſed; "*proculdubio quod alterum libertas, alterum neceſſitas impelleret*[e]." But (beſides that in our law, which is a ſtranger to ſlavery, no impunity is given to ſervants, who are as much free agents as their maſters) even with regard to wives, this rule admits of an exception in crimes that are *mala in ſe*, and prohibited by the law of nature, as murder and the like: not only becauſe theſe are of a deeper dye; but alſo, ſince in a ſtate of nature no one is in ſubjection to another, it would be unreaſonable to ſcreen an offender from the puniſhment due to natural crimes, by the refinements and ſubordinations of civil ſociety. In treaſon alſo, (the higheſt crime which a member of ſociety can, as ſuch, be guilty of) no plea of coverture ſhall excuſe the wife; no preſumption of the huſband's coercion ſhall extenuate her guilt[f]: as well becauſe of the odiouſneſs and dangerous conſequence of the crime itſelf, as becauſe the huſband, having broken through the moſt ſacred tie of ſocial community by rebellion againſt the ſtate, has no right to that obedience from a wife, which he himſelf as a ſubject has forgotten to pay. In inferior miſdemeſnors alſo, we may remark another exception; that a wife may be indicted and ſet in the pillory *with* her huſband, for keeping a brothel: for this is an offence touching the domeſtic oeconomy or government of the houſe, in which the wife has a principal ſhare; and is alſo ſuch an offence as the law preſumes to be generally conducted by the intrigues of the female ſex[g]. And in all caſes, where the wife offends alone, without the company or command of her huſband, ſhe is reſponſible for her offence, as much as any feme-ſole.

[d] *cap.* 57.
[e] Stiernhook *de jure Sueon. l.* 2. *c.* 4.
[f] 1 Hal. P. C. 47.
[g] 1 Hawk. P. C. 2, 3.

2. AN-

2. ANOTHER ſpecies of compulſion or neceſſity is what our law calls *dureſs per minas*[h]; or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reaſon the guilt of many crimes and miſdemeſnors; at leaſt before the human tribunal. But then that fear, which compels a man to do an unwarrantable action, ought to be juſt and well grounded; ſuch, "*qui cadere poſſit in virum conſtantem, "non timidum et meticuloſum,*" as Bracton expreſſes it[i], in the words of the civil law[k]. Therefore, in time of war or rebellion, a man may be juſtified in doing many treaſonable acts by compulſion of the enemy or rebels, which would admit of no excuſe in the time of peace[l]. This however ſeems only, or at leaſt principally, to hold as to poſitive crimes, ſo created by the laws of ſociety; and which therefore ſociety may excuſe; but not as to natural offences, ſo declared by the law of God, wherein human magiſtrates are only the executioners of divine puniſhment. And therefore though a man be violently aſſaulted, and hath no other poſſible means of eſcaping death, but by killing an innocent perſon; this fear and force ſhall not acquit him of murder; for he ought rather to die himſelf, than eſcape by the murder of an innocent[m]. But in ſuch a caſe he is permitted to kill the aſſailant; for there the law of nature, and ſelf-defence it's primary canon, have made him his own protector.

3. THERE is a third ſpecies of neceſſity, which may be diſtinguiſhed from the actual compulſion of external force or fear; being the reſult of reaſon and reflection, which act upon and conſtrain a man's will, and oblige him to do an action, which without ſuch obligation would be criminal. And that is, when a man has his choice of two evils ſet before him, and, being under a neceſſity of chooſing one, he chuſes the leaſt

[h] See Vol. I. pag. 131.
[i] *l.* 2. *f.* 16.
[k] *Ff.* 4. 2. 5, & 6.
[l] 1 Hal. P. C. 50.
[m] *Ibid.* 51.

pernicious

pernicious of the two. Here the will cannot be ſaid freely to exert itſelf, being rather paſſive, than active; or, if active, it is rather in rejecting the greater evil than in chooſing the leſs. Of this ſort is that neceſſity, where a man by the commandment of the law is bound to arreſt another for any capital offence, or to diſperſe a riot, and reſiſtance is made to his authority: it is here juſtifiable and even neceſſary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to eſcape, or the riot to continue. For the preſervation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmoſt conſequence to the public; and therefore excuſe the felony, which the killing would otherwiſe amount to[n].

4. THERE is yet another caſe of neceſſity, which has occaſioned great ſpeculation among the writers upon general law; *viz.* whether a man in extreme want of food or clothing may juſtify ſtealing either, to relieve his preſent neceſſities. And this both Grotius[o] and Puffendorf[p], together with many other of the foreign juriſts, hold in the affirmative; maintaining by many ingenious, humane, and plauſible reaſons, that in ſuch caſes the community of goods by a kind of tacit conceſſion of ſociety is revived. And ſome even of our own lawyers have held the ſame[q]; though it ſeems to be an unwarranted doctrine, borrowed from the notions of ſome civilians: at leaſt it is now antiquated, the law of England admitting no ſuch excuſe at preſent[r]. And this it's doctrine is agreeable not only to the ſentiments of many of the wiſeſt antients, particularly Cicero[s], who holds that "*ſuum cuique incommodum ferendum eſt, potius* "*quam de alterius commodis detrahendum*;" but alſo to the Jewiſh law, as certified by king Solomon himſelf[t]: "if a thief ſteal to "ſatisfy his ſoul when he is hungry, he ſhall reſtore ſevenfold,

[n] 1 Hal. P. C. 53.
[o] *de jure b. & p. l.* 2. *c.* 2.
[p] L. of Nat. and N. l. 2. c. 6.
[q] Briton, c. 10. Mirr. c. 4. §. 16.
[r] 1 Hal. P. C. 54.
[s] *de off. l.* 3. *c.* 5.
[t] Prov. vi. 30.

"and

" and ſhall give all the ſubſtance of his houſe :" which was the ordinary puniſhment for theft in that kingdom. And this is founded upon the higheſt reaſon : for men's properties would be under a ſtrange inſecurity, if liable to be invaded according to the wants of others ; of which wants no man can poſſibly be an adequate judge, but the party himſelf who pleads them. In this country eſpecially, there would be a peculiar impropriety in admitting ſo dubious an excuſe : for by our laws ſuch ſufficient proviſion is made for the poor by the power of the civil magiſtrate, that it is impoſſible that the moſt needy ſtranger ſhould ever be reduced to the neceſſity of thieving to ſupport nature. This caſe of a ſtranger is, by the way, the ſtrongeſt inſtance put by baron Puffendorf, and whereon he builds his principal arguments : which, however they may hold upon the continent, where the parſimonious induſtry of the natives orders every one to work or ſtarve, yet muſt loſe all their weight and efficacy in England, where charity is reduced to a ſyſtem, and interwoven in our very conſtitution. Therefore our laws ought by no means to be taxed with being unmerciful, for denying this privilege to the neceſſitous ; eſpecially when we conſider, that the king, on the repreſentation of his miniſters of juſtice, hath a power to ſoften the law, and to extend mercy in caſes of peculiar hardſhip. An advantage which is wanting in many ſtates, particularly thoſe which are democratical : and theſe have in it's ſtead introduced and adopted, in the body of the law itſelf, a multitude of circumſtances tending to alleviate it's rigour. But the founders of our conſtitution thought it better to veſt in the crown the power of pardoning particular objects of compaſſion, than to countenance and eſtabliſh theft by one general undiſtinguiſhing law.

VII. In the ſeveral caſes before-mentioned, the incapacity of committing crimes ariſes from a deficiency of the will. To theſe we may add one more, in which the law ſuppoſes an incapacity of doing wrong, from the excellence and perfection of the perſon ;

ſon; which extend as well to the will as to the other qualities of his mind. I mean the caſe of the king: who, by virtue of his royal prerogative, is not under the coercive power of the law[u]; which will not ſuppoſe him capable of committing a folly, much leſs a crime. We are therefore, out of reverence and decency, to forbear any idle enquiries, of what would be the conſequence if the king were to act thus and thus: ſince the law deems ſo highly of his wiſdom and virtue, as not even to preſume it poſſible for him to do any thing inconſiſtent with his ſtation and dignity; and therefore has made no proviſion to remedy ſuch a grievance. But of this ſufficient was ſaid in a former volume[w], to which I muſt refer the reader.

[u] 1 Hal. P. C. 44.

[w] Book I. ch. 7. pag. 244.

CHAPTER THE THIRD.

OF PRINCIPALS AND ACCESSORIES.

IT having been ſhewn in the preceding chapter what perſons are, or are not, upon account of their ſituation and circumſtances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among perſons that are capable of offending; *viz.* as *principal*, and as *acceſſory*.

I. A MAN may be *principal* in an offence in two degrees. A principal, in the firſt degree, is he that is the actor, or abſolute perpetrator of the crime; and, in the ſecond degree, he who is preſent, aiding, and abetting the fact to be done[a]. Which *preſence* need not always be an actual immediate ſtanding by, within ſight or hearing of the fact; but there may be alſo a conſtructive preſence, as when one commits a robbery or murder, and another keeps watch or guard at ſome convenient diſtance[b]. And this rule hath alſo other exceptions: for, in caſe of murder by poiſoning, a man may be a principal felon, by preparing and laying the poiſon, or giving it to another (who is ignorant of it's poiſonous quality[c]) for that purpoſe; and yet not adminiſter it himſelf, nor be preſent when the very deed of poiſoning is committed[d]. And the ſame reaſoning will hold,

[a] 1 Hal. P. C. 615.
[b] Foſter. 350.
[c] *Ibid.* 349.
[d] 3 Inſt. 138.

with

with regard to other murders committed in the abſence of the murderer, by means which he had prepared before-hand, and which probably could not fail of their miſchievous effect. As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beaſt, with an intent to do miſchief; or exciting a madman to commit murder, ſo that death thereupon enſues; in every of theſe caſes the party offending is guilty of murder as a principal, in the firſt degree. For he cannot be called an acceſſory, that neceſſarily pre-ſuppoſing a principal; and the poiſon, the pitfall, the beaſt, or the madman cannot be held principals, being only the inſtruments of death. As therefore he muſt be certainly guilty, either as principal or acceſſory, and cannot be ſo as acceſſory, it follows that he muſt be guilty as principal: and if principal, then in the firſt degree; for there is no other criminal, much leſs a ſuperior in the guilt, whom he could aid, abet, or aſſiſt[e].

II. AN *acceſſory* is he who is not the chief actor in the offence, nor preſent at it's performance, but is ſomeway concerned therein, either *before* or *after* the fact committed. In conſidering the nature of which degree of guilt, we will, firſt, examine, what offences admit of acceſſories, and what not: ſecondly, who may be an acceſſory *before* the fact: thirdly, who may be an acceſſory *after* it: and, laſtly, how acceſſories, conſidered merely as ſuch, and diſtinct from principals, are to be treated.

1. AND, firſt, as to what offences admit of acceſſories, and what not. In high treaſon there are no acceſſories, but all are principals: the ſame acts, that make a man acceſſory in felony, making him a principal in high treaſon, upon account of the heinouſneſs of the crime[f]. Beſides it is to be conſidered, that the bare intent to commit treaſon is many times actual treaſon; as imagining the death of the king, or conſpiring to take away his crown. And, as no one can adviſe and abet ſuch a crime without an intention to have it done, there can be no acceſſories

[e] 1 Hal. P. C. 617. 2 Hawk. P. C. 315. [f] 3 Inſt. 138. 1 Hal. P. C. 613.

before the fact; ſince the very advice and abetment amount to principal treaſon. But this will not hold in the inferior ſpecies of high treaſon, which do not amount to the legal idea of compaſſing the death of the king, queen, or prince. For in thoſe no advice to commit them, unleſs the thing be actually performed, will make a man a principal traitor[g]. In petit treaſon, murder, and felonies of all kinds, there may be acceſſories: except only in thoſe offences, which by judgment of law are ſudden and unpremeditated, as manſlaughter and the like; which therefore cannot have any acceſſories *before* the fact[h]. But in petit larciny, or minute thefts, and all other crimes under the degree of felony, there are no acceſſories; but all perſons concerned therein, if guilty at all, are principals[i]: the ſame rule holding with regard to the higheſt and loweſt offences; though upon different reaſons. In treaſon all are principals, *propter odium delicti*; in treſpaſs all are principals, becauſe the law, *quae de minimis non curat*, does not deſcend to diſtinguiſh the different ſhades of guilt in petty miſdemeſnors. It is a maxim, that *acceſſorius ſequitur naturam ſui principalis*[k]: and therefore an acceſſory cannot be guilty of a higher crime than his principal; being only puniſhed, as a partaker of his guilt. So that if a ſervant inſtigates a ſtranger to kill his maſter, this being murder in the ſtranger as principal, of courſe the ſervant is acceſſory only to the crime of murder; though, had he been preſent and aſſiſting, he would have been guilty as principal of petty treaſon, and the ſtranger of murder[l].

2. As to the ſecond point, who may be an acceſſory *before* the fact; ſir Matthew Hale[m] defines him to be one, who being abſent at the time of the crime committed, doth yet procure, counſel, or command another to commit a crime. Herein abſence is neceſſary to make him an acceſſory; for if ſuch procurer, or the like, be preſent, he is guilty of the crime as principal.

[g] Foſter. 342.
[h] 1 Hal. P. C. 615.
[i] *Ibid.* 613.
[k] 3 Inſt. 139.
[l] 2 Hawk. P. C. 315.
[m] 1 Hal. P. C. 615, 616.

cipal. If A then adviſes B to kill another, and B does it in the abſence of A, now B is principal, and A is acceſſory in the murder. And this holds, even though the party killed be not *in rerum natura* at the time of the advice given. As if A, the reputed father, adviſes B the mother of a baſtard child, unborn, to ſtrangle it when born, and ſhe does ſo; A is acceſſory to this murder[n]. And it is alſo ſettled[o], that whoever procureth a felony to be committed, though it be by the intervention of a third perſon, is an acceſſory before the fact. It is likewiſe a rule, that he who in any wiſe commands or counſels another to commit an unlawful act, is acceſſory to all that enſues upon that unlawful act; but is not acceſſory to any act diſtinct from the other. As if A commands B to beat C, and B beats him ſo that he dies; B is guilty of murder as principal, and A as acceſſory. But if A commands B to burn C's houſe; and he, in ſo doing, commits a robbery; now A, though acceſſory to the burning, is not acceſſory to the robbery, for that is a thing of a diſtinct and unconſequential nature[p]. But if the felony committed be the ſame in ſubſtance with that which is commanded, and only varying in ſome circumſtantial matters; as if, upon a command to poiſon Titius, he is ſtabbed or ſhot, that he dies; the commander is ſtill acceſſory to the murder, for the ſubſtance of the thing commanded was the death of Titius, and the manner of it's execution is a mere collateral circumſtance[q].

3. AN acceſſory *after* the fact may be, where a perſon, knowing a felony to have been committed, receives, relieves, comforts, or aſſiſts the felon[r]. Therefore, to make an acceſſory *ex poſt facto*, it is in the firſt place requiſite that he knows of the felony committed[s]. In the next place, he muſt receive, relieve, comfort, or aſſiſt him. And, generally, any aſſiſtance whatever given to a felon, to hinder his being apprehended,

[n] Dyer. 186.
[o] Foſter. 125.
[p] 1 Hal. P. C. 617.
[q] 2 Hawk. P. C. 316.
[r] 1 Hal. P. C. 618.
[s] 2 Hawk. P. C. 319.

tried,

tried, or ſuffering puniſhment, makes the aſſiſtor an acceſſory. As furniſhing him with a horſe to eſcape his purſuers, money or victuals to ſupport him, a houſe or other ſhelter to conceal him, or open force and violence to reſcue or protect him[t]. So likewiſe to convey inſtruments to a felon to enable him to break gaol, or to bribe the gaoler to let him eſcape, makes a man an acceſſory to the felony. But to relieve a felon in gaol with clothes or other neceſſaries, is no offence: for the crime imputable to this ſpecies of acceſſory is the hindrance of public juſtice, by aſſiſting the felon to eſcape the vengeance of the law[u]. To buy or receive ſtolen goods, knowing them to be ſtolen, falls under none of theſe deſcriptions; it was therefore at common law, a mere miſdemeſnor, and made not the receiver acceſſory to the theft, becauſe he received the *goods* only, and not the *felon*[w]: but now by the ſtatutes 5 Ann. c. 31. and 4 Geo. I. c. 11. all ſuch receivers are made acceſſories, and may be tranſported for fourteen years. In France this is puniſhed with death: and the Gothic conſtitutions diſtinguiſhed alſo three ſorts of thieves, "*unum qui conſilium daret, alterum qui* "*contrectaret, tertium qui receptaret et occuleret; pari poenae ſin-*"*gulos obnoxios*[x].

THE felony muſt be complete at the time of the aſſiſtance given; elſe it makes not the aſſiſtant an acceſſory. As if one wounds another mortally, and after the wound given, but before death enſues, a perſon aſſiſts or receives the delinquent: this does not make him acceſſory to the homicide, for till death enſues there is no felony committed[y]. But ſo ſtrict is the law where a felony is actually complete, in order to do effectual juſtice, that the neareſt relations are not ſuffered to aid or receive one another. If the parent aſſiſts his child, or the child his parent, if the brother receives his brother, the maſter his ſervant, or the ſervant his maſter, or even if the huſband relieves

[t] 2 Hawk. P. C. 317, 318.
[u] 1 Hal. P. C. 620, 621.
[w] 1 Hal. P. C. 620.
[x] Stiernhook *de jure Goth. l.* 3, *c.* 5.
[y] 2 Hawk. P. C. 320.

his

his wife, who have any of them committed a felony, the receivers become acceſſories *ex poſt facto*[z]. But a feme covert cannot become an acceſſory by the receipt and concealment of her huſband; for ſhe is preſumed to act under his coercion, and therefore ſhe is not bound, neither ought ſhe, to diſcover her lord[a].

4. THE laſt point of enquiry is, how acceſſories are to be treated, conſidered diſtinct from principals. And the general rule of the antient law (borrowed from the Gothic conſtitutions[b]) is this, that acceſſories ſhall ſuffer the ſame puniſhment as their principals: if one be liable to death, the other is alſo liable[c]: as, by the laws of Athens, delinquents and their abettors were to receive the ſame puniſhment[d]. Why then, it may be aſked, are ſuch elaborate diſtinctions made between acceſſories and principals, if both are to ſuffer the ſame puniſhment? For theſe reaſons. 1. To diſtinguiſh the nature and denomination of crimes, that the accuſed may know how to defend himſelf when indicted: the commiſſion of an actual robbery being quite a different accuſation, from that of harbouring the robber. 2. Becauſe, though by the antient common law the rule is as before laid down, that both ſhall be puniſhed alike, yet now by the ſtatutes relating to the benefit of clergy a diſtinction is made between them: acceſſories *after* the fact being ſtill allowed the benefit of clergy in all caſes; which is denied to the principals, and acceſſories *before* the fact, in many caſes; as in petit treaſon, murder, robbery, and wilful burning[e]. And perhaps if a diſtinction were conſtantly to be made between the puniſhment of principals and acceſſories, even *before* the fact, the latter to be treated with a little leſs ſeverity than the former, it might prevent the perpetration of many crimes, by increaſing the difficulty of finding a perſon to execute the deed itſelf; as his danger would be greater than that of his accomplices, by

[z] 3 Inſt. 108. 2 Hawk. P. C. 320.
[a] 1 Hal. P. C. 621.
[b] See Stiernhook. *ibid.*
[c] 3 Inſt. 188.
[d] Pott. Antiq. b. 1. c. 26.
[e] 1 Hal. P. C. 615.

reaſon

reaſon of the difference of his puniſhment[f]. 3. Becauſe formerly no man could be tried as acceſſory, till after the principal was convicted, or at leaſt he muſt have been tried at the ſame time with him: though that law is now much altered, as will be ſhewn more fully in it's proper place. 4. Becauſe, though a man be indicted as acceſſory and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counſelling a felon is no acquittal of the felony itſelf: but it is matter of ſome doubt, whether, if a man be acquitted as principal, he can be afterwards indicted as acceſſory *before* the fact; ſince thoſe offences are frequently very near allied, and therefore an acquittal of the guilt of one may be an acquittal of the other alſo[g]. But it is clearly held, that one acquitted as principal may be indicted as an acceſſory *after* the fact; ſince that is always an offence of a different ſpecies of guilt, principally tending to evade the public juſtice, and is ſubſequent in it's commencement to the other. Upon theſe reaſons the diſtinction of principal and acceſſory will appear to be highly neceſſary; though the puniſhment is ſtill much the ſame with regard to principals, and ſuch acceſſories as offend *a priori*.

[f] Beccar. c. 37.

[g] 1 Hal. P. C. 625, 626. 2 Hawk. P. C. 373. Foſter. 361.

CHAPTER THE FOURTH.

OF OFFENCES AGAINST GOD AND RELIGION.

IN the preſent chapter we are to enter upon the detail of the ſeveral ſpecies of crimes and miſdemeſnors, with the puniſhment annexed to each by the laws of England. It was obſerved, in the beginning of this book [a], that crimes and miſdemeſnors are a breach and violation of the public rights and duties, owing to the whole community, conſidered as a community, in it's ſocial aggregate capacity. And in the very entrance of theſe commentaries [b] it was ſhewn, that human laws can have no concern with any but ſocial and relative duties; being intended only to regulate the conduct of man, conſidered under various relations, as a member of civil ſociety. All crimes ought therefore to be eſtimated merely according to the miſchiefs which they produce in civil ſociety [c]: and, of conſequence, private vices, or the breach of mere abſolute duties, which man is bound to perform conſidered only as an individual, are not, cannot be, the object of any municipal law; any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a ſpecies of public crimes. Thus the vice of drunkenneſs, if committed privately and alone, is beyond the knowlege and of courſe beyond the reach of human tribunals: but if committed publicly, in the face of the world, it's evil example makes it liable

[a] See pag. 5.
[b] See Vol. I. pag. 123, 124.
[c] Beccar. ch. 8.

to temporal cenſures. The vice of lying, which conſiſts (abſtractedly taken) in a criminal violation of truth, and therefore in any ſhape is derogatory from ſound morality, is not however taken notice of by our law, unleſs it carries with it ſome public inconvenience, as ſpreading falſe news; or ſome ſocial injury, as ſlander and malicious proſecution, for which a private recompence is given. And yet drunkenneſs and lying are *in foro conſcientiae* as thoroughly criminal when they are not, as when they are, attended with public inconvenience. The only difference is, that both public and private vices are ſubject to the vengeance of eternal juſtice; and public vices are beſides liable to the temporal puniſhments of human tribunals.

ON the other hand, there are ſome miſdemeſnors, which are puniſhed by the municipal law, that are in themſelves nothing criminal, but are made ſo by the poſitive conſtitutions of the ſtate for public convenience. Such as poaching, exportation of wool, and the like. Theſe are naturally no offences at all; but their whole criminality conſiſts in their diſobedience to the ſupreme power, which has an undoubted right for the well-being and peace of the community to make ſome things unlawful, which were in themſelves indifferent. Upon the whole therefore, though part of the offences to be enumerated in the following ſheets are offences againſt the revealed law of God, others againſt the law of nature, and ſome are offences againſt neither; yet in a treatiſe of municipal law we muſt conſider them all as deriving their particular guilt, here puniſhable, from the law of man.

HAVING premiſed this caution, I ſhall next proceed to diſtribute the ſeveral offences, which are either directly or by conſequence injurious to civil ſociety, and therefore puniſhable by the laws of England, under the following general heads: firſt, thoſe which are more immediately injurious to God and his holy religion; ſecondly, ſuch as violate and tranſgreſs the law of nations; thirdly, ſuch as more eſpecially affect the ſove-

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reign executive power of the ſtate, or the king and his government; fourthly, ſuch as more directly infringe the rights of the public or common wealth; and, laſtly, ſuch as derogate from thoſe rights and duties, which are owing to particular individuals, and in the preſervation and vindication of which the community is deeply intereſted.

FIRST then, of ſuch crimes and miſdemeſnors, as more immediately offend Almighty God, by openly tranſgreſſing the precepts of religion either natural or revealed; and mediately, by their bad example and conſequence, the law of ſociety alſo; which conſtitutes that guilt in the action, which human tribunals are to cenſure.

I. Of this ſpecies the firſt is that of *apoſtacy*, or a total renunciation of chriſtianity, by embracing either a falſe religion, or no religion at all. This offence can only take place in ſuch as have once profeſſed the true religion. The perverſion of a chriſtian to judaiſm, paganiſm, or other falſe religion, was puniſhed by the emperors Conſtantius and Julian with confiſcation of goods [d]; to which the emperors Theodoſius and Valentinian added capital puniſhment, in caſe the apoſtate endeavoured to pervert others to the ſame iniquity [e]. A puniſhment too ſevere for any temporal laws to inflict: and yet the zeal of our anceſtors imported it into this country; for we find by Bracton [f], that in his time apoſtates were to be burnt to death. Doubtleſs the preſervation of chriſtianity, as a national religion, is, abſtracted from it's own intrinſic truth, of the utmoſt conſequence to the civil ſtate: which a ſingle inſtance will ſufficiently demonſtrate. The belief of a future ſtate of rewards and puniſhments, the entertaining juſt ideas of the moral attributes of the ſupreme being, and a firm perſuaſion that he ſuperintends and will finally compenſate every action in human life (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our ſaviour Chriſt) theſe are the grand founda-

[d] *Cod.* 1. 7. 1.
[e] *Ibid.* 6.
[f] *l.* 3. *c.* 9.

tion of all judicial oaths; which call God to witneſs the truth of thoſe facts, which perhaps may be only known to him and the party atteſting: all moral evidence therefore, all confidence in human veracity, muſt be weakened by apoſtacy, and overthrown by total infidelity. Wherefore all affronts to chriſtianity, or endeavours to depreciate it's efficacy, in thoſe who have once profeſſed it, are highly deſerving of cenſure. But yet the loſs of life is a heavier penalty than the offence, taken in a civil light, deſerves: and, taken in a ſpiritual light, our laws have no juriſdiction over it. This puniſhment therefore has long ago become obſolete; and the offence of apoſtacy was for a long time the object only of the eccleſiaſtical courts, which corrected the offender *pro ſalute animae*. But about the cloſe of the laſt century, the civil liberties to which we were then reſtored being uſed as a cloke of maliciouſneſs, and the moſt horrid doctrines ſubverſive of all religion being publicly avowed both in diſcourſe and writings, it was thought neceſſary again for the civil power to interpoſe, by not admitting thoſe miſcreants[g] to the privileges of ſociety, who maintained ſuch principles as deſtroyed all moral obligation. To this end it was enacted by ſtatute 9 & 10 W. III. c. 32. that if any perſon educated in, or having made profeſſion of, the chriſtian religion, ſhall by writing, printing, teaching, or adviſed ſpeaking, deny the chriſtian religion to be true, or the holy ſcriptures to be of divine authority, he ſhall upon the firſt offence be rendered incapable to hold any office or place of truſt; and, for the ſecond, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaſer of lands, and ſhall ſuffer three years impriſonment without bail. To give room however for repentance; if, within four months after the firſt conviction, the delinquent will in open court publicly renounce his error, he is diſcharged for that once from all diſabilities.

II. A SECOND offence is that of *hereſy*; which conſiſts not in a total denial of chriſtianity, but of ſome of it's eſſential

[g] *Miſcreantz* in our antient law books is the name of unbelievers.

doctrines,

doctrines, publicly and obſtinately avowed; being defined, "*ſententia rerum divinarum humano ſenſu excogitata, palam docta, "et pertinaciter defenſa*[h]." And here it muſt alſo be acknowleged that particular modes of belief or unbelief, not tending to overturn chriſtianity itſelf, or to ſap the foundations of morality, are by no means the object of coercion by the civil magiſtrate. What doctrines ſhall therefore be adjudged hereſy, was left by our old conſtitution to the determination of the eccleſiaſtical judge; who had herein a moſt arbitrary latitude allowed him. For the general definition of an heretic given by Lyndewode[i], extends to the ſmalleſt deviations from the doctrines of holy church: "*haereticus eſt qui dubitat de fide catholica, et qui negligit ſervare ea, "quae Romana eccleſia ſtatuit, ſeu ſervare decreverat.*" Or, as the ſtatute 2 Hen. IV. c. 15. expreſſes it in Engliſh, "teachers of "erroneous opinions, contrary to the faith and bleſſed determi- "nations of the holy church." Very contrary this to the uſage of the firſt general councils, which defined all heretical doctrines with the utmoſt preciſion and exactneſs. And what ought to have alleviated the puniſhment, the uncertainty of the crime, ſeems to have enhanced it in thoſe days of blind zeal and pious cruelty. It is true, that the ſanctimonious hypocriſy of the canoniſts went at firſt no farther than enjoining penance, excommunication, and eccleſiaſtical deprivation, for hereſy; though afterwards they proceeded boldly to impriſonment by the ordinary, and confiſcation of goods *in pios uſus*. But in the mean time they had prevailed upon the weakneſs of bigotted princes to make the civil power ſubſervient to their purpoſes, by making hereſy not only a temporal, but even a capital, offence: the Romiſh eccleſiaſtics determining, without appeal, whatever they pleaſed to be hereſy, and ſhifting off to the ſecular arm the odium and drudgery of executions; with which they themſelves were too tender and delicate to intermeddle. Nay they pretended to intercede and pray, on behalf of the convicted heretic, *ut citra mortis periculum ſententia circa eum moderetur*[k]: well

[h] 1 Hal. P. C. 384.
[i] *cap. de haereticis.*
[k] *Decretal. l. 5. t. 40. c. 27.*

knowing

knowing at the ſame time that they were delivering the unhappy victim to certain death. Hence the capital puniſhments inflicted on the antient Donatiſts and Manichaeans by the emperors Theodoſius and Juſtinian [l]: hence alſo the conſtitution of the emperor Frederic mentioned by Lyndewode [m], adjudging all perſons without diſtinction to be burnt with fire, who were convicted of hereſy by the eccleſiaſtical judge. The ſame emperor, in another conſtitution [n], ordained that if any temporal lord, when admoniſhed by the church, ſhould neglect to clear his territories of heretics within a year, it ſhould be lawful for good catholics to ſeiſe and occupy the lands, and utterly to exterminate the heretical poſſeſſors. And upon this foundation was built that arbitrary power, ſo long claimed and ſo fatally exerted by the pope, of diſpoſing even of the kingdoms of refractory princes to more dutiful ſons of the church. The immediate event of this conſtitution was ſomething ſingular, and may ſerve to illuſtrate at once the gratitude of the holy ſee, and the juſt puniſhment of the royal bigot: for upon the authority of this very conſtitution, the pope afterwards expelled this very emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou [o].

CHRISTIANITY being thus deformed by the daemon of perſecution upon the continent, we cannot expect that our own iſland ſhould be entirely free from the ſame ſcourge. And therefore we find among our antient precedents [p] a writ *de haeretico comburendo*, which is thought by ſome to be as antient as the common law itſelf. However it appears from thence, that the conviction of hereſy by the common law was not in any petty eccleſiaſtical court, but before the archbiſhop himſelf in a provincial ſynod; and that the delinquent was delivered over to the king to do as he ſhould pleaſe with him: ſo that the crown had a control over the ſpiritual power, and might pardon the convict by iſſuing

[l] *Cod. l.* 1. *tit.* 5.
[m] *c. de haereticis.*
[n] *Cod.* 1. 5. 4.
[o] Baldus *in Cod.* 1. 5. 4.
[p] F. N. B. 269.

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no proceſs againſt him; the writ *de haeretico comburendo* being not a writ of courſe, but iſſuing only by the ſpecial direction of the king in council [q].

BUT in the reign of Henry the fourth, when the eyes of the chriſtian world began to open, and the ſeeds of the proteſtant religion (though under the opprobrious name of lollardy [r]) took root in this kingdom; the clergy, taking advantage from the king's dubious title to demand an increaſe of their own power, obtained an act of parliament [s], which ſharpened the edge of perſecution to it's utmoſt keenneſs. For, by that ſtatute, the diocеſan alone, without the intervention of a ſynod, might convict of heretical tenets; and unleſs the convict abjured his opinions, or if after abjuration he relapſed, the ſheriff was bound *ex officio*, if required by the biſhop, to commit the unhappy victim to the flames, without waiting for the conſent of the crown. By the ſtatute 2 Hen. V. c. 7. lollardy was alſo made a temporal offence, and indictable in the king's courts; which did not thereby gain an excluſive, but only a concurrent juriſdiction with the biſhop's conſiſtory.

AFTERWARDS, when the final reformation of religion began to advance, the power of the eccleſiaſtics was ſomewhat moderated: for though what hereſy *is*, was not then preciſely defined, yet we are told in ſome points what it *is not*: the ſtatute 25 Hen. VIII. c. 14. declaring, that offences againſt the ſee of Rome are not hereſy; and the ordinary being thereby reſtrained from proceeding in any caſe upon mere ſuſpicion; that is, unleſs the party be accuſed by two credible witneſſes, or an indictment of hereſy be firſt previouſly found in the king's courts of common law. And yet the ſpirit of perſecution was not then abated, but only diverted into a lay chanel. For in ſix years afterwards, by ſtatute 31 Hen. VIII. c. 14. the bloody law of the ſix articles was made, which eſtabliſhed the ſix moſt conteſted points of popery, tran-

[q] 1 Hal. P. C. 395.

[r] So called not from *lolium*, or tares, (an etymology, which was afterwards deviſed, in order to juſtify the *burning* of them; Matt. xiii. 30.) but from one Walter Lollard, a German reformer. Mod. Un. Hiſt. xxvi. 13. Spelm. *Gloſſ.* 371.

[s] 2 Hen. IV. c. 15.

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ſubſtantiation, communion in one kind, the celibacy of the clergy, monaſtic vows, the ſacrifice of the maſs, and auricular confeſſion; which points were "determined and reſolved by the "moſt godly ſtudy, pain, and travail of his majeſty: for which "his moſt humble and obedient ſubjects, the lords *ſpiritual* and "temporal and the commons, in parliament aſſembled, did not "only render and give unto his highneſs their moſt high and "hearty thanks," but did alſo enact and declare all oppugners of the firſt to be heretics, and to be burnt with fire; and of the five laſt to be felons, and to ſuffer death. The ſame ſtatute eſtabliſhed a new and mixed juriſdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on deſtroying the ſupremacy of the biſhops of Rome, and eſtabliſhing all other their corruptions of the chriſtian religion.

I SHALL not perplex this detail with the various repeals and revivals of theſe ſanguinary laws in the two ſucceeding reigns; but ſhall proceed directly to the reign of queen Elizabeth; when the reformation was finally eſtabliſhed with temper and decency, unſullied with party rancour, or perſonal caprice and reſentment. By ſtatute 1 Eliz. c. 1. all former ſtatutes relating to hereſy are repealed, which leaves the juriſdiction of hereſy as it ſtood at common law; *viz.* as to the infliction of common cenſures, in the eccleſiaſtical courts; and, in caſe of burning the heretic, in the provincial ſynod only [t]. Sir Matthew Hale is indeed of a different opinion, and holds that ſuch power reſided in the dioceſan alſo; though he agrees, that in either caſe the writ *de haeretico comburendo* was not demandable of common right, but grantable or otherwiſe merely at the king's diſcretion [u]. But the principal point now gained, was, that by this ſtatute a boundary is for the firſt time ſet to what ſhall be accounted hereſy; nothing for the future being to be ſo determined, but only ſuch tenets, which have been heretofore ſo declared, 1. By the words of the canonical ſcriptures; 2. By the firſt four general councils, or ſuch others

[t] 5 Rep. 23. 12 Rep. 56. 92.

[u] 1 Hal. P. C. 405.

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as have only uſed the words of the holy ſcriptures; or, 3. Which ſhall hereafter be ſo declared by the parliament, with the aſſent of the clergy in convocation. Thus was hereſy reduced to a greater certainty than before; though it might not have been the worſe to have defined it in terms ſtill more preciſe and particular: as a man continued ſtill liable to be burnt, for what perhaps he did not underſtand to be hereſy, till the eccleſiaſtical judge ſo interpreted the words of the canonical ſcriptures.

FOR the writ *de haeretico comburendo* remained ſtill in force; and we have inſtances of it's being put in execution upon two anabaptiſts in the ſeventeenth of Elizabeth, and two Arians in the ninth of James the firſt. But it was totally aboliſhed, and hereſy again ſubjected only to eccleſiaſtical correction, *pro ſalute animae*, by virtue of the ſtatute 29 Car. II. c. 9. For in one and the ſame reign, our lands were delivered from the ſlavery of military tenures; our bodies from arbitrary impriſonment by the *habeas corpus* act; and our minds from the tyranny of ſuperſtitious bigotry, by demoliſhing this laſt badge of perſecution in the Engliſh law.

IN what I have now ſaid I would not be underſtood to derogate from the juſt rights of the national church, or to favour a looſe latitude of propagating any crude undigeſted ſentiments in religious matters. Of propagating, I ſay; for the bare entertaining them, without an endeavour to diffuſe them, ſeems hardly cognizable by any human authority. I only mean to illuſtrate the excellence of our preſent eſtabliſhment, by looking back to former times. Every thing is now as it ſhould be, with reſpect to the ſpiritual cognizance, and ſpiritual puniſhment, of hereſy: unleſs perhaps that the crime ought to be more ſtrictly defined, and no proſecution permitted, even in the eccleſiaſtical courts, till the tenets in queſtion are by proper authority previouſly declared to be heretical. Under theſe reſtrictions, it ſeems neceſſary for the ſupport of the national religion, that the officers of the church ſhould have power to cenſure heretics; yet not to harraſs them with temporal penalties, much

leſs to exterminate or deſtroy them. The legiſlature hath indeed thought it proper, that the civil magiſtrate ſhould again interpoſe, with regard to one ſpecies of hereſy, very prevalent in modern times: for by ſtatute 9 & 10 W. III. c. 32. if any perſon educated in the chriſtian religion, or profeſſing the ſame, ſhall by writing, printing, teaching, or adviſed ſpeaking, deny any one of the perſons in the holy trinity to be God, or maintain that there are more Gods than one, he ſhall undergo the ſame penalties and incapacities, which were juſt now mentioned to be inflicted on apoſtacy by the ſame ſtatute. And thus much for the crime of hereſy.

III. ANOTHER ſpecies of offences againſt religion are thoſe which affect the *eſtabliſhed church*. And theſe are either poſitive, or negative. Poſitive, as by reviling it's ordinances: or negative, by non-conformity to it's worſhip. Of both of theſe in their order.

1. AND, firſt, of the offence of *reviling the ordinances* of the church. This is a crime of a much groſſer nature than the other of mere non-conformity; ſince it carries with it the utmoſt indecency, arrogance, and ingratitude: indecency, by ſetting up private judgment in virulent and factious oppoſition to public authority; arrogance, by treating with contempt and rudeneſs what has at leaſt a better chance to be right, than the ſingular notions of any particular man; and ingratitude, by denying that indulgence and undiſturbed liberty of conſcience to the members of the national church, which the retainers to every petty conventicle enjoy. However it is provided by ſtatutes 1 Edw. VI. c. 1. and 1 Eliz. c. 1. that whoever reviles the ſacrament of the lord's ſupper ſhall be puniſhed by fine and impriſonment: and by the ſtatute 1 Eliz. c. 2. if any *miniſter* ſhall ſpeak any thing in derogation of the book of common prayer, he ſhall be impriſoned ſix months, and forfeit a year's value of his benefice; and for the ſecond offence he ſhall be deprived. And if *any perſon* whatſoever ſhall in plays, ſongs, or other open words, ſpeak any thing in derogation, depraving, or

deſpiſing

deſpiſing of the ſaid book, he ſhall forfeit for the firſt offence an hundred marks; for the ſecond four hundred; and for the third ſhall forfeit all his goods and chattels, and ſuffer impriſonment for life. Theſe penalties were framed in the infancy of our preſent eſtabliſhment; when the diſciples of Rome and of Geneva united in inveighing with the utmoſt bitterneſs againſt the Engliſh liturgy: and the terror of theſe laws (for they ſeldom, if ever, were fully executed) proved a principal means, under providence, of preſerving the purity as well as decency of our national worſhip. Nor can their continuance to this time (*in terrorem* at leaſt) be thought too ſevere and intolerant; when we conſider, that they are levelled at the offence, not of *thinking* differently from the national church, but of *railing* at that church and it's ordinances, for not ſubmitting it's public judgment to the private opinion of others. For, though it is clear, that no reſtraint ſhould be laid upon rational and diſpaſſionate enquiries into the rectitude and propriety of the eſtabliſhed mode of worſhip; yet contumely and contempt are what no eſtabliſhment can tolerate[w]. A rigid attachment to trifles, and an intemperate zeal for reforming them, are equally ridiculous and abſurd: but the latter is at preſent the leſs excuſable, becauſe from political reaſons, ſufficiently hinted at in a former volume[x], it would now be extremely unadviſable to make any alterations in the ſervice of the church; unleſs it could be ſhewn that ſome manifeſt impiety or ſhocking abſurdity would follow from continuing it in it's preſent form.

2. NON-CONFORMITY to the worſhip of the church is the other, or negative branch of this offence. And for this there is much more to be pleaded than for the former; being a matter of private conſcience, to the ſcruples of which our preſent laws have ſhewn a very juſt and chriſtian indulgence. For undoubtedly all perſecution and oppreſſion of weak conſciences, on the ſcore of

[w] By an ordinance 23 Aug. 1645, which continued till the reſtoration, to preach, write, or print, any thing in derogation or depraving of the *directory*, for the then eſtabliſhed preſbyterian worſhip, ſubjected the offender upon indictment to a diſcretionary fine, not exceeding fifty pounds. (Scobell. 98.)

[x] Vol. I. pag. 98.

religious perſuaſions, are highly unjuſtifiable upon every principle of natural reaſon, civil liberty, or ſound religion. But care muſt be taken not to carry this indulgence into ſuch extremes, as may endanger the national church: there is always a difference to be made between toleration and eſtabliſhment.

NON-CONFORMISTS are of two ſorts: firſt, ſuch as abſent themſelves from divine worſhip in the eſtabliſhed church, through total irreligion, and attend the ſervice of no other perſuaſion. Theſe by the ſtatutes of 1 Eliz. c. 2. 23 Eliz. c. 1. and 3 Jac. I. c. 4. forfeit one ſhilling to the poor every lord's day they ſo abſent themſelves, and 20*l.* to the king if they continue ſuch default for a month together. And if they keep any inmate, thus irreligiouſly diſpoſed, in their houſes, they forfeit 10*l. per* month.

THE ſecond ſpecies of non-conformiſts are thoſe who offend through a miſtaken or perverſe zeal. Such were eſteemed by our laws, enacted ſince the time of the reformation, to be papiſts and proteſtant diſſenters: both of which were ſuppoſed to be equally ſchiſmatics in not communicating with the national church; with this difference, that the papiſts divided from it upon material, though erroneous, reaſons; but many of the diſſenters upon matters of indifference, or, in other words, upon no reaſon at all. Yet certainly our anceſtors were miſtaken in their plans of compulſion and intolerance. The ſin of ſchiſm, as ſuch, is by no means the object of temporal coercion and puniſhment. If through weakneſs of intellect, through miſdirected piety, through perverſeneſs and acerbity of temper, or (which is often the caſe) through a proſpect of ſecular advantage in herding with a party, men quarrel with the eccleſiaſtical eſtabliſhment, the civil magiſtrate has nothing to do with it; unleſs their tenets and practice are ſuch as threaten ruin or diſturbance to the ſtate. He is bound indeed to protect the eſtabliſhed church: and, if this can be better effected, by admitting none but it's genuine members to offices of truſt and emolument, he is certainly at liberty ſo to do; the diſpoſal of offices being matter of favour and diſcretion. But, this point being once ſecured,

cured, all perſecution for diverſity of opinions, however ridiculous or abſurd they may be, is contrary to every principle of ſound policy and civil freedom. The names and ſubordination of the clergy, the poſture of devotion, the materials and colour of the miniſter's garment, the joining in a known or an unknown form of prayer, and other matters of the ſame kind, muſt be left to the option of every man's private judgment.

WITH regard therefore to *proteſtant diſſenters*, although the experience of their turbulent diſpoſition in former times occaſioned ſeveral diſabilities and reſtrictions (which I ſhall not undertake to juſtify) to be laid upon them by abundance of ſtatutes[y], yet at length the legiſlature, with a ſpirit of true magnanimity, extended that indulgence to theſe ſectaries, which they themſelves, when in power, had held to be countenancing ſchiſm, and denied to the church of England[z]. The penalties are all of them ſuſpended by the ſtatute 1 W. & M. ſt. 1. c. 18. "for "exempting their majeſties proteſtant ſubjects, diſſenting from "the church of England, from the penalties of certain laws," commonly called the toleration act; which exempts all diſſenters (except papiſts, and ſuch as deny the trinity) from all penal laws relating to religion, provided they take the oaths of allegiance and ſupremacy (or make a ſimilar affirmation, being quakers[a]) and ſubſcribe the declaration againſt popery, and repair to ſome congregation regiſtered in the biſhop's court or at the ſeſſions, the doors whereof muſt be always open: and diſſenting teachers are alſo to ſubſcribe the thirty nine articles, except thoſe relating to church government and infant baptiſm. Thus are all perſons, who will approve themſelves no papiſts or oppugners of the trinity, left at full liberty to act as their conſcience ſhall direct them, in the matter of religious worſhip. And, if any perſon ſhall wilfully, maliciouſly, or contemptuouſly diſturb any congrega-

[y] 23 Eliz. c. 1. 35 Eliz. c. 1. 17 Car. II. c. 2. 22 Car. II. c. 1.

[z] The ordinance of 1645 (before-cited) inflicted impriſonment for a year on the third offence, and pecuniary penalties on the former two, in caſe of uſing the book of common-prayer, not only in a place of public worſhip, but alſo in any private family.

[a] See Stat. 8 Geo. I. c. 6.

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tion, aſſembled in any church or permitted meeting-houſe, or ſhall miſuſe any preacher or teacher there, he ſhall (by virtue of the ſame ſtatute) be bound over to the ſeſſions of the peace, and forfeit twenty pounds. But by ſtatute 5 Geo. I. c. 4. no mayor, or principal magiſtrate, muſt appear at any diſſenting meeting with the enſigns of his office[b], on pain of diſability to hold that or any other office: the legiſlature judging it a matter of propriety, that a mode of worſhip, ſet up in oppoſition to the national, when allowed to be exerciſed in peace, ſhould be exerciſed alſo with decency, gratitude, and humility.

As to *papiſts*, what has been ſaid of the proteſtant diſſenters would hold equally ſtrong for a general toleration of them; provided their ſeparation was founded only upon difference of opinion in religion, and their principles did not alſo extend to a ſubverſion of the civil government. If once they could be brought to renounce the ſupremacy of the pope, they might quietly enjoy their ſeven ſacraments, their purgatory, and auricular confeſſion; their worſhip of reliques and images; nay even their tranſubſtantiation. But while they acknowlege a foreign power, ſuperior to the ſovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good ſubjects.

LET us therefore now take a view of the laws in force againſt the papiſts; who may be divided into three claſſes, perſons profeſſing popery, popiſh recuſants convict, and popiſh prieſts. 1. Perſons profeſſing the popiſh religion, beſides the former penalties for not frequenting their pariſh church, are by ſeveral ſtatutes, too numerous to be here recited[c], diſabled from taking any lands either by deſcent or purchaſe, after eighteen years of age, until they renounce their errors; they muſt at the age of twenty one regiſter their eſtates before acquired, and all future

[b] Sir Humphrey Edwin, a lord mayor of London, had the imprudence ſoon after the toleration-act to go to a preſbyterian meeting-houſe in his formalities: which is alluded to by dean Swift, in his *tale of a tub*, under the allegory of *Jack* getting on a great horſe, and eating cuſtard.

[c] See Hawkins's pleas of the crown, and Burn's juſtice.

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conveyances and wills relating to them; they are incapable of preſenting to any advowſon, or granting to any other perſon any avoidance of the ſame, in prejudice of the two univerſities; they may not keep or teach any ſchool under pain of perpetual impriſonment; they are liable alſo in ſome inſtances to pay double taxes; and, if they willingly ſay or hear maſs, they forfeit the one two hundred, the other one hundred marks, and each ſhall ſuffer a year's impriſonment. Thus much for perſons, who, from the misfortune of family prejudices or otherwiſe, have conceived an unhappy attachment to the Romiſh church from their infancy, and publicly profeſs it's errors. But if any evil induſtry is uſed to rivet theſe errors upon them, if any perſon ſends another abroad to be educated in the popiſh religion, or to reſide in any religious houſe abroad for that purpoſe, or contributes any thing to their maintenance when there; both the ſender, the ſent, and the contributor, are diſabled to ſue in law or equity, to be executor or adminiſtrator to any perſon, to take any legacy or deed of gift, and to bear any office in the realm, and ſhall forfeit all their goods and chattels, and likewiſe all their real eſtate for life. And where theſe errors are alſo aggravated by apoſtacy, or perverſion, where a perſon is reconciled to the ſee of Rome or procures others to be reconciled, the offence amounts to high treaſon. 2. Popiſh recuſants, convicted in a court of law of not attending the ſervice of the church of England, are ſubject to the following diſabilities, penalties, and forfeitures, over and above thoſe before-mentioned. They can hold no office or employment; they muſt not keep arms in their houſes, but the ſame may be ſeiſed by the juſtices of the peace; they may not come within ten miles of London, on pain of 100*l*; they can bring no action at law, or ſuit in equity; they are not permitted to travel above five miles from home, unleſs by licence, upon pain of forfeiting all their goods; and they may not come to court, under pain of 100*l*. No marriage or burial of ſuch recuſant, or baptiſm of his child, ſhall be had otherwiſe than by the miniſters of the church of England, under other ſevere penalties. A married woman, when recuſant, ſhall forfeit two thirds of her dower or jointure, may not be executrix or adminiſtratrix

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to her huſband, nor have any part of his goods; and during the coverture may be kept in priſon, unleſs her huſband redeems her at the rate of 10*l.* a month, or the third part of all his lands. And, laſtly, as a feme-covert recuſant may be impriſoned, ſo all others muſt, within three months after conviction, either ſubmit and renounce their errors, or, if required ſo to do by four juſtices, muſt abjure and renounce the realm: and if they do not depart, or if they return without the king's licence, they ſhall be guilty of felony, and ſuffer death as felons. There is alſo an inferior ſpecies of recuſancy, (refuſing to make the declaration againſt popery enjoined by ſtatute 30 Car. II. ſt. 2. when tendered by the proper magiſtrate) which, if the party reſides within ten miles of London, makes him an abſolute recuſant convict; or, if at a greater diſtance, ſuſpends him from having any ſeat in parliament, keeping arms in his houſe, or any horſe above the value of five pounds. This is the ſtate, by the laws now in being, of a lay papiſt. But, 3. The remaining ſpecies or degree, *viz.* popiſh prieſts, are in a ſtill more dangerous condition. By ſtatute 11 & 12 W. III. c. 4. popiſh prieſts or biſhops, celebrating maſs or exerciſing any parts of their functions in England, except in the houſes of embaſſadors, are liable to perpetual impriſonment. And by the ſtatute 27 Eliz. c. 2. any popiſh prieſt, born in the dominions of the crown of England, who ſhall come over hither from beyond ſea, or ſhall be in England three days without conforming and taking the oaths, is guilty of high treaſon: and all perſons harbouring him are guilty of felony without the benefit of clergy.

THIS is a ſhort ſummary of the laws againſt the papiſts, under their three ſeveral claſſes, of perſons profeſſing the popiſh religion, popiſh recuſants convict, and popiſh prieſts. Of which the preſident Monteſquieu obſerves[d], that they are ſo rigorous, though not profeſſedly of the ſanguinary kind, that they do all the hurt that can poſſibly be done in cold blood. But in anſwer to this it may be obſerved, (what foreigners who only judge from our ſtatute book are not fully apprized of) that theſe laws

[d] Sp. L. b. 19. c. 27.

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are ſeldom exerted to their utmoſt rigor: and indeed, if they were, it would be very difficult to excuſe them. For they are rather to be accounted for from their hiſtory, and the urgency of the times which produced them, than to be approved (upon a cool review) as a ſtanding ſyſtem of law. The reſtleſs machinations of the jeſuits during the reign of Elizabeth, the turbulence and uneaſineſs of the papiſts under the new religious eſtabliſhment, and the boldneſs of their hopes and wiſhes for the ſucceſſion of the queen of Scots, obliged the parliament to counteract ſo dangerous a ſpirit by laws of a great, and perhaps neceſſary, ſeverity. The powder-treaſon, in the ſucceeding reign, ſtruck a panic into James I, which operated in different ways: it occaſioned the enacting of new laws againſt the papiſts; but deterred him from putting them in execution. The intrigues of queen Henrietta in the reign of Charles I, the proſpect of a popiſh ſucceſſor in that of Charles II, the aſſaſſination-plot in the reign of king William, and the avowed claim of a popiſh pretender to the crown, will account for the extenſion of theſe penalties at thoſe ſeveral periods of our hiſtory. But if a time ſhould ever arrive, and perhaps it is not very diſtant, when all fears of a pretender ſhall have vaniſhed, and the power and influence of the pope ſhall become feeble, ridiculous, and deſpicable, not only in England but in every kingdom of Europe; it probably would not then be amiſs to review and ſoften theſe rigorous edicts; at leaſt till the *civil* principles of the roman-catholics called again upon the legiſlature to renew them: for it ought not to be left in the breaſt of every mercileſs bigot, to drag down the vengeance of theſe occaſional laws upon inoffenſive, though miſtaken, ſubjects; in oppoſition to the lenient inclinations of the civil magiſtrate, and to the deſtruction of every principle of toleration and religious liberty.

IN order the better to ſecure the eſtabliſhed church againſt perils from non-conformiſts of all denominations, infidels, turks, jews, heretics, papiſts, and ſectaries, there are however two bulwarks erected; called the *corporation* and *teſt* acts: by the

former of which [e] no perſon can be legally elected to any office relating to the government of any city or corporation, unleſs, within a twelvemonth before, he has received the ſacrament of the lord's ſupper according to the rites of the church of England: and he is alſo enjoined to take the oaths of allegiance and ſupremacy at the ſame time that he takes the oath of office: or, in default of either of theſe requiſites, ſuch election ſhall be void. The other, called the teſt act [f], directs all officers civil and military to take the oaths and make the declaration againſt tranſubſtantiation, in the court of king's bench or chancery, the next term, or at the next quarter ſeſſions, or (by ſubſequent ſtatutes) within ſix months, after their admiſſion; and alſo within the ſame time to receive the ſacrament of the lord's ſupper, according to the uſage of the church of England, in ſome public church immediately after divine ſervice and ſermon, and to deliver into court a certificate thereof ſigned by the miniſter and church-warden, and alſo to prove the ſame by two credible witneſſes; upon forfeiture of 500 *l*, and diſability to hold the ſaid office. And of much the ſame nature with theſe is the ſtatute 7 Jac. I. c. 2. which permits no perſons to be naturalized or reſtored in blood, but ſuch as undergo a like teſt: which teſt having been removed in 1753, in favour of the Jews, was the next ſeſſion of parliament reſtored again with ſome precipitation.

THUS much for offences, which ſtrike at our national religion, or the doctrine and diſcipline of the church of England in particular. I proceed now to conſider ſome groſs impieties and general immoralities, which are taken notice of and puniſhed by our municipal law; frequently in concurrence with the eccleſiaſtical, to which the cenſure of many of them does alſo of right appertain; though with a view ſomewhat different: the ſpiritual court puniſhing all ſinful enormities for the ſake of reforming the private ſinner, *pro ſalute animae*; while the temporal courts reſent the public affront to religion and morality, on

[e] Stat. 13 Car. II. ſt. 2. c. 1.

[f] Stat. 25 Car. II. c. 2.

which

which all government muſt depend for ſupport, and correct more for the ſake of example than private amendment.

IV. THE fourth ſpecies of offences therefore, more immediately againſt God and religion, is that of *blaſphemy* againſt the Almighty, by denying his being or providence; or by contumelious reproaches of our ſaviour Chriſt. Whither alſo may be referred all profane ſcoffing at the holy ſcripture, or expoſing it to contempt and ridicule. Theſe are offences puniſhable at common law by fine and impriſonment, or other infamous corporal puniſhment [g]: for chriſtianity is part of the laws of England [h].

V. SOMEWHAT allied to this, though in an inferior degree, is the offence of profane and common *ſwearing* and *curſing*. By the laſt ſtatute againſt which, 19 Geo. II. c. 21. which repeals all former ones, every labourer, ſailor, or ſoldier ſhall forfeit 1*s*. for every profane oath or curſe, every other perſon under the degree of a gentleman 2*s*. and every gentleman or perſon of ſuperior rank 5*s*. to the poor of the pariſh; and, on a ſecond conviction, double; and, for every ſubſequent conviction, treble the ſum firſt forfeited; with all charges of conviction: and in default of payment ſhall be ſent to the houſe of correction for ten days. Any juſtice of the peace may convict upon his own hearing, or the teſtimony of one witneſs; and any conſtable or peace officer, upon his own hearing, may ſecure any offender and carry him before a juſtice, and there convict him. If the juſtice omits his duty, he forfeits 5*l*, and the conſtable 40*s*. And the act is to be read in all pariſh churches, and public chapels, the ſunday after every quarter day, on pain of 5*l*. to be levied by warrant from any juſtice. Beſides this puniſhment for taking God's name in vain in common diſcourſe, it is enacted by ſtatute 3 Jac. I. c. 21. that if in any ſtage play, interlude, or ſhew, the name of the holy trinity, or any of the perſons therein,

[g] 1 Hawk. P. C. 7. [h] 1 Vent. 293. 2 Strange, 834.

be jeſtingly or profanely uſed, the offender ſhall forfeit 10 *l.* one moiety to the king, and the other to the informer.

VI. A SIXTH ſpecies of offences againſt God and religion, of which our antient books are full, is a crime of which one knows not well what account to give. I mean the offence of *witchcraft, conjuration, inchantment*, or *ſorcery*. To deny the poſſibility, nay, actual exiſtence, of witchcraft and ſorcery, is at once flatly to contradict the revealed word of God, in various paſſages both of the old and new teſtament: and the thing itſelf is a truth to which every nation in the world hath in it's turn borne teſtimony, by either examples ſeemingly well atteſted, or prohibitory laws, which at leaſt ſuppoſe the poſſibility of a commerce with evil ſpirits. The civil law puniſhes with death not only the ſorcerers themſelves, but alſo thoſe who conſult them [i]; imitating in the former the expreſs law of God [k], "thou ſhall not ſuffer a "witch to live." And our own laws, both before and ſince the conqueſt, have been equally penal; ranking this crime in the ſame claſs with hereſy, and condemning both to the flames [l]. The preſident Monteſquieu [m] ranks them alſo both together, but with a very different view: laying it down as an important maxim, that we ought to be very circumſpect in the proſecution of magic and hereſy; becauſe the moſt unexceptionable conduct, the pureſt morals, and the conſtant practice of every duty in life, are not a ſufficient ſecurity againſt the ſuſpicion of crimes like theſe. And indeed the ridiculous ſtories that are generally told, and the many impoſtures and deluſions that have been diſcovered in all ages, are enough to demoliſh all faith in ſuch a dubious crime; if the contrary evidence were not alſo extremely ſtrong. Wherefore it ſeems to be the moſt eligible way to conclude, with an ingenious writer of our own [n], that in general there has been ſuch a thing as witchcraft; though one cannot give credit to any particular modern inſtance of it.

[i] *Cod. l.* 9. *t.* 18.
[k] Exod. xxii. 18.
[l] 3 Inſt. 44.
[m] Sp. L. b. 12. c. 5.
[n] Mr. Addiſon, Spect. N° 117.

OUR

OUR forefathers were ſtronger believers, when they enacted by ſtatute 33 Hen. VIII. c. 8. all witchcraft and ſorcery to be felony without benefit of clergy; and again by ſtatute 1 Jac. I. c. 12. that all perſons invoking any evil ſpirit, or conſulting, covenanting with, entertaining, employing, feeding, or rewarding any evil ſpirit; or taking up dead bodies from their graves to be uſed in any witchcraft, ſorcery, charm, or inchantment; or killing or otherwiſe hurting any perſon by ſuch infernal arts; ſhould be guilty of felony without benefit of clergy, and ſuffer death. And, if any perſon ſhould attempt by ſorcery to diſcover hidden treaſure, or to reſtore ſtolen goods, or to provoke unlawful love, or to hurt any man or beaſt, though the ſame were not effected, he or ſhe ſhould ſuffer impriſonment and pillory for the firſt offence, and death for the ſecond. Theſe acts continued in force till lately, to the terror of all antient females in the kingdom: and many poor wretches were ſacrificed thereby to the prejudice of their neighbours, and their own illuſions; not a few having, by ſome means or other, confeſſed the fact at the gallows. But all executions for this dubious crime are now at end; our legiſlature having at length followed the wiſe example of Louis XIV in France, who thought proper by an edict to reſtrain the tribunals of juſtice from receiving informations of witchcraft [a]. And accordingly it is with us enacted by ſtatute 9 Geo. II. c. 5. that no proſecution ſhall for the future be carried on againſt any perſon for conjuration, witchcraft, ſorcery, or inchantment. But the miſdemeſnor of perſons pretending to uſe witchcraft, tell fortunes, or diſcover ſtolen goods by ſkill in the occult ſciences, is ſtill deſervedly puniſhed with a year's impriſonment, and ſtanding four times in the pillory.

VII. A SEVENTH ſpecies of offenders in this claſs are all *religious impoſtors*: ſuch as falſely pretend an extraordinary com-

[a] Voltaire *Siecl. Louis xiv.* ch. 29. Mod. Univ. Hiſt. xxv. 215. Yet Vouglans *(de droit criminel,* 353. 459.) ſtill reckons up ſorcery and witchcraft among the crimes puniſhable in France.

miſſion

miſſion from heaven; or terrify and abuſe the people with falſe denunciations of judgments. Theſe, as tending to ſubvert all religion, by bringing it into ridicule and contempt, are puniſhable by the temporal courts with fine, impriſonment, and infamous corporal puniſhment [p].

VIII. SIMONY, or the corrupt preſentation of any one to an eccleſiaſtical benefice for gift or reward, is alſo to be conſidered as an offence againſt religion; as well by reaſon of the ſacredneſs of the charge which is thus profanely bought and ſold, as becauſe it is always attended with perjury in the perſon preſented [q]. The ſtatute 31 Eliz. c. 6. (which, ſo far as it relates to the forfeiture of the right of preſentation, was conſidered in a former book [r]) enacts, that if any patron, for money or any other corrupt conſideration or promiſe, directly or indirectly given, ſhall preſent, admit, inſtitute, induct, inſtall, or collate any perſon to an eccleſiaſtical benefice or dignity, both the giver and taker ſhall forfeit two years value of the benefice or dignity; one moiety to the king, and the other to any one who will ſue for the ſame. If perſons alſo corruptly reſign or exchange their benefices, both the giver and taker ſhall in like manner forfeit double the value of the money or other corrupt conſideration. And perſons who ſhall corruptly ordain or licence any miniſter, or procure him to be ordained or licenced (which is the true idea of ſimony) ſhall incur a like forfeiture of forty pounds; and the miniſter himſelf of ten pounds, beſides an incapacity to hold any eccleſiaſtical preferment for ſeven years afterwards. Corrupt elections and reſignations in colleges, hoſpitals, and other eleemoſynary corporations, are alſo puniſhed by the ſame ſtatute with forfeiture of the double value, vacating the place or office, and a devolution of the right of election for that turn to the crown.

[p] 1 Hawk. P. C. 7.
[q] 3 Inſt. 156.
[r] See Vol. II. pag. 279.

IX. PROFA-

IX. PROFANATION of the lord's day, or *ſabbath-breaking*, is a ninth offence againſt God and religion, puniſhed by the municipal laws of England. For, beſides the notorious indecency and ſcandal, of permitting any ſecular buſineſs to be publicly tranſacted on that day, in a country profeſſing chriſtianity, and the corruption of morals which uſually follows it's profanation, the keeping one day in ſeven holy, as a time of relaxation and refreſhment as well as for public worſhip, is of admirable ſervice to a ſtate, conſidered merely as a civil inſtitution. It humanizes by the help of converſation and ſociety the manners of the lower claſſes; which would otherwiſe degenerate into a ſordid ferocity and ſavage ſelfiſhneſs of ſpirit: it enables the induſtrious workman to purſue his occupation in the enſuing week with health and chearfulneſs: it imprints on the minds of the people that ſenſe of their duty to God, ſo neceſſary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any ſtated times of recalling them to the worſhip of their maker. And therefore the laws of king Athelſtan [5] forbad all merchandizing on the lord's day, under very ſevere penalties. And by the ſtatute 27 Hen. VI. c. 5. no fair or market ſhall be held on the principal feſtivals, good friday, or any ſunday (except the four ſundays in harveſt) on pain of forfeiting the goods expoſed to ſale. And, ſince, by the ſtatute 1 Car. I. c. 1. no perſons ſhall aſſemble, out of their own pariſhes, for any ſport whatſoever upon this day; nor, in their pariſhes, ſhall uſe any bull or bear baiting, interludes, plays, or other *unlawful* exerciſes, or paſtimes; on pain that every offender ſhall pay 3*s.* 4*d.* to the poor. This ſtatute does not prohibit, but rather impliedly allows, any innocent recreation or amuſement, within their reſpective pariſhes, even on the lord's day, after divine ſervice is over. But by ſtatute 29 Car. II. c. 7. no perſon is allowed to *work* on the lord's day, or uſe any boat or barge, or expoſe any goods to ſale; except meat in public houſes, milk at certain hours, and works of ne-

[5] *c.* 24.

ceſſity

ceſſity or charity, on forfeiture of 5*s*. Nor ſhall any drover, carrier, or the like, travel upon that day, under pain of twenty ſhillings.

X. DRUNKENNESS is alſo puniſhed by ſtatute 4 Jac. I. c. 5. with the forfeiture of 5*s*; or the ſitting ſix hours in the ſtocks: by which time the ſtatute preſumes the offender will have regained his ſenſes, and not be liable to do miſchief to his neighbours. And there are many wholeſome ſtatutes, by way of prevention, chiefly paſſed in the ſame reign of king James I, which regulate the licencing of ale-houſes, and puniſh perſons found tippling therein; or the maſters of ſuch houſes permitting them.

XI. THE laſt offence which I ſhall mention, more immediately againſt religion and morality, and cognizable by the temporal courts, is that of open and notorious *lewdneſs*: either by frequenting houſes of ill fame, which is an indictable offence[t]; or by ſome groſſly ſcandalous and public indecency, for which the puniſhment is by fine and impriſonment[u]. In the year 1650, when the ruling powers found it for their intereſt to put on the ſemblance of a very extraordinary ſtrictneſs and purity of morals, not only inceſt and wilful adultery were made capital crimes; but alſo the repeated act of keeping a brothel, or committing fornication, were (upon a ſecond conviction) made felony without benefit of clergy[w]. But at the reſtoration, when men from an abhorrence of the hypocriſy of the late times fell into a contrary extreme, of licentiouſneſs, it was not thought proper to renew a law of ſuch unfaſhionable rigour. And theſe offences have been ever ſince left to the feeble coercion of the ſpiritual court, according to the rules of the canon law; a law which has treated the offence of incontinence, nay even adultery itſelf, with a great degree of tenderneſs and lenity; owing perhaps to the celibacy of it's firſt compilers. The temporal

[t] Poph. 208.
[u] 1 Siderf 168.
[w] Scobell. 121.

courts

courts therefore take no cognizance of the crime of adultery, otherwiſe than as a private injury [x].

BUT, before we quit this ſubject, we muſt take notice of the temporal puniſhment for having *baſtard children*, conſidered in a criminal light; for with regard to the maintenance of ſuch illegitimate offspring, which is a civil concern, we have formerly ſpoken at large [y]. By the ſtatute 18 Eliz. c. 3. two juſtices may take order for the puniſhment of the mother and reputed father; but what that puniſhment ſhall be, is not therein aſcertained: though the contemporary expoſition was, that a corporal puniſhment was intended [z]. By ſtatute 7 Jac. I. c. 4. a ſpecific puniſhment (*viz.* commitment to the houſe of correction) is inflicted on the woman only. But in both caſes, it ſeems that the penalty can only be inflicted, if the baſtard becomes chargeable to the pariſh: for otherwiſe the very maintenance of the child is conſidered as a degree of puniſhment. By the laſt mentioned ſtatute the juſtices may commit the mother to the houſe of correction, there to be puniſhed and ſet on work for one year; and, in caſe of a ſecond offence, till ſhe find ſureties never to offend again.

[x] See Vol. III. pag. 139.
[y] See Vol. I. pag. 458.
[z] Dalt. juſt. ch. 11.

CHAPTER THE FIFTH.

OF OFFENCES AGAINST THE LAW OF NATIONS.

ACCORDING to the method marked out in the preceding chapter, we are next to conſider the offences more immediately repugnant to that univerſal law of ſociety, which regulates the mutual intercourſe between one ſtate and another; thoſe, I mean, which are particularly animadverted on, as ſuch, by the Engliſh law.

THE law of nations is a ſyſtem of rules, deducible by natural reaſon, and eſtabliſhed by univerſal conſent among the civilized inhabitants of the world [a]; in order to decide all diſputes, to regulate all ceremonies and civilities, and to inſure the obſervance of juſtice and good faith, in that intercourſe which muſt frequently occur between two or more independent ſtates, and the individuals belonging to each [b]. This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can; and, in time of war, as little harm as poſſible, without prejudice to their own real intereſts [c]. And, as none of theſe ſtates will allow a ſuperiority in the other, therefore neither can dictate or preſcribe the rules of this law to the reſt; but ſuch rules muſt neceſſarily

[a] *Ff.* 1. 1. 9.
[b] See Vol. I. pag. 43.
[c] Sp. L. b. 1. c. 3.

reſult

reſult from thoſe principles of natural juſtice, in which all the learned of every nation agree: or they depend upon mutual compacts or treaties between the reſpective communities; in the conſtruction of which there is alſo no judge to reſort to, but the law of nature and reaſon, being the only one in which all the contracting parties are equally converſant, and to which they are equally ſubject.

IN arbitrary ſtates this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but ſince in England no royal power can introduce a new law, or ſuſpend the execution of the old, therefore the law of nations (wherever any queſtion ariſes which is properly the object of it's juriſdiction) is here adopted in it's full extent by the common law, and is held to be a part of the law of the land. And thoſe acts of parliament, which have from time to time been made to enforce this univerſal law, or to facilitate the execution of it's deciſions, are not to be conſidered as introductive of any new rule, but merely as declaratory of the old fundamental conſtitutions of the kingdom; without which it muſt ceaſe to be a part of the civilized world. Thus in mercantile queſtions, ſuch as bills of exchange and the like; in all marine cauſes, relating to freight, average, demurrage, inſurances, bottomry, and others of a ſimilar nature; the law-merchant [d], which is a branch of the law of nations, is regularly and conſtantly adhered to. So too in all diſputes relating to prizes, to ſhipwrecks, to hoſtages, and ranſom bills, there is no other rule of deciſion but this great univerſal law, collected from hiſtory and uſage, and ſuch writers of all nations and languages as are generally approved and allowed of.

BUT, though in civil tranſactions and queſtions of property between the ſubjects of different ſtates, the law of nations has much ſcope and extent, as adopted by the law of England; yet the preſent branch of our enquiries will fall within a narrow

[d] See Vol. I. pag. 273.

compaſs, as offences againſt the law of nations can rarely be the object of the criminal law of any particular ſtate. For offences againſt this law are principally incident to whole ſtates or nations: in which caſe recourſe can only be had to war; which is an appeal to the God of hoſts, to puniſh ſuch infractions of public faith, as are committed by one independent people againſt another: neither ſtate having any ſuperior juriſdiction to reſort to upon earth for juſtice. But where the individuals of any ſtate violate this general law, it is then the intereſt as well as duty of the government under which they live, to animadvert upon them with a becoming ſeverity, that the peace of the world may be maintained. For in vain would nations in their collective capacity obſerve theſe univerſal rules, if private ſubjects were at liberty to break them at their own diſcretion, and involve the two ſtates in a war. It is therefore incumbent upon the nation injured, firſt to demand ſatisfaction and juſtice to be done on the offender, by the ſtate to which he belongs; and, if that be refuſed or neglected, the ſovereign then avows himſelf an accomplice or abettor of his ſubject's crime, and draws upon his community the calamities of foreign war.

THE principal offences againſt the law of nations, animadverted on as ſuch by the municipal laws of England, are of three kinds; 1. Violation of ſafe-conducts; 2. Infringement of the rights of embaſſadors; and, 3. Piracy.

I. AS to the firſt, *violation* of *ſafe-conducts* or *paſſports*, expreſſly granted by the king or his embaſſadors [e] to the ſubjects of a foreign power in time of mutual war; or, committing acts of hoſtility againſt ſuch as are in amity, league, or truce with us, who are here under a general implied ſafe-conduct; theſe are breaches of the public faith, without the preſervation of which there can be no intercourſe or commerce between one nation and another: and ſuch offences may, according to the writers upon the law of nations, be a juſt ground

[e] See Vol. I. pag. 260.

of

of a national war; ſince it is not in the power of the foreign prince to cauſe juſtice to be done to his ſubjects by the very individual delinquent, but he muſt require it of the whole community. And as during the continuance of any ſafe-conduct, either expreſs or implied, the foreigner is under the protection of the king and the law; and, more eſpecially, as it is one of the articles of *magna carta* [f], that foreign merchants ſhall be intitled to ſafe-conduct and ſecurity throughout the kingdom; there is no queſtion but that any violation of either the perſon or property of ſuch foreigner may be puniſhed by indictment in the name of the king, whoſe honour is more particularly engaged in ſupporting his own ſafe-conduct. And, when this malicious rapacity was not confined to private individuals, but broke out into general hoſtilities, by the ſtatute 2 Hen. V. ſt. 1. c. 6. breaking of truce and ſafe conducts, or abetting and receiving the truce-breakers, was (in affirmance and ſupport of the law of nations) declared to be high treaſon againſt the crown and dignity of the king; and conſervators of truce and ſafe-conducts were appointed in every port, and impowered to hear and determine ſuch treaſons (when committed at ſea) according to the antient marine law then practiſed in the admiral's court: and, together with two men learned in the law of the land, to hear and determine according to that law the ſame treaſons, when committed within the body of any county. Which ſtatute, ſo far as it made theſe offences amount to treaſon, was ſuſpended by 14 Hen. VI. c. 8. and repealed by 20 Hen. VI. c. 11. but revived by 29 Hen. VI. c. 2. which gave the ſame powers to the lord chancellor, aſſociated with either of the chief juſtices, as belonged to the conſervators of truce and their aſſeſſors; and enacted that, notwithſtanding the party be convicted of treaſon, the injured ſtranger ſhould have reſtitution out of his effects, prior to any claim of the crown. And it is farther enacted by the ſtatute 31 Hen. VI. c. 4. that if any of the king's ſubjects attempt or offend, upon the ſea, or in any port within the king's obeyſance, againſt any ſtranger in amity, league, or truce, or under ſafe-conduct; and

[f] 9 *Hen. III. c.* 30. See Vol. I. pag. 259, &c.

eſpecially

eſpecially by attaching his perſon, or ſpoiling him, or robbing him of his goods; the lord chancellor, with any of the juſtices of either the king's-bench or common pleas, may cauſe full reſtitution and amends to be made to the party injured.

IT is to be obſerved, that the ſuſpending and repealing acts of 14 & 20 Hen. VI, and alſo the reviving act of 29 Hen. VI, were only temporary; ſo that it ſhould ſeem that, after the expiration of them all, the ſtatute 2 Hen. V continued in full force: but yet it is conſidered as extinct by the ſtatute 14 Edw. IV. c. 4. which revives and confirms all ſtatutes and ordinances, made before the acceſſion of the houſe of York, againſt breakers of amities, truces, leagues, and ſafe-conducts, with an expreſs exception to the ſtatutes of 2 Hen. V. But (however that may be) I apprehend it was finally repealed by the general ſtatutes of Edward VI and queen Mary, for aboliſhing new-created treaſons; though ſir Matthew Hale ſeems to queſtion it as to treaſons committed on the ſea [g]. But certainly the ſtatute of 31 Hen. VI remains in full force to this day.

II. AS to the rights of *embaſſadors*, which are alſo eſtabliſhed by the law of nations, and are therefore matter of univerſal concern, they have formerly been treated of at large [h]. It may here be ſufficient to remark, that the common law of England recognizes them in their full extent, by immediately ſtopping all legal proceſs, ſued out through the ignorance or raſhneſs of individuals, which may intrench upon the immunities of a foreign miniſter or any of his train. And, the more effectually to enforce the law of nations in this reſpect, when violated through wantonneſs or inſolence, it is declared by the ſtatute 7 Ann. c. 12. that all proceſs whereby the perſon of any embaſſador, or of his domeſtic or domeſtic ſervant, may be arreſted, or his goods diſtreined or ſeiſed, ſhall be utterly null and void; and that all perſons proſecuting, ſoliciting, or executing ſuch proceſs, being convicted by confeſſion or the oath of one

[g] 1 Hal. P. C. 267.

[h] See Vol. I. pag. 253.

witneſs,

witneſs, before the lord chancellor and the chief juſtices, or any two of them, ſhall be deemed violators of the laws of nations, and diſturbers of the public repoſe; and ſhall ſuffer ſuch penalties and corporal puniſhment as the ſaid judges, or any two of them, ſhall think fit[i]. Thus, in caſes of extraordinary outrage, for which the law hath provided no ſpecial penalty, the legiſlature hath intruſted to the three principal judges of the kingdom an unlimited power of proportioning the puniſhment to the crime.

III. LASTLY, the crime of *piracy*, or robbery and depredation upon the high ſeas, is an offence againſt the univerſal law of ſociety; a pirate being, according to ſir Edward Coke[k], *hoſtis humani generis*. As therefore he has renounced all the benefits of ſociety and government, and has reduced himſelf afreſh to the ſavage ſtate of nature, by declaring war againſt all mankind, all mankind muſt declare war againſt him: ſo that every community hath a right, by the rule of ſelf-defence, to inflict that puniſhment upon him, which every individual would in a ſtate of nature have been otherwiſe entitled to do, for any invaſion of his perſon or perſonal property.

BY the antient common law, piracy, if committed by a ſubject, was held to be a ſpecies of treaſon, being contrary to his natural allegiance; and by an alien to be felony only: but now, ſince the ſtatute of treaſons, 25 Edw. III. c. 2. it is held to be only felony in a ſubject[l]. Formerly it was only cognizable by the admiralty courts, which proceed by the rules of the civil law[m]. But, it being inconſiſtent with the liberties of the nation, that any man's life ſhould be taken away, unleſs by the judgment of his peers, or the common law of the land, the ſtatute 28 Hen. VIII. c. 15. eſtabliſhed a new juriſdiction for this purpoſe; which proceeds according to the courſe of the common law, and of which we ſhall ſay more hereafter.

[i] See the occaſion of making this ſtatute; Vol. I. pag. 255.

[k] 3 Inſt. 113.

[l] *Ibid.*

[m] 1 Hawk. P. C. 98.

THE

THE offence of piracy, by common law, conſiſts in committing thoſe acts of robbery and depredation upon the high ſeas, which, if committed upon land, would have amounted to felony there[n]. But, by ſtatute, ſome other offences are made piracy alſo: as, by ſtatute 11 & 12 W. III. c. 7. if any natural born ſubject commits any act of hoſtility upon the high ſeas, againſt others of his majeſty's ſubjects, under colour of a commiſſion from any foreign power; this, though it would only be an act of war in an alien, ſhall be conſtrued piracy in a ſubject. And farther, any commander, or other ſeafaring perſon, betraying his truſt, and running away with any ſhip, boat, ordnance, ammunition, or goods; or yielding them up voluntarily to a pirate; or conſpiring to do theſe acts; or any perſon confining the commander of a veſſel, to hinder him from fighting in defence of his ſhip, or to cauſe a revolt on board; ſhall, for each of theſe offences, be adjudged a pirate, felon, and robber, and ſhall ſuffer death, whether he be principal or acceſſory. By the ſtatute 8 Geo. I. c. 24. the trading with known pirates, or furniſhing them with ſtores or ammunition, or fitting out any veſſel for that purpoſe, or in any wiſe conſulting, combining, confederating, or correſponding with them; or the forcibly boarding any merchant veſſel, though without ſeiſing or carrying her off, and deſtroying or throwing any of the goods overboard; ſhall be deemed piracy: and all acceſſories to piracy, are declared to be principal pirates, and felons without benefit of clergy. By the ſame ſtatutes alſo, (to encourage the defence of merchant veſſels againſt pirates) the commanders or ſeamen wounded, and the widows of ſuch ſeamen as are ſlain, in any piratical engagement, ſhall be entitled to a bounty, to be divided among them, not exceeding one fiftieth part of the value of the cargo on board: and ſuch wounded ſeamen ſhall be entitled to the penſion of Greenwich hoſpital; which no other ſeamen are, except only ſuch as have ſerved in a ſhip of war. And if the commander ſhall behave cowardly, by not defending the ſhip,

[n] 1 Hawk. P. C. 100.

if

if ſhe carries guns or arms, or ſhall diſcharge the mariners from fighting, ſo that the ſhip falls into the hands of pirates, ſuch commander ſhall forfeit all his wages, and ſuffer ſix months impriſonment.

THESE are the principal caſes, in which the ſtatute law of England interpoſes, to aid and enforce the law of nations, as a part of the common law; by inflicting an adequate puniſhment upon offences againſt that univerſal law, committed by private perſons. We ſhall proceed in the next chapter to conſider offences, which more immediately affect the ſovereign executive power of our own particular ſtate, or the king and government; which ſpecies of crimes branches itſelf into a much larger extent, than either of thoſe of which we have already treated.

CHAPTER THE SIXTH.

OF HIGH TREASON.

THE third general diviſion of crimes conſiſts of ſuch, as more eſpecially affect the ſupreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the leaſt to a criminal neglect of that duty, which is due from every ſubject to his ſovereign. In a former part of theſe commentaries[a] we had occaſion to mention the nature of allegiance, as the tie or *ligamen* which binds every ſubject to be true and faithful to his ſovereign *liege* lord the king, in return for that protection which is afforded him; and truth and faith to bear of life and limb, and earthly honour; and not to know or hear of any ill intended him, without defending him therefrom. And this allegiance, we may remember, was diſtinguiſhed into two ſorts or ſpecies: the one natural and perpetual, which is inherent only in natives of the king's dominions; the other local and temporary, which is incident to aliens alſo. Every offence therefore more immediately affecting the royal perſon, his crown, or dignity, is in ſome degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by reſidence: and theſe may be diſtinguiſhed into four kinds; 1. Treaſon. 2. Felonies injurious to the king's prerogative. 3. *Praemunire*. 4. Other miſpriſions and contempts. Of which crimes the firſt and principal is that of treaſon.

[a] Book I. ch. 10.

TREASON,

TREASON, *proditio*, in it's very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith. It therefore happens only between allies, ſaith the mirror[b]: for treaſon is indeed a general appellation, made uſe of by the law, to denote not only offences againſt the king and government, but alſo that accumulation of guilt which ariſes whenever a ſuperior repoſes a confidence in a ſubject or inferior, between whom and himſelf there ſubſiſts a natural, a civil, or even a ſpiritual relation; and the inferior ſo abuſes that confidence, ſo forgets the obligations of duty, ſubjection, and allegiance, as to deſtroy the life of any ſuch ſuperior or lord. This is looked upon as proceeding from the ſame principle of treachery in private life, as would have urged him who harbours it to have conſpired in public againſt his liege lord and ſovereign: and therefore for a wife to kill her lord or huſband, a ſervant his lord or maſter, and an eccleſiaſtic his lord or ordinary; theſe, being breaches of the lower allegiance, of private and domeſtic faith, are denominated *petit* treaſons. But when diſloyalty ſo rears it's creſt, as to attack even majeſty itſelf, it is called by way of eminent diſtinction *high* treaſon, *alta proditio*; being equivalent to the *crimen laeſae majeſtatis* of the Romans, as Glanvil[c] denominates it alſo in our Engliſh law.

As this is the higheſt civil crime, which (conſidered as a member of the community) any man can poſſibly commit, it ought therefore to be the moſt preciſely aſcertained. For if the crime of high treaſon be indeterminate, this alone (ſays the preſident Monteſquieu) is ſufficient to make any government degenerate into arbitrary power[d]. And yet, by the antient common law, there was a great latitude left in the breaſt of the judges, to determine what was treaſon, or not ſo: whereby the creatures of tyrannical princes had opportunity to create abundance of conſtructive treaſons; that is, to raiſe, by forced and arbitrary

[b] *c.* 1. §. 7.
[c] *l.* 1. *c.* 2.
[d] Sp. L. b. 12. c. 7.

conſtructions, offences into the crime and puniſhment of treaſon, which never were ſuſpected to be ſuch. Thus the *accroaching*, or attempting to exerciſe, royal power (a very uncertain charge) was in the 21 Edw. III. held to be treaſon in a knight of Hertfordſhire, who forcibly aſſaulted and detained one of the king's ſubjects till he paid him 90*l*[e]: a crime, it muſt be owned, well deſerving of puniſhment; but which ſeems to be of a complexion very different from that of treaſon. Killing the king's father, or brother, or even his meſſenger, has alſo fallen under the ſame denomination[f]. The latter of which is almoſt as tyrannical a doctrine as that of the imperial conſtitution of Arcadius and Honorius, which determines that any attempts or deſigns againſt the miniſters of the prince ſhall be treaſon[g]. But however, to prevent the inconveniences which began to ariſe in England from this multitude of conſtructive treaſons, the ſtatute 25 Edw. III. c. 2. was made; which defines what offences only for the future ſhould be held to be treaſon: in like manner as the *lex Julia majeſtatis* among the Romans, promulged by Auguſtus Caeſar, comprehended all the antient laws, that had before been enacted to puniſh tranſgreſſors againſt the ſtate[h]. This ſtatute muſt therefore be our text and guide, in order to examine into the ſeveral ſpecies of high treaſon. And we ſhall find that it comprehends all kinds of high treaſon under ſeven diſtinct branches.

1. "WHEN a man doth compaſs or imagine the death of our "lord the king, of our lady his queen, or of their eldeſt ſon "and heir." Under this deſcription it is held that a queen regnant (ſuch as queen Elizabeth and queen Anne) is within the words of the act, being inveſted with royal power and entitled to the allegiance of her ſubjects[i]: but the huſband of ſuch a

[e] 1 Hal. P. C. 80.

[f] Britt. c. 22. 1 Hawk. P. C. 34.

[g] *Qui de nece virorum illuſtrium, qui conſiliis et conſiſtorio noſtro interſunt, ſenatorum etiam (nam et ipſi pars corporis noſtri ſunt) vel cujuſlibet poſtremo, qui militat nobiſcum, cogitaverit: (eadem enim ſeveritate voluntatem ſceleris, qua effectum, puniri jura voluerunt) ipſe quidem, utpote majeſtatis reus, gladio feriatur, bonis ejus omnibus fiſco noſtro addictis.* (*Cod.* 9. 8. 5.)

[h] Gravin. *Orig.* 1. §. 34.

[i] 1 Hal. P. C. 101.

queen

queen is not comprized within theſe words, and therefore no treaſon can be committed againſt him[k]. The king here intended is the king in poſſeſſion, without any reſpect to his title: for it is held, that a king *de facto* and not *de jure*, or in other words an uſurper that hath got poſſeſſion of the throne, is a king within the meaning of the ſtatute; as there is a temporary allegiance due to him, for his adminiſtration of the government, and temporary protection of the public: and therefore treaſons committed againſt Henry VI were puniſhed under Edward IV, though all the line of Lancaſter had been previouſly declared uſurpers by act of parliament. But the moſt rightful heir of the crown, or king *de jure* and not *de facto*, who hath never had plenary poſſeſſion of the throne, as was the caſe of the houſe of York during the three reigns of the line of Lancaſter, is not a king within this ſtatute, againſt whom treaſons may be committed[l]. And a very ſenſible writer on the crown-law carries the point of poſſeſſion ſo far, that he holds[m], that a king out of poſſeſſion is ſo far from having any right to our allegiance, by any other title which he may ſet up againſt the king in being, that we are bound by the duty of our allegiance to reſiſt him. A doctrine which he grounds upon the ſtatute 11 Hen. VII. c. 1. which is declaratory of the common law, and pronounces all ſubjects excuſed from any penalty or forfeiture, which do aſſiſt and obey a king *de facto*. But, in truth, this ſeems to be confounding all notions of right and wrong; and the conſequence would be, that when Cromwell had murdered the elder Charles, and uſurped the power (though not the name) of king, the people were bound in duty to hinder the ſon's reſtoration: and were the king of Poland or Morocco to invade this kingdom, and by any means to get poſſeſſion of the crown (a term, by the way, of very looſe and indiſtinct ſignification) the ſubject would be bound by his allegiance to fight for his natural prince to-day, and by the ſame duty of allegiance to fight againſt him to-morrow. The true diſtinction ſeems to be,

[k] 3 Inſt. 7. 1 Hal. P. C. 106.
[l] 3 Inſt. 7. 1 Hal. P. C. 104.
[m] 1 Hawk. P. C. 36.

that

that the ſtatute of Henry the ſeventh does by no means *command* any oppoſition to a king *de jure*; but *excuſes* the obedience paid to a king *de facto*. When therefore a uſurper is in poſſeſſion, the ſubject is *excuſed* and *juſtified* in obeying and giving him aſſiſtance: otherwiſe, under a uſurpation, no man could be ſafe; if the lawful prince had a right to hang him for obedience to the powers in being, as the uſurper would certainly do for diſobedience. Nay farther, as the maſs of people are imperfect judges of title, of which in all caſes poſſeſſion is *prima facie* evidence, the law compels no man to yield obedience to that prince, whoſe right is by want of poſſeſſion rendered uncertain and diſputable, till providence ſhall think fit to interpoſe in his favour, and decide the ambiguous claim: and therefore, till he is entitled to ſuch allegiance by poſſeſſion, no treaſon can be committed againſt him. Laſtly, a king who has reſigned his crown, ſuch reſignation being admitted and ratified in parliament, is according to ſir Matthew Hale no longer the object of treaſon[n]. And the ſame reaſon holds, in caſe a king abdicates the government; or, by actions ſubverſive of the conſtitution, virtually renounces the authority which he claims by that very conſtitution: ſince, as was formerly obſerved[o], when the fact of abdication is once eſtabliſhed, and determined by the proper judges, the conſequence neceſſarily follows, that the throne is thereby vacant, and he is no longer king.

LET us next ſee, what is a *compaſſing* or *imagining* the death of the king, *&c.* Theſe are ſynonymous terms; the word *compaſs* ſignifying the purpoſe or deſign of the mind or will[p], and not, as in common ſpeech, the carrying ſuch deſign to effect[q]. And therefore an accidental ſtroke, which may mortally wound the ſovereign, *per infortunium*, without any traiterous intent, is no treaſon: as was the caſe of ſir Walter Tyrrel, who, by the

[n] 1 Hal. P. C. 104.

[o] Vol. I. pag. 212.

[p] By the antient law *compaſſing* or intending the death of any man, demonſtrated by ſome evident fact, was equally penal as homicide itſelf. (3 Inſt. 5.)

[q] 1 Hal. P. C. 107.

command

command of king William Rufus, ſhooting at a hart, the arrow glanced againſt a tree, and killed the king upon the ſpot[r]. But, as this compaſſing or imagination is an act of the mind, it cannot poſſibly fall under any judicial cognizance, unleſs it be demonſtrated by ſome open, or *overt*, act. And yet the tyrant Dionyſius is recorded[s] to have executed a ſubject, barely for dreaming that he had killed him; which was held for a ſufficient proof, that he had thought thereof in his waking hours. But ſuch is not the temper of the Engliſh law; and therefore in this, and the three next ſpecies of treaſon, it is neceſſary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon. The ſtatute expreſſly requires, that the accuſed "be thereof upon ſufficient proof attainted of ſome "open act by men of his own condition." Thus, to provide weapons or ammunition for the purpoſe of killing the king, is held to be a palpable overt act of treaſon in imagining his death[t]. To conſpire to impriſon the king by force, and move towards it by aſſembling company, is an overt act of compaſſing the king's death[u]; for all force, uſed to the perſon of the king, in it's conſequence may tend to his death, and is a ſtrong preſumption of ſomething worſe intended than the preſent force, by ſuch as have ſo far thrown off their bounden duty to their ſovereign: it being an old obſervation, that there is generally but a ſhort interval between the priſons and the graves of princes. There is no queſtion alſo, but that taking any meaſures to render ſuch treaſonable purpoſes effectual, as aſſembling and conſulting on the means to kill the king, is a ſufficient overt act of high-treaſon[w].

How far mere *words*, ſpoken by an individual, and not relative to any treaſonable act or deſign then in agitation, ſhall amount to treaſon, has been formerly matter of doubt. We have two inſtances, in the reign of Edward the fourth, of per-

[r] 3 Inſt. 6.
[s] Plutarch. *in vit.*
[t] 3 Inſt. 12.
[u] 1 Hal. P. C. 109.
[w] 1 Hawk. P. C. 38. 1 Hal. P. C. 119.

ſons

ſons executed for treaſonable words: the one a citizen of London, who ſaid he would make his ſon heir of the *crown*, being the ſign of the houſe in which he lived; the other a gentleman, whoſe favourite buck the king killed in hunting, whereupon he wiſhed it, horns and all, in the king's belly. Theſe were eſteemed hard caſes: and the chief juſtice Markham rather choſe to leave his place than aſſent to the latter judgment[x]. But now it ſeems clearly to be agreed, that, by the common law and the ſtatute of Edward III, words ſpoken amount only to a high miſdemeſnor, and no treaſon. For they may be ſpoken in heat, without any intention, or be miſtaken, perverted, or miſ-remembered by the hearers; their meaning depends always on their connexion with other words, and things; they may ſignify differently even according to the tone of voice, with which they are delivered; and ſometimes ſilence itſelf is more expreſſive than any diſcourſe. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreaſonable to make them amount to high treaſon. And accordingly in 4 Car. I. on a reference to all the judges, concerning ſome very atrocious words ſpoken by one Pyne, they certified to the king, "that though the words were as wicked as might "be, yet they were no treaſon: for, unleſs it be by ſome par-"ticular ſtatute, no words will be treaſon[y]." If the words be ſet down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treaſon; for *ſcribere eſt agere*. But even in this caſe the bare words are not the treaſon, but the deliberate act of writing them. And ſuch writing, though unpubliſhed, has in ſome arbitrary reigns convicted it's author of treaſon: particularly in the caſes of one Peacham a clergyman, for treaſonable paſſages in a ſermon never preached[z]; and of Algernon Sidney, for ſome papers found in his cloſet: which, had they been plainly relative to any previous formed deſign of dethroning or murdering the king, might doubtleſs have been properly read in evidence as overt

[x] 1 Hal. P. C. 115.
[y] Cro. Car. 125.
[z] *Ibid.*

acts

acts of that treason, which was specially laid in the indictment[a]. But, being merely speculative, without any intention (so far as appeared) of making any public use of them, the convicting the authors of treason upon such an insufficient foundation has been universally disapproved. Peacham was therefore pardoned: and, though Sidney indeed was executed, yet it was to the general discontent of the nation; and his attainder was afterwards reversed by parliament. There was then no manner of doubt, but that the publication of such a treasonable writing was a sufficient overt act of treason at the common law[b]; though of late even that has been questioned.

2. THE second species of treason is, "if a man do violate "the king's companion, or the king's eldest daughter unmarried, "or the wife of the king's eldest son and heir." By the king's companion is meant his wife; and by violation is understood carnal knowlege, as well without force, as with it: and this is high treason in both parties, if both be consenting; as some of the wives of Henry the eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious: and therefore, when this reason ceases, the law ceases with it; for to violate a queen or princess dowager is held to be no treason[c]: in like manner as, by the feodal law, it was a felony and attended with a forfeiture of the fief, if the vasal vitiated the wife or daughter of his lord[d]; but not so, if he only vitiated his widow[e].

3. THE third species of treason is, "if a man do levy war "against our lord the king in his realm." And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances whether real or pretended[f]. For the law does not, neither can it, permit any private man, or set of

[a] Foster. 198.
[b] 1 Hal. P. C. 118. 1 Hawk. P. C. 38.
[c] 3 Inst. 9.
[d] *Feud. l.* 1. *t.* 5.
[e] *Ibid. t.* 21.
[f] 1 Hawk. P. C. 37.

men, to interfere forcibly in matters of ſuch high importance; eſpecially as it has eſtabliſhed a ſufficient power, for theſe purpoſes, in the high court of parliament: neither does the conſtitution juſtify any private or particular reſiſtance for private or particular grievances; though in caſes of national oppreſſion the nation has very juſtifiably riſen as one man, to vindicate the original contract ſubſiſting between the king and his people. To reſiſt the king's forces by defending a caſtle againſt them, is a levying of war: and ſo is an inſurrection with an avowed deſign to pull down *all* incloſures, *all* brothels, and the like; the univerſality of the deſign making it a rebellion againſt the ſtate, an uſurpation of the powers of government, and an inſolent invaſion of the king's authority [g]. But a tumult with a view to pull down a particular houſe, or lay open a particular incloſure, amounts at moſt to a riot; this being no general defiance of public government. So, if two ſubjects quarrel and levy war againſt each other, (in that ſpirit of private war, which prevailed all over Europe [h] in the early feodal times) it is only a great riot and contempt, and no treaſon. Thus it happened between the earls of Hereford and Gloceſter in 20 Edw. I. who raiſed each a little army, and committed outrages upon each others lands, burning houſes, attended with the loſs of many lives: yet this was held to be no high treaſon, but only a great miſdemeſnor [i]. A bare conſpiracy to levy war does not amount to this ſpecies of treaſon; but (if particularly pointed at the perſon of the king or his government) it falls within the firſt, of compaſſing or imagining the king's death [j].

4. "IF a man be adherent to the king's enemies in his "realm, giving to them aid and comfort in the realm, or elſe-"where," he is alſo declared guilty of high treaſon. This muſt likewiſe be proved by ſome overt act, as by giving them intelligence, by ſending them proviſions, by ſelling them arms, by treacherouſly ſurrendering a fortreſs, or the like [k]. By enemies

[g] 1 Hal. P. C. 132.
[h] Robertſon Cha. V. i. 45. 286.
[i] 1 Hal. P. C. 136.
[j] 3 Inſt. 9. Foſter. 211. 213.
[k] 3 Inſt. 10.

are

are here underſtood the ſubjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coaſts, without any open hoſtilities between their nation and our own, and without any commiſſion from any prince or ſtate at enmity with the crown of Great Britain, the giving them any aſſiſtance is alſo clearly treaſon; either in the light of adhering to the public enemies of the king and kingdom [l], or elſe in that of levying war againſt his majeſty. And, moſt indiſputably, the ſame acts of adherence or aid, which (when applied to foreign enemies) will conſtitute treaſon under this branch of the ſtatute, will (when afforded to our own fellow-ſubjects in actual rebellion at home) amount to high treaſon under the deſcription of levying war againſt the king [m]. But to relieve a rebel, fled out of the kingdom, is no treaſon: for the ſtatute is taken ſtrictly, and a rebel is not an *enemy*; an enemy being always the ſubject of ſome foreign prince, and one who owes no allegiance to the crown of England [n]. And if a perſon be under circumſtances of actual force and conſtraint, through a well-grounded apprehenſion of injury to his life or perſon, this fear or compulſion will excuſe his even joining with either rebels or enemies *in* the kingdom, provided he leaves them whenever he hath a ſafe opportunity [o].

5. "IF a man counterfeit the king's great or privy ſeal," this is alſo high treaſon. But if a man takes wax bearing the impreſſion of the great ſeal off from one patent, and fixes it to another, this is held to be only an abuſe of the ſeal, and not a counterfeiting of it; as was the caſe of a certain chaplain, who in ſuch manner framed a diſpenſation for non-reſidence. But the knaviſh artifice of a lawyer much exceeded this of the divine. One of the clerks in chancery glewed together two pieces of parchment; on the uppermoſt of which he wrote a patent, to which he regularly obtained the great ſeal, the label going through both the ſkins. He then diſſolved the cement; and

[l] Foſter. 219.
[m] *Ibid.* 216.
[n] 1 Hawk. P. C. 38.
[o] Foſter. 216.

taking off the written patent, on the blank ſkin wrote a freſh patent, of a different import from the former, and publiſhed it as true. This was held no counterfeiting of the great ſeal, but only a great miſpriſion; and ſir Edward Coke [p] mentions it with ſome indignation, that the party was living at that day.

6. THE ſixth ſpecies of treaſon under this ſtatute, is "if a "man counterfeit the king's money; and if a man bring falſe "money into the realm counterfeit to the money of England, "knowing the money to be falſe." As to the firſt branch, counterfeiting the king's money; this is treaſon, whether the falſe money be uttered in payment or not. Alſo if the king's own minters alter the ſtandard or alloy eſtabliſhed by law, it is treaſon. But gold and ſilver money only are held to be within this ſtatute [q]. With regard likewiſe to the ſecond branch, importing foreign counterfeit money, in order to utter it here; it is held that uttering it, without importing it, is not within the ſtatute [r]. But of this we ſhall preſently ſay more.

7. THE laſt ſpecies of treaſon, aſcertained by this ſtatute, is "if a man ſlay the chancellor, treaſurer, or the king's juſtices "of the one bench or the other, juſtices in eyre, or juſtices of "aſſize, and all other juſtices aſſigned to hear and determine, "being in their places doing their offices." Theſe high magiſtrates, as they repreſent the king's majeſty during the execution of their offices, are therefore for the time equally regarded by the law. But this ſtatute extends only to the actual killing of them, and not to wounding, or a bare attempt to kill them. It extends alſo only to the officers therein ſpecified; and therefore the barons of the exchequer, as ſuch, are not within the protection of this act [s].

THUS careful was the legiſlature, in the reign of Edward the third, to ſpecify and reduce to a certainty the vague notions of

[p] 3 Inſt. 16.
[q] 1 Hawk. P. C. 42.
[r] *Ibid.* 43.
[s] 1 Hal. P. C. 231.

treaſon,

treaſon, that had formerly prevailed in our courts. But the act does not ſtop here, but goes on. "Becauſe other like caſes of "treaſon may happen in time to come, which cannot be thought "of nor declared at preſent, it is accorded, that if any other "caſe ſuppoſed to be treaſon, which is not above ſpecified, doth "happen before any judge; the judge ſhall tarry without going "to judgment of the treaſon, till the cauſe be ſhewed and de-"clared before the king and his parliament, whether it ought "to be judged treaſon, or other felony." Sir Matthew Hale [t] is very high in his encomiums on the great wiſdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this act, by not ſuffering them to run out (upon their own opinions) into conſtructive treaſons, though in caſes that ſeem to them to have a like parity of reaſon; but reſerving them to the deciſion of parliament. This is a great ſecurity to the public, the judges, and even this ſacred act itſelf; and leaves a weighty *memento* to judges to be careful, and not overhaſty in letting in treaſons by conſtruction or interpretation, eſpecially in new caſes that have not been reſolved and ſettled. 2. He obſerves, that as the authoritative deciſion of theſe *caſus omiſſi* is reſerved to the king and parliament, the moſt regular way to do it is by a new declarative act: and therefore the opinion of any one or of both houſes, though of very reſpectable weight, is not that ſolemn declaration referred to by this act, as the only criterion for judging of future treaſons.

IN conſequence of this power, not indeed originally granted by the ſtatute of Edward III, but conſtitutionally inherent in every ſubſequent parliament, (which cannot be abridged of any rights by the act of a precedent one) the legiſlature was extremely liberal in declaring new treaſons in the unfortunate reign of king Richard the ſecond: as, particularly, the killing of an embaſſador was made ſo; which ſeems to be founded upon better reaſon than the multitude of other points, that were then ſtrained up to this high offence: the moſt arbitrary and abſurd of all

[t] 1 Hal. P. C. 259.

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which was by the ſtatute 21 Ric. II. c. 3. which made the bare purpoſe and intent of killing or depoſing the king, without any overt act to demonſtrate it, high treaſon. And yet ſo little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both depoſed and murdered. And, in the firſt year of his ſucceſſor's reign, an act was paſſed [u], reciting "that no man knew how he ought to behave himſelf, "to do, ſpeak, or ſay, for doubt of ſuch pains of treaſon: and "therefore it was accorded that in no time to come any treaſon "be judged, otherwiſe than was ordained by the ſtatute of king "Edward the third." This at once ſwept away the whole load of extravagant treaſons introduced in the time of Richard the ſecond.

BUT afterwards, between the reign of Henry the fourth and queen Mary, and particularly in the bloody reign of Henry the eighth, the ſpirit of inventing new and ſtrange treaſons was revived; among which we may reckon the offences of clipping money; breaking priſon or reſcue, when the priſoner is committed for treaſon; burning houſes to extort money; ſtealing cattle by Welchmen; counterfeiting foreign coin; wilful poiſoning; execrations againſt the king; calling him opprobrious names by public writing; counterfeiting the ſign manual or ſignet; refuſing to abjure the pope; deflowering, or marrying without the royal licence, any of the king's children, ſiſters, aunts, nephews, or nieces; bare ſolicitation of the chaſtity of the queen or princeſs, or advances made by themſelves; marrying with the king, by a woman not a virgin, without previouſly diſcovering to him ſuch her unchaſte life; judging or *believing* (manifeſted by any overt act) the king to have been lawfully married to Anne of Cleve; derogating from the king's royal ſtile and title; impugning his ſupremacy; and aſſembling riotouſly to the number of twelve, and not diſperſing upon proclamation: all which new-fangled treaſons were totally abrogated by the ſtatute 1 Mar. c. 1. which once more reduced all

[u] Stat. 1 Hen. IV. c. 10.

treaſons

treaſons to the ſtandard of the ſtatute 25 Edw. III. Since which time, though the legiſlature has been more cautious in creating new offences of this kind, yet the number is very conſiderably encreaſed, as we ſhall find upon a ſhort review.

THESE new treaſons, created ſince the ſtatute 1 Mar. c. 1. and not comprehended under the deſcription of ſtatute 25 Edw. III, I ſhall comprize under three heads. 1. Such as relate to papiſts. 2. Such as relate to falſifying the coin or other royal ſignatures. 3. Such as are created for the ſecurity of the proteſtant ſucceſſion in the houſe of Hanover.

1. THE firſt ſpecies, relating to *papiſts*, was conſidered in the preceding chapter, among the penalties incurred by that branch of non-conformiſts to the national church; wherein we have only to remember that by ſtatute 5 Eliz. c. 1. to defend the pope's juriſdiction in this realm is, for the firſt time, a heavy miſdemeſnor; and, if the offence be repeated, it is high treaſon. Alſo by ſtatute 27 Eliz. c. 2. if any popiſh prieſt, born in the dominions of the crown of England, ſhall come over hither from beyond the ſeas; or ſhall tarry here three days without conforming to the church; he is guilty of high treaſon. And by ſtatute 3 Jac. I. c. 4. if any natural born ſubject be withdrawn from his allegiance, and reconciled to the pope or ſee of Rome, or any other prince or ſtate, both he and all ſuch as procure ſuch reconciliation ſhall incur the guilt of high treaſon. Theſe were mentioned under the diviſion before referred to, as ſpiritual offences, and I now repeat them as temporal ones alſo: the reaſon of diſtinguiſhing theſe overt acts of popery from all others, by ſetting the mark of high treaſon upon them, being certainly on a civil, and not on a religious, account. For every popiſh prieſt of courſe renounces his allegiance to his temporal ſovereign upon taking orders; that being inconſiſtent with his new engagements of canonical obedience to the pope: and the ſame may be ſaid of an obſtinate defence of his authority here, or a formal reconciliation to the ſee of Rome, which the ſta-

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tute conſtrues to be a withdrawing from one's natural allegiance; and therefore, beſides being reconciled "to the pope," it alſo adds "or any other prince or ſtate."

2. WITH regard to treaſons relative to the *coin* or other *royal ſignatures*, we may recollect that the only two offences reſpecting the coinage, which are made treaſon by the ſtatute 25 Edw. III. are the actual counterfeiting the gold and ſilver coin of this kingdom; or the importing ſuch counterfeit money with intent to utter it, knowing it to be falſe. But theſe not being found ſufficient to reſtrain the evil practices of coiners and falſe moneyers, other ſtatutes have been ſince made for that purpoſe. The crime itſelf is made a ſpecies of high treaſon; as being a breach of allegiance, by infringing the king's prerogative, and aſſuming one of the attributes of the ſovereign, to whom alone it belongs to ſet the value and denomination of coin made at home, or to fix the currency of foreign money: and beſides, as all money which bears the ſtamp of the kingdom is ſent into the world upon the public faith, as containing metal of a particular weight and ſtandard, whoever falſifies this is an offender againſt the ſtate, by contributing to render that public faith ſuſpected. And upon the ſame reaſons, by a law of the emperor Conſtantine [w], falſe coiners were declared guilty of high treaſon, and were condemned to be burned alive: as, by the laws of Athens [x], all counterfeiters, debaſers, and diminiſhers of the current coin were ſubjected to capital puniſhment. However, it muſt be owned, that this method of reaſoning is a little overſtrained: counterfeiting or debaſing the coin being uſually practiſed, rather for the ſake of private and unlawful lucre, than out of any diſaffection to the ſovereign. And therefore both this and it's kindred ſpecies of treaſon, that of counterfeiting the ſeals of the crown or other royal ſignatures, ſeem better denominated by the later civilians a branch of the *crimen falſi* or forgery (in which they are followed by Glanvil [y], Bracton [z], and Fleta [a]) than by

[w] *C.* 9. 24. 2. *Cod. Theod. de falſa moneta, l.* 9.
[x] Pott. Ant. l. 1. c. 26.
[y] *l.* 14. *c.* 7.
[z] *l.* 3. *c.* 3. §. 1 & 2.
[a] *l.* 1. *c.* 22.

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Conſtantine and our Edward the third, a ſpecies of the *crimen laeſae majeſtatis* or high treaſon. For this confounds the diſtinction and proportion of offences; and, by affixing the ſame ideas of guilt upon the man who coins a leaden groat and him who aſſaſſinates his ſovereign, takes off from that horror which ought to attend the very mention of the crime of high treaſon, and makes it more familiar to the ſubject. Before the ſtatute 25 Edw. III. the offence of counterfeiting the coin was held to be only a ſpecies of petit treaſon[b]: but ſubſequent acts in their new extenſions of the offence have followed the example of that, and have made it equally high treaſon as an endeavour to ſubvert the government, though not quite equal in it's puniſhment.

IN conſequence of the principle thus adopted, the ſtatute 1 Mar. c. 1. having at one blow repealed all intermediate treaſons created ſince the 25 Edw. III. it was thought expedient by ſtatute 1 Mar. ſt. 2. c. 6. to revive two ſpecies thereof; *viz.* 1. That if any perſon falſely forge or counterfeit any ſuch kind of coin of gold or ſilver, as is not the proper coin of this realm, but ſhall be current within this realm by conſent of the crown; or, 2. ſhall falſely forge or counterfeit the ſign manual, privy ſignet, or privy ſeal; ſuch offences ſhall be deemed high treaſon. And by ſtatute 1 & 2 P. & M. c. 11. if any perſons do bring into this realm ſuch falſe or counterfeit foreign money, being current here, knowing the ſame to be falſe, and ſhall utter the ſame in payment, they ſhall be deemed offenders in high treaſon. The money referred to in theſe ſtatutes muſt be ſuch as is abſolutely current here, in all payments, by the king's proclamation; of which there is none at preſent, Portugal money being only taken by conſent, as approaching the neareſt to our ſtandard, and falling in well enough with our diviſions of money into pounds and ſhillings: therefore to counterfeit it is not high treaſon, but another inferior offence. Clipping or defacing the genuine coin was not hitherto included in theſe ſtatutes; though an offence equally pernicious to trade, and an equal inſult upon

[b] 1 Hal. P. C. 224.

the prerogative, as well as perſonal affront to the ſovereign; whoſe very image ought to be had in reverence by all loyal ſubjects. And therefore, among the Romans[c], defacing or even melting down the emperor's ſtatues was made treaſon by the Julian law; together with other offences of the like ſort, according to that vague appendix, "*aliudve quid ſimile ſi admiſerint.*" And now, in England, by ſtatute 5 Eliz. c. 11. clipping, waſhing, rounding, or filing, for wicked gain's ſake, any of the money of this realm, or other money ſuffered to be current here, ſhall be adjudged high treaſon; and by ſtatute 18 Eliz. c. 1. the ſame offence is deſcribed in other more general words; *viz.* impairing, diminiſhing, falſifying, ſcaling, and lightening; and made liable to the ſame penalties. By ſtatute 8 & 9 W. III. c. 26. made perpetual by 7 Ann. c. 25. whoever ſhall knowingly make or mend, or aſſiſt in ſo doing, or ſhall buy or ſell, or have in his poſſeſſion, any inſtruments proper only for the coinage of money; or ſhall convey ſuch inſtruments out of the king's mint; ſhall be guilty of high treaſon: which is by much the ſevereſt branch of the coinage law. The ſtatute goes on farther, and enacts, that to mark any coin on the edges with letters, or otherwiſe, in imitation of thoſe uſed in the mint; or to colour, gild, or caſe over any coin reſembling the current coin, or even round blanks of baſe metal; ſhall be conſtrued high treaſon. And, laſtly, by ſtatute 15 & 16 Geo. II. c. 28. if any perſon colours or alters any ſilver current coin of this kingdom, to make it reſemble a gold one; or any copper coin, to make it reſemble a ſilver one; this is alſo high treaſon: but the offender ſhall be pardoned, in caſe he diſcovers and convicts two other offenders of the ſame kind.

3. THE other new ſpecies of high treaſon is ſuch as is created for the ſecurity of the *proteſtant ſucceſſion*, over and above ſuch treaſons againſt the king and government as were comprized under the ſtatute 25 Edw. III. For this purpoſe, after the act of ſettlement was made, for transferring the crown to

[c] *Ff.* 48. 4. 6.

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the illuſtrious houſe of Hanover, it was enacted by ſtatute 13 & 14 W. III. c. 3. that the pretended prince of Wales, who was then thirteen years of age, and had aſſumed the title of king James III, ſhould be attainted of high treaſon; and it was made high treaſon for any of the king's ſubjects by letters, meſſages, or otherwiſe, to hold correſpondence with him, or any perſon employed by him, or to remit any money for his uſe, knowing the ſame to be for his ſervice. And by ſtatute 17 Geo. II. c. 39. it is enacted, that if any of the ſons of the pretender ſhall land or attempt to land in this kingdom, or be found in Great Britain, or Ireland, or any of the dominions belonging to the ſame, he ſhall be judged attainted of high treaſon, and ſuffer the pains thereof. And to correſpond with them, or remit money for their uſe, is made high treaſon in the ſame manner as it was to correſpond with the father. By the ſtatute 1 Ann. ſt. 2. c. 17. if any perſon ſhall endeavour to deprive or hinder any perſon, being the next in ſucceſſion to the crown according to the limitations of the act of ſettlement, from ſucceeding to the crown, and ſhall maliciouſly and directly attempt the ſame by any overt act, ſuch offence ſhall be high treaſon. And by ſtatute 6 Ann. c. 7. if any perſon ſhall maliciouſly, adviſedly, and directly, by writing or printing, maintain and affirm, that any other perſon hath any right or title to the crown of this realm, otherwiſe than according to the act of ſettlement; or that the kings of this realm with the authority of parliament are not able to make laws and ſtatutes, to bind the crown and the deſcent thereof; ſuch perſon ſhall be guilty of high treaſon. This offence (or indeed maintaining this doctrine in any wiſe, that the king and parliament cannot limit the crown) was once before made high treaſon, by ſtatute 13 Eliz. c. 1. during the life of that princeſs. And after her deceaſe it continued a high miſdemeſnor, puniſhable with forfeiture of goods and chattels, even in the moſt flouriſhing aera of indefeaſible hereditary right and *jure divino* ſucceſſion. But it was again raiſed into high treaſon, by the ſtatute of Anne before-mentioned, at the time of a projected invaſion in favour of the then pretender; and

upon this ſtatute one Matthews, a printer, was convicted and executed in 1719, for printing a treaſonable pamphlet intitled *vox populi vox Dei*[d].

THUS much for the crime of treaſon, or *laeſae majeſtatis*, in all it's branches; which conſiſts, we may obſerve, originally, in groſſly counteracting that allegiance, which is due from the ſubject by either birth or reſidence: though, in ſome inſtances, the zeal of our legiſlators to ſtop the progreſs of ſome highly pernicious practices has occaſioned them a little to depart from this it's primitive idea. But of this enough has been hinted already: it is now time to paſs on from defining the crime to deſcribing it's puniſhment.

THE puniſhment of high treaſon in general is very ſolemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though uſually a ſledge or hurdle is allowed, to preſerve the offender from the extreme torment of being dragged on the ground or pavement[e]. 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's diſpoſal[f].

THE king may, and often doth, diſcharge all the puniſhment, except beheading, eſpecially where any of noble blood are attainted. For, beheading being part of the judgment, that may be executed, though all the reſt be omitted by the king's command[g]. But where beheading is no part of the judgment, as in murder or other felonies, it hath been ſaid that the king cannot change the judgment, although at the requeſt of the party,

[d] State Tr. IX. 680.

[e] 1 Hal. P. C. 382.

[f] This puniſhment for treaſon, ſir Edward Coke tells us, is warranted by divers examples in ſcripture; for Joab was drawn, Bithan was hanged, Judas was embowelled, and ſo of the reſt. (3 Inſt. 211.)

[g] 1 Hal. P. C. 351.

from

from one ſpecies of death to another[h]. But of this we ſhall ſay more hereafter.

IN the caſe of coining, which is a treaſon of a different complexion from the reſt, the puniſhment is milder for male offenders; being only to be drawn, and hanged by the neck till dead[i]. But in treaſons of every kind the puniſhment of women is the ſame, and different from that of men. For, as the natural modeſty of the ſex forbids the expoſing and publicly mangling their bodies, their ſentence (which is to the full as terrible to ſenſe as the other) is to be drawn to the gallows, and there to be burned alive[k].

THE conſequences of this judgment, (attainder, forfeiture, and corruption of blood) muſt be referred to the latter end of this book, when we ſhall treat of them all together, as well in treaſon as in other offences.

[h] 3 Inſt. 52.
[i] 1 Hal. P. C. 351.
[k] 2 Hal. P. C. 399.

CHAPTER THE SEVENTH.

OF FELONIES, INJURIOUS TO THE KING'S PREROGATIVE.

AS, according to the method I have adopted, we are next to conſider ſuch felonies as are more immediately injurious to the king's prerogative, it will not be amiſs here, at our firſt entrance upon this crime, to enquire briefly into the nature and meaning of *felony*; before we proceed upon any of the particular branches, into which it is divided.

FELONY, in the general acceptation of our Engliſh law, comprizes every ſpecies of crime, which occaſioned at common law the forfeiture of lands or goods. This moſt frequently happens in thoſe crimes, for which a capital puniſhment either is or was liable to be inflicted: for thoſe felonies, which are called clergyable, or to which the benefit of clergy extends, were antiently puniſhed with death in all lay, or unlearned, offenders; though now by the ſtatute-law that puniſhment is for the firſt offence univerſally remitted. Treaſon itſelf, ſays ſir Edward Coke [a], was antiently comprized under the name of felony: and in confirmation of this we may obſerve, that the ſtatute of treaſons, 25 Edw. III. c. 2. ſpeaking of ſome dubious crimes, directs a

[a] 3 Inſt. 15.

reference

reference to parliament; that it may be there adjudged, "whether they be treaſon, or *other* felony." All treaſons therefore, ſtrictly ſpeaking, are felonies; though all felonies are not treaſon. And to this alſo we may add, that all offences, now capital, are in ſome degree or other felony: and this is likewiſe the caſe with ſome other offences, which are not puniſhed with death; as ſuicide, where the party is already dead; homicide by chance-medly, or in ſelf-defence; and petit larceny, or pilfering; all which are (ſtrictly ſpeaking) felonies, as they ſubject the committers of them to forfeitures. So that upon the whole the only adequate definition of felony ſeems to be that which is before laid down; *viz.* an offence which occaſions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other puniſhment may be ſuperadded, according to the degree of guilt.

To explain this matter a little farther: the word *felony*, or *felonia*, is of undoubted feodal original, being frequently to be met with in the books of feuds, &c; but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the reſt: ſome deriving it from the Greek, φηλος, an impoſtor or deceiver; others from the Latin, *fallo*, *fefelli*, to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a ſtill ſtranger etymology[b]; that it is *crimen animo felleo perpetratum*, with a bitter or galliſh inclination. But all of them agree in the deſcription, that it is ſuch a crime as works a forfeiture of all the offender's lands, or goods. And this gives great probability to ſir Henry Spelman's Teutonic or German derivation of it[c]: in which language indeed, as the word is clearly of feodal original, we ought rather to look for it's ſignification, than among the Greeks and Romans. *Fe-lon* then, according to him, is derived from two northern words; fee, which ſignifies (we well know) the fief, feud, or beneficiary eſtate; and lon, which ſignifies price or value. Felony is therefore the ſame as *pretium feudi*, the conſi-

[b] 1 Inſt. 391. [c] Gloſſar. *tit. Felon.*

deration

deration for which a man gives up his fief; as we ſay in common ſpeech, ſuch an act is as much as your life, or eſtate, is worth. In this ſenſe it will clearly ſignify the feodal forfeiture, or act by which an eſtate is forfeited, or eſcheats, to the lord.

To confirm this we may obſerve, that it is in this ſenſe, of forfeiture to the lord, that the feodal writers conſtantly uſe it. For all thoſe acts, whether of a criminal nature or not, which at this day are generally forfeitures of copyhold eſtates[d], are ſtiled *feloniae* in the feodal law: "*ſcilicet, per quas feudum amittitur*[e]." As, "*ſi domino deſervire noluerit*[f]; *ſi per annum et diem ceſſaverit* "*in petenda inveſtitura*[g]; *ſi dominum ejuravit, i. e. negavit ſe a* "*domino feudum habere*[h]; *ſi a domino, in jus eum vocante, ter ci-* "*tatus non comparuerit*[i];" all theſe, with many others, are ſtill cauſes of forfeiture in our copyhold eſtates, and were denominated felonies by the feodal conſtitutions. So likewiſe injuries of a more ſubſtantial or criminal nature were denominated felonies, that is, forfeitures: as aſſaulting or beating the lord[k]; vitiating his wife or daughter, "*ſi dominum cucurbitaverit, i. e. cum uxore ejus concubue-* "*rit*[l];" all theſe are eſteemed felonies, and the latter is expreſſly ſo denominated, "*ſi fecerit feloniam, dominum forte cucurbitando*[m]." And as theſe contempts, or ſmaller offences, were felonies or acts of forfeiture, of courſe greater crimes, as murder and robbery, fell under the ſame denomination. On the other hand, the lord might be guilty of felony, or forfeit his ſeignory to the vaſſal, by the ſame acts as the vaſſal would have forfeited his feud to the lord. "*Si dominus commiſit feloniam, per quam vaſallus amitteret* "*feudum ſi eam commiſerit in dominum, feudi proprietatem etiam* "*dominus perdere debet*[n]." One inſtance given of this ſort of felony in the lord is beating the ſervant of his vaſal, ſo as that he loſes his ſervice; which ſeems merely in the nature of a civil

[d] See Vol. II. pag. 284.
[e] *Feud. l.* 2. *t.* 26. *in calc.*
[f] *Feud. l.* 1. *t.* 21.
[g] *Feud. l.* 2. *t.* 24.
[h] *Feud. l.* 2. *t.* 34. *l.* 2. *t.* 26. §. 3.
[i] *Feud. l.* 2. *t.* 22.
[k] *Feud. l.* 2. *t.* 24. §. 2.
[l] *Feud. l.* 1. *t.* 5.
[m] *Feud. l.* 2. *t.* 38. Britton. *l.* 1. *c.* 22.
[n] *Feud. l.* 2. *t.* 26 & 47.

injury,

injury, ſo far as it reſpects the vaſal. And all theſe felonies were to be determined "*per laudamentum ſive judicium parium ſuorum*" in the lord's court; as with us forfeitures of copyhold lands are preſentable by the homage in the court-baron.

FELONY, and the act of forfeiture to the lord, being thus ſynonymous terms in the feodal law, we may eaſily trace the reaſon why, upon the introduction of that law into England, thoſe crimes which induced ſuch forfeiture or eſcheat of lands (and, by a ſmall deflexion from the original ſenſe, ſuch as induced the forfeiture of goods alſo) were denominated felonies. Thus it was ſaid, that ſuicide, robbery, and rape, were felonies; that is, the conſequence of ſuch crimes was forfeiture; till by long uſe we began to ſignify by the term of felony the actual crime committed, and not the penal conſequence. And upon this ſyſtem only can we account for the cauſe, why treaſon in antient times was held to be a ſpecies of felony: *viz.* becauſe it induced a forfeiture.

HENCE it follows, that capital puniſhment does by no means enter into the true idea and definition of felony. Felony may be without inflicting capital puniſhment, as in the caſes inſtanced of ſelf-murder, excuſable homicide, and petit larciny: and it is poſſible that capital puniſhments may be inflicted, and yet the offence be no felony; as in the caſe of hereſy by the common law, which, though capital, never worked any forfeiture of lands or goods[o], an inſeparable incident to felony. And of the ſame nature is the puniſhment of ſtanding mute, without pleading to an indictment; which is capital, but without any forfeiture, and therefore ſuch ſtanding mute is no felony. In ſhort the true criterion of felony is forfeiture; for, as ſir Edward Coke juſtly obſerves[p], in all felonies which are puniſhable with death, the offender loſes all his lands in fee-ſimple, and alſo his goods and chattels; in ſuch as are not ſo puniſhable, his goods and chattels only.

[o] 3 Inſt. 43.

[p] 1 Inſt. 391.

THE idea of felony is indeed ſo generally connected with that of capital puniſhment, that we find it hard to ſeparate them; and to this uſage the interpretations of the law do now conform. And therefore if a ſtatute makes any new offence felony, the law[q] implies that it ſhall be puniſhed with death, *viz.* by hanging, as well as with forfeiture: unleſs the offender prays the benefit of clergy; which all felons are entitled once to have, unleſs the ſame is expreſſly taken away by ſtatute. And, in compliance herewith, I ſhall for the future conſider it alſo in the ſame light, as a generical term, including all capital crimes below treaſon; having premiſed thus much concerning the true nature and original meaning of felony, in order to account for the reaſon of thoſe inſtances I have mentioned, of felonies that are not capital, and capital offences that are not felonies: which ſeem at firſt view repugnant to the general idea which we now entertain of felony, as a crime to be puniſhed by death; whereas properly it is a crime to be puniſhed by forfeiture, and to which death may, or may not be, though it generally is, ſuperadded.

I PROCEED now to conſider ſuch felonies, as are more immediately injurious to the king's prerogative. Theſe are, 1. Offences relating to the coin, not amounting to treaſon. 2. Offences againſt the king's council. 3. The offence of ſerving a foreign prince. 4. The offence of imbezzling the king's armour or ſtores of war. To which may be added a fifth, 5. Deſertion from the king's armies in time of war.

1. OFFENCES relating to the *coin*, under which may be ranked ſome inferior miſdemeſnors not amounting to felony, are thus declared by a ſeries of ſtatutes, which I ſhall recite in the order of time. And, firſt, by ſtatute 27 Edw. I. c. 3. none ſhall bring pollards and crockards, which were foreign coins of baſe metal, into the realm, on pain of forfeiture of life and goods. By ſtatute 9 Edw. III. ſt. 2. no ſterling money ſhall be melted

[q] 1 Hawk. P. C. 107. 2 Hawk. P. C. 444.

down,

down, upon pain of forfeiture thereof. By ſtatute 14 Eliz. c. 3. ſuch as forge any foreign coin, although it be not made current here by proclamation, ſhall (with their aiders and abettors) be guilty of miſpriſion of treaſon: a crime which we ſhall hereafter conſider. By ſtatute 13 & 14 Car. II. c. 31. the offence of melting down any current ſilver money ſhall be puniſhed with forfeiture of the ſame, and alſo the double value: and the offender, if a freeman of any town, ſhall be disfranchiſed; if not, ſhall ſuffer ſix months impriſonment. By ſtatute 6 & 7 W. III. c. 17. if any perſon buys or ſells, or knowingly has in his cuſtody, any clippings or filings of the coin, he ſhall forfeit the ſame and 500*l*; one moiety to the king, and the other to the informer; and be branded in the cheek with the letter R. By ſtatute 8 & 9 W. III. c. 26. if any perſon ſhall blanch, or whiten, copper for ſale; (which makes it reſemble ſilver) or buy or ſell or offer to ſale any malleable compoſition, which ſhall be heavier than ſilver, and look, touch, and wear like gold, but be beneath the ſtandard: or if any perſon ſhall receive or pay any counterfeit or diminiſhed money of this kingdom, not being cut in pieces, (an operation which every man is thereby empowered to perform) at a leſs rate than it ſhall import to be of: (which demonſtrates a conſciouſneſs of it's baſeneſs, and a fraudulent deſign) all ſuch perſons ſhall be guilty of felony. But theſe precautions not being found ſufficient to prevent the uttering of falſe or diminiſhed money, which was only a miſdemeſnor at common law, it is enacted by ſtatute 15 & 16 Geo. II. c. 28. that if any perſon ſhall tender in payment any counterfeit coin, knowing it ſo to be, he ſhall for the firſt offence be impriſoned ſix months; and find ſureties for his good behaviour for ſix months more: for the ſecond offence, ſhall be impriſoned and find ſureties for two years: and, for the third offence, ſhall be guilty of felony without benefit of clergy. Alſo if a perſon knowingly tenders in payment any counterfeit money, and at the ſame time has more in his cuſtody; or ſhall, within ten days after, knowingly tender other falſe money; he ſhall for the firſt offence be impriſoned one year, and find ſureties for his good behaviour for two

years longer; and for the ſecond, be guilty of felony without benefit of clergy. By the ſame ſtatute it is alſo enacted, that, if any perſon counterfeits the copper coin, he ſhall ſuffer two years impriſonment, and find ſureties for two years more. Thus much for offences relating to the coin, as well miſdemeſnors as felonies, which I thought it moſt convenient to conſider in one and the ſame view.

2. FELONIES, againſt the king's *council*[r], are; firſt, by ſtatute 3 Hen. VII. c. 14. if any ſworn ſervant of the king's houſhold conſpires or confederates to kill any lord of this realm, or other perſon, ſworn of the king's council, he ſhall be guilty of felony. Secondly, by ſtatute 9 Ann. c. 16. to aſſault, ſtrike, wound, or attempt to kill, any privy counſellor in the execution of his office, is made felony without benefit of clergy.

3. FELONIES in *ſerving foreign ſtates*, which ſervice is generally inconſiſtent with allegiance to one's natural prince, are reſtrained and puniſhed by ſtatute 3 Jac. I. c. 4. which makes it felony for any perſon whatever to go out of the realm, to ſerve any foreign prince, without having firſt taken the oath of allegiance before his departure. And it is felony alſo for any gentleman, or perſon of higher degree, or who hath borne any office in the army, to go out of the realm to ſerve ſuch foreign prince or ſtate, without previouſly entering into a bond with two ſureties, not to be reconciled to the ſee of Rome, or enter into any conſpiracy againſt his natural ſovereign. And farther, by ſtatute 9 Geo. II. c. 30. enforced by ſtatute 29 Geo. II. c. 17. if any ſubject of Great Britain ſhall enliſt himſelf, or if any perſon ſhall procure him to be enliſted, in any foreign ſervice, or detain or embark him for that purpoſe, without licence under the king's ſign manual, he ſhall be guilty of felony without benefit of clergy: but if the perſon, ſo enliſted or enticed, ſhall diſcover his ſeducer within fifteen days, ſo as he may be apprehended and convicted of the ſame, he ſhall himſelf be indem-

[r] See Vol. I. pag. 332.

nified.

nified. By ſtatute 29 Geo. II. c. 17. it is moreover enacted, that to ſerve under the French king, as a military officer, ſhall be felony without benefit of clergy; and to enter into the Scotch brigade, in the Dutch ſervice, without previouſly taking the oaths of allegiance and abjuration, ſhall be a forfeiture of 500*l.*

4. FELONY, by *imbezzling* the king's *armour* or warlike *ſtores*, is ſo declared to be by ſtatute 31 Eliz. c. 4. which enacts, that if any perſon having the charge or cuſtody of the king's armour, ordnance, ammunition, or habiliments of war; or of any victual provided for victualling the king's ſoldiers or mariners; ſhall, either for gain, or to impede his majeſty's ſervice, imbezzle the ſame to the value of twenty ſhillings, ſuch offence ſhall be felony. And the ſtatute 22 Car. II. c. 5. takes away the benefit of clergy from this offence, ſo far as it relates to naval ſtores. Other inferior imbezzlements and miſdemeſnors, that fall under this denomination, are puniſhed by ſtatute 1 Geo. I. c. 25. with fine and impriſonment.

5. DESERTION from the king's armies in time of war, whether by land or ſea, in England or in parts beyond the ſeas, is by the ſtanding laws of the land (excluſive of the annual acts of parliament to puniſh mutiny and deſertion) and particularly by ſtatute 18 Hen. VI. c. 19. and 5 Eliz. c. 5. made felony, but not without benefit of clergy. But by the ſtatute 2 & 3 Edw. VI. c. 2. clergy is taken away from ſuch deſerters, and the offence is made triable by the juſtices of every ſhire. The ſame ſtatutes puniſh other inferior military offences with fines, impriſonment, and other penalties.

CHAPTER THE EIGHTH.

OF PRAEMUNIRE.

A THIRD ſpecies of offence more immediately affecting the king and his government, though not ſubject to capital puniſhment, is that of *praemunire:* ſo called from the words of the writ preparatory to the proſecution thereof; "*praemunire*[a] "*facias A. B.*" forewarn A. B. that he appear before us to anſwer the contempt wherewith he ſtands charged; which contempt is particularly recited in the preamble to the writ[b]. It took it's original from the exorbitant power claimed and exerciſed in England by the pope, which even in the days of blind zeal was too heavy for our anceſtors to bear.

IT may juſtly be obſerved, that religious principles, which (when genuine and pure) have an evident tendency to make their profeſſors better citizens as well as better men, have (when perverted and erroneous) been uſually ſubverſive of civil government, and been made both the cloak and the inſtrument of every pernicious deſign that can be harboured in the heart of man. The unbounded authority that was exerciſed by the Druids in the weſt, under the influence of pagan ſuperſtition, and the terrible ravages committed by the Saracens in the eaſt, to propagate the religion of Mahomet, both witneſs to the truth of

[a] A barbarous word for *praemonere.* [b] Old *Nat. Brev.* 101. *edit.* 1534.

that

that antient univerſal obſervation; that, in all ages and in all countries, civil and eccleſiaſtical tyranny are mutually productive of each other. It is therefore the glory of the church of England, that ſhe inculcates due obedience to lawful authority, and hath been (as her prelates on a trying occaſion once expreſſed it[c]) in her principles and practice ever moſt unqueſtionably loyal. The clergy of her perſuaſion, holy in their doctrines and unblemiſhed in their lives and converſation, are alſo moderate in their ambition, and entertain juſt notions of the ties of ſociety and the rights of civil government. As in matters of faith and morality they acknowlege no guide but the ſcriptures, ſo, in matters of external polity and of private right, they derive all their title from the civil magiſtrate; they look up to the king as their head, to the parliament as their law-giver, and pride themſelves in nothing more juſtly, than in being true members of the church, emphatically *by law* eſtabliſhed. Whereas the notions of eccleſiaſtical liberty, in thoſe who differ from them, as well in one extreme as the other (for I here only ſpeak of extremes) are equally and totally deſtructive of thoſe ties and obligations by which all ſociety is kept together; equally encroaching on thoſe rights, which reaſon and the original contract of every free ſtate in the univerſe have veſted in the ſovereign power; and equally aiming at a diſtinct independent ſupremacy of their own, where ſpiritual men and ſpiritual cauſes are concerned. The dreadful effects of ſuch a religious bigotry, when actuated by erroneous principles, even of the proteſtant kind, are ſufficiently evident from the hiſtory of the anabaptiſts in Germany, the covenanters in Scotland, and that deluge of ſectaries in England, who murdered their ſovereign, overturned the church and monarchy, ſhook every pillar of law, juſtice, and private property, and moſt devoutly eſtabliſhed a kingdom of the ſaints in their ſtead. But theſe horrid devaſtations, the effects of mere madneſs or of zeal that was nearly allied to it, though violent and tumultuous, were but of a ſhort duration. Whereas the progreſs of the papal policy, long actuated by the ſteady counſels of ſucceſſive pontiffs,

[c] Addreſs to James II. 1687.

took

took deeper root, and was at length in ſome places with difficulty, in others never yet, extirpated. For this we might call to witneſs the black intrigues of the Jeſuits, ſo lately triumphant over Chriſtendom, but now univerſally abandoned by even the Roman catholic powers: but the ſubject of our preſent chapter rather leads us to conſider the vaſt ſtrides, which were formerly made in this kingdom by the popiſh clergy; how nearly they arrived to effecting their grand deſign; ſome few of the means they made uſe of for eſtabliſhing their plan; and how almoſt all of them have been defeated or converted to better purpoſes, by the vigour of our free conſtitution, and the wiſdom of ſucceſſive parliaments.

THE antient Britiſh church, by whomſoever planted, was a ſtranger to the biſhop of Rome, and all his pretended authority. But, the pagan Saxon invaders having driven the profeſſors of chriſtianity to the remoteſt corners of our iſland, their own converſion was afterwards effected by Auguſtin the monk, and other miſſionaries from the court of Rome. This naturally introduced ſome few of the papal corruptions in point of faith and doctrine; but we read of no civil authority claimed by the pope in theſe kingdoms, till the aera of the Norman conqueſt: when the then reigning pontiff having favoured duke William in his projected invaſion, by bleſſing his hoſt and conſecrating his banners, he took that opportunity alſo of eſtabliſhing his ſpiritual encroachments; and was even permitted ſo to do by the policy of the conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates: prelates, who, being bred abroad in the doctrine and practice of ſlavery, had contracted a reverence and regard for it, and took a pleaſure in rivetting the chains of a free-born people.

THE moſt ſtable foundation of legal and rational government is a due ſubordination of rank, and a gradual ſcale of authority; and tyranny alſo itſelf is moſt ſurely ſupported by a regular increaſe of deſpotiſm, riſing from the ſlave to the ſultan: with this

this difference however, that the meaſure of obedience in the one is grounded on the principles of ſociety, and is extended no farther than reaſon and neceſſity will warrant; in the other it is limited only by abſolute will and pleaſure, without permitting the inferior to examine the title upon which it is founded. More effectually therefore to enſlave the conſciences and minds of the people, the Romiſh clergy themſelves paid the moſt implicit obedience to their own ſuperiors or prelates; and they, in their turns, were as blindly devoted to the will of the ſovereign pontiff, whoſe deciſions they held to be infallible, and his authority co-extenſive with the chriſtian world. Hence his legates *a latere* were introduced into every kingdom of Europe, his bulles and decretal epiſtles became the rule both of faith and diſcipline, his judgment was the final reſort in all caſes of doubt or difficulty, his decrees were enforced by anathemas and ſpiritual cenſures, he dethroned even kings that were refractory, and denied to whole kingdoms (when undutiful) the exerciſe of chriſtian ordinances, and the benefits of the goſpel of God.

BUT, though the being ſpiritual head of the church was a thing of great ſound, and of greater authority, among men of conſcience and piety, yet the court of Rome was fully apprized that (among the bulk of mankind) power cannot be maintained without property; and therefore it's attention began very early to be rivetted upon every method that promiſed pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchaſe of maſſes to redeem the ſouls of the deceaſed. New-fangled offences were created, and indulgences were ſold to the wealthy, for liberty to ſin without danger. The canon law took cognizance of crimes, injoined penance *pro ſalute animae*, and commuted that penance for money. Non-reſidence and pluralities among the clergy, and marriages among the laity related within the ſeventh degree, were ſtrictly prohibited by canon; but diſpenſations were ſeldom denied to thoſe who could afford to buy them. In ſhort, all the wealth of chriſtendom

was gradually drained, by a thouſand chanels, into the coffers of the holy ſee.

THE eſtabliſhment alſo of the feodal ſyſtem in moſt of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for uſurping a ſimilar authority over all the preferments of the church; which began firſt in Italy, and gradually ſpread itſelf to England. The pope became a feodal lord; and all ordinary patrons were to hold their right of patronage under this univerſal ſuperior. Eſtates held by feodal tenure, being originally gratuitous donations, were at that time denominated *beneficia:* their very name as well as conſtitution was borrowed, and the care of the ſouls of a pariſh thence came to be denominated a *benefice*. Lay fees were conferred by inveſtiture or delivery of corporal poſſeſſion; and ſpiritual benefices, which at firſt were univerſally donatives, now received in like manner a ſpiritual inveſtiture, by inſtitution from the biſhop, and induction under his authority. As lands eſcheated to the lord, in defect of a legal tenant, ſo benefices lapſed to the biſhop upon non-preſentation by the patron, in the nature of a ſpiritual eſcheat. The annual tenths collected from the clergy were equivalent to the feodal render, or rent reſerved upon a grant; the oath of canonical obedience was copied from the oath of fealty required from the vaſal by his ſuperior; and the *primer ſeiſins* of our military tenures, whereby the firſt profits of an heir's eſtate were cruelly extorted by his lord, gave birth to as cruel an exaction of firſt-fruits from the beneficed clergy. And the occaſional aids and talliages, levied by the prince on his vaſals, gave a handle to the pope to levy, by the means of his legates *a latere*, peter-pence and other taxations.

AT length the holy father went a ſtep beyond any example of either emperor or feodal lord. He reſerved to himſelf, by his own apoſtolical authority[d], the preſentation to all benefices which

[d] *Extrav. l.* 3. *t.* 2. *c.* 13.

became

became vacant while the incumbent was attending the court of Rome upon any occaſion, or on his journey thither, or back again; and moreover ſuch alſo as became vacant by his promotion to a biſhoprick or abbey: "*etiamſi ad illa perſonae conſue-*" *verint et debuerint per electionem aut quemvis alium modum aſſumi.*" And this laſt, the canoniſts declared, was no detriment at all to the patron, being only like the change of a life in a feodal eſtate by the lord. Diſpenſations to avoid theſe vacancies begat the doctrine of *commendams:* and papal *proviſions* were the previous nomination to ſuch benefices, by a kind of anticipation, before they became actually void; though afterwards indiſcriminately applied to any right of patronage exerted or uſurped by the pope. In conſequence of which the beſt livings were filled by Italian and other foreign clergy, equally unſkilled in and averſe to the laws and conſtitution of England. The very nomination to biſhopricks, that antient prerogative of the crown, was wreſted from king Henry the firſt, and afterwards from his ſucceſſor king John; and ſeemingly indeed conferred on the chapters belonging to each ſee: but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually veſted in the pope. And, to ſum up this head with a tranſaction moſt unparalleled and aſtoniſhing in it's kind, pope Innocent III had at length the effrontery to demand, and king John had the meanneſs to conſent to, a reſignation of his crown to the pope, whereby England was to become for ever St Peter's patrimony; and the daſtardly monarch re-accepted his ſceptre from the hands of the papal legate, to hold as the vaſal of the holy ſee, at the annual rent of a thouſand marks.

ANOTHER engine ſet on foot, or at leaſt greatly improved, by the court of Rome, was a maſterpiece of papal policy. Not content with the ample proviſion of tithes, which the law of the land had given to the parochial clergy, they endeavoured to graſp at the lands and inheritances of the kingdom, and (had not the legiſlature withſtood them) would by this time have probably

been maſters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine and other rules, men of ſour and auſtere religion, ſeparated from the world and it's concerns by a vow of perpetual celibacy, yet faſcinating the minds of the people by pretences to extraordinary ſanctity, while all their aim was to aggrandize the power and extend the influence of their grand ſuperior the pope. And as, in thoſe times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe, that founding a monaſtery a little before their deaths would atone for a life of incontinence, diſorder, and bloodſhed. Hence innumerable abbeys and religious houſes were built within a century after the conqueſt, and endowed, not only with the tithes of pariſhes which were raviſhed from the ſecular clergy, but alſo with lands, manors, lordſhips, and extenſive baronies. And the doctrine inculcated was, that whatever was ſo given to, or purchaſed by, the monks and friers, was conſecrated to God himſelf; and that to alienate or take it away was no leſs than the ſin of ſacrilege.

I MIGHT here have enlarged upon other contrivances, which will occur to the recollection of the reader, ſet on foot by the court of Rome, for effecting an entire exemption of it's clergy from any intercourſe with the civil magiſtrate: ſuch as the ſeparation of the eccleſiaſtical court from the temporal; the appointment of it's judges by merely ſpiritual authority, without any interpoſition from the crown; the excluſive juriſdiction it claimed over all eccleſiaſtical perſons and cauſes; and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or puniſhment except before their own tribunal. But the hiſtory and progreſs of eccleſiaſtical courts [e], as well as of purchaſes in mortmain [f], have already been fully diſcuſſed in the preceding volumes: and we ſhall have an opportunity of examining at large the nature of the *privilegium clericale* in the progreſs of the preſent book. And therefore I ſhall only obſerve

[e] See Vol. III. pag. 61.

[f] See Vol. II. pag. 268.

at

at preſent, that notwithſtanding this plan of pontificial power was ſo deeply laid, and ſo indefatigably purſued by the unwearied politics of the court of Rome through a long ſucceſſion of ages; notwithſtanding it was poliſhed and improved by the united endeavours of a body of men, who engroſſed all the learning of Europe for centuries together; notwithſtanding it was firmly and reſolutely executed by perſons the beſt calculated for eſtabliſhing tyranny and deſpotiſm, being fired with a bigoted enthuſiaſm, (which prevailed not only among the weak and ſimple, but even among thoſe of the beſt natural and acquired endowments) unconnected with their fellow-ſubjects, and totally indifferent what might befal that poſterity to which they bore no endearing relation;---yet it vaniſhed into nothing, when the eyes of the people were a little enlightened, and they ſet themſelves with vigour to oppoſe it. So vain and ridiculous is the attempt to live in ſociety, without acknowleging the obligations which it lays us under; and to affect an intire independence of that civil ſtate, which protects us in all our rights, and gives us every other liberty, that only excepted of deſpiſing the laws of the community.

HAVING thus in ſome degree endeavoured to trace out the original and ſubſequent progreſs of the papal uſurpations in England, let us now return to the ſtatutes of *praemunire*, which were framed to encounter this overgrown yet encreaſing evil. King Edward I, a wiſe and magnanimous prince, ſet himſelf in earneſt to ſhake off this ſervile yoke [g]. He would not ſuffer his biſhops to attend a general council, till they had ſworn not to receive the papal benediction. He made light of all papal bulles and proceſſes: attacking Scotland in defiance of one; and ſeiſing the temporalities of his clergy, who under pretence of another refuſed to pay a tax impoſed by parliament. He ſtrengthened the ſtatutes of mortmain; thereby cloſing the great gulph, in which all the lands of the kingdom were in danger of being ſwallowed.

[g] Dav. 83, &c.

And,

And, one of his ſubjects having obtained a bulle of excommunication againſt another, he ordered him to be executed as a traitor, according to the antient law[h]. And in the thirty fifth year of his reign was made the firſt ſtatute againſt papal proviſions, which, according to ſir Edward Coke[i], is the foundation of all the ſubſequent ſtatutes of *praemunire*; which we rank as an offence immediately againſt the king, becauſe every encouragement of the papal power is a diminution of the authority of the crown.

IN the weak reign of Edward the ſecond the pope again endeavoured to encroach, but the parliament manfully withſtood him; and it was one of the principal articles charged againſt that unhappy prince, that he had given allowance to the bulles of the ſee of Rome. But Edward the third was of a temper extremely different; and, to remedy theſe inconveniences firſt by gentle means, he and his nobility wrote an expoſtulation to the pope: but receiving a menacing and contemptuous anſwer, withal acquainting him, that the emperor, (who a few years before at the diet of Nuremberg, *A. D.* 1323, had eſtabliſhed a law againſt proviſions[k]) and alſo the king of France, had lately ſubmitted to the holy ſee; the king replied, that if both the emperor and the French king ſhould take the pope's part, he was ready to give battel to them both, in defence of the liberties of his crown. Hereupon more ſharp and penal laws were deviſed againſt proviſors[l], which enact ſeverally, that the court of Rome ſhall preſent or collate to no biſhoprick or living in England; and that whoever diſturbs any patron in the preſentation to a living by virtue of a papal proviſion, ſuch proviſor ſhall pay fine and ranſom to the king at his will; and be impriſoned till he renounces ſuch proviſion: and the ſame puniſhment is inflicted on ſuch as cite the king, or any of his ſubjects,

[h] Bro. *Abr. tit. Coron.* 115. *Treaſon.* 14. 5 Rep. part. 1. fol. 12. 3 Aſſ. 19.

[i] 2 Inſt. 583.

[k] Mod. Univ. Hiſt. xxix. 293.

[l] Stat. 25 Edw. III. ſt. 6. 27 Edw. III. ſt. 1. c. 1. 38 Edw. III. ſt. 1. c. 4. & ſt. 2. c. 1, 2, 3, 4.

to

to anſwer in the court of Rome. And when the holy ſee reſented theſe proceedings, and pope Urban V attempted to revive the vaſalage and annual rent to which king John had ſubjected his kingdom, it was unanimouſly agreed by all the eſtates of the realm in parliament aſſembled, 40 Edw. III. that king John's donation was null and void, being without the concurrence of parliament, and contrary to his coronation oath: and all the temporal nobility and commons engaged, that if the pope ſhould endeavour by proceſs or otherwiſe to maintain theſe uſurpations, they would reſiſt and withſtand him with all their power [m].

IN the reign of Richard the ſecond, it was found neceſſary to ſharpen and ſtrengthen theſe laws, and therefore it was enacted by ſtatutes 3 Ric. II. c. 3. and 7 Ric. II. c. 12. firſt, that no alien ſhould be capable of letting his benefice to farm; in order to compel ſuch, as had crept in, at leaſt to reſide on their preferments: and, afterwards, that no alien ſhould be capable to be preſented to any eccleſiaſtical preferment, under the penalty of the ſtatutes of proviſors. By the ſtatute 12 Ric. II. c. 15. all liegemen of the king, accepting of a living by any foreign proviſion, are put out of the king's protection, and the benefice made void. To which the ſtatute 13 Ric. II. ſt. 2. c. 2. adds baniſhment and forfeiture of lands and goods: and by c. 3. of the ſame ſtatute, any perſon bringing over any citation or excommunication from beyond ſea, on account of the execution of the foregoing ſtatutes of proviſors, ſhall be impriſoned, forfeit his goods and lands, and moreover ſuffer pain of life and member.

IN the writ for the execution of all theſe ſtatutes the words *praemunire facias*, being (as was ſaid) uſed to command a citation of the party, have denominated in common ſpeech, not only the writ, but the offence itſelf of maintaining the papal power, by the name of *praemunire*. And accordingly the next ſtatute I ſhall mention, which is generally referred to by all ſubſequent

[m] Seld. *in Flet.* 10. 4.

ſta-

ſtatutes, is uſually called the ſtatute of *praemunire*. It is the ſtatute 16 Ric. II. c. 5. which enacts, that whoever procures at Rome, or elſewhere, any tranſlations, proceſſes, excommunications, bulles, inſtruments, or other things which touch the king, againſt him, his crown, and realm, and all perſons aiding and aſſiſting therein, ſhall be put out of the king's protection, their lands and goods forfeited to the king's uſe, and they ſhall be attached by their bodies to anſwer to the king and his council; or proceſs of *praemunire facias* ſhall be made out againſt them, as in other caſes of proviſors.

BY the ſtatute 2 Hen. IV. c. 3. all perſons who accept any proviſion from the pope, to be exempt from canonical obedience to their proper ordinary, are alſo ſubjected to the penalties of *praemunire*. And this is the laſt of our antient ſtatutes touching this offence; the uſurped civil power of the biſhop of Rome being pretty well broken down by theſe ſtatutes, as his uſurped religious power was in about a century afterwards: the ſpirit of the nation being ſo much raiſed againſt foreigners, that about this time, in the reign of Henry the fifth, the alien priories, or abbies for foreign monks, were ſuppreſſed, and their lands given to the crown. And no farther attempts were afterwards made in ſupport of theſe foreign juriſdictions.

A LEARNED writer, before referred to, is therefore greatly miſtaken, when he ſays[n], that in Henry the ſixth's time the archbiſhop of Canterbury and other biſhops offered to the king a large ſupply, if he would conſent that all laws againſt proviſors, and eſpecially the ſtatute 16 Ric. II. might be repealed; but that this motion was rejected. This account is incorrect in all it's branches. For, firſt, the application, which he probably means, was made not by the biſhops only, but by the unanimous conſent of a provincial ſynod, aſſembled in 1439, 18 Hen. VI. that very ſynod which at the ſame time refuſed to confirm and allow a papal bulle, which then was laid before them. Next, the

[n] Dav. 96.

purport

purport of it was not to procure a repeal of the ſtatutes againſt proviſors, or that of Richard II in particular; but to requeſt that the penalties thereof, which by a forced conſtruction were applied to all that ſued in the ſpiritual, and even in many temporal, courts of this realm, might be turned againſt the proper objects only; thoſe who appealed to Rome or to any foreign juriſdictions: the tenor of the petition being, "that thoſe "penalties ſhould be taken to extend only to thoſe that commenced any ſuits or procured any writs or public inſtruments "at Rome, or elſewhere out of England; and that no one "ſhould be proſecuted upon that ſtatute for any ſuit in the ſpiritual courts or lay juriſdictions of this kingdom." Laſtly, the motion was ſo far from being rejected, that the king promiſed to recommend it to the next parliament, and in the mean time that no one ſhould be moleſted upon this account. And the clergy were ſo ſatisfied with their ſucceſs, that they granted to the king a whole tenth upon this occaſion [o].

AND indeed ſo far was the archbiſhop, who preſided in this ſynod, from countenancing the uſurped power of the pope in this realm, that he was ever a firm oppoſer of it. And, particularly, in the reign of Henry the fifth, he prevented the king's uncle from being then made a cardinal, and legate *a latere* from the pope; upon the mere principle of it's being within the miſchief of papal proviſions, and derogatory from the liberties of the Engliſh church and nation. For, as he expreſſed himſelf to the king in his letter upon that ſubject, "he was "bound to oppoſe it by his ligeance, and alſo to quit himſelf to "God, and the church of this land, of which God and the "king had made him governor." This was not the language of a prelate addicted to the ſlavery of the ſee of Rome; but of one, who was indeed of principles ſo very oppoſite to the papal uſurpations, that in the year preceding this ſynod, 17 Hen. VI. he refuſed to conſecrate a biſhop of Ely, that was nominated by pope Eugenius IV. A conduct quite conſonant to his former

[o] Wilk. *Concil. Mag. Brit. III.* 533.

behaviour, in 6 Hen. VI, when he refuſed to obey the commands of pope Martin V, who had required him to exert his endeavours to repeal the ſtatute of *praemunire*; ("*execrabile illud ſtatutum*," as the holy father phraſes it) which refuſal ſo far exaſperated the court of Rome againſt him, that at length the pope iſſued a bulle to ſuſpend him from his office and authority, which the archbiſhop diſregarded, and appealed to a general council. And ſo ſenſible were the nation of their primate's merit, that the lords ſpiritual, and temporal, and alſo the univerſity of Oxford, wrote letters to the pope in his defence; and the houſe of commons addreſſed the king, to ſend an embaſſador forthwith to his holineſs, on behalf of the archbiſhop, who had incurred the diſpleaſure of the pope for oppoſing the exceſſive power of the court of Rome [p].

THIS then is the original meaning of the offence, which we call *praemunire*; viz. introducing a foreign power into this land, and creating *imperium in imperio*, by paying that obedience to papal proceſs, which conſtitutionally belonged to the king alone, long before the reformation in the reign of Henry the eighth: at which time the penalties of *praemunire* were indeed extended to more papal abuſes than before; as the kingdom then entirely renounced the authority of the ſee of Rome, though not all the corrupted doctrines of the Roman church. And therefore by the ſeveral ſtatutes of 24 Hen. VIII. c. 12. and 25 Hen. VIII. c. 19 & 21. to appeal to Rome from any of the king's courts, which (though illegal before) had at times been connived at; to ſue to Rome for any licence or diſpenſation; or to obey any proceſs from thence; are made liable to the pains of *praemunire*. And, in order to reſtore to the king in effect the nomination of vacant biſhopricks, and yet keep up the eſtabliſhed forms, it is

[p] See Wilk. *Concil. Mag. Br.* Vol. III. *paſſim.* and Dr Duck's life of archbiſhop Chichele, who was the prelate here ſpoken of, and the munificent founder of All Souls college in Oxford: in vindication of whoſe memory the author hopes to be excuſed this digreſſion; if indeed it be a digreſſion, to ſhew how contrary to the ſentiments of ſo learned and pious a prelate, even in the days of popery, thoſe uſurpations were, which the ſtatutes of *praemunire* and proviſors were made to reſtrain.

enacted

enacted by ſtatute 25 Hen. VIII. c. 20. that if the dean and chapter refuſe to elect the perſon named by the king, or any archbiſhop or biſhop to confirm or conſecrate him, they ſhall fall within the penalties of the ſtatutes of *praemunire*. Alſo by ſtatute 5 Eliz. c. 1. to refuſe the oath of ſupremacy will incur the pains of *praemunire*; and to defend the pope's juriſdiction in this realm, is a *praemunire* for the firſt offence, and high treaſon for the ſecond. So too, by ſtatute 13 Eliz. c. 2. to import any *agnus Dei*, croſſes, beads, or other ſuperſtitious things pretended to be hallowed by the biſhop of Rome, and tender the ſame to be uſed; or to receive the ſame with ſuch intent, and not diſcover the offender; or if a juſtice of the peace, knowing thereof, ſhall not within fourteen days declare it to a privy counſellor; they all incur a *praemunire*. But importing or ſelling maſs books, or other popiſh books, is by ſtatute 3 Jac. I. c. 5. §. 25. only liable to a penalty of forty ſhillings. Laſtly, to contribute to the maintenance of a jeſuit's college, or any popiſh ſeminary whatever, beyond ſea; or any perſon in the ſame; or to contribute to the maintenance of any jeſuit or popiſh prieſt in England, is by ſtatute 27 Eliz. c. 2. made liable to the penalties of *premunire*.

THUS far the penalties of *praemunire* ſeem to have kept within the proper bounds of their original inſtitution, the depreſſing the power of the pope: but, they being pains of no inconſiderable conſequence, it has been thought fit to apply the ſame to other heinous offences; ſome of which bear more, and ſome leſs relation to this original offence, and ſome no relation at all.

THUS, 1. By the ſtatute 1 & 2 Ph. & Mar. c. 8. to moleſt the poſſeſſors of abbey lands granted by parliament to Henry the eighth, and Edward the ſixth, is a *praemunire*. 2. So likewiſe is the offence of acting as a broker or agent in any uſurious contract, where above ten *per cent.* intereſt is taken, by ſtatute 13 Eliz. c. 10. 3. To obtain any ſtay of proceedings, other than by arreſt of judgment or writ of error, in any ſuit for a monopoly, is likewiſe a *p. aemunire*, by ſtatute 21 Jac. I. c. 3.

4. To obtain an excluſive patent for the ſole making or importation of gunpowder or arms, or to hinder others from importing them, is alſo a *praemunire* by two ſtatutes; the one 16 Car. I. c. 21. the other 1 Jac. II. c. 8. 5. On the abolition, by ſtatute 12 Car. II. c. 24. of purveyance [q], and the prerogative of preemption, or taking any victual, beaſts, or goods for the king's uſe, at a ſtated price, without conſent of the proprietor, the exertion of any ſuch power for the future was declared to incur the penalties of *praemunire*. 6. To aſſert, maliciouſly and adviſedly, by ſpeaking or writing, that both or either houſe of parliament have a legiſlative authority without the king, is declared a *praemunire* by ſtatute 13 Car. II. c. 1. 7. By the *habeas corpus* act alſo, 31 Car. II. c. 2. it is a *praemunire*, and incapable of the king's pardon, beſides other heavy penalties [r], to ſend any ſubject of this realm a priſoner into parts beyond the ſeas. 8. By the ſtatute 1 W. & M. ſt. 1. c. 8. perſons of eighteen years of age, refuſing to take the new oaths of allegiance, as well as ſupremacy, upon tender by the proper magiſtrate, are ſubject to the penalties of a *praemunire*; and by ſtatute 7 & 8 W. III. c. 24. ſerjeants, counſellors, proctors, attorneys, and all officers of courts, practiſing without having taken the oaths of allegiance and ſupremacy, and ſubſcribed the declaration againſt popery, are guilty of a *praemunire*, whether the oaths be tendered or no. 9. By the ſtatute 6 Ann. c. 7. to aſſert maliciouſly and directly, by preaching, teaching, or adviſed ſpeaking, that the then pretended prince of Wales, or any perſon other than according to the acts of ſettlement and union, hath any right to the throne of theſe kingdoms; or that the king and parliament cannot make laws to limit the deſcent of the crown; ſuch preaching, teaching, or adviſed ſpeaking is a *praemunire*: as writing, printing, or publiſhing the ſame doctrines amounted, we may remember, to high treaſon. 10. By ſtatute 6 Ann. c. 23. if the aſſembly of peers of Scotland, convened to elect their ſixteen repreſentatives in the Britiſh parliament, ſhall preſume to treat

[q] See Vol. I. pag. 287.

[r] See Vol. I. pag. 138. Vol. III. pag. 137

of

of any other matter ſave only the election, they incur the penalties of a *praemunire*. 11. The laſt offence that has been made a *praemunire*, was by ſtatute 6 Geo. I. c. 18. the year after the infamous ſouth ſea project had beggared half the nation. This therefore makes all unwarrantable undertakings by unlawful ſubſcriptions, then commonly known by the name of bubbles, ſubject to the penalties of a *praemunire*.

HAVING thus enquired into the nature and ſeveral ſpecies of *praemunire*, it's puniſhment may be gathered from the foregoing ſtatutes, which are thus ſhortly ſummed up by ſir Edward Coke[s]: "that, from the conviction, the defendant ſhall "be out of the king's protection, and his lands and tenements, "goods and chattels forfeited to the king: and that his body "ſhall remain in priſon *at the king's pleaſure*; or (as other autho-"rities have it) *during life*[t]:" both which amount to the ſame thing; as the king by his prerogative may any time remit the whole, or any part of the puniſhment, except in the caſe of tranſgreſſing the ſtatute of *habeas corpus*. Theſe forfeitures, here inflicted, do not (by the way) bring this offence within our former definition of felony; being inflicted by particular ſtatutes, and not by the common law. But ſo odious, ſir Edward Coke adds, was this offence of *praemunire*, that a man that was attainted of the ſame might have been ſlain by any other man without danger of law: becauſe it was provided by law[u], that any man might do to him as to the king's enemy; and any man may lawfully kill an enemy. However, the poſition itſelf, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battel, or for neceſſary ſelf-defence. And, to obviate ſuch ſavage and miſtaken notions, the ſtatute 5 Eliz. c. 1. provides, that it ſhall not be lawful to kill any perſon attainted in a *praemunire*, any law, ſtatute, opinion, or expoſi-

[s] 1 Inſt. 129.
[t] 1 Bulſtr. 199.
[u] Stat. 25 Edw. III. ſt. 5. c. 22.

tion

tion of law to the contrary notwithſtanding. But ſtill ſuch delinquent, though protected as a part of the public from public wrongs, can bring no action for any private injury, how atrocious ſoever; being ſo far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may ſuffer. And no man, knowing him to be guilty, can with ſafety give him comfort, aid, or relief[w].

[w] 1 Hawk. P. C. 55.

CHAPTER THE NINTH.

OF MISPRISIONS AND CONTEMPTS, AFFECTING THE KING AND GOVERNMENT.

THE fourth ſpecies of offences, more immediately againſt the king and government, are intitled miſpriſions and contempts.

MISPRISIONS (a term derived from the old French, *meſpris*, a neglect or contempt) are, in the acceptation of our law, generally underſtood to be all ſuch high offences as are under the degree of capital, but nearly bordering thereon: and it is ſaid, that a miſpriſion is contained in every treaſon and felony whatſoever; and that, if the king ſo pleaſe, the offender may be proceeded againſt for the miſpriſion only [a]. And upon the ſame principle, while the juriſdiction of the ſtar-chamber ſubſiſted, it was held that the king might remit a proſecution for treaſon, and cauſe the delinquent to be cenſured in that court, merely for a high miſdemeſnor: as happened in the caſe of Roger earl of Rutland, in 43 Eliz. who was concerned in the earl of Eſſex's rebellion [b]. Miſpriſions are generally divided into two ſorts; negative, which conſiſt in the concealment of ſomething which ought to be revealed; and poſitive, which conſiſt in the commiſſion of ſomething which ought not to be done.

[a] Yearb. 2 *Ric. III.* 10. Staundf. P. C. 37. 1 Hawk. P. C. 55, 56.

[b] Hudſon of the court of ſtar-chamber. *MS. in Muſ. Brit.*

I. OF

I. OF the firſt, or negative kind, is what is called *miſpriſion of treaſon*; conſiſting in the bare knowlege and concealment of treaſon, without any degree of aſſent thereto: for any aſſent makes the party a principal traitor; as indeed the concealment, which was conſtrued aiding and abetting, did at the common law: in like manner as the knowlege of a plot againſt the ſtate, and not revealing it, was a capital crime at Florence, and other ſtates of Italy [c]. But it is now enacted by the ſtatute 1 & 2 Ph. & Mar. c. 10. that a bare concealment of treaſon ſhall be only held a miſpriſion. This concealment becomes criminal, if the party apprized of the treaſon does not, as ſoon as conveniently may be, reveal it to ſome judge of aſſize or juſtice of the peace[d]. But if there be any probable circumſtances of aſſent, as if one goes to a treaſonable meeting, knowing beforehand that a conſpiracy is intended againſt the king; or, being in ſuch company once by accident, and having heard ſuch treaſonable conſpiracy, meets the ſame company again, and hears more of it, but conceals it; this is an implied aſſent in law, and makes the concealer guilty of principal high treaſon [e].

THERE is alſo one poſitive miſpriſion of treaſon, created ſo by act of parliament. The ſtatute 13 Eliz. c. 2. enacts, that thoſe who forge foreign coin, not current in this kingdom, their aiders, abettors, and procurers, ſhall all be guilty of miſpriſion of treaſon. For, though the law would not put foreign coin upon quite the ſame footing as our own; yet, if the circumſtances of trade concur, the falſifying it may be attended with conſequences almoſt equally pernicious to the public; as the counterfeiting of Portugal money would be at preſent: and therefore the law has made it an offence juſt below capital, and that is all. For the puniſhment of miſpriſion of treaſon is loſs of the profits of lands during life, forfeiture of goods, and impriſonment during life. [f]. Which total forfeiture of the goods

[c] Guicciard. Hiſt. b. 3 & 13.
[d] 1 Hal. P. C. 372.
[e] 1 Hawk. P. C. 56.
[f] 1 Hal. P. C. 374.

was

was originally inflicted while the offence amounted to principal treaſon, and of courſe included in it a felony, by the common law; and therefore is no exception to the general rule laid down in a former chapter[g], that wherever an offence is puniſhed by ſuch total forfeiture it is felony at the common law.

MISPRISION *of felony* is alſo the concealment of a felony which a man knows, but never aſſented to; for, if he aſſented, this makes him either principal, or acceſſory. And the puniſhment of this, in a public officer, by the ſtatute Weſtm. 1. 3 Edw. I. c. 9. is impriſonment for a year and a day; in a common perſon, impriſonment for a leſs diſcretionary time; and, in both, fine and ranſom at the king's pleaſure: which pleaſure of the king muſt be obſerved, once for all, not to ſignify any extrajudicial will of the ſovereign, but ſuch as is declared by his repreſentatives, the judges in his courts of juſtice; "*voluntas regis in curia, non in camera*[h]."

THERE is alſo another ſpecies of negative miſpriſions; namely, the *concealing of treaſure-trove*, which belongs to the king or his grantees, by prerogative royal: the concealment of which was formerly puniſhable by death[j]; but now only by fine and impriſonment[i].

II. MISPRISIONS, which are merely poſitive, are generally denominated *contempts* or *high miſdemeſnors*; of which

1. THE firſt and principal is the *mal-adminiſtration* of ſuch high officers, as are in public truſt and employment. This is uſually puniſhed by the method of parliamentary impeachment: wherein ſuch penalties, ſhort of death, are inflicted, as to the wiſdom of the houſe of peers ſhall ſeem proper; conſiſting uſually of baniſhment, impriſonment, fines, or perpetual diſability. Hitherto alſo may be referred the offence of *imbezzling the*

[g] See pag. 94.
[h] 1 Hal. P. C. 375.
[j] Glanv. *l.* 1. *c.* 2.
[i] 3 Inſt. 133.

public money, called among the Romans *peculatus*, which the Julian law puniſhed with death in a magiſtrate, and with deportation, or baniſhment, in a private perſon[k]. With us it is not a capital crime, but ſubjects the committer of it to a diſcretionary fine and impriſonment. Other miſpriſions are, in general, ſuch contempts of the executive magiſtrate, as demonſtrate themſelves by ſome arrogant and undutiful behaviour towards the king and government. Theſe are

2. CONTEMPTS againſt the king's *prerogative*. As, by refuſing to aſſiſt him for the good of the public; either in his councils, by advice, if called upon; or in his wars, by perſonal ſervice for defence of the realm, againſt a rebellion or invaſion[l]. Under which claſs may be ranked the neglecting to join the *poſſe comitatus*, or power of the county, being thereunto required by the ſheriff or juſtices, according to the ſtatute 2 Hen. V. c. 8. which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel[m]. Contempts againſt the prerogative may alſo be, by preferring the intereſts of a foreign potentate to thoſe of our own, or doing or receiving any thing that may create an undue influence in favour of ſuch extrinſic power; as, by taking a penſion from any foreign prince without the conſent of the king[n]. Or, by diſobeying the king's lawful commands; whether by writs iſſuing out of his courts of juſtice, or by a ſummons to attend his privy council, or by letters from the king to a ſubject commanding him to return from beyond the ſeas, (for diſobedience to which his lands ſhall be ſeiſed till he does return, and himſelf afterwards puniſhed) or by his writ of *ne exeat regnum*, or proclamation, commanding the ſubject to ſtay at home[o]. Diſobedience to any of theſe commands is a high miſpriſion and contempt: and ſo, laſtly, is diſobedience to any act of parliament, where no particular penalty is aſſigned; for then it is puniſhable, like the reſt of

[k] *Inſt.* 4. 18. 9.
[l] 1 Hawk. P. C. 59.
[m] Lamb. Eir. 315.
[n] 3 Inſt. 144.
[o] See Vol. I. pag. 266.

theſe

theſe contempts, by fine and impriſonment, at the diſcretion of the king's courts of juſtice[p].

3. CONTEMPTS and miſpriſions againſt the king's *perſon* and *government*, may be by ſpeaking or writing againſt them, curſing or wiſhing him ill, giving out ſcandalous ſtories concerning him, or doing any thing that may tend to leſſen him in the eſteem of his ſubjects, may weaken his government, or may raiſe jealouſies between him and his people. It has been alſo held an offence of this ſpecies to drink to the pious memory of a traitor; or for a clergyman to abſolve perſons at the gallows, who there perſiſt in the treaſons for which they die: theſe being acts which impliedly encourage rebellion. And for this ſpecies of contempt a man may not only be fined and impriſoned, but ſuffer the pillory or other infamous corporal puniſhment[q]: in like manner as, in the antient German empire, ſuch perſons as endeavoured to ſow ſedition, and diſturb the public tranquillity, were condemned to become the objects of public notoriety and deriſion, by carrying a dog upon their ſhoulders from one great town to another. The emperors Otho I. and Frederic Barbaroſſa inflicted this puniſhment on noblemen of the higheſt rank[r].

4. CONTEMPTS againſt the king's *title*, not amounting to treaſon or *praemunire*, are the denial of his right to the crown in common and unadviſed diſcourſe; for, if it be by adviſedly ſpeaking, we have ſeen[s] that it amounts to a *praemunire*. This heedleſs ſpecies of contempt is however puniſhed by our law with fine and impriſonment. Likewiſe if any perſon ſhall in any wiſe hold, affirm, or maintain, that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; this is a miſdemeſnor, by ſtatute 13 Eliz. c. 1. and puniſhable with forfeiture of goods and chattels. A contempt may alſo ariſe from refuſing or neglecting to take the oaths, appointed by ſtatute for the better ſecuring the

[p] 1 Hawk. P. C. 60.
[q] *Ibid.*
[r] Mod. Un. Hiſt. xxix. 28. 119.
[s] See pag. 91.

government; and yet acting in a public office, place of truſt, or other capacity, for which the ſaid oaths are required to be taken; *viz.* thoſe of allegiance, ſupremacy, and abjuration: which muſt be taken within ſix calendar months after admiſſion. The penalties for this contempt, inflicted by ſtatute 1 Geo. I. ſt. 2. c. 13. are very little, if any thing, ſhort of thoſe of a *praemunire:* being an incapacity to hold the ſaid offices, or any other; to proſecute any ſuit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of parliament: and after conviction the offender ſhall alſo forfeit 500*l.* to him or them that will ſue for the ſame. Members on the foundation of any college in the two univerſities, who by this ſtatute are bound to take the oaths, muſt alſo regiſter a certificate thereof in the college regiſter, within one month after; otherwiſe, if the electors do not remove him, and elect another within twelve months, or after, the king may nominate a perſon to ſucceed him by his great ſeal or ſign manual. Beſides thus taking the oaths for offices, any two juſtices of the peace may by the ſame ſtatute ſummon, and tender the oaths to, any perſon whom they ſhall ſuſpect to be diſaffected; and every perſon refuſing the ſame, who is properly called a non-juror, ſhall be adjudged a popiſh recuſant convict, and ſubjected to the ſame penalties that were mentioned in a former chapter[t]; which in the end may amount to the alternative of abjuring the realm, or ſuffering death as a felon.

5. CONTEMPTS againſt the king's *palaces* or *courts of juſtice* have always been looked upon as high miſpriſions: and by the antient law, before the conqueſt, fighting in the king's palace, or before the king's judges, was puniſhed with death[v]. So too, in the old Gothic conſtitution, there were many places privileged by law, *quibus major reverentia et ſecuritas debetur, ut templa et judicia, quae ſancta habebantur,---arces et aula regis, ---denique locus quilibet praeſente aut adventante rege*[u]. And at

[t] See pag. 55.

[u] Stiernh. *de jure Goth. l.* 3. *c.* 3.

[v] 3 Inſt. 140. *LL. Alured. cap.* 7. & 34.

preſent,

preſent, with us, by the ſtatute 33 Hen. VIII. c. 12. malicious ſtriking in the king's palace, wherein his royal perſon reſides, whereby blood is drawn, is puniſhable by perpetual impriſonment, and fine at the king's pleaſure; and alſo with loſs of the offender's right hand, the ſolemn execution of which ſentence is preſcribed in the ſtatute at length.

BUT *ſtriking* in the king's ſuperior courts of juſtice, in Weſtminſter-hall, or at the aſſiſes, is made ſtill more penal than even in the king's palace. The reaſon ſeems to be, that thoſe courts being antiently held in the king's palace, and before the king himſelf, ſtriking there included the former contempt againſt the king's palace, and ſomething more; *viz.* the diſturbance of public juſtice. For this reaſon, by the antient common law before the conqueſt[w], ſtriking in the king's courts of juſtice, or drawing a ſword therein, was a capital felony: and our modern law retains ſo much of the antient ſeverity, as only to exchange the loſs of life for the loſs of the offending limb. Therefore a ſtroke or a blow in ſuch court of juſtice, whether blood be drawn or not, or even aſſaulting a judge, ſitting in the court, by drawing a weapon, without any blow ſtruck, is puniſhable with the loſs of the right hand, impriſonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life[x]. A *reſcue* alſo of a priſoner from any of the ſaid courts, without ſtriking a blow, is puniſhed with perpetual impriſonment, and forfeiture of goods, and of the profits of lands during life[y]: being looked upon as an offence of the ſame nature with the laſt; but only, as no blow is actually given, the amputation of the hand is excuſed. For the like reaſon an affray, or riot, near the ſaid courts, but out of their actual view, is puniſhed only with fine and impriſonment[z].

[w] *LL. Inat. c.* 6. *LL. Canut. c.* 56. *LL. Alured. c.* 7.

[x] Staundf. P. C. 38. 3 Inſt. 140, 141.

[y] 1 Hawk. P. C. 57.

[z] Cro. Car. 373.

NOT

NOT only ſuch as are guilty of an actual violence, but of threatening or reproachful words to any judge ſitting in the courts, are guilty of a high miſpriſion, and have been puniſhed with large fines, impriſonment, and corporal puniſhment[a]. And, even in the inferior courts of the king, an affray, or contemptuous behaviour, is puniſhable with a fine by the judges there ſitting; as by the ſteward in a court-leet, or the like[b].

LIKEWISE all ſuch, as are guilty of any injurious treatment to thoſe who are immediately under the protection of a court of juſtice, are puniſhable by fine and impriſonment: as if a man aſſaults or threatens his adverſary for ſuing him, a counſellor or attorney for being employed againſt him, a juror for his verdict, or a gaoler or other miniſterial officer for keeping him in cuſtody, and properly executing his duty[c]: which offences, when they proceeded farther than bare threats, were puniſhed in the Gothic conſtitutions with exile and forfeiture of goods[d].

LASTLY, to endeavour to diſſuade a witneſs from giving evidence; to diſcloſe an examination before the privy council; or, to adviſe a priſoner to ſtand mute; (all of which are impediments of juſtice) are high miſpriſions, and contempts of the king's courts, and puniſhable by fine and impriſonment. And antiently it was held, that if one of the grand jury diſcloſed to any perſon indicted the evidence that appeared againſt him, he was thereby made acceſſory to the offence, if felony; and in treaſon a principal. And at this day it is agreed, that he is guilty of a high miſpriſion[e], and liable to be fined and impriſoned[f].

[a] Cro. Car. 503.
[b] 1 Hawk. P. C. 58.
[c] 3 Inſt. 141, 142.
[d] Stiernh. *de jure Goth. l.* 3. *c.* 3.
[e] See Barr. 212. 27 Aſſ. pl. 44. §. 4. fol. 138.
[f] 1 Hawk. P. C. 59.

CHAPTER THE TENTH.

OF OFFENCES AGAINST PUBLIC JUSTICE.

THE order of our diſtribution will next lead us to take into conſideration ſuch crimes and miſdemeſnors as more eſpecially affect the *common-wealth*, or public polity of the kingdom: which however, as well as thoſe which are peculiarly pointed againſt the lives and ſecurity of private ſubjects, are alſo offences againſt the king, as the *pater-familias* of the nation; to whom it appertains by his regal office to protect the community, and each individual therein, from every degree of injurious violence, by executing thoſe laws, which the people themſelves in conjunction with him have enacted; or at leaſt have conſented to, by an agreement either expreſſly made in the perſons of their repreſentatives, or by a tacit and implied conſent preſumed and proved by immemorial uſage.

THE ſpecies of crimes, which we have now before us, is ſubdivided into ſuch a number of inferior and ſubordinate claſſes, that it would much exceed the bounds of an elementary treatiſe, and be inſupportably tedious to the reader, were I to examine them all minutely, or with any degree of critical accuracy. I ſhall therefore confine myſelf principally to general definitions or deſcriptions of this great variety of offences, and to the puniſhments inflicted by law for each particular offence; with now and then a few incidental obſervations: referring the ſtudent for more

more particulars to other voluminous authors; who have treated of theſe ſubjects with greater preciſion and more in detail, than is conſiſtent with the plan of theſe commentaries.

THE crimes and miſdemeſnors, that more eſpecially affect the common-wealth, may be divided into five ſpecies; *viz.* offences againſt public *juſtice*, againſt the public *peace*, againſt public *trade*, againſt the public *health*, and againſt the public *police* or *oeconomy:* of each of which we will take a curſory view in their order.

FIRST then, of offences againſt public *juſtice:* ſome of which are felonious, whoſe puniſhment may extend to death; others only miſdemeſnors. I ſhall begin with thoſe that are moſt penal, and deſcend gradually to ſuch as are of leſs malignity.

1. IMBEZZLING or vacating *records*, or falſifying certain other proceedings in a court of judicature, is a felonious offence againſt public juſtice. It is enacted by ſtatute 8 Hen. VI. c. 12. that if any clerk, or other perſon, ſhall wilfully take away, withdraw, or avoid any record, or proceſs in the ſuperior courts of juſtice in Weſtminſter-hall, by reaſon whereof the judgment ſhall be reverſed or not take effect; it is felony not only in the principal actors, but alſo in their procurers, and abettors. Likewiſe by ſtatute 21 Jac. I. c. 26. to acknowlege any fine, recovery, deed enrolled, ſtatute, recognizance, bail, or judgment, in the name of another perſon not privy to the ſame, is felony without benefit of clergy. Which law extends only to proceedings in the courts themſelves: but by ſtatute 4 W. & M. c. 4. to perſonate any other perſon before any commiſſioner authorized to take bail in the country is alſo felony. For no man's property would be ſafe, if records might be ſuppreſſed or falſified, or perſons' names be falſely uſurped in courts, or before their public officers.

2. To

2. To prevent abuſes by the extenſive power, which the law is obliged to repoſe in gaolers, it is enacted by ſtatute 14 Edw. III. c. 10. that if any *gaoler* by too great dureſs of impriſonment makes any priſoner, that he hath in ward, become an *approver* or an *appellor* againſt his will; that is, as we ſhall ſee hereafter, to accuſe and turn evidence againſt ſome other perſon; it is felony in the gaoler. For, as ſir Edward Coke[a] obſerves, it is not lawful to induce or excite any man even to a juſt accuſation of another; much leſs to do it by dureſs of impriſonment; and leaſt of all by a gaoler, to whom the priſoner is committed for ſafe cuſtody.

3. A THIRD offence againſt public juſtice is *obſtructing* the execution of lawful *proceſs*. This is at all times an offence of a very high and preſumptuous nature; but more particularly ſo, when it is an obſtruction of an arreſt upon criminal proceſs. And it hath been holden, that the party oppoſing ſuch arreſt becomes thereby *particeps criminis*; that is, an acceſſory in felony, and a principal in high treaſon[b]. Formerly one of the greateſt obſtructions to public juſtice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent perſons aſſembled together to ſhelter themſelves from juſtice, (eſpecially in London and Southwark) under the pretext of their having been antient palaces of the crown, or the like[c]: all of which ſanctuaries for iniquity are now demoliſhed, and the oppoſing of any proceſs therein is made highly penal, by the ſtatutes 8 & 9 W. III. c. 27. 9 Geo. I. c. 28. and 11 Geo. I. c. 22. which enact, that perſons oppoſing the execution of any proceſs in ſuch pretended privileged places within the bills of mortality, or abuſing any officer in his endeavours to execute his duty therein, ſo that he receives bodily hurt, ſhall be guilty of felony, and tranſported for ſeven years.

[a] 3 Inſt. 91.

[b] 1 Hawk. P. C. 121.

[c] Such as *White-Friers*, and it's environs; the *Savoy*: and the *Mint* in Southwark.

4. An *eſcape* of a perſon arreſted upon criminal proceſs, by eluding the vigilance of his keepers before he is put in hold, is alſo an offence againſt public juſtice, and the party himſelf is puniſhable by fine or impriſonment[d]. But the officer permitting ſuch eſcape, either by negligence or connivance, is much more culpable than the priſoner; the natural deſire of liberty pleading ſtrongly in his behalf, though he ought in ſtrictneſs of law to ſubmit himſelf quietly to cuſtody, till cleared by the due courſe of juſtice. Officers therefore who, after arreſt, *negligently* permit a felon to eſcape, are alſo puniſhable by fine[e]; but *voluntary* eſcapes, by conſent and connivance of the officer, are a much more ſerious offence: for it is generally agreed that ſuch eſcapes amount to the ſame kind of offence, and are puniſhable in the ſame degree, as the offence of which the priſoner is guilty, and for which he is in cuſtody, whether treaſon, felony, or treſpaſs. And this, whether he were actually committed to gaol, or only under a bare arreſt[f]. But the officer cannot be thus puniſhed, till the original delinquent is actually found guilty or convicted, by verdict, confeſſion, or outlawry, of the crime for which he was ſo committed or arreſted: otherwiſe it might happen, that the officer might be puniſhed for treaſon or felony, and the perſon arreſted and eſcaping might turn out to be an innocent man. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and impriſoned for a miſdemeſnor[g].

5. Breach of priſon by the offender himſelf, when committed for *any* cauſe, was felony at the common law[h]: or even conſpiring to break it[i]. But this ſeverity is mitigated by the ſtatute *de frangentibus priſonam*, 1 Edw. II. which enacts, that no perſon ſhall have judgment of life or member, for breaking pri-

[d] 2 Hawk. P. C. 122.
[e] 1 Hal. P. C. 600.
[f] 1 Hal. P. C. 590. 2 Hawk. P. C. 134.
[g] 1 Hal. P. C. 588,9. 2 Hawk. P. C. 134,5.
[h] 1 Hal. P. C. 607.
[i] Bract. *l.* 3. *c.* 9.

ſon,

ſon, unleſs committed for ſome capital offence. So that to break priſon, when lawfully committed for any treaſon or felony, remains ſtill felony as at the common law; and to break priſon, when lawfully confined upon any other inferior charge, is ſtill puniſhable as a high miſdemeſnor by fine and impriſonment. For the ſtatute, which ordains that ſuch offence ſhall be no longer capital, never meant to exempt it entirely from every degree of puniſhment [k].

6. RESCUE is the forcibly freeing another from an arreſt or impriſonment; and is generally the ſame offence in the ſtranger ſo reſcuing, as it would have been in the party himſelf to have broken priſon [l]. A reſcue therefore of one apprehended for felony, is felony; for treaſon, treaſon; and for a miſdemeſnor, a miſdemeſnor alſo. But here, as upon voluntary eſcapes, the principal muſt firſt be attainted before the reſcuer can be puniſhed: and for the ſame reaſon; becauſe perhaps in fact it may turn out that there has been no offence committed [m]. By the ſtatute, 16 Geo. II. c. 31. to aſſiſt a priſoner in cuſtody for treaſon or felony with any arms, inſtruments of eſcape, or diſguiſe, without the knowlege of the gaoler; or any way to aſſiſt ſuch priſoner to attempt an eſcape, though no eſcape be actually made, is felony, and ſubjects the offender to tranſportation for ſeven years. And by the ſtatutes 25 Geo. II. c. 37. and 27 Geo. II. c. 15. to reſcue, or attempt to reſcue, any perſon committed for murder, or for any of the offences enumerated in the latter of thoſe acts, or in the black act 9 Geo. I. c. 22. is felony without benefit of clergy.

7. ANOTHER capital offence againſt public juſtice is the *returning from tranſportation*, or being ſeen at large in Great Britain before the expiration of the term for which the offender was ſentenced to be tranſported. This is made felony without

[k] 2 Hawk. P. C. 128.
[l] *Ibid.* 139.
[m] 1 Hal. P. C. 607.

benefit of clergy in moſt caſes by ſtatutes 4 Geo. I. c. 11. 6 Geo. I. c. 23. and 8 Geo. III. c. 15.

8. AN eighth is that of *taking a reward*, under pretence of *helping* the owner to his *ſtolen goods*. This was a contrivance carried to a great length of villainy in the beginning of the reign of George the firſt: the confederates of the felons thus diſpoſing of ſtolen goods, at a cheap rate, to the owners themſelves, and thereby ſtifling all farther enquiry. The famous Jonathan Wild had under him a well diſciplined corps of thieves, who brought in all their ſpoils to him; and he kept a ſort of public office for reſtoring them to the owners at half price. To prevent which audacious practice, to the ruin and in defiance of public juſtice, it was enacted by ſtatute 4 Geo. I. c. 11. that whoever ſhall take a reward under the pretence of helping any one to ſtolen goods, ſhall ſuffer as the felon who ſtole them; unleſs he cauſe ſuch principal felon to be apprehended and brought to trial, and ſhall alſo give evidence againſt him. Wild, upon this ſtatute, (ſtill continuing in his old practice) was at laſt convicted and executed.

9. RECEIVING of ſtolen goods, *knowing them to be ſtolen*, is alſo a high miſdemeſnor and affront to public juſtice. We have ſeen in a former chapter[n], that this offence, which is only a miſdemeſnor at common law, by the ſtatutes 3 & 4 W. & M. c. 9. and 5 Ann. c. 31. makes the offendor acceſſory to the theft and felony. But becauſe the acceſſory cannot in general be tried, unleſs with the principal, or after the principal is convicted, the receivers by that means frequently eluded juſtice. To remedy which, it is enacted by ſtatute 1 Ann. c. 9. and 5 Ann. c. 31. that ſuch receivers may ſtill be proſecuted for a miſdemeſnor, and puniſhed by fine and impriſonment, though the principal felon be not before taken, ſo as to be proſecuted and convicted. And, in caſe of receiving ſtolen lead, iron, and certain other metals, ſuch offence is by ſtatute 29 Geo. II. c. 30.

[n] See pag. 38.

puniſh-

puniſhable by tranſportation for fourteen years[o]. So that now the proſecutor has two methods in his choice: either to puniſh the receivers for the miſdemeſnor immediately, before the thief is taken[p]; or to wait till the felon is convicted, and then puniſh them as acceſſories to the felony. But it is provided by the ſame ſtatutes, that he ſhall only make uſe of one, and not both of theſe methods of puniſhment. By the ſame ſtatute alſo 29 Geo. II. c. 30. perſons having lead, iron, and other metals in their cuſtody, and not giving a ſatisfactory account how they came by the ſame, are guilty of a miſdemeſnor and puniſhable by fine or impriſonment.

10. OF a nature ſomewhat ſimilar to the two laſt is the offence of *theft-bote*, which is where the party robbed not only knows the felon, but alſo takes his goods again, or other amends, upon agreement not to proſecute. This is frequently called compounding of felony, and formerly was held to make a man an acceſſory; but is now puniſhed only with fine and impriſonment[q]. This perverſion of juſtice, in the old Gothic conſtitutions, was liable to the moſt ſevere and infamous puniſhment. And the Salic law "*latroni eum ſimilem habuit, qui furtum celare vellet, et occulte ſine judice compoſitionem ejus admittere*[r]." By ſtatute 25 Geo. II. c. 36. even to advertiſe a reward for the return of things ſtolen, with no queſtions aſked, or words to the ſame purport, ſubjects the advertiſer and the printer to a forfeiture of 50*l.* each.

11. COMMON *barretry* is the offence of frequently exciting and ſtirring up ſuits and quarrels between his majeſty's ſubjects, either at law or otherwiſe[s]. The puniſhment for this offence, in a common perſon, is by fine and impriſonment: but if the offender (as is too frequently the caſe) belongs to the profeſſion

[o] See alſo ſtatute 2 Geo. III. c. 28. §. 12. for the puniſhment of receivers of goods ſtolen by bum-boats, &c. in the Thames.

[p] Foſter. 373.

[q] 1 Hawk. P. C. 125.

[r] Stiernh. *de jure Goth. l.* 3. *c.* 5.

[s] 1 Hawk. P. C. 243.

of

of the law, a barretor, who is thus able as well as willing to do miſchief, ought alſo to be diſabled from practiſing for the future[t]. Hereunto may be referred an offence of equal malignity and audaciouſneſs; that of ſuing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the ſuit. This offence, if committed in any of the king's ſuperior courts, is left, as a high contempt, to be puniſhed at their diſcretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extenſive, it is directed by ſtatute 8 Eliz. c. 2. to be puniſhed by ſix months impriſonment, and treble damages to the party injured.

12. MAINTENANCE is an offence, that bears a near relation to the former; being an officious intermeddling in a ſuit that no way belongs to one, by maintaining or aſſiſting either party with money or otherwiſe, to proſecute or defend it[u]: a practice, that was greatly encouraged by the firſt introduction of uſes[w]. This is an offence againſt public juſtice, as it keeps alive ſtrife and contention, and perverts the remedial proceſs of the law into an engine of oppreſſion. And therefore, by the Roman law, it was a ſpecies of the *crimen falſi* to enter into any confederacy, or do any act to ſupport another's lawſuit, by money, witneſſes, or patronage[x]. A man may however maintain the ſuit of his near kinſman, ſervant, or poor neighbour, out of charity and compaſſion, with impunity. Otherwiſe the puniſhment by common law is fine and impriſonment[y]; and, by the ſtatute 32 Hen. VIII. c. 9. a forfeiture of ten pounds.

13. CHAMPERTY, *campi-partitio*, is a ſpecies of maintenance, and puniſhed in the ſame manner[z]: being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter ſued for between them, if they prevail at law;

[t] 1 Hawk. P. C. 244.
[u] *Ibid.* 249.
[w] Dr & St. 203.
[x] *Ef.* 48. 10. 20.
[y] 1 Hawk. P. C. 255.
[z] *Ibid.* 257.

where-

whereupon the champertor is to carry on the party's ſuit at his own expenſe[a]. Thus *champart*, in the French law, ſignifies a ſimilar diviſion of profits, being a part of the crop annually due to the landlord by bargain or cuſtom. In our ſenſe of the word, it ſignifies the purchaſing of a ſuit, or right of ſuing: a practice ſo much abhorred by our law, that it is one main reaſon why a *choſe* in action, or thing of which one hath the right but not the poſſeſſion, is not aſſignable at common law; becauſe no man ſhould purchaſe any pretence to ſue in another's right. Theſe peſts of civil ſociety, that are perpetually endeavouring to diſturb the repoſe of their neighbours, and officiouſly interfering in other men's quarrels, even at the hazard of their own fortunes, were ſeverely animadverted on by the Roman law: "*qui improbe coeunt* "*in alienam litem, ut quicquid ex communicatione in rem ipſius re-* "*dactum fuerit inter eos communicaretur, lege Julia de vi privata* "*tenentur*[b];" and they were puniſhed by the forfeiture of a third part of their goods, and perpetual infamy. Hitherto alſo muſt be referred the proviſion of the ſtatute 32 Hen. VIII. c. 9. that no one ſhall ſell or purchaſe any pretended right or title to land, unleſs the vendor hath received the profits thereof for one whole year before ſuch grant, or hath been in actual poſſeſſion of the land, or of the reverſion or remainder; on pain that both purchaſor and vendor ſhall each forfeit the value of ſuch land to the king and the proſecutor. Theſe offences relate chiefly to the commencement of *civil* ſuits: but

14. THE *compounding of informations* upon penal ſtatutes are 14.
an offence of an equivalent nature in *criminal* cauſes; and are, beſides, an additional miſdemeſnor againſt public juſtice, by contributing to make the laws odious to the people. At once therefore to diſcourage malicious informers, and to provide that offences, when once diſcovered, ſhall be duly proſecuted, it is enacted by ſtatute 18 Eliz. c. 5. that if any perſon, informing under pretence of any penal law, makes any compoſition without leave of the court, or takes any money or promiſe from the

[a] Stat. of conſpirat. 33 Edw. I. [b] *Ff.* 48. 7. 6.

defendant

defendant to excuſe him (which demonſtrates his intent in commencing the proſecution to be merely to ſerve his own ends, and not for the public good) he ſhall forfeit 10*l*, ſhall ſtand two hours on the pillory, and ſhall be for ever diſabled to ſue on any popular or penal ſtatute.

15. A CONSPIRACY alſo to indict an innocent man of felony falſely and maliciouſly, who is accordingly indicted and acquitted, is a farther abuſe and perverſion of public juſtice; for which the party injured may either have a civil action by writ of conſpiracy, (of which we ſpoke in the preceding book [c]) or the conſpirators, for there muſt be at leaſt two to form a conſpiracy, may be indicted at the ſuit of the king, and were by the antient common law [d] to receive what is called the *villenous* judgment; *viz.* to loſe their *liberam legem*, whereby they are diſcredited and diſabled to be jurors or witneſſes; to forfeit their goods and chattels, and lands for life; to have thoſe lands waſted, their houſes raſed, their trees rooted up, and their own bodies committed to priſon [e]. But it now is the better opinion, that the villenous judgment is by long diſuſe become obſolete; it not having been pronounced for ſome ages: but inſtead thereof the delinquents are uſually ſentenced to impriſonment, fine, and pillory. To this head may be referred the offence of ſending letters, threatening to accuſe any perſon of a crime puniſhable with death, tranſportation, pillory, or other infamous puniſhment, with a view to extort from him any money or other valuable chattels. This is puniſhable by ſtatute 30 Geo. II. c. 24. at the diſcretion of the court, with fine, impriſonment, pillory, whipping, or tranſportation for ſeven years.

16. THE next offence againſt public juſtice is when the ſuit is paſt it's commencement, and come to trial. And that is the crime of wilful and corrupt *perjury*; which is defined by ſir Edward Coke [f], to be a crime committed when a *lawful* oath is ad-

[c] See Vol. III. pag. 126.
[d] Bro. *Abr. t. conſpiracy.* 28.
[e] 1 Hawk. P. C. 193.
[f] 3 Inſt. 164.

miniſtred,

miniſtred, in ſome *judicial* proceeding, to a perſon who ſwears *wilfully*, *abſolutely* and *falſely*, in a matter *material* to the iſſue or point in queſtion. The law takes no notice of any perjury but ſuch as is committed in ſome court of juſtice, having power to adminiſter an oath; or before ſome magiſtrate or proper officer, inveſted with a ſimilar authority, in ſome proceedings relative to a civil ſuit or a criminal proſecution: for it eſteems all other oaths unneceſſary at leaſt, and therefore will not puniſh the breach of them. For which reaſon it is much to be queſtioned how far any magiſtrate is juſtifiable in taking a voluntary *affidavit* in any extrajudicial matter, as is now too frequent upon every petty occaſion: ſince it is more than poſſible, that by ſuch idle oaths a man may frequently *in foro conſcientiae* incur the guilt, and at the ſame time evade the temporal penalties, of perjury. The perjury muſt alſo be wilful, poſitive, and abſolute; not upon ſurprize, or the like: it alſo muſt be in ſome point material to the queſtion in diſpute; for if it only be in ſome trifling collateral circumſtance, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before-mentioned. *Subornation* of perjury is the offence of procuring another to take ſuch a falſe oath, as conſtitutes perjury in the principal. The puniſhment of perjury and ſubornation, at common law, has been various. It was antiently death; afterwards baniſhment, or cutting out the tongue; then forfeiture of goods; and now it is fine and impriſonment, and never more to be capable of bearing teſtimony [5]. But the ſtatute 5 Eliz. c. 9. (if the offender be proſecuted thereon) inflicts the penalty of perpetual infamy, and a fine of 40 *l.* on the ſuborner; and, in default of payment, impriſonment for ſix months, and to ſtand with both ears nailed to the pillory. Perjury itſelf is thereby puniſhed with ſix months impriſonment, perpetual infamy, and a fine of 20 *l.* or to have both ears nailed to the pillory. But the proſecution is uſually carried on for the offence at common law; eſpecially as, to the penalties before inflicted, the ſtatute 2 Geo. II. c. 25. ſuperadds a power, for the court to order the offender to be ſent to the

[5] 3 Inſt. 163.

houſe of correction for ſeven years, or to be tranſported for the ſame period; and makes it felony without benefit of clergy to return or eſcape within the time. It has ſometimes been wiſhed, that perjury, at leaſt upon capital accuſations, whereby another's life has been or might have been deſtroyed, was alſo rendered capital, upon a principle of retaliation; as it is univerſally by the laws of France [h]. And certainly the odiouſneſs of the crime pleads ſtrongly in behalf of the French law. But it is to be conſidered, that there they admit witneſſes to be heard only on the ſide of the proſecution, and uſe the rack to extort a confeſſion from the accuſed. In ſuch a conſtitution therefore it is neceſſary to throw the dread of capital puniſhment into the other ſcale, in order to keep in awe the witneſſes for the crown; on whom alone the priſoner's fate depends: ſo naturally does one cruel law beget another. But corporal and pecuniary puniſhments, exile and perpetual infamy, are more ſuited to the genius of the Engliſh law; where the fact is openly diſcuſſed between witneſſes on *both* ſides, and the evidence for the crown may be contradicted and diſproved by thoſe of the priſoner. Where indeed the death of an innocent perſon has actually been the conſequence of ſuch wilful perjury, it falls within the guilt of deliberate murder, and deſerves an equal puniſhment: which our antient law in fact inflicted [i]. But the mere attempt to deſtroy life by other means not being capital, there is no reaſon that an attempt by perjury ſhould: much leſs that this crime ſhould in *all* judicial caſes be puniſhed with death. For to multiply capital puniſhments leſſens their effect, when applied to crimes of the deepeſt dye; and, deteſtable as perjury is, it is not by any means to be compared with ſome other offences, for which only death can be inflicted: and therefore it ſeems already (except perhaps in the inſtance of deliberate murder by perjury) very properly puniſhed by our preſent law; which has adopted the opinion of Cicero [k], derived from the law of the twelve tables, "*perjurii poena divina, exitium; humana, dedecus.*"

[h] Monteſq. Sp. L. b. 29. ch. 11.
[i] Britton. c. 5.
[k] *de Leg.* 2. 9.

1. BRI-

17. BRIBERY is the next ſpecies of offence againſt public juſtice; which is when a judge, or other perſon concerned in the adminiſtration of juſtice, takes any undue reward to influence his behaviour in his office[l]. In the eaſt it is the cuſtom never to petition any ſuperior for juſtice, not excepting their kings, without a preſent. This is calculated for the genius of deſpotic countries; where the true principles of government are never underſtood, and it is imagined that there is no obligation from the ſuperior to the inferior, no relative duty owing from the governor to the governed. The Roman law, though it contained many ſevere injunctions againſt bribery, as well for ſelling a man's vote in the ſenate or other public aſſembly, as for the bartering of common juſtice, yet, by a ſtrange indulgence in one inſtance, it tacitly encouraged this practice; allowing the magiſtrate to receive ſmall preſents, provided they did not in the whole exceed a hundred crowns in the year[m]: not conſidering the inſinuating nature and gigantic progreſs of this vice, when once admitted. Plato therefore more wiſely, in his ideal republic[n], orders thoſe who take preſents for doing their duty to be puniſhed in the ſevereſt manner: and by the laws of Athens he that offered was alſo proſecuted, as well as he that received a bribe[o]. In England this offence of taking bribes is puniſhed, in inferior officers, with fine and impriſonment; and in thoſe who offer a bribe, though not taken, the ſame[p]. But in judges, eſpecially the ſuperior ones, it hath been always looked upon as ſo heinous an offence, that the chief juſtice Thorpe was hanged for it in the reign of Edward III. By a ſtatute[q] 11 Hen. IV, all judges and officers of the king, convicted of bribery, ſhall forfeit treble the bribe, be puniſhed at the king's will, and be diſcharged from the king's ſervice for ever. And ſome notable examples have been made in parliament, of perſons in the

[l] 1 Hawk. P. C. 168.
[m] *Ff.* 48. 11. 6.
[n] *de Leg. l.* 12.
[o] Pott. Antiqu. b. 1. c. 23.
[p] 3 Inſt. 147.
[q] *Ibid.* 146.

higheſt ſtations, and otherwiſe very eminent and able, but contaminated with this ſordid vice.

18. EMBRACERY is an attempt to influence a jury corruptly to one ſide by promiſes, perſuaſions, entreaties, money, entertainments, and the like[r]. The puniſhment for the perſon embracing is by fine and impriſonment; and, for the juror ſo embraced, if it be by taking money, the puniſhment is (by divers ſtatutes of the reign of Edward III) perpetual infamy, impriſonment for a year, and forfeiture of the tenfold value.

19. THE *falſe verdict* of jurors, whether occaſioned by embracery or not, was antiently conſidered as criminal, and therefore exemplarily puniſhed by attaint in the manner formerly mentioned[s].

20. ANOTHER offence of the ſame ſpecies is the *negligence of public officers*, entruſted with the adminiſtration of juſtice, as ſheriffs, coroners, conſtables, and the like: which makes the offender liable to be fined; and in very notorious caſes will amount to a forfeiture of his office, if it be a beneficial one[t]. Alſo the omitting to apprehend perſons, offering ſtolen iron, lead, and other metals to ſale, is a miſdemeſnor and puniſhable by a ſtated fine, or impriſonment, in purſuance of the ſtatute 29 Geo. II. c. 30.

21. THERE is yet another offence againſt public juſtice, which is a crime of deep malignity; and ſo much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal proſecution. This is the *oppreſſion* and tyrannical partiality of judges, juſtices, and other *magiſtrates*, in the adminiſtration and under the colour of their office. However, when proſecuted, either by impeachment in parliament,

[r] 1 Hawk. P. C. 259.
[s] See Vol. III. pag. 402.
[t] 1 Hawk. P. C. 168.

or

or by information in the court of king's bench, (according to the rank of the offenders) it is ſure to be ſeverely puniſhed with forfeiture of their offices, fines, impriſonment, or other diſcretionary cenſure, regulated by the nature and aggravations of the offence committed.

22. LASTLY, *extortion* is an abuſe of public juſtice, which conſiſts in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due[u]. The puniſhment is fine and impriſonment, and ſometimes a forfeiture of the office.

[u] 1 Hawk. P. C. 170.

CHAPTER THE ELEVENTH.

OF OFFENCES AGAINST THE PUBLIC PEACE.

WE are next to conſider offences againſt the public *peace*; the conſervation of which is intruſted to the king and his officers, in the manner and for the reaſons which were formerly mentioned at large [a]. Theſe offences are either ſuch as are an actual breach of the peace; or conſtructively ſo, by tending to make others break it. Both of theſe ſpecies are alſo either felonious, or not felonious. The felonious breaches of the peace are ſtrained up to that degree of malignity by virtue of ſeveral modern ſtatutes: and, particularly,

1. THE *riotous aſſembling* of *twelve* perſons, or more, and not diſperſing upon proclamation. This was firſt made high treaſon by ſtatute 3 & 4 Edw. VI. c. 5. when the king was a minor, and a change in religion to be effected: but that ſtatute was repealed by ſtatute 1 Mar. c. 1. among the other treaſons created ſince the 25 Edw. III; though the prohibition was in ſubſtance re-enacted, with an inferior degree of puniſhment, by ſtatute 1. Mar. ſt. 2. c. 12. which made the ſame offence a ſingle felony. Theſe ſtatutes ſpecified and particularized the nature of the riots they were meant to ſuppreſs; as, for example, ſuch as were ſet on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other ſpecific purpoſes: in which caſes, if the perſons were

[a] Vol. I. pag. 117. 268. 350.

com-

commanded by proclamation to diſperſe, and they did not, it was by the ſtatute of Mary made felony, but within the benefit of clergy; and alſo the act indemnified the peace officers and their aſſiſtants, if they killed any of the mob in endeavouring to ſuppreſs ſuch riot. This was thought a neceſſary ſecurity in that ſanguinary reign, when popery was intended to be re-eſtabliſhed, which was like to produce great diſcontents: but at firſt it was made only for a year, and was afterwards continued for that queen's life. And, by ſtatute 1 Eliz. c. 16. when a reformation in religion was to be once more attempted, it was revived and continued during her life alſo; and then expired. From the acceſſion of James the firſt to the death of queen Anne, it was never once thought expedient to revive it: but, in the firſt year of George the firſt, it was judged neceſſary, in order to ſupport the execution of the act of ſettlement, to renew it, and at one ſtroke to make it perpetual, with large additions. For, whereas the former acts expreſſly defined and ſpecified what ſhould be accounted a riot, the ſtatute 1 Geo. I. c. 5. enacts, generally, that if any twelve perſons are unlawfully aſſembled to the diſturbance of the peace, and any one juſtice of the peace, ſheriff, under-ſheriff, or mayor of a town, ſhall think proper to command them by proclamation to diſperſe, if they contemn his orders and continue together for one hour afterwards, ſuch contempt ſhall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force oppoſed, or the reader be in any manner wilfully hindered from the reading of it, ſuch oppoſers and hinderers are felons, without benefit of clergy: and all perſons to whom ſuch proclamation *ought to have been made*, and knowing of ſuch hindrance, and not diſperſing, are felons, without benefit of clergy. There is the like indemnifying clauſe, in caſe any of the mob be unfortunately killed in the endeavour to diſperſe them; being copied from the act of queen Mary. And, by a ſubſequent clauſe of the new act, if any perſons, ſo riotouſly aſſembled, begin even before proclamation to pull down any church, chapel, meeting-houſe, dwelling-houſe, or out-houſes, they ſhall be felons without benefit of clergy.

2. By

2. By ſtatute 1 Hen. VII. c. 7. *unlawful hunting* in any legal foreſt, park, or warren, not being the king's property, *by night*, or with *painted faces*, was declared to be ſingle felony. But now by the ſtatute 9 Geo. I. c. 22. to appear armed in any open place by day, or night, with faces blacked or otherwiſe *diſguiſed*, or (being ſo diſguiſed) to hunt, wound, kill, or ſteal any deer, to rob a warren, or to ſteal fiſh, is felony without benefit of clergy. I mention this offence in this place, not on account of the damage thereby done to private property, but of the manner in which that damage is committed; namely, with the face blacked or with other diſguiſe, to the breach of the public peace and the terror of his majeſty's ſubjects.

3. Also by the ſame ſtatute 9 Geo. I. c. 22. amended by ſtatute 27 Geo. II. c. 15. knowingly to ſend any *letter* without a name, or with a fictitious name, *demanding* money, veniſon, or any other valuable thing, or *threatening* (without any demand) to kill, or fire the houſe of, any perſon, is made felony, without benefit of clergy. This offence was formerly high treaſon, by the ſtatute 8 Hen. V. c. 6.

4. To pull down or deſtroy any *turnpike-gate*, or fence thereunto belonging, by the ſtatute 1 Geo. II. c. 19. is puniſhed with public whipping, and three months impriſonment; and to deſtroy the toll-houſes, or any *ſluice or lock* on a navigable river, is made felony to be puniſhed with tranſportation for ſeven years. By the ſtatute 5 Geo. II. c. 33. the offence of deſtroying turnpike-gates or fences, is made felony alſo, with tranſportation for ſeven years. And, laſtly, by ſtatute 8 Geo. II. c. 20. the offences of deſtroying both turnpikes upon roads, and ſluices upon rivers, are made felony, without benefit of clergy; and may be tried as well in an adjacent county, as that wherein the fact is committed. The remaining offences againſt the public peace are merely miſdemeſnors, and no felonies: as,

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5. AFFRAYS (from *affraier*, to terrify) are the fighting of two or more perſons in ſome public place, to the terror of his majeſty's ſubjects: for, if the fighting be in private, it is no *affray* but an *aſſault*[b]. Affrays may be ſuppreſſed by any private perſon preſent, who is juſtifiable in endeavouring to part the combatants, whatever conſequence may enſue[c]. But more eſpecially the conſtable, or other ſimilar officer, however denominated, is bound to keep the peace; and to that purpoſe may break open doors to ſuppreſs an affray, or apprehend the affrayers; and may either carry them before a juſtice, or impriſon them by his own authority for a convenient ſpace till the heat is over; and may then perhaps alſo make them find ſureties for the peace[d]. The puniſhment of common affrays is by fine and impriſonment; the meaſure of which muſt be regulated by the circumſtances of the caſe: for, where there is any material aggravation, the puniſhment proportionably increaſes. As where two perſons coolly and deliberately engage in a duel: this being attended with an apparent intention and danger of murder, and being a high contempt of the juſtice of the nation, is a ſtrong aggravation of the affray, though no miſchief has actually enſued[e]. Another aggravation is, when thereby the officers of juſtice are diſturbed in the due execution of their office: or where a reſpect to the particular place ought to reſtrain and regulate men's behaviour, more than in common ones; as in the king's court, and the like. And upon the ſame account alſo all affrays in a church or church-yard are eſteemed very heinous offences, as being indignities to him to whoſe ſervice thoſe places are conſecrated. Therefore mere quarrelſome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by ſtatute 5 & 6 Edw. VI. c. 4. that if any perſon ſhall, by words only, quarrel, chide, or brawl, in a church or church-yard, the ordinary ſhall ſuſpend him, if a layman, *ab ingreſſu eccleſiae*; and, if a clerk in orders,

[b] 1 Hawk. P. C. 134.
[c] *Ibid.* 136.
[d] *Ibid.* 137.
[e] *Ibid.* 138.

from the miniſtration of his office during pleaſure. And, if any perſon in ſuch church or church-yard proceeds to ſmite or lay violent hands upon another, he ſhall be excommunicated *ipſo facto*; or if he ſtrikes him with a weapon, or draws any weapon with intent to ſtrike, he ſhall beſides excommunication (being convicted by a jury) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek. *Two* perſons may be guilty of an affray: but,

6. RIOTS, *routs*, and *unlawful aſſemblies* muſt have *three* perſons at leaſt to conſtitute them. An *unlawful aſſembly* is when three, or more, do aſſemble themſelves together to do an unlawful act, as to pull down incloſures, to deſtroy a warren or the game therein; and part without doing it, or making any motion towards it[f]. A *rout* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common, or of way; and make ſome advances towards it[g]. A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cauſe or quarrel[h]: as if they beat a man; or hunt and kill game in another's park, chaſe, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuſance, in a violent and tumultuous manner. The puniſhment of unlawful aſſemblies, if to the number of twelve, we have juſt now ſeen may be capital, according to the circumſtances that attend it; but, from the number of three to eleven, is by fine and impriſonment only. The ſame is the caſe in riots and routs by the common law; to which the pillory in very enormous caſes has been ſometimes ſuperadded[i]. And by the ſtatute 13 Hen. IV. c. 7. any two juſtices, together with the ſheriff or under-ſheriff of the county, may come with the *poſſe comitatus*, if need be, and ſuppreſs any ſuch riot, aſſembly, or rout, arreſt the rioters, and record upon the ſpot the nature and circumſtances of the whole tranſaction;

[f] 3 Inſt. 176.
[g] Bro. *Abr. t. Riot.* 4. 5.
[h] 3 Inſt. 176.
[i] 1 Hawk. P. C. 159.

which

which record alone ſhall be a ſufficient conviction of the offenders. In the interpretation of which ſtatute it hath been holden, that all perſons, noblemen and others, except women, clergymen, perſons decrepit, and infants under fifteen, are bound to attend the juſtices in ſuppreſſing a riot, upon pain of fine and impriſonment; and that any battery, wounding, or killing the rioters, that may happen in ſuppreſſing the riot, is juſtifiable[j]. So that our antient law, previous to the modern riot act, ſeems pretty well to have guarded againſt any violent breach of the public peace; eſpecially as any riotous aſſembly on a public or general account, as to redreſs grievances or pull down all incloſures, and alſo reſiſting the king's forces if ſent to keep the peace, may amount to overt acts of high treaſon, by levying war againſt the king.

7. NEARLY related to this head of riots is the offence of *tumultuous petitioning*; which was carried to an enormous height in the times preceding the grand rebellion. Wherefore by ſtatute 13 Car. II. ſt. 1. c. 5. it is enacted, that not more than twenty names ſhall be ſigned to any petition to the king or either houſe of parliament, for any alteration of matters eſtabliſhed by law in church or ſtate; unleſs the contents thereof be previouſly approved, in the country, by three juſtices, or the majority of the grand jury at the aſſiſes or quarter ſeſſions; and, in London, by the lord mayor, aldermen, and common council[k]: and that no petition ſhall be delivered by a company of more than ten perſons: on pain in either caſe of incurring a penalty not exceeding 100*l*, and three months impriſonment.

8. An eighth offence againſt the public peace is that of a *forcible entry* or *detainer*; which is committed by violently taking or keeping poſſeſſion of lands and tenements, with menaces, force, and arms, and without the authority of law. This was for-

j 1 Hal. P. C. 495. 1 Hawk. P. C. 161.

k This may be one reaſon (among others) why the corporation of London has, ſince the reſtoration, uſually taken the lead in petitions to parliament for the alteration of any eſtabliſhed law.

merly allowable to every perſon diſſeiſed, or turned out of poſſeſſion, unleſs his entry was taken away or barred by his own neglect, or other circumſtances; which were explained more at large in a former volume[1]. But this being found very prejudicial to the public peace, it was thought neceſſary by ſeveral ſtatutes to reſtrain all perſons from the uſe of ſuch violent methods, even of doing themſelves juſtice; and much more if they have no juſtice in their claim[m]. So that the entry now allowed by law is a peaceable one; that forbidden is ſuch as is carried on and maintained with force, with violence, and unuſual weapons. By the ſtatute 5 Ric. II. ſt. 1. c. 8. all forcible entries are puniſhed with impriſonment and ranſom at the king's will. And by the ſeveral ſtatutes of 15 Ric. II. c. 2. 8 Hen. VI. c. 9. 31 Eliz. c. 11. and 21 Jac. I. c. 15. upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more juſtices of the peace, taking ſufficient power of the county, may go to the place, and there record the force upon his own view, as in caſe of riots; and upon ſuch conviction may commit the offender to gaol, till he makes fine and ranſom to the king. And moreover the juſtice or juſtices have power to ſummon a jury, to try the forcible entry or detainer complained of: and, if the ſame be found by that jury, then, beſides the fine on the offender, the juſtices ſhall make reſtitution by the ſheriff of the poſſeſſion, without inquiring into the merits of the title; for the force is the only thing to be tried, puniſhed, and remedied by them: and the ſame may be done by indictment at the general ſeſſions. But this proviſion does not extend to ſuch as endeavour to maintain poſſeſſion by force, where they themſelves, or their anceſtors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding.

9. THE offence of *riding* or *going armed*, with dangerous or unuſual weapons, is a crime againſt the public peace, by terrifying the good people of the land; and is particularly prohibited

[1] See Vol. III. pag. 174, &c. [m] 1 Hawk. P. C. 141.

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by the ſtatute of Northampton, 2 Edw. III. c. 3. upon pain of forfeiture of the arms, and impriſonment during the king's pleaſure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour[n].

10. SPREADING *falſe news*, to make diſcord between the king and nobility, or concerning any great man of the realm, is puniſhed by common law[o] with fine and impriſonment; which is confirmed by ſtatutes Weſtm. 1. 3 Edw. I. c. 34. 2 Ric. II. ſt. 1. c. 5. and 12 Ric. II. c. 11.

11. FALSE and *pretended prophecies*, with intent to diſturb the peace, are equally unlawful, and more penal; as they raiſe enthuſiaſtic jealouſies in the people, and terrify them with imaginary fears. They are therefore puniſhed by our law, upon the ſame principle that ſpreading of public news of any kind, without communicating it firſt to the magiſtrate, was prohibited by the antient Gauls[p]. Such falſe and pretended prophecies were puniſhed capitally by ſtatute 1 Edw. VI. c. 12. which was repealed in the reign of queen Mary. And now by the ſtatute 5 Eliz. c. 15. the penalty for the firſt offence is a fine of 100*l*, and one year's impriſonment; for the ſecond, forfeiture of all goods and chattels, and impriſonment during life.

12. BESIDES actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of the ſame denomination. Therefore *challenges to fight*, either by word or letter, or to be the bearer of ſuch challenge, are puniſhable by fine and impriſonment, according to the circumſtances of the offence[q]. If this challenge ariſes on account of any mo-

[n] Pott. Antiqu. b. 1. c. 26.

[o] 2 Inſt. 226. 3 Inſt. 198.

[p] "*Habent legibus ſanctum, ſi quis quid de "republica a finitimis rumore aut fama acceperit, "uti ad magiſtratum deferat, neve cum alio "communicet: quod ſaepe homines temerarios "atque imperitos falſis rumoribus terreri, et "ad facinus impelli, et de ſummis rebus conſi- "lium capere, cognitum eſt.*" Caeſ. *de bell. Gall. lib.* 6. *cap.* 19.

[q] 1 Hawk. P. C. 135. 138.

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ney won at gaming, or if any aſſault or affray happen upon ſuch account, the offender, by ſtatute 9 Ann. c. 14. ſhall forfeit all his goods to the crown, and ſuffer two years impriſonment.

13. OF a nature very ſimilar to challenges are *libels*, *libelli famoſi*, which, taken in their largeſt and moſt extenſive ſenſe, ſignify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the ſenſe under which we are now to conſider them, are malicious defamations of any perſon, and eſpecially a magiſtrate, made public by either printing, writing, ſigns, or pictures, in order to provoke him to wrath, or expoſe him to public hatred, contempt, and ridicule[r]. The direct tendency of theſe libels is the breach of the public peace, by ſtirring up the objects of them to revenge, and perhaps to bloodſhed. The communication of a libel to any one perſon is a publication in the eye of the law[s]: and therefore the ſending an abuſive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace[t]. For the ſame reaſon it is immaterial with reſpect to the eſſence of a libel, whether the matter of it be true or falſe[u]; ſince the provocation, and not the falſity, is the thing to be puniſhed criminally: though, doubtleſs, the falſhood of it may aggravate it's guilt, and enhance it's puniſhment. In a civil action, we may remember, a libel muſt appear to be falſe, as well as ſcandalous[w]; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compenſation for himſelf, whatever offence it may be againſt the public peace: and therefore, upon a civil action, the truth of the accuſation may be pleaded in bar of the ſuit. But, in a criminal proſecution, the tendency which all libels have to create animoſities, and to diſturb the public peace, is the ſole conſideration of the law. And therefore, in ſuch proſecutions,

[r] 1 Hawk. P. C. 193.
[s] Moor. 813.
[t] 2 Brownl. 151. 12 Rep. 35. Hob. 215. Poph. 139. 1 Hawk. P. C. 195.
[u] Moor. 627. 5 Rep. 125. 11 Mod. 99.
[w] See Vol. III. pag. 125.

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the only points to be conſidered are, firſt, the making or publiſhing of the book or writing; and, ſecondly, whether the matter be criminal: and, if both theſe points are againſt the defendant, the offence againſt the public is complete. The puniſhment of ſuch libellers, for either making, repeating, printing, or publiſhing the libel, is fine, and ſuch corporal puniſhment as the court in it's diſcretion ſhall inflict; regarding the quantity of the offence, and the quality of the offender[x]. By the law of the twelve tables at Rome, libels, which affected the reputation of another, were made a capital offence: but, before the reign of Auguſtus, the puniſhment became corporal only[y]. Under the emperor Valentinian[z] it was again made capital, not only to write, but to publiſh, or even to omit deſtroying them. Our law, in this and many other reſpects, correſponds rather with the middle age of Roman juriſprudence, when liberty, learning, and humanity, were in their full vigour, than with the cruel edicts that were eſtabliſhed in the dark and tyrannical ages of the antient *decemviri*, or the later emperors.

IN this, and the other inſtances which we have lately conſidered, where blaſphemous, immoral, treaſonable, ſchiſmatical, ſeditious, or ſcandalous libels are puniſhed by the Engliſh law, ſome with a greater, others with a leſs degree of ſeverity; the *liberty of the preſs*, properly underſtood, is by no means infringed or violated. The liberty of the preſs is indeed eſſential to the nature of a free ſtate: but this conſiſts in laying no *previous* reſtraints upon publications, and not in freedom from cenſure for criminal matter when publiſhed. Every freeman has an undoubted right to lay what ſentiments he pleaſes before the public: to forbid this, is to deſtroy the freedom of the

[x] 1 Hawk. P. C. 196.

[y] ——— *Quinetiam lex*
Poenaque lata, malo quae nollet carmine quenquam
Deſcribi: —— *vertere modum formidine* fuſtis. Hor. *ad Aug.* 152.

[z] *Cod.* 9. 36.

preſs:

preſs: but if he publiſhes what is improper, miſchievous, or illegal, he muſt take the conſequence of his own temerity. To ſubject the preſs to the reſtrictive power of a licenſer, as was formerly done, both before and ſince the revolution [a], is to ſubject all freedom of ſentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to puniſh (as the law does at preſent) any dangerous or offenſive writings, which, when publiſhed, ſhall on a fair and impartial trial be adjudged of a pernicious tendency, is neceſſary for the preſervation of peace and good order, of government and religion, the only ſolid foundations of civil liberty. Thus the will of individuals is ſtill left free; the abuſe only of that free will is the object of legal puniſhment. Neither is any reſtraint hereby laid upon freedom of thought or enquiry: liberty of private ſentiment is ſtill left; the diſſeminating, or making public, of bad ſentiments, deſtructive of the ends of ſociety, is the crime which ſociety corrects. A man (ſays a fine writer on this ſubject) may be allowed to keep poiſons in his cloſet, but not publicly to vend them as cordials. And to this we may

[a] The art of printing, ſoon after it's introduction, was looked upon (as well in England as in other countries) as merely a matter of ſtate, and ſubject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of ſtarchamber; which limited the number of printers, and of preſſes which each ſhould employ, and prohibited new publications unleſs previouſly approved by proper licenſers. On the demolition of this odious juriſdiction in 1641, the long parliament of Charles I, after their rupture with that prince, aſſumed the ſame powers as the ſtarchamber exerciſed with reſpect to the licenſing of books; and in 1643, 1647, 1649, and 1652, (Scobell. i. 44, 134. ii. 88, 230.) iſſued their ordinances for that purpoſe, founded principally on the ſtarchamber decree of 1637. In 1662 was paſſed the ſtatute 13 & 14 Car. II. c. 33. which (with ſome few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by ſtatute 1 Jac. II. c. 17. and continued till 1692. It was then continued for two years longer by ſtatute 4 W. & M. c. 24. but, though frequent attempts were made by the government to revive it, in the ſubſequent part of that reign, (Com. Journ. 11 Feb. 1694. 26 Nov. 1695. 22 Oct. 1696. 9 Feb. 1697. 31 Jan. 1698.) yet the parliament reſiſted it ſo ſtrongly, that it finally expired, and the preſs became properly free, in 1694; and has ever ſince ſo continued.

add,

add, that the only plauſible argument heretofore uſed for reſtraining the juſt freedom of the preſs, "that it was neceſſary "to prevent the daily abuſe of it," will entirely loſe it's force, when it is ſhewn (by a ſeaſonable exertion of the laws) that the preſs cannot be abuſed to any bad purpoſe, without incurring a ſuitable puniſhment: whereas it never can be uſed to any good one, when under the control of an inſpector. So true will it be found, that to cenſure the licentiouſneſs, is to maintain the liberty, of the preſs.

CHAPTER THE TWELFTH.

OF OFFENCES AGAINST PUBLIC TRADE.

OFFENCES againſt public *trade*, like thoſe of the preceding claſſes, are either felonious, or not felonious. Of the firſt ſort are,

1. OWLING, ſo called from it's being uſually carried on in the night, which is the offence of tranſporting wool or ſheep out of this kingdom, to the detriment of it's ſtaple manufacture. This was forbidden at common law [a], and more particularly by ſtatute 11 Edw. III. c. 1. when the importance of our woollen manufacture was firſt attended to; and there are now many later ſtatutes relating to this offence, the moſt uſeful and principal of which are thoſe enacted in the reign of queen Elizabeth, and ſince. The ſtatute 8 Eliz. c. 3. makes the tranſportation of live ſheep, or embarking them on board any ſhip, for the firſt offence forfeiture of goods, and impriſonment for a year, and that at the end of the year the left hand ſhall be cut off in ſome public market, and ſhall be there nailed up in the openeſt place; and the ſecond offence is felony. The ſtatutes 12 Car. II. c. 32. and 7 & 8 W. III. c. 28. make the exportation of wool, ſheep, or fuller's earth, liable to pecuniary penalties, and the forfeiture of the intereſt of the ſhip and cargo by the owners, if privy;

[a] Mirr. c. 1. §. 3.

and

and confiſcation of goods, and three years impriſonment to the maſter and all the mariners. And the ſtatute 4 Geo. I. c. 11. (amended and farther enforced by 12 Geo. II. c. 21. and 19 Geo. II. c. 34.) makes it tranſportation for ſeven years, if the penalties be not paid.

2. SMUGGLING, or the offence of importing goods without paying the duties impoſed thereon by the laws of the cuſtoms and exciſe, is an offence generally connected and carried on hand in hand with the former. This is reſtrained by a great variety of ſtatutes, which inflict pecuniary penalties and ſeiſure of the goods for clandeſtine ſmuggling; and affix the guilt of felony, with tranſportation for ſeven years, upon more open, daring, and avowed practices: but the laſt of them, 19 Geo. II. c. 34. is for this purpoſe *inſtar omnium*; for it makes all forcible acts of ſmuggling, carried on in defiance of the laws, or even in diſguiſe to evade them, felony without benefit of clergy: enacting, that if three or more perſons ſhall aſſemble, with fire arms or other offenſive weapons, to aſſiſt in the illegal exportation or importation of goods, or in reſcuing the ſame after ſeiſure, or in reſcuing offenders in cuſtody for ſuch offences; or ſhall paſs with ſuch goods in diſguiſe; or ſhall wound, ſhoot at, or aſſault any officers of the revenue when in the execution of their duty; ſuch perſons ſhall be felons, without the benefit of clergy. As to that branch of the ſtatute, which required any perſon, charged upon oath as a ſmuggler, under pain of death, to ſurrender himſelf upon proclamation, it ſeems to be expired; as the ſubſequent ſtatutes [b], which continue the original act to the preſent time, do in terms continue only ſo much of the ſaid act, as relates to the *puniſhment* of the offenders, and not to the extraordinary method of apprehending or cauſing them to ſurrender: and for offences of this poſitive ſpecies, where puniſhment (though neceſſary) is rendered ſo by the laws themſelves, which by impoſing high duties on commodities increaſe the temptation

[b] Stat. 26 Geo. II. c. 32. 32 Geo. II. c. 18. 4 Geo. III. c. 12.

to evade them, we cannot ſurely be too cautious in inflicting the penalty of death [c].

3. ANOTHER offence againſt public trade is fraudulent *bankruptcy*, which was ſufficiently ſpoken of in a former volume [d]; when we thoroughly examined the nature of theſe unfortunate traders. I ſhall therefore here barely mention over again ſome abuſes incident to bankruptcy, *viz.* the bankrupt's neglect of ſurrendering himſelf to his creditors; his non-conformity to the directions of the ſeveral ſtatutes; his concealing or embezzling his effects to the value of 20 *l*; and his withholding any books or writings with intent to defraud his creditors: all which the policy of our commercial country has made capital in the offender; or, felony without benefit of clergy. And indeed it is allowed in general, by ſuch as are the moſt averſe to the infliction of capital puniſhment, that the offence of fraudulent bankruptcy, being an atrocious ſpecies of the *crimen falſi*, ought to be put upon a level with thoſe of forgery and falſifying the coin [e]. To this head we may alſo ſubjoin, that by ſtatute 32 Geo. II. c. 28. it is felony puniſhable by tranſportation for ſeven years, if a priſoner, charged in execution for any debt under 100 *l*, neglects or refuſes on demand to diſcover and deliver up his effects for the benefit of his creditors. And theſe are the only felonious offences againſt public trade; the reſidue being mere miſdemeſnors: as,

4. USURY, which is an unlawful contract upon the loan of money, to receive the ſame again with exorbitant increaſe. Of this alſo we had occaſion to diſcourſe at large in a former volume [f]. We there obſerved that by ſtatute 37 Hen. VIII. c. 9. the rate of intereſt was fixed at 10 *l. per cent. per annum:* which the ſtatute 13 Eliz. c. 8. confirms; and ordains, that all brokers ſhall be guilty of a *praemunire* that tranſact any contracts for more, and the ſecurities themſelves ſhall be void. The ſtatute

[c] See Vol. I. pag. 317. Beccar. ch. 33.
[d] See Vol. II. pag. 481, 482.
[e] Beccar. ch. 34.
[f] See Vol. II. pag. 455, &c.

21 Jac. I. c. 17. reduced intereſt to eight *per cent*; and, it having been lowered in 1650, during the uſurpation, to ſix *per cent*, the ſame reduction was re-enacted after the reſtoration by ſtatute 12 Car. II. c. 13. and, laſtly, the ſtatute 12 Ann. ſt. 2. c. 16. has reduced it to five *per cent*. Wherefore not only all contracts for taking more are in themſelves totally void, but alſo the lender ſhall forfeit treble the money borrowed. Alſo if any ſcrivener or broker takes more than five ſhillings *per cent*. procuration-money, or more than twelve-pence for making a bond, he ſhall forfeit 20 *l.* with coſts, and ſhall ſuffer impriſonment for half a year.

5. CHEATING is another offence, more immediately againſt public trade; as that cannot be carried on without a punctilious regard to common honeſty, and faith between man and man. Hither therefore may be referred that prodigious multitude of ſtatutes, which are made to prevent deceits in particular trades, and which are chiefly of uſe among the traders themſelves. For ſo cautious has the legiſlature been, and ſo thoroughly abhors all indirect practices, that there is hardly a conſiderable fraud incident to any branch of trade, but what is reſtrained and puniſhed by ſome particular ſtatute. The offence alſo of *breaking the aſſiſe* of bread, or the rules laid down by law, and particularly by ſtatute 31 Geo. II. c. 29. and 3 Geo. III. c. 11. for aſcertaining it's price in every given quantity, is reducible to this head of cheating: as is likewiſe in a peculiar manner the offence of ſelling by *falſe weights and meaſures*; the ſtandard of which fell under our conſideration in a former volume [g]. The puniſhment of bakers breaking the aſſiſe, was antiently to ſtand in the pillory, by ſtatute 51 Hen. III. ſt. 6. and for brewers (by the ſame act) to ſtand in the tumbrel or dungcart [h]: which, as we learn from domeſday book, was the puniſhment for knaviſh brewers in the city of Cheſter ſo early as the reign of Edward the confeſſor. "*Malam cerviſiam faciens, in cathedra ponebatur ſtercoris* [i]." But

[g] See Vol. I. pag. 274.
[h] 3 Inſt. 219.
[i] Seld. tit. of hon. b. 2. c. 5. §. 3.

now

now the general puniſhment for all frauds of this kind, if indicted (as they may be) at common law, is by fine and impriſonment: though the eaſier and more uſual way is by levying on a ſummary conviction, by diſtreſs and ſale, the forfeitures impoſed by the ſeveral acts of parliament. Laſtly, any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwiſe, as by playing with falſe dice, or the like, is puniſhable with fine, impriſonment, and pillory[k]. And by the ſtatutes 33 Hen. VIII. c. 1. and 30 Geo. II. c. 24. if any man defrauds another of any valuable chattels by colour of any falſe token, counterfeit letter, or falſe pretence, or pawns or diſpoſes of another's goods without the conſent of the owner, he ſhall ſuffer ſuch puniſhment by impriſonment, fine, pillory, tranſportation, whipping, or other corporal pain, as the court ſhall direct.

6. THE offence of *foreſtalling* the market is alſo an offence againſt public trade. This, which (as well as the two following) is alſo an offence at common law[l], is deſcribed by ſtatute 5 & 6 Edw. VI. c. 14. to be the buying or contracting for any merchandize or victual coming in the way to market; or diſſuading perſons from bringing their goods or proviſions there; or perſuading them to enhance the price, when there: any of which practices make the market dearer to the fair trader.

7. REGRATING is deſcribed by the ſame ſtatute to be the buying of corn, or other dead victual, in any market, and ſelling it again in the ſame market, or within four miles of the place. For this alſo enhances the price of the proviſions, as every ſucceſſive ſeller muſt have a ſucceſſive profit.

8. ENGROSSING, by the ſame ſtatute, is the getting into one's poſſeſſion, or buying up, of corn or other dead victuals, with intent to ſell them again. This muſt of courſe be injurious to the public, by putting it in the power of one or two rich men to raiſe the price of proviſions at their own diſcretion.

[k] 1 Hawk. P. C. 188. [l] 2 Hawk. P. C. 235.

And

And the penalty for theſe three offences by this ſtatute (which is the laſt that hath been made concerning them) is the forfeiture of the goods or their value, and two months impriſonment for the firſt offence; double value and ſix months impriſonment for the ſecond; and, for the third, the offender ſhall forfeit all his goods, be ſet in the pillory, and impriſoned at the king's pleaſure. Among the Romans theſe offences, and other male-practices to raiſe the price of proviſions, were puniſhed by a pecuniary mulct. "*Poena viginti aureorum ſtatuitur adverſus eum, qui contra anno-*" *nam fecerit, ſocietatemve coierit quo annona carior fiat* [m]."

9. MONOPOLIES are much the ſame offence in other branches of trade, that engroſſing is in proviſions: being a licence or privilege allowed by the king for the ſole buying and ſelling, making, working, or uſing, of any thing whatſoever; whereby the ſubject in general is reſtrained from that liberty of manufacturing or trading which he had before [n]. Theſe had been carried to an enormous height during the reign of queen Elizabeth; and were heavily complained of by ſir Edward Coke [o], in the beginning of the reign of king James the firſt: but were in great meaſure remedied by ſtatute 21 Jac. I. c. 3. which declares ſuch monopolies to be contrary to law and void; (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions;) and monopoliſts are puniſhed with the forfeiture of treble damages and double coſts, to thoſe whom they attempt to diſturb; and if they procure any action, brought againſt them for theſe damages, to be ſtayed by any extrajudicial order, other than of the court wherein it is brought, they incur the penalties of *praemunire*. Combinations alſo among victuallers or artificers, to raiſe the price of proviſions, or any commodities, or the rate of labour, are in many caſes ſeverely puniſhed by particular ſtatutes; and, in general, by ſtatute 2 & 3 Edw. VI. c. 15. with the forfeiture of 10 *l*, or twenty days impriſonment, with an allowance of only bread and water, for the firſt offence;

[m] *Ff.* 48. 12. 2.
[n] 1 Hawk. P. C. 231.
[o] 3 Inſt. 181.

20 *l*.

20 *l.* or the pillory, for the ſecond; and 40 *l.* for the third, or elſe the pillory, loſs of one ear, and perpetual infamy. In the ſame manner, by a conſtitution of the emperor Zeno [p], all monopolies and combinations to keep up the price of merchandize, proviſions, or workmanſhip, were prohibited upon pain of forfeiture of goods and perpetual baniſhment.

10. To exerciſe a *trade* in any town, without having previouſly ſerved as an *apprentice* for ſeven years [q], is looked upon to be detrimental to public trade, upon the ſuppoſed want of ſufficient ſkill in the trader; and therefore is puniſhed by ſtatute 5 Eliz. c. 4. with the forfeiture of forty ſhillings by the month.

11. LASTLY, to prevent the deſtruction of our home manufactures, by *tranſporting and ſeducing our artiſts* to ſettle abroad, it is provided by ſtatute 5 Geo. I. c. 27. that ſuch as ſo entice or ſeduce them ſhall be fined 100 *l*, and be impriſoned three months; and for the ſecond offence ſhall be fined at diſcretion, and be impriſoned a year: and the artificers, ſo going into foreign countries, and not returning within ſix months after warning given them by the Britiſh embaſſador where they reſide, ſhall be deemed aliens, and forfeit all their lands and goods, and ſhall be incapable of any legacy or gift. By ſtatute 23 Geo. II. c. 13. the ſeducers incur, for the firſt offence, a forfeiture of 500*l.* for each artificer contracted with to be ſent abroad, and impriſonment for twelve months; and for the ſecond, 1000 *l*, and are liable to two years impriſonment: and if any perſon exports any tools or utenſils uſed in the ſilk or woollen manufactures, he forfeits the ſame and 200 *l*, and the captain of the ſhip (having knowlege thereof) 100 *l:* and if any captain of a king's ſhip, or officer of the cuſtoms, knowingly ſuffers ſuch exportation, he forfeits 100 *l.* and his employment; and is for ever made incapable of bearing any public office.

[p] *Cod.* 4. 59. 1.

[q] See Vol. I. pag. 427.

CHAPTER THE THIRTEENTH.

OF OFFENCES AGAINST THE PUBLIC HEALTH, AND THE PUBLIC POLICE OR OECONOMY.

THE fourth ſpecies of offences, more eſpecially affecting the commonwealth, are ſuch as are againſt the public *health* of the nation; a concern of the higheſt importance, and for the preſervation of which there are in many countries ſpecial magiſtrates or curators appointed.

1. THE firſt of theſe offences is a felony; but, by the bleſſing of providence for more than a century paſt, incapable of being committed in this nation. For by ſtatute 1 Jac. I. c. 31. it is enacted, that if any perſon infected with the plague, or dwelling in any infected houſe, be commanded by the mayor or conſtable, or other head officer of his town or vill, to keep his houſe, and ſhall venture to diſobey it; he may be inforced, by the watchmen appointed on ſuch melancholy occaſions, to obey ſuch neceſſary command: and, if any hurt enſue by ſuch inforcement, the watchmen are thereby indemnified. And farther, if ſuch perſon ſo commanded to confine himſelf goes abroad, and converſes in company, if he has no plague ſore upon him, he ſhall be puniſhed as a vagabond by whipping, and be bound to his good behaviour: but, if he has any infectious ſore upon him uncured, he then ſhall be guilty of felony. By the ſtatute 26 Geo. II. c. 6. (explained and amended by 29 Geo. II. c. 8.) the method of performing *quarentine*, or forty days probation,

by ſhips coming from infected countries, is put in a much more regular and effectual order than formerly; and maſters of ſhips, coming from infected places and diſobeying the directions there given, or having the plague on board and concealing it, are guilty of felony without benefit of clergy. The ſame penalty alſo attends perſons eſcaping from the *lazarets*, or places wherein quarentine is to be performed; and officers and watchmen neglecting their duty; and perſons conveying goods or letters from ſhips performing quarentine.

2. A SECOND, but much inferior, ſpecies of offence againſt public health is the ſelling of *unwholſome proviſions*. To prevent which the ſtatute 51 Hen. III. ſt. 6. and the ordinance for bakers, c. 7. prohibit the ſale of corrupted wine, contagious or unwholſome fleſh, or fleſh that is bought of a Jew; under pain of amercement for the firſt offence, pillory for the ſecond, fine and impriſonment for the third, and abjuration of the town for the fourth. And by the ſtatute 12 Car. II. c. 25. §. 11. any brewing or adulteration of wine is puniſhed with the forfeiture of 100*l*, if done by the wholeſale merchant; and 40*l*, if done by the vintner or retale trader. Theſe are all the offences, which may properly be ſaid to reſpect the public health.

V. THE laſt ſpecies of offences which eſpecially affect the commonwealth are thoſe againſt the public *police* and *oeconomy*. By the public police and oeconomy I mean the due regulation and domeſtic order of the kingdom: whereby the individuals of the ſtate, like members of a well governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, induſtrious, and inoffenſive in their reſpective ſtations. This head of offences muſt therefore be very miſcellaneous, as it comprizes all ſuch crimes as eſpecially affect public ſociety, and are not comprehended under any of the four preceding ſpecies. Theſe amount, ſome of them to felony, and others to miſdemeſnors only. Among the former are,

1. THE

1. THE offence of *clandeſtine marriages:* for by the ſtatute 26 Geo. II. c. 33. 1. To ſolemnize marriage in any other place beſides a church, or public chapel wherein banns have been uſually publiſhed, except by licence from the archbiſhop;---and, 2. To ſolemnize marriage in ſuch church or chapel without due publication of banns, or licence obtained from a proper authority;---do both of them not only render the marriage void, but ſubject the perſon ſolemnizing it to felony, puniſhed by tranſportation for fourteen years: as, by three former ſtatutes[a], he and his aſſiſtants were ſubject to a pecuniary forfeiture of 100*l.* 3. To make a falſe entry in a marriage regiſter; to alter it when made; to forge, or counterfeit, ſuch entry, or a marriage licence, or aid and abet ſuch forgery; to utter the ſame as true, knowing it to be counterfeit; or to deſtroy or procure the deſtruction of any regiſter, in order to vacate any marriage, or ſubject any perſon to the penalties of this act; all theſe offences, knowingly and wilfully committed, ſubject the party to the guilt of felony, without benefit of clergy.

2. ANOTHER felonious offence, with regard to this holy eſtate of matrimony, is what our law corruptly calls *bigamy*; which properly ſignifies being twice married, but with us is uſed as ſynonymous to *polygamy*, or having a plurality of wives at once[b]. Such ſecond marriage, living the former huſband or wife, is ſimply void, and a mere nullity, by the eccleſiaſtical law of England: and yet the legiſlature has thought it juſt to make it felony, by reaſon of it's being ſo great a violation of the public oeconomy and decency of a well ordered ſtate. For polygamy can never be endured under any rational civil eſtabliſhment, whatever ſpecious reaſons may be urged for it by the eaſtern nations, the fallaciouſneſs of which has been fully proved by many ſenſible writers: but in northern countries the very nature of the climate ſeems to reclaim againſt it; it never having obtained in this part of the

[a] 6 & 7 W. III. c. 6. 7 & 8 W. III. c. 35. 10 Ann. c. 19. §. 176.

[b] 3 Inſt. 88.

world, even from the time of our German anceſtors; who, as Tacitus informs us[c], "*prope ſoli barbarorum ſingulis uxoribus* "*contenti ſunt.*" It is therefore puniſhed by the laws both of antient and modern Sweden with death[d]. And with us in England it is enacted by ſtatute 1 Jac. I. c. 11. that if any perſon, being married, do afterwards marry again, the former huſband or wife being alive, it is felony; but within the benefit of clergy. The firſt wife in this caſe ſhall not be admitted as an evidence againſt her huſband, becauſe ſhe is the true wife; but the ſecond may, for ſhe is indeed no wife at all[e]; and ſo, *vice verſa*, of a ſecond huſband. This act makes an exception to five caſes, in which ſuch ſecond marriage, though in the three firſt it is void, is yet no felony. 1. Where either party hath been continually *abroad* for ſeven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been abſent from the other ſeven years *within* this kingdom, and the remaining party hath had no notice of the other's being alive within that time. 3. Where there is a divorce or ſeparation *a menſa et thoro* by ſentence in the eccleſiaſtical court. 4. Where the firſt marriage is declared abſolutely void by any ſuch ſentence, and the parties looſed *a vinculo*. Or, 5. Where either of the parties was under the age of conſent at the time of the firſt marriage: for in ſuch caſe the firſt marriage was voidable by the diſagreement of either party, which this ſecond marriage very clearly amounts to. But, if at the age of conſent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage; and afterwards one of them ſhould marry again; I ſhould apprehend that ſuch ſecond marriage would be within the reaſon and penalties of the act.

3. A THIRD ſpecies of felony againſt the good order and oeconomy of the kingdom, is by idle *ſoldiers* and *mariners wandering* about the realm, or perſons pretending ſo to be, and

[c] *de mor. Germ.* 18.
[d] Stiernh. *de jure Sueon. l.* 3. *c.* 2.
[e] 1 Hal. P. C. 693.

abuſing

abuſing the name of that honourable profeſſion [f]. Such a one, not having a teſtimonial or paſs from a juſtice of the peace, limiting the time of his paſſage; or exceeding the time limited for fourteen days, unleſs he falls ſick; or forging ſuch teſtimonial; is by ſtatute 39 Eliz. c. 17. made guilty of felony, without benefit of clergy. This ſanguinary law, though in practice deſervedly antiquated, ſtill remains a diſgrace to our ſtatute-book: yet attended with this mitigation, that the offender may be delivered, if any honeſt freeholder or other perſon of ſubſtance will take him into his ſervice, and he abides in the ſame for one year; unleſs licenced to depart by his employer, who in ſuch caſe ſhall forfeit ten pounds.

4. OUTLANDISH perſons calling themſelves *Egyptians*, or *gypſies*, are another object of the ſeverity of ſome of our unrepealed ſtatutes. Theſe are a ſtrange kind of commonwealth among themſelves of wandering impoſtors and jugglers, who made their firſt appearance in Germany about the beginning of the ſixteenth century, and have ſince ſpread themſelves all over Europe. Munſter, it is true [g], who is followed and relied upon by Spelman [h], fixes the time of their firſt appearance to the year 1417; but, as he owns, that the firſt whom he ever ſaw were in 1524, it is probably an error of the preſs for 1517: eſpecially as other hiſtorians [i] inform us, that when ſultan Selim conquered Egypt, in the year 1517, ſeveral of the natives refuſed to ſubmit to the Turkiſh yoke; but, being at length ſubdued and baniſhed, they agreed to diſperſe in ſmall parties all over the world, where their ſuppoſed ſkill in the black art gave them an univerſal reception, in that age of ſuperſtition and credulity. In the compaſs of a very few years they gained ſuch a number of idle proſelytes, (who imitated their language and complexion, and betook themſelves to the ſame arts of chiromancy, begging, and pilfering) that they became troubleſome and even formidable to moſt of

[f] 3 Inſt. 85.
[g] *Coſmogr. l.* 3.
[h] *Gloſſ.* 193.
[i] Mod. Univ. Hiſt. xliii. 271.

the

the ſtates of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591[i]. And the government in England took the alarm much earlier: for in 1530, they are deſcribed by ſtatute 22 Hen. VIII. c. 10. as "outlandiſh "people, calling themſelves Egyptians, uſing no craft nor feat "of merchandize, who have come into this realm and gone from "ſhire to ſhire and place to place in great company, and uſed "great, ſubtil, and crafty means to deceive the people; bearing "them in hand, that they by palmeſtry could tell men's and "women's fortunes; and ſo many times by craft and ſubtilty "have deceived the people of their money, and alſo have com-"mitted many heinous felonies and robberies." Wherefore they are directed to avoid the realm, and not to return under pain of impriſonment, and forfeiture of their goods and chattels; and, upon their trials for any felony which they may have committed, they ſhall not be intitled to a jury *de medietate linguae*. And afterwards, it is enacted by ſtatutes 1 & 2 Ph. & M. c. 4. and 5 Eliz. c. 20. that if any ſuch perſons ſhall be imported into this kingdom, the importer ſhall forfeit 40*l*. And if the Egyptians themſelves remain one month in this kingdom; or if any perſon, being fourteen years old, (whether natural born ſubject or ſtranger) which hath been ſeen or found in the fellowſhip of ſuch Egyptians, or which hath diſguiſed him or herſelf like them, ſhall remain in the ſame one month, at one or ſeveral times; it is felony without benefit of clergy: and ſir Matthew Hale informs us[k], that at one Suffolk aſſiſes no leſs than thirteen gypſies were executed upon theſe ſtatutes, a few years before the reſtoration. But, to the honour of our national humanity, there are no inſtances more modern than this, of carrying theſe laws into practice.

5. To deſcend next to offences, whoſe puniſhment is ſhort of death. *Common nuſances* are a ſpecies of offences againſt the public order and oeconomical regimen of the ſtate; being either

[i] Dufreſne. *Gloſſ. I.* 200.

[k] 1 Hal. P. C. 671.

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the doing of a thing to the annoyance of all the king's ſubjects, or the neglecting to do a thing which the common good requires[l]. The nature of *common* nuſances, and their diſtinction from *private* nuſances, were explained in the preceding volume[m]; when we conſidered more particularly the nature of the private ſort, as a civil injury to individuals. I ſhall here only remind the ſtudent, that common nuſances are ſuch inconvenient or troubleſome offences, as annoy the whole community in general, and not merely ſome particular perſon; and therefore are indictable only, and not actionable; as it would be unreaſonable to multiply ſuits, by giving every man a ſeparate right of action, for what damnifies him in common only with the reſt of his fellow ſubjects. Of this nature are, 1. Annoyances in *highways*, *bridges*, and public *rivers*, by rendering the ſame inconvenient or dangerous to paſs: either poſitively, by actual obſtructions; or negatively, by want of reparations. For both of theſe, the perſon ſo obſtructing, or ſuch individuals as are bound to repair and cleanſe them, or (in default of theſe laſt) the pariſh at large, may be indicted, diſtreined to repair and amend them, and in ſome caſes fined. And a preſentment thereof by a judge of aſſiſe, *&c*, or a juſtice of the peace, ſhall be in all reſpects equivalent to an indictment[n]. Where there is an houſe erected, or an incloſure made, upon any part of the king's demeſnes, or of an highway, or common ſtreet, or public water, or ſuch like public things, it is properly called a *purpreſture*[o]. 2. All thoſe kinds of nuſances, (ſuch as offenſive trades and manufactures) which when injurious to a private man are actionable, are, when detrimental to the public, puniſhable by public proſecution, and ſubject to fine according to the quantity of the miſdemeſnor: and particularly the keeping of hogs in any city or market town is indictable as a public nuſance[p]. 3. All diſorderly *inns* or *ale-houſes*, *bawdy-houſes*, *gaming-houſes*, *ſtage-plays* unlicenced, booths and ſtages for *rope-dancers*, *mount-*

[l] 1 Hawk. P. C. 197.
[m] Vol. III. pag. 216.
[n] Stat. 7 Geo. III. c. 42.
[o] Co. Litt. 277. from the French *pourpris*, an incloſure.
[p] Salk. 460.

ebanks,

ebanks, and the like, are public nuſances, and may upon indictment be ſuppreſſed and fined [q]. Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, ſuppreſſed, and the inn-keepers fined, if they refuſe to entertain a traveller without a very ſufficient cauſe: for thus to fruſtrate the end of their inſtitution is held to be diſorderly behaviour [r]. Thus too the hoſpitable laws of Norway puniſh, in the ſevereſt degree, ſuch inn-keepers as refuſe to furniſh accommodations at a juſt and reaſonable price [s]. 4. By ſtatute 10 & 11 W. III. c. 17. all *lotteries* are declared to be public nuſances, and all grants, patents, or licences for the ſame to be contrary to law. 5. *Cottages* are held to be common nuſances, if erected ſingly on the waſte, being harbours for thieves and other idle and diſſolute perſons. Therefore it is enacted by ſtatute 31 Eliz. c. 7. that no perſon ſhall erect a cottage, unleſs he lays to it four acres of freehold land of inheritance to be occupied therewith, on pain to forfeit to the king 10*l.* for it's erection, and 40 *s. per* month for it's continuance: and no owner or occupier of a cottage ſhall ſuffer any inmates therein, or more families than one to inhabit there, on pain to forfeit 10 *s. per* month to the lord of the leet. This ſeems, upon our preſent more enlarged notions, a hard and impolitic law; depriving the people of houſes to dwell in, and conſequently preventing the populouſneſs of towns and pariſhes: which, though it is generally endeavoured to be guarded againſt, through a fatal rural policy, (being ſometimes, when the poor are ill-managed, an intolerable hardſhip) yet, taken in a national view, and on a ſuppoſition of proper induſtry and good parochial government, is a very great advantage to any kingdom. But indeed this, like moſt other rigid or inconvenient laws, is rarely put in execution. 6. The making and ſelling of *fireworks* and *ſquibs*, or throwing them about in any ſtreet, is, on account of the danger that may

[q] 1 Hawk. P. C. 198. 225.
[r] 1 Hawk. P. C. 225.
[s] Stiernh. *de jure Sueon. l.* 2. *c.* 9.

enſue

enſue to any thatched or timber buildings, declared to be a common nuſance, by ſtatute 9 & 10 W. III. c. 7. and therefore is puniſhable by fine. 7. *Eaves-droppers*, or ſuch as liſten under walls or windows, or the eaves of a houſe, to hearken after diſcourſe, and thereupon to frame ſlanderous and miſchievous tales, are a common nuſance and preſentable at the court-leet[s]: or are indictable at the ſeſſions, and puniſhable by fine and finding ſureties for the good behaviour[t]. 8. Laſtly, a *common ſcold*, *communis rixatrix*, (for our law-latin confines it to the feminine gender) is a public nuſance to her neighbourhood. For which offence ſhe may be indicted[u]; and, if convicted, ſhall[w] be ſentenced to be placed in a certain engine of correction called the trebucket, caſtigatory, or *cucking* ſtool, which in the Saxon language ſignifies the ſcolding ſtool; though now it is frequently corrupted into *ducking* ſtool, becauſe the reſidue of the judgment is, that, when ſhe is ſo placed therein, ſhe ſhall be plunged in the water for her puniſhment[x].

6. IDLENESS in any perſon whatſoever is alſo a high offence againſt the public oeconomy. In China it is a maxim, that if there be a man who does not work, or a woman that is idle, in the empire, ſomebody muſt ſuffer cold or hunger: the produce of the lands not being more than ſufficient, with culture, to maintain the inhabitants; and therefore, though the idle perſon may ſhift off the want from himſelf, yet it muſt in the end fall ſomewhere. The court alſo of Areopagus at Athens puniſhed idleneſs, and exerted a right of examining every citizen in what manner he ſpent his time; the intention of which was[y], that the Athenians, knowing they were to give an account of their occupations, ſhould follow only ſuch as were laudable, and that there might be no room left for ſuch as lived by unlawful arts. The civil law expelled all ſturdy vagrants from the city[z]: and,

[s] Kitch. of courts. 20.
[t] *Ibid.* 1 Hawk. P. C. 132.
[u] 6 Mod. 213.
[w] 1 Hawk. P. C. 198. 200.
[x] 3 Inſt 219.
[y] Valer. Maxim. *l.* 2. *c.* 6.
[z] *Nov.* 80. *c.* 5.

in our own law, all idle perſons or vagabonds, whom our antient ſtatutes deſcribe to be "ſuch as wake on the night, and ſleep on "the day, and haunt cuſtomable taverns, and ale-houſes, and "routs about; and no man wot from whence they come, ne "whither they go;" or ſuch as are moſt particularly deſcribed by ſtatute 17 Geo. II. c. 5. and divided into three claſſes, *idle* and *diſorderly* perſons, *rogues* and *vagabonds*, and *incorrigible rogues*;---all theſe are offenders againſt the good order, and blemiſhes in the government, of any kingdom. They are therefore all puniſhed, by the ſtatute laſt-mentioned; that is to ſay, idle and diſorderly perſons with one month's impriſonment in the houſe of correction; rogues and vagabonds with whipping and impriſonment not exceeding ſix months; and incorrigible rogues with the like diſcipline and confinement, not exceeding two years: the breach and eſcape from which confinement in one of an inferior claſs, ranks him among incorrigible rogues; and in a rogue (before incorrigible) makes him a felon, and liable to be tranſported for ſeven years. Perſons harbouring vagrants are liable to a fine of forty ſhillings, and to pay all expenſes brought upon the pariſh thereby; in the ſame manner as, by our antient laws, whoever harboured any ſtranger for more than two nights, was anſwerable to the public for any offence that ſuch his inmate might commit[a].

7. UNDER the head of public oeconomy may alſo be properly ranked all ſumptuary laws againſt *luxury*, and extravagant expenſes in dreſs, diet, and the like; concerning the general utility of which to a ſtate, there is much controverſy among the political writers. Baron Monteſquieu lays it down[b], that luxury is neceſſary in monarchies, as in France; but ruinous to democracies, as in Holland. With regard therefore to England, whoſe government is compounded of both ſpecies, it may ſtill be a dubious queſtion, how far private luxury is a public evil; and, as ſuch, cognizable by public laws. And indeed our legiſ-

[a] *LL. Edw. c.* 27. Bracton. *l.* 3. *tr.* 2. *c.* 10. §. 2. [b] Sp. L. b. 7. c. 2 & 4.

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lators have ſeveral times changed their ſentiments as to this point: for formerly there were a multitude of penal laws exiſting, to reſtrain exceſs in apparel [c]; chiefly made in the reigns of Edward the third, Edward the fourth, and Henry the eighth, againſt piked ſhoes, ſhort doublets, and long coats; all of which were repealed by ſtatute 1 Jac. I. c. 25. But, as to exceſs in diet, there ſtill remains one antient ſtatute unrepealed, 10 Edw. III. ſt. 3. which ordains that no man ſhall be ſerved, at dinner or ſupper, with more than two courſes; except upon ſome great holydays there ſpecified, in which he may be ſerved with three.

8. NEXT to that of luxury, naturally follows the offence of *gaming*, which is generally introduced to ſupply or retrieve the expenſes occaſioned by the former: it being a kind of tacit confeſſion, that the company engaged therein do, in general, exceed the bounds of their reſpective fortunes; and therefore they caſt lots to determine upon whom the ruin ſhall at preſent fall, that the reſt may be ſaved a little longer. But, taken in any light, it is an offence of the moſt alarming nature; tending by neceſſary conſequence to promote public idleneſs, theft, and debauchery among thoſe of a lower claſs: and, among perſons of a ſuperior rank, it hath frequently been attended with the ſudden ruin and deſolation of antient and opulent families, an abandoned proſtitution of every principle of honour and virtue, and too often hath ended in ſelf-murder. To reſtrain this pernicious vice, among the inferior ſort of people, the ſtatute 33 Hen. VIII. c. 9. was made; which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diverſions there ſpecified [d], unleſs in the time of chriſtmas, under pecuniary pains and impriſonment. And the ſame law, and alſo the ſtatute 30 Geo. II. c. 24. inflict pecuniary penalties, as well upon the maſter of any public houſe wherein ſervants are permitted to game, as upon the ſervants themſelves who are found to be gaming there. But this is not the principal ground of modern

[c] 3 Inſt. 199.

[d] Logetting in the fields, ſlide-thrift or ſhove-groat, cloyſh-cayls, half-bowl, and coyting.

complaint: it is the gaming in high life, that demands the attention of the magiſtrate; a paſſion to which every valuable conſideration is made a ſacrifice, and which we ſeem to have inherited from our anceſtors the antient Germans; whom Tacitus[e] deſcribes to have been bewitched with the ſpirit of play to a moſt exorbitant degree. "They addict themſelves, ſays he, to dice, "(which is wonderful) when ſober, and as a ſerious employ-"ment; with ſuch a mad deſire of winning or loſing, that, when "ſtript of every thing elſe, they will ſtake at laſt their liberty, "and their very ſelves. The loſer goes into a voluntary ſlavery, "and, though younger and ſtronger than his antagoniſt, ſuffers "himſelf to be bound and ſold. And this perſeverance in ſo bad "a cauſe they call the point of honour: *ea eſt in re prava per-*"*vicacia, ipſi fidem vocant.*" One would almoſt be tempted to think Tacitus was deſcribing a modern Engliſhman. When men are thus intoxicated with ſo frantic a ſpirit, laws will be of little avail: becauſe the ſame falſe ſenſe of honour, that prompts a man to ſacrifice himſelf, will deter him from appealing to the magiſtrate. Yet it is proper that laws ſhould be, and be known publicly, that gentlemen may learn what penalties they wilfully incur, and what a confidence they repoſe in ſharpers; who, if ſucceſsful in play, are certain to be paid with honour, or, if unſucceſsful, have it in their power to be ſtill greater gainers by informing. For by ſtatute 16 Car. II. c. 7. if any perſon by playing or betting ſhall loſe more than 100*l.* at one time, he ſhall not be compellable to pay the ſame; and the winner ſhall forfeit treble the value, one moiety to the king, the other to the informer. The ſtatute 9 Ann. c. 14. enacts, that all bonds and other ſecurities, given for money won at play, or money lent at the time to play withal, ſhall be utterly void: that all mortgages and incumbrances of lands, made upon the ſame conſideration, ſhall be and enure to the uſe of the heir of the mortgagor: that, if any perſon at one time loſes 10*l.* at play, he may ſue the winner, and recover it back by action of debt at law; and, in caſe the loſer does not, any other perſon may ſue the win-

[e] *de mor. Germ. c.* 24.

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ner for treble the ſum ſo loſt; and the plaintiff in either caſe may examine the defendant himſelf upon oath: and that in any of theſe ſuits no privilege of parliament ſhall be allowed. The ſtatute farther enacts, that if any perſon cheats at play, and at one time wins more than 10*l.* or any valuable thing, he may be indicted thereupon, and ſhall forfeit five times the value, ſhall be deemed infamous, and ſuffer ſuch corporal puniſhment as in caſe of wilful perjury. By ſeveral ſtatutes of the reign of king George II[f], all private lotteries by tickets, cards, or dice, (and particularly the games of faro, baſſet, ace of hearts, hazard, paſſage, rolly polly, and all other games with dice, except baggammon) are prohibited under a penalty of 200*l.* for him that ſhall erect ſuch lotteries, and 50*l.* a time for the players. Public lotteries, unleſs by authority of parliament, and all manner of ingenious devices, under the denomination of ſales or otherwiſe, which in the end are equivalent to lotteries, were before prohibited by a great variety of ſtatutes[g] under heavy pecuniary penalties. But particular deſcriptions will ever be lame and deficient, unleſs all games of mere chance are at once prohibited; the inventions of ſharpers being ſwifter than the puniſhment of the law, which only hunts them from one device to another. The ſtatute 13 Geo. II. c. 19. to prevent the multiplicity of horſe races, another fund of gaming, directs that no plates or matches under 50*l.* value ſhall be run, upon penalty of 200*l.* to be paid by the owner of each horſe running, and 100*l.* by ſuch as advertiſe the plate. By ſtatute 18 Geo. II. c. 34. the ſtatute 9 Ann. is farther enforced, and ſome deficiences ſupplied: the forfeitures of that act may now be recovered in a court of equity; and, moreover, if any man be convicted upon information or indictment of winning or loſing at any ſitting 10*l.* or 20*l.* within twenty four hours, he ſhall forfeit five times the ſum. Thus careful has the legiſlature been to prevent this deſtructive vice: which may ſhew that our laws againſt gaming

[f] 12 Geo. II. c. 28. 13 Geo. II. c. 19. §. 56. 10 Ann. c. 26. §. 109. 2 Geo. I. c. 2. 18 Geo. II. c. 34. §. 36, 37. 9 Geo. I. c. 19. §. 4, 5. 6 Geo. II. c. 35. §. 29, 30.

[g] 10 & 11 W. III. c. 17. 9 Ann. c. 6.

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are not ſo deficient, as ourſelves and our magiſtrates in putting thoſe laws in execution.

9. LASTLY, there is another offence, ſo conſtituted by a variety of acts of parliament, which are ſo numerous and ſo confuſed, and the crime itſelf of ſo queſtionable a nature, that I ſhall not detain the reader with many obſervations thereupon. And yet it is an offence which the ſportſmen of England ſeem to think of the higheſt importance; and a matter, perhaps the only one, of general and national concern: aſſociations having been formed all over the kingdom to prevent it's deſtructive progreſs. I mean the offence of deſtroying ſuch beaſts and fowls, as are ranked under the denomination of *game*: which, we may remember, was formerly obſerved[h], (upon the old principles of the foreſt law) to be a treſpaſs and offence in all perſons alike, who have not authority from the crown to kill game (which is royal property) by the grant of either a free warren, or at leaſt a manor of their own. But the laws, called the game laws, have alſo inflicted additional puniſhments (chiefly pecuniary) on perſons guilty of this general offence, unleſs they be people of ſuch rank or fortune as is therein particularly ſpecified. All perſons therefore, of what property or diſtinction ſoever, that kill game out of their own territories, or even upon their own eſtates, without the king's licence expreſſed by the grant of a franchiſe, are guilty of the firſt original offence, of encroaching on the royal prerogative. And thoſe indigent perſons who do ſo, without having ſuch rank or fortune as is generally called a qualification, are guilty not only of the original offence, but of the aggravations alſo, created by the ſtatutes for preſerving the game: which aggravations are ſo ſeverely puniſhed, and thoſe puniſhments ſo implacably inflicted, that the offence againſt the king is ſeldom thought of, provided the miſerable delinquent can make his peace with the lord of the manor. This offence, thus aggravated, I have ranked under the preſent head, becauſe the only rational footing, upon which we can conſider it as a

[h] See Vol. II. pag 417, &c.

crime,

crime, is, that in low and indigent perſons it promotes idleneſs, and takes them away from their proper employments and callings; which is an offence againſt the public police and oeconomy of the commonwealth.

THE ſtatutes for preſerving the game are many and various, and not a little obſcure and intricate; it being remarked[i], that in one ſtatute only, 5 Ann. c. 14. there is falſe grammar in no fewer than ſix places, beſides other miſtakes: the occaſion of which, or what denomination of perſons were probably the penners of theſe ſtatutes, I ſhall not at preſent enquire. It is in general ſufficient to obſerve, that the *qualifications* for killing game, as they are uſually called, or more properly the *exemptions* from the penalties inflicted by the ſtatute law, are, 1. The having a freehold eſtate of 100 *l. per annum*; there being fifty times the property required to enable a man to kill a partridge, as to vote for a knight of the ſhire: 2. A leaſehold for ninety nine years of 150 *l. per annum*: 3. Being the ſon and heir apparent of an eſquire (a very looſe and vague deſcription) or perſon of ſuperior degree: 4. Being the owner, or keeper, of a foreſt, park, chaſe, or warren. For unqualified perſons tranſgreſſing theſe laws, by killing game, keeping engines for that purpoſe, or even having game in their cuſtody, or for perſons (however qualified) that kill game, or have it in poſſeſſion, at unſeaſonable times of the year, there are various penalties aſſigned, corporal and pecuniary, by different ſtatutes[k]; on any of which, but only on one at a time, the juſtices may convict in a ſummary way, or proſecutions may be carried on at the aſſiſes. And, laſtly, by ſtatute 28 Geo. II. c. 12. no perſon, however qualified to *kill*, may make merchandize of this valuable privilege, by *ſelling* or expoſing to ſale any game, on pain of like forfeiture as if he had no qualification.

[i] Burn's Juſtice, tit. Game. §. 3.

[k] *Ibid. eod. tit.*

CHAPTER THE FOURTEENTH.

OF HOMICIDE.

IN the ten preceding chapters we have conſidered, firſt, ſuch crimes and miſdemeſnors as are more immediately injurious to God and his holy religion; ſecondly, ſuch as violate or tranſgreſs the law of nations; thirdly, ſuch as more eſpecially affect the king, the father and repreſentative of his people; fourthly, ſuch as more directly infringe the rights of the public or commonwealth, taken in it's collective capacity; and are now, laſtly, to take into conſideration thoſe which in a more peculiar manner affect and injure *individuals* or private ſubjects.

WERE theſe injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall abſolutely under the notion of private wrongs; for which a ſatisfaction would be due only to the party injured: the manner of obtaining which was the ſubject of our enquiries in the preceding volume. But the wrongs, which we are now to treat of, are of a much more extenſive conſequence; 1. Becauſe it is impoſſible they can be committed without a violation of the laws of nature; of the moral as well as political rules of right: 2. Becauſe they include in them almoſt always a breach of the public peace: 3. Becauſe by their example and evil tendency they threaten and endanger the ſubverſion of all civil ſociety.

ciety. Upon these accounts it is, that, besides the private satisfaction due and given in many cases to the individual, by action for the private wrong, the government also calls upon the offender to submit to public punishment for the public crime. And the prosecution of these offences is always at the suit and in the name of the king, in whom by the texture of our constitution the *jus gladii*, or executory power of the law, entirely resides. Thus too, in the old Gothic constitution, there was a threefold punishment inflicted on all delinquents: first, for the private wrong to the party injured; secondly, for the offence against the king by disobedience to the laws; and thirdly, for the crime against the public by their evil example [a]. Of which we may trace the groundwork, in what Tacitus tells us of his Germans [b]; that, whenever offenders were fined, "*pars mulctae regi, vel civitati, "pars ipsi qui vindicatur vel propinquis ejus, exsolvitur.*"

THESE crimes and misdemesnors against private subjects are principally of three kinds; against their *persons*, their *habitations*, and their *property*.

OF crimes injurious to the *persons* of private subjects, the most principal and important is the offence of taking away that life, which is the immediate gift of the great creator; and of which therefore no man can be entitled to deprive himself or another, but in some manner either expressly commanded in, or evidently deducible from, those laws which the creator has given us; the divine laws, I mean, of either nature or revelation. The subject therefore of the present chapter will be, the offence of *homicide* or destroying the life of man, in it's several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.

NOW homicide, or the killing of any human creature, is of three kinds; *justifiable*, *excusable*, and *felonious*. The first has no share of guilt at all; the second very little; but the third is

[a] Stiernhook, *l.* 1. *c.* 5.
[b] *de mor. Germ. c.* 12.

the higheſt crime againſt the law of nature, that man is capable of committing.

I. JUSTIFIABLE homicide is of divers kinds.

1. SUCH as is owing to ſome unavoidable *neceſſity*, without any will, intention, or deſire, and without any inadvertence or negligence, in the party killing, and therefore without any ſhadow of blame. As, for inſtance, by virtue of ſuch an office as obliges one, in the execution of public juſtice, to put a malefactor to death, who hath forfeited his life by the laws and verdict of his country. This is an act of neceſſity, and even of civil duty; and therefore not only juſtifiable, but commendable, where the law requires it. But the law muſt *require* it, otherwiſe it is not juſtifiable: therefore wantonly to kill the greateſt of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder[c]. For as Bracton[d] very juſtly obſerves, "*iſtud homicidium ſi fit ex livore, "vel delectatione effundendi humanum ſanguinem, licet juſte occidatur "iſte, tamen occiſor peccat mortaliter, propter intentionem corrup-"tam.*" And farther, if judgment of death be given by a judge not authorized by lawful commiſſion, and execution is done accordingly, the judge is guilty of murder[e]. And upon this account ſir Matthew Hale himſelf, though he accepted the place of a judge of the common pleas under Cromwell's government (ſince it is neceſſary to decide the diſputes of civil property in the worſt of times) yet declined to ſit on the crown ſide at the aſſiſes, and try priſoners; having very ſtrong objections to the legality of the uſurper's commiſſion[f]: a diſtinction perhaps rather too refined; ſince the puniſhment of crimes is at leaſt as neceſſary to ſociety, as maintaining the boundaries of property. Alſo ſuch judgment, when legal, muſt be executed by the proper officer, or his appointed deputy; for no one elſe is *required* by law to do it, which requiſition it is, that juſtifies

[c] 1 Hal. P. C. 497.
[d] *fol.* 120.
[e] 1 Hawk. P. C. 70. 1 Hal. P. C. 497.
[f] Burnet in his life.

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the homicide. If another perſon doth it of his own head, it is held to be murder[g]: even though it be the judge himſelf[h]. It muſt farther be executed, *ſervato juris ordine*; it muſt purſue the ſentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice verſâ*, it is murder[i]: for he is merely miniſterial, and therefore only juſtified when he acts under the authority and compulſion of the law; but, if a ſheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commiſſion of homicide: and, beſides, this licence might occaſion a very groſs abuſe of his power. The king indeed may remit part of a ſentence; as, in the caſe of treaſon, all but the beheading: but this is no change no introduction of a new puniſhment; and in the caſe of felony, where the judgment is *to be hanged*, the king (it hath been ſaid) cannot legally order even a peer to be beheaded[k]. But this doctrine will be more fully conſidered in a ſubſequent chapter.

AGAIN: in ſome caſes homicide is juſtifiable, rather by the *permiſſion*, than by the abſolute *command*, of the law: either for the *advancement* of public *juſtice*, which without ſuch indemnification would never be carried on with proper vigour; or, in ſuch inſtances where it is committed for the *prevention* of ſome atrocious *crime*, which cannot otherwiſe be avoided.

2. HOMICIDES, committed for the *advancement* of public *juſtice*, are; 1. Where an officer, in the execution of his office, either in a civil or criminal caſe, kills a perſon that aſſaults and reſiſts him[l]. 2. If an officer, or any private perſon, attempts to take a man charged with felony, and is reſiſted; and, in the endeavour to take him, kills him[m]. This is of a piece with the old Gothic conſtitutions, which (Stiernhook informs us[n]) "*furem, ſi aliter capi non poſſet, occidere permittunt.*" 3. In caſe

[g] 1 Hal. P. C. 501. 1 Hawk. P. C. 70.
[h] Dalt. Juſt. c. 150.
[i] Finch. L. 31. 3 Inſt. 52. 1 Hal. P. C. 501.
[k] 3 Inſt. 52. 212.
[l] 1 Hal. P. C. 494. 1 Hawk. P. C. 71.
[m] 1 Hal. P. C. 494.
[n] *de jure Goth. l.* 3. *c.* 5.

of a riot, or rebellious aſſembly, the officers endeavouring to diſperſe the mob are juſtifiable in killing them, both at common law [o], and by the riot act, 1 Geo. I. c. 5. 4. Where the priſoners in a gaol, or going to gaol, aſſault the gaoler or officer, and he in his defence kills any of them, it is juſtifiable, for the ſake of preventing an eſcape [p]. 5. If treſpaſſers in foreſts, parks, chaſes, or warrens, will not ſurrender themſelves to the keepers, they may be ſlain; by virtue of the ſtatute 21 Edw. I. ſt. 2. *de malefactoribus in parcis*, and 3 & 4 W. & M. c. 10. But, in all theſe caſes, there muſt be an apparent neceſſity on the officer's ſide; *viz.* that the party could not be arreſted or apprehended, the riot could not be ſuppreſſed, the priſoners could not be kept in hold, the deer-ſtealers could not but eſcape, unleſs ſuch homicide were committed: otherwiſe, without ſuch abſolute neceſſity, it is not juſtifiable. 6. If the champions in a trial by battel killed either of them the other, ſuch homicide was juſtifiable, and was imputed to the juſt judgment of God, who was thereby preſumed to have decided in favour of the truth [q].

3. IN the next place, ſuch homicide, as is committed for the *prevention* of any forcible and atrocious *crime*, is juſtifiable by the law of nature [r]; and alſo by the law of England, as it ſtood ſo early as the time of Bracton [s], and as it is ſince declared by ſtatute 24 Hen. VIII. c. 5. If any perſon attempts a robbery or murder of another, or attempts to break open a houſe *in the night time*, (which extends alſo to an attempt to burn it [t],) and ſhall be killed in ſuch attempt, the ſlayer ſhall be acquitted and diſcharged. This reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any houſe *in the day time*, unleſs it carries with it an attempt of robbery alſo. So the Jewiſh law, which puniſhed no theft with death, makes homicide only juſtifiable, in caſe of *nocturnal* houſebreaking: "if a thief be found breaking up, and he be ſmitten

[o] 1 Hal. P. C. 495. 1 Hawk. P. C. 161.
[p] 1 Hal. P. C. 496.
[q] 1 Hawk. P. C. 71.
[r] Puff. L. of N. l. 2. c. 5.
[s] *fol.* 155.
[t] 1 Hal. P. C. 488.

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"that he die, no blood ſhall be ſhed for him: but if the ſun "be riſen upon him, there ſhall blood be ſhed for him; for he "ſhould have made full reſtitution[u]." At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact[w]: and, by the Roman law of the twelve tables, a thief might be ſlain by night with impunity; or even by day, if he armed himſelf with any dangerous weapon[x]: which amounts very nearly to the ſame as is permitted by our own conſtitutions.

THE Roman law alſo juſtifies homicide, when committed in defence of the chaſtity either of oneſelf or relations[y]: and ſo alſo, according to Selden[z], ſtood the law in the Jewiſh republic. The Engliſh law likewiſe juſtifies a woman, killing one who attempts to raviſh her[a]: and ſo too the huſband or father may juſtify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by conſent, for the one is forcible and felonious, but not the other[b]. And I make no doubt but the forcibly attempting a crime, of a ſtill more deteſtable nature, may be equally reſiſted by the death of the unnatural aggreſſor. For the one uniform principle that runs through our own, and all other laws, ſeems to be this: that where a crime, in itſelf capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. But we muſt not carry this doctrine to the ſame viſionary length that Mr. Locke does; who holds[c], "that all man-"ner of force without right upon a man's perſon, puts him in a "ſtate of war with the aggreſſor; and, of conſequence, that, "being in ſuch a ſtate of war, he may lawfully kill him that "puts him under this unnatural reſtraint." However juſt this concluſion may be in a ſtate of uncivilized nature, yet the law

[u] Exod. xxii. 2.
[w] Potter. Antiqu. b. 1. c. 24.
[x] Cic. *pro Milone.* 3. *Ff.* 9. 2. 4.
[y] "*Divus Hadrianus reſcripſit, eum qui "ſtuprum ſibi vel ſuis inferentem occidit, di-"mittendum.*" (*Ff.* 48. 8. 1.)
[z] *de legib. Hebræor. l.* 4. *c.* 3.
[a] Bac. Elem. 34. 1 Hawk. P. C. 71.
[b] 1 Hal. P. C. 485, 486.
[c] Eſſ. on gov. p. 2. c. 3.

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of England, like that of every other well-regulated community, is too tender of the public peace, too careful of the lives of the ſubjects, to adopt ſo contentious a ſyſtem; nor will ſuffer with impunity any crime to be *prevented* by death, unleſs the ſame, if committed, would alſo be *puniſhed* by death.

IN theſe inſtances of *juſtifiable* homicide, you will obſerve that the ſlayer is in no kind of fault whatſoever, not even in the minuteſt degree; and is therefore to be totally acquitted and diſcharged, with commendation rather than blame. But that is not quite the caſe in *excuſable* homicide, the very name whereof imports ſome fault, ſome error, or omiſſion; ſo trivial however, that the law excuſes it from the guilt of felony, though in ſtrictneſs it judges it deſerving of ſome little degree of puniſhment.

II. EXCUSABLE homicide is of two ſorts; either *per infortunium*, by miſadventure; or *ſe defendendo*, upon a principle of ſelf-preſervation. We will firſt ſee wherein theſe two ſpecies of homicide are diſtinct, and then wherein they agree.

1. HOMICIDE *per infortunium*, or *miſadventure*, is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a ſtander by; or, where a perſon, qualified to keep a gun, is ſhooting at a mark, and undeſignedly kills a man [d]: for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a maſter his ſervant or ſcholar, or an officer puniſhing a criminal, and happens to occaſion his death, it is only miſadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the inſtrument, or the quantity of puniſhment, and death enſues, it is manſlaughter at leaſt, and in ſome caſes (according to the circumſtances) murder [e]; for the act of immoderate correction is un-

[d] 1 Hawk. P. C. 73, 74.

[e] 1 Hal. P. C. 473, 474.

lawful.

lawful. Thus by an edict of the emperor Conſtantine [f], when the rigor of the Roman law with regard to ſlaves began to relax and ſoften, a maſter was allowed to chaſtiſe his ſlave with rods and impriſonment, and, if death accidentally enſued, he was guilty of no crime: but if he ſtruck him with a club or a ſtone, and thereby occaſioned his death; or if in any other yet groſſer manner "*immoderate ſuo jure utatur, tunc reus homicidii ſit.*"

BUT, to proceed. A tilt or tournament, the martial diverſion of our anceſtors, was however an unlawful act; and ſo are boxing and ſwordplaying, the ſucceeding amuſement of their poſterity: and therefore if a knight in the former caſe, or a gladiator in the latter, be killed, ſuch killing is felony of manſlaughter. But, if the king command or permit ſuch diverſion, it is ſaid to be only miſadventure; for then the act is lawful [g]. In like manner as, by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games, authorized or permitted by the ſtate, was not held to be guilty of homicide [h]. Likewiſe to whip another's horſe, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful; but manſlaughter in the perſon who whipped him, for the act was a treſpaſs, and at beſt a piece of idleneſs, of inevitably dangerous conſequence [i]. And in general, if death enſues in conſequence of any idle, dangerous, and unlawful ſport, as ſhooting or caſting ſtones in a town, or the barbarous diverſion of cock-throwing, in theſe and ſimilar caſes, the ſlayer is guilty of man-ſlaughter, and not miſadventure only, for theſe are unlawful acts [k].

2. HOMICIDE in *ſelf-defence*, or *ſe defendendo*, upon a ſudden affray, is alſo excuſable rather than juſtifiable, by the Engliſh law. This ſpecies of ſelf-defence muſt be diſtinguiſhed from that juſt now mentioned, as calculated to hinder the perpetra-

[f] *Cod. l.* 9. *t.* 14.
[g] 1 Hal. P. C. 473. 1 Hawk. P. C. 74.
[h] Plato. *de LL. lib.* 7. *Ff.* 9. 2. 7.
[i] Hawk. P. C. 73.
[k] *Ibid.* 74. 1 Hal. P. C. 472. Foſt. 261.

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tion of a capital crime; which is not only a matter of excuſe, but of juſtification. But the ſelf-defence, which we are now ſpeaking of, is that whereby a man may protect himſelf from an aſſault, or the like, in the courſe of a ſudden brawl or quarrel, by killing him who aſſaults him. And this is what the law expreſſes by the word *chance-medley*, or (as ſome rather chuſe to write it) *chaud-medley*; the former of which in it's etymology ſignifies a *caſual* affray, the latter an affray in the *heat* of blood or paſſion: both of them of pretty much the ſame import; but the former is in common ſpeech too often erroneouſly applied to any manner of homicide by miſadventure; whereas it appears by the ſtatute 24 Hen. VIII. c. 5. and our antient books [l], that it is properly applied to ſuch killing, as happens in ſelf-defence upon a ſudden rencounter [m]. This right of natural defence does not imply a right of attacking: for, inſtead of attacking one another for injuries paſt or impending, men need only have recourſe to the proper tribunals of juſtice. They cannot therefore legally exerciſe this right of preventive defence, but in ſudden and violent caſes; when certain and immediate ſuffering would be the conſequence of waiting for the aſſiſtance of the law. Wherefore, to excuſe homicide by the plea of ſelf-defence, it muſt appear that the ſlayer had no other poſſible means of eſcaping from his aſſailant.

IN ſome caſes this ſpecies of homicide (upon *chance-medley* in ſelf-defence) differs but little from manſlaughter, which alſo happens frequently upon *chance-medley* in the proper legal ſenſe of the word [n]. But the true criterion between them ſeems to be this: when both parties are actually combating at the time when the mortal ſtroke is given, the ſlayer is then guilty of manſlaughter; but if the ſlayer hath not begun to fight, or (having begun) endeavours to decline any farther ſtruggle, and afterwards, being cloſely preſſed by his antagoniſt, kills him to avoid his own deſtruction, this is homicide excuſable by ſelf-defence [o]. For which reaſon the law requires, that the perſon, who kills another

[l] Staundf. P. C. 16.
[m] 3 Inſt. 55. 57. Foſt. 275, 276.
[n] 3 Inſt. 55.
[o] Foſt. 277.

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in his own defence, ſhould have retreated as far as he conveniently or ſafely can, to avoid the violence of the aſſault, before he turns upon his aſſailant; and that, not fictitiouſly, or in order to watch his opportunity, but from a real tenderneſs of ſhedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow ſubjects the law countenances no ſuch point of honour: becauſe the king and his courts are the *vindices injuriarum*, and will give to the party wronged all the ſatisfaction he deſerves [p]. In this the civil law alſo agrees with ours, or perhaps goes rather farther; "*qui cum aliter tueri ſe non poſſunt*, "*damni culpam dederint, innoxii ſunt* [q]. The party aſſaulted muſt therefore flee as far as he conveniently can, either by reaſon of ſome wall, ditch, or other impediment; or as far as the fierceneſs of the aſſault will permit him [r]: for it may be ſo fierce as not to allow him to yield a ſtep, without manifeſt danger of his life, or enormous bodily harm; and then in his defence he may kill his aſſailant inſtantly. And this is the doctrine of univerſal juſtice [s], as well as of the municipal law.

AND, as the *manner* of the defence, ſo is alſo the *time* to be conſidered: for if the perſon aſſaulted does not fall upon the aggreſſor till the affray is over, or when he is running away, this is revenge and not defence. Neither, under the colour of ſelf defence, will the law permit a man to ſcreen himſelf from the guilt of deliberate murder: for if two perſons, A and B, agree to fight a duel, and A gives the firſt onſet, and B retreats as far as he ſafely can, and then kills A, this is murder; becauſe of the previous malice and concerted deſign [t]. But if A upon a ſudden quarrel aſſaults B firſt, and upon B's returning the aſſault, A really and *bona fide* flees; and, being driven to the wall, turns again upon B and kills him; this may be *ſe defendendo* according to ſome of our writers [u]:

[p] 1 Hal. P. C. 481. 483.
[q] *Ff.* 9. 2. 45.
[r] 1 Hal. P. C. 483.
[s] Puff. b. 2. c. 5. §. 13.
[t] 1 Hal. P. C. 479.
[u] 1 Hal. P. C. 482.

though others [w] have thought this opinion too favourable; inaſmuch as the neceſſity, to which he is at laſt reduced, originally aroſe from his own fault. Under this excuſe, of ſelf-defence, the principal civil and natural relations are comprehended; therefore maſter and ſervant, parent and child, huſband and wife, killing an aſſailant in the neceſſary defence of each other reſpectively, are excuſed; the act of the relation aſſiſting being conſtrued the ſame as the act of the party himſelf [x].

THERE is one ſpecies of homicide *ſe defendendo*, where the party ſlain is equally innocent as he who occaſions his death: and yet this homicide is alſo excuſable from the great univerſal principle of ſelf-preſervation, which prompts every man to ſave his own life preferably to that of another, where one of them muſt inevitably periſh. As, among others, in that caſe mentioned by lord Bacon [y], where two perſons, being ſhipwrecked, and getting on the ſame plank, but finding it not able to ſave them both, one of them thruſts the other from it, whereby he is drowned. He who thus preſerves his own life at the expenſe of another man's, is excuſable through unavoidable neceſſity, and the principle of ſelf-defence; ſince their both remaining on the ſame weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life.

LET us next take a view of thoſe circumſtances wherein theſe two ſpecies of homicide, by miſadventure and ſelf-defence, agree; and thoſe are in their blame and puniſhment. For the law ſets ſo high a value upon the life of a man, that it always intends ſome miſbehaviour in the perſon who takes it away, unleſs by the command or expreſs permiſſion of the law. In the caſe of miſadventure, it preſumes negligence, or at leaſt a want of ſufficient caution in him who was ſo unfortunate as to commit it; who therefore is not altogether faultleſs [z]. And as to the neceſſity which excuſes a man who kills another *ſe defendendo*,

[w] 1 Hawk. P. C. 75.
[x] 1 Hal. P. C. 484.
[y] Elem. c. 5. See alſo 1 Hawk. P. C. 73.
[z] 1 Hawk. P. C. 72.

lord

lord Bacon [a] entitles it *neceſſitas culpabilis*, and thereby diſtinguiſhes it from the former neceſſity of killing a thief or a malefactor. For the law intends that the quarrel or aſſault aroſe from ſome unknown wrong, or ſome provocation, either in word or deed: and ſince in quarrels both parties may be, and uſually are, in ſome fault; and it ſcarce can be tried who was originally in the wrong; the law will not hold the ſurvivor intirely guiltleſs. But it is clear, in the other caſe, that where I kill a thief that breaks into my houſe, the original default can never be upon my ſide. The law beſides may have a farther view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining, that he who ſlays his neighbour, without an expreſs warrant from the law ſo to do, ſhall in no caſe be abſolutely free from guilt.

NOR is the law of England ſingular in this reſpect. Even the ſlaughter of enemies required a ſolemn purgation among the Jews; which implies that the death of a man, however it happens, will leave ſome ſtain behind it. And the moſaical law [b] appointed certain cities of refuge for him "who killed his neigh-"bour unawares; as if a man goeth into the wood with his "neighbour to hew wood, and his hand fetcheth a ſtroke with "the ax to cut down a tree, and the head ſlippeth from the "helve, and lighteth upon his neighbour that he die, he ſhall "flee unto one of theſe cities and live." But it ſeems he was not held wholly blameleſs, any more than in the Engliſh law; ſince the avenger of blood might ſlay him before he reached his aſylum, or if he afterwards ſtirred out of it till the death of the high prieſt. In the imperial law likewiſe [c] caſual homicide was excuſed, by the indulgence of the emperor ſigned with his own ſign manual, "*adnotatione principis:*" otherwiſe the death of a man, however committed, was in ſome degree puniſhable. Among the Greeks [d] homicide by misfortune was expiated by

[a] Elem. c 5.
[b] Numb. c. 35. and Deut. c. 19.
[c] *Cod.* 9. 16. 5.
[d] Plato *de Leg. lib.* 9.

voluntary baniſhment for a year [c]. In Saxony a fine is paid to the kindred of the ſlain; which alſo, among the weſtern Goths, was little inferior to that of voluntary homicide [f]: and in France [g] no perſon is ever abſolved in caſes of this nature, without a largeſs to the poor, and the charge of certain maſſes for the ſoul of the party killed.

THE penalty inflicted by our laws is ſaid by ſir Edward Coke to have been antiently no leſs than death [h]; which however is with reaſon denied by later and more accurate writers [i]. It ſeems rather to have conſiſted in a forfeiture, ſome ſay of all the goods and chattels, others of only part of them, by way of fine or *weregild* [k]: which was probably diſpoſed of, as in France, *in pios uſus*, according to the humane ſuperſtition of the times, for the benefit of *his* ſoul, who was thus ſuddenly ſent to his account, with all his imperfections on his head. But that reaſon having long ceaſed, and the penalty (eſpecially if a total forfeiture) growing more ſevere than was intended, in proportion as perſonal property has become more conſiderable, the delinquent has now, and has had as early as our records will reach [l], a pardon and writ of reſtitution of his goods as a matter of courſe and right, only paying for ſuing out the ſame [m]. And indeed, to prevent this expenſe, in caſes where the death has notoriouſly happened by miſadventure or in ſelf-defence, the judges will uſually permit (if not direct) a general verdict of acquittal [n].

III. FELONIOUS homicide is an act of a very different nature from the former, being the killing of a human creature, of any

[c] To this expiation by baniſhment the ſpirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty third Iliad, that, when a child, he was obliged to flee his country for caſually killing his playfellow; "νηπιος, ἀκ ἑθελων."

[f] Stiernh. *de jure Goth. l.* 3. *c.* 4.

[g] De Mornay on the digeſt.

[h] 2 Inſt. 148. 315.

[i] 1 Hal. P. C. 425. 1 Hawk. P. C. 75. Foſt. 282, &c.

[k] Foſt. 287.

[l] Foſt. 283.

[m] 2 Hawk. P. C. 381.

[n] Foſt. 288.

age

age or ſex, without juſtification or excuſe. This may be done, either by killing one's ſelf, or another man.

SELF-MURDER, the pretended heroiſm, but real cowardice, of the Stoic philoſophers, who deſtroyed themſelves to avoid thoſe ills which they had not the fortitude to endure, though the attempting it ſeems to be countenanced by the civil law [o], yet was puniſhed by the Athenian law with cutting off the hand, which committed the deſperate deed [p]. And alſo the law of England wiſely and religiouſly conſiders, that no man hath a power to deſtroy life, but by commiſſion from God, the author of it: and, as the ſuicide is guilty of a double offence; one ſpiritual, in invading the prerogative of the Almighty, and ruſhing into his immediate preſence uncalled for; the other temporal, againſt the king, who hath an intereſt in the preſervation of all his ſubjects; the law has therefore ranked this among the higheſt crimes, making it a peculiar ſpecies of felony, a felony committed on oneſelf. A *felo de ſe* therefore is he that deliberately puts an end to his own exiſtence, or commits any unlawful malicious act, the conſequence of which is his own death: as if, attempting to kill another, he runs upon his antagoniſt's ſword; or, ſhooting at another, the gun burſts and kills himſelf [q]. The party muſt be of years of diſcretion, and in his ſenſes, elſe it is no crime. But this excuſe ought not to be ſtrained to that length, to which our coroners' juries are apt to carry it, *viz.* that the very act of ſuicide is an evidence of inſanity; as if every man who acts contrary to reaſon, had no reaſon at all: for the ſame argument would prove every other criminal *non compos*, as well as the ſelf-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of diſcerning right from wrong; which is neceſſary, as was obſerved in a former chapter [r], to form a legal excuſe. And

[o] "*Si quis impatientia doloris, aut taedio vitae, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum.*" *Ff.* 49. 16. 6.

[p] Pott. Antiqu. b. 1. c. 26.

[q] 1 Hawk. P. C. 68. 1 Hal. P. C. 413.

[r] See pag. 24.

there-

therefore, if a real lunatic kills himſelf in a lucid interval, he is a *felo de ſe* as much as another man [s].

BUT now the queſtion follows, what puniſhment can human laws inflict on one who has withdrawn himſelf from their reach? They can only act upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial in the highway, with a ſtake driven through his body; on the latter, by a forfeiture of all his goods and chattels to the king: hoping that his care for either his own reputation, or the welfare of his family, would be ſome motive to reſtrain him from ſo deſperate and wicked an act. And it is obſervable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cauſe of his death. As if huſband and wife be poſſeſſed jointly of a term of years in land, and the huſband drowns himſelf; the land ſhall be forfeited to the king, and the wife ſhall not have it by ſurvivorſhip. For by the act of caſting himſelf into the water he forfeits the term; which gives a title to the king, prior to the wife's title by ſurvivorſhip, which could not accrue till the inſtant of her huſband's death [t]. And, though it muſt be owned that the letter of the law herein borders a little upon ſeverity, yet it is ſome alleviation that the power of mitigation is left in the breaſt of the ſovereign, who upon this (as on all other occaſions) is reminded by the oath of his office to execute judgment in mercy.

THE other ſpecies of criminal homicide is that of killing another man. But in this there are alſo degrees of guilt, which divide the offence into *manſlaughter*, and *murder*. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles, and principally conſiſts in this, that manſlaughter ariſes from the ſudden heat of the paſſions, murder from the wickedneſs of the heart.

[s] 1 Hal. P. C. 412.

[t] Finch. L. 216.

1. MANSLAUGHTER is therefore thus defined [u], the unlawful killing of another, without malice either expreſs or implied: which may be either voluntarily, upon a ſudden heat; or involuntarily, but in the commiſſion of ſome unlawful act. Theſe were called in the Gothic conſtitutions "*homicidia vulgaria*; *quae* "*aut caſu, aut etiam ſponte committuntur, ſed in ſubitaneo quodam* "*iracundiae calore et impetu* [w]." And hence it follows, that in manſlaughter there can be no acceſſories before the fact; becauſe it muſt be done without premeditation.

As to the firſt, or *voluntary* branch: if upon a ſudden quarrel two perſons fight, and one of them kills the other, this is manſlaughter: and ſo it is, if they upon ſuch an occaſion go out and fight in a field; for this is one continued act of paſſion [x]: and the law pays that regard to human frailty, as not to put a haſty and a deliberate act upon the ſame footing with regard to guilt. So alſo if a man be greatly provoked, as by pulling his noſe, or other great indignity, and immediately kills the aggreſſor, though this is not excuſable *ſe defendendo*, ſince there is no abſolute neceſſity for doing it to preſerve himſelf; yet neither is it murder, for there is no previous malice; but it is manſlaughter [y]. But in this, and in every other caſe of homicide upon provocation, if there be a ſufficient cooling-time for paſſion to ſubſide and reaſon to interpoſe, and the perſon ſo provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder [z]. So, if a man takes another in the act of adultery with his wife, and kills him directly upon the ſpot; though this was allowed by the laws of Solon [a], as likewiſe by the Roman civil law, (if the adulterer was found in the huſband's own houſe [b]) and alſo among the antient Goths [c]; yet in England it is not abſolutely ranked in the claſs

[u] 1 Hal. P. C. 466.
[w] Stiernh. *de jure Goth. l.* 3. *c.* 4.
[x] 1 Hawk. P. C. 82.
[y] Kelyng. 135.
[z] Foſt. 296.
[a] Plutarch. *in vit. Solon.*
[b] *Ff.* 48. 5. 24.
[c] Stiernh. *de jure Goth. l.* 3. *c.* 2.

of

of juſtifiable homicide, as in caſe of a forcible rape, but it is manſlaughter [d]. It is however the loweſt degree of it: and therefore in ſuch a caſe the court directed the burning in the hand to be gently inflicted, becauſe there could not be a greater provocation [e]. Manſlaughter therefore on a ſudden provocation differs from excuſable homicide *ſe defendendo* in this: that in one caſe there is an apparent neceſſity, for ſelf-preſervation, to kill the aggreſſor; in the other no neceſſity at all, being only a ſudden act of revenge.

THE ſecond branch, or *involuntary* manſlaughter, differs alſo from homicide excuſable by miſadventure, in this; that miſadventure always happens in conſequence of a lawful act, but this ſpecies of manſlaughter in conſequence of an unlawful one. As if two perſons play at ſword and buckler, unleſs by the king's command, and one of them kills the other: this is manſlaughter, becauſe the original act was unlawful; but it is not murder, for the one had no intent to do the other any perſonal miſchief [f]. So where a perſon does an act, lawful in itſelf, but in an unlawful manner, and without due caution and circumſpection: as when a workman flings down a ſtone or piece of timber into the ſtreet and kills a man; this may be either miſadventure, manſlaughter, or murder, according to the circumſtances under which the original act was done: if it were in a country village, where few paſſengers are, and he calls out to all people to have a care, it is miſadventure only: but if it were in London, or other populous town, where people are continually paſſing, it is manſlaughter, though he gives loud warning [g]; and murder, if he knows of their paſſing and gives no warning at all, for then it is malice againſt all mankind [h]. And, in general, when an involuntary killing happens in conſequence of an unlawful act, it will be either murder or manſlaughter according to the nature of the act which occaſioned it. If it be in proſecution of a felonious

[d] 1 Hal. P. C. 486.
[e] Sir T. Raym. 212.
[f] 3 Inſt. 56.
[g] Kel. 40.
[h] 3 Inſt. 57.

intent,

intent, it will be murder; but if no more was intended than a mere treſpaſs, it will only amount to manſlaughter[i].

NEXT, as to the *puniſhment* of this degree of homicide: the crime of manſlaughter amounts to felony, but within the benefit of clergy; and the offender ſhall be burnt in the hand, and forfeit all his goods and chattels.

BUT there is one ſpecies of manſlaughter, which is puniſhed as murder, the benefit of clergy being taken away from it by ſtatute; namely, the offence of mortally *ſtabbing* another, though done upon ſudden provocation. For by ſtatute 1 Jac. I. c. 8. when one thruſts or ſtabs another, not then having a weapon drawn, or who hath not then firſt ſtricken the party ſtabbing, ſo that he dies thereof within ſix months after, the offender ſhall not have the benefit of clergy, though he did it not of malice aforethought. This ſtatute was made on account of the frequent quarrels and ſtabbings with ſhort daggers, between the Scotch and the Engliſh, at the acceſſion of James the firſt[k]; and, being therefore of a temporary nature, ought to have expired with the miſchief, which it meant to remedy. For, in point of ſolid and ſubſtantial juſtice, it cannot be ſaid that the mode of killing, whether by ſtabbing, ſtrangling or ſhooting, can either extenuate or enhance the guilt: unleſs where, as in the caſe of poiſoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath conſtrued the ſtatute ſo favourably in behalf of the ſubject, and ſo ſtrictly when againſt him, that the offence of ſtabbing ſtands almoſt upon the ſame footing, as it did at the common law[l]. Thus, (not to repeat the caſes before-mentioned, of ſtabbing an adultereſs, *&c.* which are barely manſlaughter, as at common law) in the conſtruction of this ſtatute it hath been doubted, whether, if the deceaſed had ſtruck at all before the mortal blow given, this takes it out of the ſtatute, though in the preceding quarrel the

[i] Foſter. 258.
[k] 1 Lord Raym. 140.
[l] Foſt. 299, 300.

ſtabber had given the firſt blow; and it ſeems to be the better opinion, that this is not within the ſtatute[m]. Alſo it hath been reſolved, that the killing a man by throwing a hammer or other weapon is not within the ſtatute; and whether a ſhot with a piſtol be ſo or not, is doubted[n]. But if the party ſlain had a cudgel in his hand, or had thrown a pot or a bottle, or diſcharged a piſtol at the party ſtabbing, this is a ſufficient having a weapon drawn on his ſide within the words of the ſtatute[o].

2. WE are next to conſider the crime of deliberate and wilful *murder*; a crime at which human nature ſtarts, and which is I believe puniſhed almoſt univerſally throughout the world with death. The words of the moſaical law (over and above the general precept to Noah[p], that "whoſo ſheddeth man's blood, by "man ſhall his blood be ſhed") are very emphatical in prohibiting the pardon of murderers[q]. "Moreover ye ſhall take no ſa-"tisfaction for the life of a murderer, who is guilty of death, "but he ſhall ſurely be put to death; for the land cannot be "cleanſed of the blood that is ſhed therein, but by the blood "of him that ſhed it." And therefore our law has provided one courſe of proſecution, (that by appeal, of which hereafter) wherein the king himſelf is excluded the power of pardoning murder: ſo that, were the king of England ſo inclined, he could not imitate that Poliſh monarch mentioned by Puffendorf[r]; who thought proper to remit the penalties of murder to all the nobility, in an edict with this arrogant preamble, "*nos, divini "juris rigorem moderantes, &c.*" But let us now conſider the definition of this great offence.

THE name of *murder* was antiently applied only to the ſecret killing of another[s]; (which the word, *moërda*, ſignifies in the Teutonic language[t]) and it was defined "*homicidium quod nullo*

[m] Foſt. 301. 1 Hawk. P. C. 77.
[n] 1 Hal. P. C. 470.
[o] 1 Hawk. P. C. 77.
[p] Gen. ix. 6.
[q] Numb. xxxv. 31.
[r] L. of N. b. 8. c. 3.
[s] *Dialog. de Scacch. l.* 1. *c.* 10.
[t] Stiernh. *de jure Sueon. l.* 3. *c.* 3.

"*vidente,*

"*vidente, nullo ſciente, clam perpetratur*[u]:" for which the vill wherein it was committed, or (if that were too poor) the whole hundred, was liable to a heavy amercement; which amercement itſelf was alſo denominated *murdrum*[w]. This was an antient uſage among the Goths in Sweden and Denmark; who ſuppoſed the neighbourhood, unleſs they produced the murderer, to have perpetrated or at leaſt connived at the murder[x]: and, according to Bracton[y], was introduced into this kingdom by king Canute, to prevent his countrymen the Danes from being privily murdered by the Engliſh; and was afterwards continued by William the conqueror, for the like ſecurity to his own Normans[z]. And therefore if, upon inquiſition had, it appeared that the perſon found ſlain was an Engliſhman, (the preſentment whereof was denominated *engleſcherie*[a]) the country ſeems to have been excuſed from this burthen. But, this difference being totally aboliſhed by ſtatute 14 Edw. III. c. 4. we muſt now (as is obſerved by Staundforde[b]) define murder in quite another manner, without regarding whether the party ſlain was killed openly or ſecretly, or whether he was of Engliſh or foreign extraction.

MURDER is therefore now thus defined, or rather deſcribed, by ſir Edward Coke[c]; "when a perſon, of ſound memory and "diſcretion, unlawfully killeth any reaſonable creature in being "and under the king's peace, with malice aforethought, either "expreſs or implied." The beſt way of examining the nature of this crime will be by conſidering the ſeveral branches of this definition.

FIRST, it muſt be committed by *a perſon of ſound memory and diſcretion:* for a lunatic or infant, as was formerly obſerved, are incapable of committing any crime; unleſs in ſuch caſes where

[u] Glanv. *l.* 14. *c.* 3.
[w] Bract. *l.* 3. *tr.* 2. *c.* 15. §. 7. Stat. Marlbr. *c.* 26. Foſt. 281.
[x] Stiernh. *l.* 3. *c.* 4.
[y] *l.* 3. *tr.* 2. *c.* 15.
[z] 1 Hal. P. C. 447.
[a] Bract. *ubi ſupr.*
[b] P. C. *l.* 1. *c.* 10.
[c] 3 Inſt. 47.

they ſhew a conſciouſneſs of doing wrong, and of courſe a diſcretion, or diſcernment, between good and evil.

NEXT, it happens when a perſon of ſuch ſound diſcretion *unlawfully killeth*. The unlawfulneſs ariſes from the killing without warrant or excuſe: and there muſt alſo be an actual killing to conſtitute murder; for a bare aſſault, with intent to kill, is only a great miſdemeſnor, though formerly it was held to be murder [d]. The killing may be by poiſoning, ſtriking, ſtarving, drowning, and a thouſand other forms of death, by which human nature may be overcome. Of theſe the moſt deteſtable of all is poiſon; becauſe it can of all others be the leaſt prevented either by manhood or forethought [e]. And therefore by the ſtatute 22 Hen. VIII. c. 9. it was made treaſon, and a more grievous and lingering kind of death was inflicted on it than the common law allowed; namely, boiling to death: but this act did not live long, being repealed by 1 Edw. VI. c. 12. There was alſo, by the antient common law, one ſpecies of killing held to be murder, which is hardly ſo at this day, nor has there been an inſtance wherein it has been held to be murder for many ages paſt [f]: I mean by bearing falſe witneſs againſt another, with an expreſs premeditated deſign to take away his life, ſo as the innocent perſon be condemned and executed [g]. The Gothic laws puniſhed in this caſe, both the judge, the witneſſes, and the proſecutor; "*peculiari poena judicem puniunt; peculiari "teſtes, quorum fides judicem ſeduxit; peculiari denique et maxima "auctorem, ut homicidam* [h]." And, among the Romans, the *lex Cornelia, de ſicariis*, puniſhed the falſe witneſs with death, as being guilty of a ſpecies of aſſaſſination [i]. And there is no doubt

[d] 1 Hal. P. C. 425.

[e] 3 Inſt. 48.

[f] Foſt. 132. In the caſe of Macdaniel and Berry, reported by ſir Michael Foſter, though the then attorney general declined to argue this point of law, I have grounds to believe it was not from any apprehenſion that the point was not maintainable, but from other prudential reaſons. Nothing therefore ſhould be concluded from the waiving of that proſecution.

[g] Mirror c. 1 §. 9. Britt. c. 5. Bracton. *l.* 3. *c.* 4

[h] Stiernh. *de jure Goth. l.* 3. *c.* 3.

[i] *Ff.* 48. 8. 1.

but

but this is equally murder *in foro conſcientiae* as killing with a ſword; though the modern law (to avoid the danger of deterring witneſſes from giving evidence upon capital proſecutions, if it muſt be at the peril of their own lives) has not yet puniſhed it as ſuch. If a man however does ſuch an act, of which the probable conſequence may be, and eventually is, death; ſuch killing may be murder, although no ſtroke be ſtruck by himſelf: as was the caſe of the unnatural ſon, who expoſed his ſick father to the air, againſt his will, by reaſon whereof he died [k]; and of the harlot, who laid her child in an orchard, where a kite ſtruck it and killed it [l]. So too, if a man hath a beaſt that is uſed to do miſchief; and he, knowing it, *ſuffers* it to go abroad, and it kills a man; even this is manſlaughter in the owner: but if he had purpoſely *turned it looſe*, though barely to frighten people and make what is called ſport, it is with us (as in the Jewiſh law) as much murder, as if he had incited a bear or a dog to worry them [m]. If a phyſician or ſurgeon gives his patient a potion or plaiſter to cure him, which contrary to expectation kills him, this is neither murder, nor manſlaughter, but miſadventure; and he ſhall not be puniſhed criminally, however liable he might formerly have been to a civil action for neglect or ignorance [n]: but it hath been holden, that if it be not a *regular* phyſician or ſurgeon, who adminiſters the medicine or performs the operation, it is manſlaughter at the leaſt [o]. Yet ſir Matthew Hale very juſtly queſtions the law of this determination; ſince phyſic and ſalves were in uſe before licenſed phyſicians and ſurgeons: wherefore he treats this doctrine as apocryphal, and fitted only to gratify and flatter licentiates and doctors in phyſic; though it may be of uſe to make people cautious and wary, how they meddle too much in ſo dangerous an employment [p]. In order alſo to make the killing murder, it is requiſite that the party die within a year and a day after the ſtroke received, or cauſe of death adminiſtred;

[k] 1 Hawk. P. C. 78.
[l] 1 Hal. P. C. 432.
[m] *Ibid.* 431.
[n] Mirr. c. 4. §. 16. See Vol. III. pag. 122.
[o] Britt. c. 5. 4 Inſt. 251.
[p] 1 Hal. P. C. 430.

in

in the computation of which, the whole day upon which the hurt was done ſhall be reckoned the firſt [q].

FARTHER; the perſon killed muſt be "*a reaſonable creature* "*in being, and under the king's peace,*" at the time of the killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace or protection, is as much murder as to kill the moſt regular born Engliſhman; except he be an alien-enemy, in time of war [r]. To kill a child in it's mother's womb, is now no murder, but a great miſpriſion: but if the child be born alive, and dieth by reaſon of the potion or bruiſes it received in the womb, it is murder in ſuch as adminiſtred or gave them [s]. But, as there is one caſe where it is difficult to prove the child's being born alive, namely, in the caſe of the murder of baſtard children by the unnatural mother, it is enacted by ſtatute 21 Jac. I. c. 27. that if any woman be delivered of a child, which if born alive ſhould by law be a baſtard; and endeavours privately to conceal it's death, by burying the child or the like; the mother ſo offending ſhall ſuffer death as in the caſe of murder, unleſs ſhe can prove by one witneſs at leaſt that the child was actually born dead. This law, which ſavours pretty ſtrongly of ſeverity, in making the concealment of the death almoſt concluſive evidence of the child's being murdered by the mother, is nevertheleſs to be alſo met with in the criminal codes of many other nations of Europe; as the Danes, the Swedes, and the French [t]: but I apprehend it has of late years been uſual with us in England, upon trials for this offence, to require ſome ſort of preſumptive evidence that the child was born alive, before the other conſtrained preſumption (that the child, whoſe death is concealed, was therefore killed by it's parent) is admitted to convict the priſoner.

LASTLY, the killing muſt be committed *with malice aforethought*, to make it the crime of murder. This is the grand cri-

[q] 1 Hawk. P. C. 79.
[r] 3 Inſt. 50. 1 Hal. P. C. 433.
[s] 3 Inſt. 50. 1 Hawk. P. C. 80.
[t] See Barrington on the ſtatutes. 425.

terion,

terion, which now diſtinguiſhes murder from other killing: and this malice prepenſe, *malitia praecogitata*, is not ſo properly ſpite or malevolence to the deceaſed in particular, as any evil deſign in general; the dictate of a wicked, depraved, and malignant heart[u]; *un diſpoſition a faire un male choſe*[w]: and it may be either *expreſs*, or *implied* in law. Expreſs malice is when one, with a ſedate deliberate mind and formed deſign, doth kill another: which formed deſign is evidenced by external circumſtances diſcovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted ſchemes to do him ſome bodily harm[x]. This takes in the caſe of deliberate duelling, where both parties meet avowedly with an intent to murder: thinking it their duty, as gentlemen, and claiming it as their right, to wanton with their own lives and thoſe of their fellow creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has juſtly fixed the crime and puniſhment of murder, on them, and on their ſeconds alſo[y]. Yet it requires ſuch a degree of paſſive valour, to combat the dread of even undeſerved contempt, ariſing from the falſe notions of honour too generally received in Europe, that the ſtrongeſt prohibitions and penalties of the law will never be intirely effectual to eradicate this unhappy cuſtom; till a method be found out of compelling the original aggreſſor to make ſome other ſatisfaction to the affronted party, which the world ſhall eſteem equally reputable, as that which is now given at the hazard of the life and fortune, as well of the perſon inſulted, as of him who hath given the inſult. Alſo, if even upon a ſudden provocation one beats another in a cruel and unuſual manner, ſo that he dies, though he did not intend his death, yet he is guilty of murder by expreſs malice; that is, by an expreſs evil deſign, the genuine ſenſe of *malitia*. As when a park-keeper tied a boy, that was ſtealing wood, to a horſe's tail, and dragged him along the park; when a maſter corrected his

[u] Foſter. 256.
[w] 2 Roll. Rep. 461.
[x] 1 Hal. P. C. 451.
[y] 1 Hawk. P. C. 82.

ſervant

ſervant with an iron bar, and a ſchoolmaſter ſtamped on his ſcholar's belly; ſo that each of the ſufferers died; theſe were juſtly held to be murders, becauſe the correction being exceſſive, and ſuch as could not proceed but from a bad heart, it was equivalent to a deliberate act of ſlaughter[z]. Neither ſhall he be guilty of a leſs crime, who kills another in conſequence of ſuch a wilful act, as ſhews him to be an enemy to all mankind in general; as going deliberately with a horſe uſed to ſtrike, or diſcharging a gun, among a multitude of people [a]. So if a man reſolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is univerſal malice. And, if two or more come together to do an unlawful act againſt the king's peace, of which the probable conſequence might be bloodſhed; as to beat a man, to commit a riot, or to rob a park; and one of them kills a man; it is murder in them all, becauſe of the unlawful act, the *malitia praecogitata*, or evil intended beforehand[b].

ALSO in many caſes where no malice is expreſſed, the law will imply it: as, where a man wilfully poiſons another, in ſuch a deliberate act the law preſumes malice, though no particular enmity can be proved [c]. And if a man kills another ſuddenly, without any, or without a conſiderable, provocation, the law implies malice; for no perſon, unleſs of an abandoned heart, would be guilty of ſuch an act, upon a ſlight or no apparent cauſe. No affront, by words, or geſtures only, is a ſufficient provocation, ſo as to excuſe or extenuate ſuch acts of violence as manifeſtly endanger the life of another [d]. But if the perſon ſo provoked had unfortunately killed the other, by beating him in ſuch a manner as ſhewed only an intent to chaſtiſe and not to kill him, the law ſo far conſiders the provocation of contumelious behaviour, as to adjudge it only manſlaughter, and not murder [e]. In like manner if one kills an officer of juſtice, either

[z] 1 Hal. P. C. 454. 473, 474.
[a] 1 Hawk. P. C. 74.
[b] *Ibid.* 84.
[c] 1 Hal. P. C. 455.
[d] 1 Hawk. P. C. 82. 1 Hal. P. C. 455, 456.
[e] Foſt. 291.

civil

civil or criminal, in the execution of his duty, or any of his aſſiſtants endeavouring to conſerve the peace, or any private perſon endeavouring to ſuppreſs an affray or apprehend a felon, knowing his authority or the intention with which he interpoſes, the law will imply malice, and the killer ſhall be guilty of murder [f]. And if one intends to do another felony, and undeſignedly kills a man, this is alſo murder [g]. Thus if one ſhoots at A and miſſes *him*, but kills B, this is murder; becauſe of the previous felonious intent, which the law transfers from one to the other. The ſame is the caſe, where one lays poiſon for A; and B, againſt whom the priſoner had no malicious intent, takes it, and it kills him; this is likewiſe murder [h]. It were endleſs to go through all the caſes of homicide, which have been adjudged either expreſſly, or impliedly, malicious: theſe therefore may ſuffice as a ſpecimen; and we may take it for a general rule, that all homicide is malicious, and of courſe amounts to murder, unleſs where *juſtified* by the command or permiſſion of the law; *excuſed* on a principle of accident or ſelf-preſervation; or *alleviated* into manſlaughter, by being either the involuntary conſequence of ſome act, not ſtrictly lawful, or (if voluntary) occaſioned by ſome ſudden and ſufficiently violent provocation. And all theſe circumſtances of juſtification, excuſe, or alleviation, it is incumbent upon the priſoner to make out, to the ſatisfaction of the court and jury: the latter of whom are to decide whether the circumſtances alleged be proved to have actually exiſted; the former, how far they extend to take away or mitigate the guilt. For all homicide is preſumed to be malicious, until the contrary appeareth upon evidence [i].

THE puniſhment of murder, and that of manſlaughter, were formerly one and the ſame; both having the benefit of clergy: ſo that none but unlearned perſons, who leaſt knew the guilt of

[f] 1 Hal. P. C. 457. Foſter. 308, &c.
[g] 1 Hal. P. C. 465.
[h] 1 Hal. P. C. 466.
[i] Foſt. 255.

it, were put to death for this enormous crime [k]. But now, by ſtatute 23 Hen. VIII. c. 1. and 1 Edw. VI. c. 12. the benefit of clergy is taken away from murder though malice prepenſe. In atrocious caſes it was frequently uſual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains, near the place where the fact was committed: but this was no part of the legal judgment; and the like is ſtill ſometimes practiced in the caſe of notorious thieves. This, being quite contrary to the expreſs command of the moſaical law [l], ſeems to have been borrowed from the civil law; which, beſides the terror of the example, gives alſo another reaſon for this practice, *viz.* that it is a comfortable ſight to the relations and friends of the deceaſed [m]. But now in England, it is enacted by ſtatute 25 Geo. II. c. 37. that the judge, before whom a murderer is convicted, ſhall in paſſing ſentence direct him to be executed on the next day but one, (unleſs the ſame ſhall be ſunday, and then on the monday following) and that his body be delivered to the ſurgeons to be diſſected and anatomized [n]; and that the judge may direct his body to be afterwards hung in chains, but in no wiſe to be buried without diſſection. And, during the ſhort but awful interval between ſentence and execution, the priſoner ſhall be kept alone, and ſuſtained with only bread and water. But a power is allowed to the judge, upon good and ſufficient cauſe, to reſpite the execution, and relax the other reſtraints of this act.

BY the Roman law, *parricide*, or the murder of one's parents or children, was puniſhed in a much ſeverer manner than any other kind of homicide. After being ſcourged, the delinquents were ſewed up in a leathern ſack, with a live dog, a cock, a vi-

[k] 1 Hal. P. C. 450.

[l] "The body of a malefactor ſhall not "remain all night upon the tree; but thou "ſhalt in any wiſe bury him in that day, "that the land be not defiled." Deut. xxi. 23.

[m] "*Famoſos latrones, in his locis, ubi graſſati ſunt, furca figendos placuit; ut, et conſpectu deterreantur alii, et ſolatio ſit cognatis interemptorum, eodem loco poena reddita, in quo latrones homicidia feciſſent.*" *Ff.* 48. 19. 28. §. 15.

[n] Foſt. 107.

per,

per, and an ape, and ſo caſt into the ſea [o]. Solon, it is true, in his laws, made none againſt parricide; apprehending it impoſſible that any one ſhould be guilty of ſo unnatural a barbarity [p]. And the Perſians, according to Herodotus, entertained the ſame notion, when they adjudged all perſons who killed their reputed parents to be baſtards. And, upon ſome ſuch reaſon as this, muſt we account for the omiſſion of an exemplary puniſhment for this crime in our Engliſh laws; which treat it no otherwiſe than as ſimple murder, unleſs the child was alſo the ſervant of his parent [q].

FOR, though the breach of natural relation is unobſerved, yet the breach of civil or eccleſiaſtical connexions, when coupled with murder, denominates it a new offence; no leſs than a ſpecies of treaſon, called *parva proditio*, or *petit treaſon*: which however is nothing elſe but an aggravated degree of murder [r]; although, on account of the violation of private allegiance, it is ſtigmatized as an inferior ſpecies of treaſon [s]. And thus, in the antient Gothic conſtitution, we find the breach both of natural and civil relations ranked in the ſame claſs with crimes againſt the ſtate and the ſovereign [t].

PETIT treaſon, according to the ſtatute 25 Edw. III. c. 2. may happen three ways: by a ſervant killing his maſter, a wife her huſband, or an eccleſiaſtical perſon (either ſecular, or regular) his ſuperior, to whom he owes faith and obedience. A ſervant who kills his maſter whom he has left, upon a grudge conceived againſt him during his ſervice, is guilty of petit treaſon: for the traiterous intention was hatched while the relation ſubſiſted between them; and this is only an execution of that intention [u]. So if a wife be divorced *a menſa et thoro*, ſtill the *vinculum ma-*

[o] *Ff.* 48. 9. 9.
[p] Cic. *pro S. Roſcio.* §. 25.
[q] 1 Hal. P. C. 380.
[r] Foſter. 107. 324. 336.
[s] See pag. 75.
[t] "*Omnium graviſſima cenſetur vis facta ab incolis in patriam, ſubditis in regem, liberis in parentes, maritis in uxores, (et vice verſa) ſervis in dominos, aut etiam ab homine in ſemet ipſum.*" Stiernh. *de jure Goth. l.* 3. *c.* 3.
[u] 1 Hawk. P. C. 89. 1 Hal. P. C. 380.

matrimonii ſubſiſts; and if ſhe kills ſuch divorced huſband, ſhe is a traitreſs [w]. And a clergyman is underſtood to owe canonical obedience, to the biſhop who ordained him, to him in whoſe dioceſe he is beneficed, and alſo to the metropolitan of ſuch ſuffragan or dioceſan biſhop: and therefore to kill any of theſe is petit treaſon [x]. As to the reſt, whatever has been ſaid, or remains to be obſerved hereafter, with reſpect to wilful murder, is alſo applicable to the crime of petit treaſon, which is no other than murder in it's moſt odious degree: except that the trial ſhall be as in caſes of high treaſon, before the improvements therein made by the ſtatutes of William III [y]; and alſo except in it's puniſhment.

THE puniſhment of petit treaſon, in a man, is to be drawn and hanged, and, in a woman, to be drawn and burned [z]: the idea of which latter puniſhment ſeems to have been handed down to us from the laws of the antient Druids, which condemned a woman to be burned for murdering her huſband [a]; and it is now the uſual puniſhment for all ſorts of treaſons committed by thoſe of the female ſex [b]. Perſons guilty of petit treaſon were firſt debarred the benefit of clergy by ſtatute 12 Hen. VII. c. 7.

[w] 1 Hal. P. C. 381.
[x] *Ibid.*
[y] Foſt. 337.
[z] 1 Hal. P. C. 382. 3 Inſt. 211.
[a] Caeſar *de bell. Gall. l.* 6. *c.* 18.
[b] See pag. 93.

CHAPTER THE FIFTEENTH.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

HAVING in the preceding chapter conſidered the principal crime, or public wrong, that can be committed againſt a private ſubject, namely, by deſtroying his life; I proceed now to enquire into ſuch other crimes and miſdemeſnors, as more peculiarly affect the ſecurity of his perſon, while living.

OF theſe ſome are felonious, and in their nature capital; others are ſimple miſdemeſnors, and puniſhable with a lighter animadverſion. Of the felonies the firſt is that of *mayhem*.

I. MAYHEM, *mahemium*, was in part conſidered in the preceding volume [a], as a civil injury: but it is alſo looked upon in a criminal light by the law; being an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and aſſiſtance of his ſubjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the uſe of ſuch of his members, as may render him the leſs able in fighting, either to defend himſelf, or to annoy his adverſary [b]. And therefore the cutting off, or diſabling, or weakening a man's

[a] See Vol. III. pag. 121.

[b] Brit. *l.* 1. *c.* 25. 1 Hawk. P. C. 111.

hand

hand or finger, or ſtriking out his eye or foretooth, or depriving him of thoſe parts, the loſs of which in all animals abates their courage, are held to be mayhems. But the cutting off his ear, or noſe, or the like, are not held to be mayhems at common law; becauſe they do not weaken but only disfigure him.

BY the antient law of England he that maimed any man, whereby he loſt any part of his body, was ſentenced to loſe the like part; *membrum pro membro* [c]: which is ſtill the law in Sweden [d]. But this went afterwards out of uſe: partly becauſe the law of retaliation, as was formerly ſhewn [e], is at beſt an inadequate rule of puniſhment; and partly becauſe upon a repetition of the offence the puniſhment could not be repeated. So that, by the common law, as it for a long time ſtood, mayhem was only puniſhable with fine and impriſonment [f]; unleſs perhaps the offence of mayhem by caſtration, which all our old writers held to be felony; "*et ſequitur aliquando poena capitalis, aliquando perpetuum exilium, cum omnium bonorum ademptione* [g]." And this, although the mayhem was committed upon the higheſt provocation [h].

BUT ſubſequent ſtatutes have put the crime and puniſhment of mayhem more out of doubt. For, firſt, by ſtatute 5 Hen. IV. c. 5. to remedy a miſchief that then prevailed, of beating, wounding, or robbing a man, and then cutting out his *tongue* or putting out his *eyes*, to prevent him from being an evidence againſt them, this offence is declared to be felony, if done of malice prepenſe; that is, as ſir Edward Coke [i] explains it, voluntarily

[c] 3 Inſt. 118.—*Mes, ſi la pleynte ſoit faite de femme qu' avera tollet a home ſes membres, en tiel caſe perdra la feme la une meyn par jugement, come le membre dount ele avera treſpaſſe.* (Brit. c. 25.)

[d] Stiernhook *de jure Sueon. l.* 3. *c.* 3.

[e] See pag. 12.

[f] 1 Hawk. P. C. 112.

[g] Bract. *fol.* 144.

[h] Sir Edward Coke (3 Inſt. 62.) has tranſcribed a record of Henry the third's time, (*Clauſ.* 13 *Hen. III. m.* 9.) by which a gentleman of Somerſetſhire and his wife appear to have been apprehended and committed to priſon, being indicted for dealing thus with John the monk, who was caught in adultery with the wife.

[i] 3 Inſt. 62.

and

and of ſet purpoſe, though done upon a ſudden occaſion. Next, in order of time, is the ſtatute 37 Hen. VIII. c. 6. which directs, that if a man ſhall maliciouſly and unlawfully cut off the *ear* of any of the king's ſubjects, he ſhall not only forfeit treble damages to the party grieved, to be recovered by action of treſpaſs at common law, as a civil ſatisfaction; but alſo 10 *l.* by way of fine to the king, which was his criminal amercement. The laſt ſtatute, but by far the moſt ſevere and effectual of all, is that of 22 & 23 Car. II. c. 1. called the coventry act; being occaſioned by an aſſault on ſir John Coventry in the ſtreet, and ſlitting his noſe, in revenge (as was ſuppoſed) for ſome obnoxious words uttered by him in parliament. By this ſtatute it is enacted, that if any perſon ſhall of malice aforethought, and by lying in wait, unlawfully cut out or diſable the tongue, put out an eye, ſlit the noſe, cut off a noſe or lip, or cut off or diſable any limb or member of any other perſon, *with intent to maim or to diſfigure him*; ſuch perſon, his counſellors, aiders, and abettors, ſhall be guilty of felony without benefit of clergy [k].

[k] On this ſtatute Mr. Coke, a gentleman of Suffolk, and one Woodburn, a labourer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact, of ſlitting the noſe of Mr. Criſpe, Coke's brother in law. The caſe was ſomewhat ſingular. The murder of Criſpe was intended, and he was left for dead, being terribly hacked and diſfigured with a hedge bill; but he recovered. Now the bare intent to murder is no felony: but to diſfigure, with an intent to diſfigure, is made ſo by this ſtatute; on which they were therefore indicted. And Coke, who was a diſgrace to the profeſſion of the law, had the effrontery to reſt his defence upon this point, that the aſſault was not committed with an intent to diſfigure, but with an intent to murder; and therefore not within the ſtatute. But the court held, that if a man attacks another to murder him with ſuch an inſtrument as a hedge bill, which cannot but endanger the diſfiguring him; and in ſuch attack happens not to kill, but only to diſfigure him; he may be indicted on this ſtatute: and it ſhall be left to the jury whether it were not a deſign to murder by diſfiguring, and conſequently a malicious intent to diſfigure as well as to murder. Accordingly the jury found them guilty of ſuch previous intent to diſfigure, in order to effect their principal intent to murder, and they were both condemned and executed. (State Trials. VI. 212.)

THUS

THUS much for the felony of mayhem: to which may be added the offence of wilfully and maliciouſly ſhooting at any perſon, which may endanger either killing or maiming him. This, though no ſuch evil conſequence enſues, is made felony without benefit of clergy by ſtatute 9 Geo. I. c. 22. and thereupon one Arnold was convicted in 1723, for ſhooting at lord Onſlow; but, being half a madman, was never executed, but confined in priſon, where he died about thirty years after.

II. THE ſecond offence, more immediately affecting the perſonal ſecurity of individuals, relates to the female part of his majeſty's ſubjects; being that of their *forcible abduction* and *marriage*; which is vulgarly called *ſtealing an heireſs*. For by ſtatute 3 Hen. VII. c. 2. it is enacted, that if any perſon ſhall for lucre take any woman, being maid, widow, or wife, and having ſubſtance either in goods or lands, or being heir apparent to her anceſtors, contrary to her will; and afterwards ſhe be married to ſuch miſdoer, or by his conſent to others, or defiled; ſuch perſon, and all his acceſſories, ſhall be deemed principal felons: and by ſtatute 39 Eliz. c. 9. the benefit of clergy is taken away from all ſuch felons, except acceſſories *after* the offence.

IN the conſtruction of this ſtatute it hath been determined, 1. That the indictment muſt allege that the taking was for lucre, for ſuch are the words of the ſtatute [l]. 2. In order to ſhew this, it muſt appear that the woman has ſubſtance either real or perſonal, or is an heir apparent [m]. 3. It muſt appear that ſhe was taken away againſt her will. 4. It muſt alſo appear, that ſhe was afterwards married, or defiled. And though poſſibly the marriage or defilement might be by her ſubſequent conſent, being won thereunto by flatteries after the taking, yet this is felony, if the firſt taking were againſt her will [n]: and ſo *vice*

[l] 1 Hawk. P. C. 110.
[m] 1 Hal. P. C. 660. 1 Hawk. P. C. 109.
[n] 1 Hal. P. C. 660.

verſa,

verſa, if the woman be originally taken away with her own conſent, yet if ſhe afterwards refuſe to continue with the offender, and be forced againſt her will, ſhe may, from that time, as properly be ſaid to be taken againſt her will, as if ſhe never had given any conſent at all; for, till the force was put upon her, ſhe was in her own power[o]. It is held that a woman, thus taken away and married, may be ſworn and give evidence againſt the offender, though he is her huſband *de facto*; contrary to the general rule of law: becauſe he is no huſband *de jure*, in caſe the actual marriage was alſo againſt her will[p]. In caſes indeed where the actual marriage is good, by the conſent of the inveigled woman obtained after her forcible abduction, ſir Matthew Hale ſeems to queſtion how far her evidence ſhould be allowed: but other authorities[q] ſeem to agree, that it ſhould even then be admitted; eſteeming it abſurd, that the offender ſhould thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, ſhould (by a forced conſtruction of law) be made uſe of to ſtop the mouth of the moſt material witneſs againſt him.

AN inferior degree of the ſame kind of offence, but not attended with force, is puniſhed by the ſtatute 4 & 5 Ph. & Mar. c. 8. which enacts, that if any perſon, above the age of fourteen, unlawfully ſhall convey or *take away any woman child unmarried*, (which is held[r] to extend to baſtards as well as to legitimate children) within the age of ſixteen years, from the poſſeſſion and againſt the will of the father, mother, guardians, or governors, he ſhall be impriſoned two years, or fined at the diſcretion of the juſtices: and if he deflowers ſuch maid or woman child, or, without the conſent of parents, contracts matrimony with her, *he* ſhall be impriſoned five years, or fined at the diſcretion of the juſtices, and *ſhe* ſhall forfeit all her lands to her next of kin, during the life of her ſaid huſband. So that

[o] 1 Hawk. P. C. 110.
[p] 1 Hal. P. C. 661.
[q] Cro. Car. 488. 3 Keb. 193. State Trials. V. 455.
[r] Stra. 1162.

as theſe ſtolen marriages, under the age of ſixteen, were uſually upon mercenary views, this act, beſides puniſhing the ſeducer, wiſely removed the temptation. But this latter part of the act is now rendered almoſt uſeleſs, by proviſions of a very different kind, which make the marriage totally void[s], in the ſtatute 26 Geo. II. c. 33.

III. A THIRD offence, againſt the female part alſo of his majeſty's ſubjects, but attended with greater aggravations than that of forcible marriage, is the crime of *rape*, *raptus mulierum*, or the carnal knowlege of a woman forcibly and againſt her will. This, by the Jewiſh law[t], was puniſhed with death, in caſe the damſel was betrothed to another man; and, in caſe ſhe was not betrothed, then a heavy fine of fifty ſhekels was to be paid to the damſel's father, and ſhe was to be the wife of the raviſher all the days of his life; without that power of divorce, which was in general permitted by the moſaic law.

THE civil law[u] puniſhes the crime of raviſhment with death and confiſcation of goods: under which it includes both the offence of forcible abduction, or taking away a woman from her friends, of which we laſt ſpoke; and alſo the preſent offence of forcibly diſhonouring them; either of which, without the other, is in that law ſufficient to conſtitute a capital crime. Alſo the ſtealing away a woman from her parents or guardians, and debauching her, is equally penal by the emperor's edict, whether ſhe conſent or is forced: "*ſive volentibus, ſive nolentibus mulie-*" "*ribus, tale facinus fuerit perpetratum.*" And this, in order to take away from women every opportunity of offending in this way; whom the Roman laws ſuppoſe never to go aſtray, without the ſeduction and arts of the other ſex: and therefore, by reſtraining and making ſo highly penal the ſolicitations of the men, they meant to ſecure effectually the honour of the women.

[s] See Vol. I. pag. 437, &c.
[t] Deut. xxii. 25.
[u] *Cod.* 9 *tit.* 13.

"*Si*

" *Si enim ipſi raptores metu, vel atrocitate poenae, ab hujuſmodi fa-*
" *cinore ſe temperaverint, nulli mulieri, ſive volenti, ſive nolenti,*
" *peccandi locus relinquetur; quia hoc ipſum* velle *mulierum, ab in-*
" *ſidiis nequiſſimi hominis, qui meditatur rapinam, inducitur. Niſi*
" *etenim eam ſolicitaverit, niſi odioſis artibus circumvenerit, non*
" *faciet eam velle in tantum dedecus ſeſe prodere.*" But our Engliſh law does not entertain quite ſuch ſublime ideas of the honour of either ſex, as to lay the blame of a mutual fault upon one of the tranſgreſſors only: and therefore makes it a neceſſary ingredient in the crime of rape, that it muſt be againſt the woman's will.

RAPE was puniſhed by the Saxon laws, particularly thoſe of king Athelſtan[w], with death: which was alſo agreeable to the old Gothic or Scandinavian conſtitution[x]. But this was afterwards thought too hard: and in it's ſtead another ſevere, but not capital, puniſhment was inflicted by William the conqueror; *viz*, caſtration and loſs of eyes[y]; which continued till after Bracton wrote, in the reign of Henry the third. But in order to prevent malicious accuſations, it was then the law, (and, it ſeems, ſtill continues to be ſo in appeals of rape[z]) that the woman ſhould immediately after, " *dum recens fuerit maleficium,*" go to the next town, and there make diſcovery to ſome credible perſons of the injury ſhe has ſuffered; and afterwards ſhould acquaint the high conſtable of the hundred, the coroners, and the ſheriff with the outrage[a]. This ſeems to correſpond in ſome degree with the laws of Scotland and Arragon[b], which require that complaint muſt be made within twenty four hours: though afterwards by ſtatute Weſtm. 1. c. 13. the time of limitation in England was extended to forty days. At preſent there is no time of limitation fixed: for, as it is uſually now puniſhed by indictment at the ſuit of the king, the maxim of law takes place, that *nullum tempus occurrit regi*: but the jury will rarely give credit to a ſtale

[w] Bracton. *l.* 3. *c.* 28.
[x] Stiernh. *de jure Sueon. l.* 3. *c.* 2.
[y] *LL. Guil. Conqu. c.* 19.
[z] 1 Hal. P. C. 632.
[a] Glanv. *l.* 14 *c.* 6. Bract. *l.* 3. *c.* 28.
[b] Barrington. 107.

complaint. During the former period alſo it was held for law[c], that the woman (by conſent of the judge and her parents) might redeem the offender from the execution of his ſentence, by accepting him for her huſband; if he alſo was willing to agree to the exchange, but not otherwiſe.

IN the 3 Edw. I. by the ſtatute Weſtm. 1. c. 13. the puniſhment of rape was much mitigated: the offence itſelf being reduced to a treſpaſs, if not proſecuted by the woman within forty days, and ſubjecting the offender only to two years impriſonment, and a fine at the king's will. But, this lenity being productive of the moſt terrible conſequences, it was in ten years afterwards, 13 Edw. I. found neceſſary to make the offence of rape felony, by ſtatute Weſtm. 2. c. 34. And by ſtatute 18 Eliz. c. 7. it is made felony without benefit of clergy: as is alſo the abominable wickedneſs of carnally knowing or abuſing any woman child under the age of ten years; in which caſe the conſent or non-conſent is immaterial, as by reaſon of her tender years ſhe is incapable of judgment and diſcretion. Sir Matthew Hale is indeed of opinion, that ſuch profligate actions committed on an infant under the age of *twelve* years, the age of female diſcretion by the common law, either with or without conſent, amount to rape and felony; as well ſince as before the ſtatute of queen Elizabeth[d]: but the law has in general been held only to extend to infants under *ten*.

A MALE infant, under the age of fourteen years, is preſumed by law incapable to commit a rape, and therefore it ſeems cannot be found guilty of it. For though in other felonies *malitia ſupplet aetatem*, as has in ſome caſes been ſhewn; yet, as to this particular ſpecies of felony, the law ſuppoſes an imbecillity of body as well as mind[e].

[c] Glanv. *l.* 14. *c.* 6. Bract. *l.* 3. *c.* 28. [e] *Ibid.*
[d] 1 Hal. P. C. 631.

THE

THE civil law ſeems to ſuppoſe a proſtitute or common harlot incapable of any injuries of this kind [f]: not allowing any puniſhment for violating the chaſtity of her, who hath indeed no chaſtity at all, or at leaſt hath no regard to it. But the law of England does not judge ſo hardly of offenders, as to cut off all opportunity of retreat even from common ſtrumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; becauſe the woman may have forſaken that unlawful courſe of life [g]: for, as Bracton well obſerves [h], "*licet meretrix fuerit antea, certe tunc* "*temporis non fuit, cum reclamando nequitiae ejus conſentire noluit.*"

As to the material facts requiſite to be given in evidence and proved upon an indictment of rape, they are of ſuch a nature, that though neceſſary to be known and ſettled, for the conviction of the guilty and preſervation of the innocent, and therefore are to be found in ſuch criminal treatiſes as diſcourſe of theſe matters in detail, yet they are highly improper to be publicly diſcuſſed, except only in a court of juſtice. I ſhall therefore merely add upon this head a few remarks from ſir Matthew Hale, with regard to the competency and credibility of witneſſes; which may, *ſalvo pudore*, be conſidered.

AND, firſt, the party raviſhed may give evidence upon oath, and is in law a competent witneſs; but the credibility of her teſtimony, and how far forth ſhe is to be believed, muſt be left to the jury upon the circumſtances of fact that concur in that teſtimony. For inſtance: if the witneſs be of good fame; if ſhe preſently diſcovered the offence, and made ſearch for the offender; if the party accuſed fled for it; theſe and the like are concurring circumſtances, which give greater probability to her evidence. But, on the other ſide, if ſhe be of evil fame, and ſtand unſupported by others; if ſhe concealed the injury for any conſiderable time after ſhe had opportunity to complain; if the

[f] *Cod.* 9. 9. 22. *Ff.* 47. 2. 39.
[g] 1 Hal. P. C. 629. 1 Hawk. P. C. 108.
[h] *fol.* 147.

place,

place, where the fact was alleged to be committed, was where it was poſſible ſhe might have been heard, and ſhe made no outcry; theſe and the like circumſtances carry a ſtrong, but not concluſive, preſumption that her teſtimony is falſe or feigned.

MOREOVER, if the rape be charged to be committed on an infant under twelve years of age, ſhe may ſtill be a competent witneſs, if ſhe hath ſenſe and underſtanding to know the nature and obligations of an oath; and, even if ſhe hath not, it is thought by ſir Matthew Hale[1] that ſhe ought to be heard without oath, to give the court information; though that alone will not be ſufficient to convict the offender. And he is of this opinion, firſt, becauſe the nature of the offence being ſecret, there may be no other poſſible proof of the actual fact; though afterwards there may be concurrent circumſtances to corroborate it, proved by other witneſſes: and, ſecondly, becauſe the law allows what the child told her mother, or other relations, to be given in evidence, ſince the nature of the caſe admits frequently of no better proof; and there is much more reaſon for the court to hear the narration of the child herſelf, than to receive it at ſecond hand from thoſe who ſwear they heard her ſay ſo. And indeed it is now ſettled, that infants of any age are to be heard; and, if they have any idea of an oath, to be alſo ſworn: it being found by experience that infants of very tender years often give the cleareſt and trueſt teſtimony. But in any of theſe caſes, whether the child be ſworn or not, it is to be wiſhed, in order to render her evidence credible, that there ſhould be ſome concurrent teſtimony, of time, place and circumſtances, in order to make out the fact; and that the conviction ſhould not be grounded ſingly on the unſupported accuſation of an infant under years of diſcretion. There may be therefore, in many caſes of this nature, witneſſes who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or ſuch as the jury is bound to believe. For one excel-

[1] 1 Hal. P.C. 634.

lence

lence of the trial by jury is, that the jury are triors of the credit of the witneſſes, as well as of the truth of the fact.

"IT is true, ſays this learned judge[j], that rape is a moſt "deteſtable crime, and therefore ought ſeverely and impartially "to be puniſhed with death; but it muſt be remembered, that "it is an accuſation eaſy to be made, hard to be proved, but "harder to be defended by the party accuſed, though innocent." He then relates two very extraordinary caſes of malicious proſecution for this crime, that had happened within his own obſervation; and concludes thus: "I mention theſe inſtances, that "we may be the more cautious upon trials of offences of this "nature, wherein the court and jury may with ſo much eaſe be "impoſed upon, without great care and vigilance; the heinouſ-"neſs of the offence many times tranſporting the judge and jury "with ſo much indignation, that they are overhaſtily carried to "the conviction of the perſon accuſed thereof, by the confident "teſtimony of ſometimes falſe and malicious witneſſes."

IV. WHAT has been here obſerved, eſpecially with regard to the manner of proof, which ought to be the more clear in proportion as the crime is the more deteſtable, may be applied to another offence, of a ſtill deeper malignity; the infamous *crime againſt nature*, committed either with man or beaſt. A crime, which ought to be ſtrictly and impartially proved, and then as ſtrictly and impartially puniſhed. But it is an offence of ſo dark a nature, ſo eaſily charged, and the negative ſo difficult to be proved, that the accuſation ſhould be clearly made out: for, if falſe, it deſerves a puniſhment inferior only to that of the crime itſelf.

I WILL not act ſo diſagreeable a part, to my readers as well as myſelf, as to dwell any longer upon a ſubject, the very mention of which is a diſgrace to human nature. It will be more eligible to imitate in this reſpect the delicacy of our Engliſh law, which treats it, in it's very indictments, as a crime not fit to be named;

[j] 1 Hal. P. C. 635. "*pec-*

"*peccatum illud horribile, inter chriſtianos non nominandum*[k]." A taciturnity obſerved likewiſe by the edict of Conſtantius and Conſtans[l]; "*ubi ſcelus eſt id, quod non proficit ſcire, jubemus inſur-*
"*gere leges, armari jura gladio ultore, ut exquiſitis poenis ſubdan-*
"*tur infames, qui ſunt, vel qui futuri ſunt, rei.*" Which leads me to add a word concerning it's puniſhment.

THIS the voice of nature and of reaſon, and the expreſs law of God[m], determine to be capital. Of which we have a ſignal inſtance, long before the Jewiſh diſpenſation, by the deſtruction of two cities by fire from heaven: ſo that this is an univerſal, not merely a provincial, precept. And our antient law in ſome degree imitated this puniſhment, by commanding ſuch miſcreants to be burnt to death[n]; though Fleta[o] ſays they ſhould be buried alive: either of which puniſhments was indifferently uſed for this crime among the antient Goths[p]. But now the general puniſhment of all felonies is the ſame, namely, by hanging: and this offence (being in the times of popery only ſubject to eccleſiaſtical cenſures) was made felony without benefit of clergy by ſtatute 25 Hen. VIII. c. 6. revived and confirmed by 5 Eliz. c. 17. And the rule of law herein is, that, if both are arrived at years of diſcretion, *agentes et conſentientes pari poena plectantur*[q].

THESE are all the felonious offences, more immediately againſt the perſonal ſecurity of the ſubject. The inferior offences, or miſdemeſnors, that fall under this head, are *aſſaults*, *batteries*, *wounding*, *falſe impriſonment*, and *kidnapping*.

V, VI, VII. WITH regard to the nature of the three firſt of theſe offences in general, I have nothing farther to add to what has already been obſerved in the preceding book of theſe com-

[k] See in *Rot. Parl.* 50 *Edw.* III. *n.* 58, a complaint, that a Lombard did commit the ſin "that was not to be named". (12 Rep. 37.)

[l] *Cod.* 9. 9. 31.

[m] Levit. xx. 13. 15.

[n] Brit. *c.* 9.

[o] *l.* 1. *c.* 37.

[p] Stiernh. *de jure Goth. l.* 3. *c.* 2.

[q] 3 Inſt. 59.

mentaries[r];

mentaries[r]; when we considered them as private wrongs, or civil injuries, for which a satisfaction or remedy is given to the party aggrieved. But, taken in a public light, as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fine and imprisonment; or with other ignominious corporal penalties, where they are committed with any very atrocious design[s]. As in case of an assault with an intent to murder, or with an intent to commit either of the crimes last spoken of; for which intentional assaults, in the two last cases, indictments are much more usual, than for the absolute perpetration of the facts themselves, on account of the difficulty of proof: and herein, besides heavy fine and imprisonment, it is usual to award judgment of the pillory.

THERE is also one species of battery, more atrocious and penal than the rest, which is the beating of a clerk in orders, or clergyman; on account of the respect and reverence due to his sacred character, as the minister and embassador of peace. Accordingly it is enacted by the statute called *articuli cleri*, 9 Edw. II. c. 3. that if any person lay violent hands upon a clerk, the amends for the peace broken shall be before the king; that is by indictment in the king's courts: and the assailant may also be sued before the bishop, that excommunication or bodily penance may be imposed: which if the offender will redeem by money, to be given to the bishop, or the party grieved, it may be sued for before the bishop; whereas otherwise to sue in any spiritual court, for civil damages for the battery, falls within the danger of *praemunire*[t]. But suits are, and always were, allowable in the spiritual court, for money agreed to be given as a commutation for penance[u]. So that upon the whole it appears, that a person guilty of such brutal behaviour to a clergyman, is subject to three kinds of prosecution, all of which may be pursued for one and the same offence: an indictment, for the breach

[r] See Vol. III. pag. 120.
[s] 1 Hawk. P. C. 65.
[t] 2 Inst. 492. 620.
[u] *Artic. Cler.* 9 *Edw. II. c.* 4. F. N. B. 53.

of the king's peace by ſuch aſſault and battery; a civil action, for the ſpecial damage ſuſtained by the party injured; and a ſuit in the eccleſiaſtical court, firſt, *pro correctione et ſalute animae* by *enjoining* penance, and then again for ſuch ſum of money as ſhall be agreed on for *taking off* the penance enjoined: it being uſual in thoſe courts to exchange their ſpiritual cenſures for a round compenſation in money [v]; perhaps becauſe poverty is generally eſteemed by the moraliſts the beſt medicine *pro ſalute animae*.

VIII. THE two remaining crimes and offences, againſt the perſons of his majeſty's ſubjects, are infringements of their natural liberty: concerning the firſt of which, *falſe impriſonment*, it's nature and incidents, I muſt content myſelf with referring the ſtudent to what was obſerved in the preceding volume [w], when we conſidered it as a mere civil injury. But, beſides the private ſatisfaction given to the individual by action, the law alſo demands public vengeance for the breach of the king's peace, for the loſs which the ſtate ſuſtains by the confinement of one of it's members, and for the infringement of the good order of ſociety. We have before ſeen [x], that the moſt atrocious degree of this offence, that of ſending any ſubject of this realm a priſoner into parts beyond the ſeas, whereby he is deprived of the friendly aſſiſtance of the laws to redeem him from ſuch his captivity, is puniſhed with the pains of *praemunire*, and incapacity to hold any office, without any poſſibility of pardon [y]. Inferior degrees of the ſame offence of falſe impriſonment are alſo puniſhable by indictment (like aſſaults and batteries) and the delinquent may be fined and impriſoned [z]. And indeed [a] there can be no doubt, but that all kinds of crimes of a public nature, all diſturbances of the peace, all oppreſſions, and other miſdemeſnors whatſoever, of a notoriouſly evil example, may be indicted at the ſuit of the king.

[v] 2 Rol. Rep. 384.
[w] See Vol. III. pag. 127.
[x] See pag. 116.
[y] Stat. 31 Car. II. c. 2.
[z] Weſt. Symbol. part 2. pag. 92.
[a] 1 Hawk. P. C. 210.

IX. THE

IX. THE other remaining offence, that of *kidnapping*, being the forcible abduction or ſtealing away of man, woman, or child from their own country, and ſelling them into another, was capital by the Jewiſh law. "He that ſtealeth a man, and ſelleth "him, or if he be found in his hand, he ſhall ſurely be put to "death [b]." So likewiſe in the civil law, the offence of ſpiriting away and ſtealing men and children, which was called *plagium*, and the offenders *plagiarii*, was puniſhed with death [c]. This is unqueſtionably a very heinous crime, as it robs the king of his ſubjects, baniſhes a man from his country, and may in it's conſequences be productive of the moſt cruel and diſagreeable hardſhips; and therefore the common law of England has puniſhed it with fine, impriſonment, and pillory [d]. And alſo the ſtatute 11 & 12 W. III. c. 7. though principally intended againſt pirates, has a clauſe that extends to prevent the leaving of ſuch perſons abroad, as are thus kidnapped or ſpirited away; by enacting, that if any captain of a merchant veſſel ſhall (during his being abroad) force any perſon on ſhore, or wilfully leave him behind, or refuſe to bring home all ſuch men as he carried out, if able and deſirous to return, he ſhall ſuffer three months impriſonment. And thus much for offences that more immediately affect the *perſons* of individuals.

[b] Exod. xxi. 16.
[c] *Ff.* 48. 15. 1.
[d] Raym. 474. 2 Show. 221. Skin. 47. Comb. 10.

CHAPTER THE SIXTEENTH.

OF OFFENCES AGAINST THE HABITATIONS OF INDIVIDUALS.

THE only two offences, that more immediately affect the *habitations* of individuals or private ſubjects, are thoſe of *arſon* and *burglary*.

I. ARSON, *ab ardendo*, is the malicious and wilful burning of the houſe or outhouſes of another man. This is an offence of very great malignity, and much more pernicious to the public than ſimple theft: becauſe, firſt, it is an offence againſt that right, of habitation, which is acquired by the law of nature as well as by the laws of ſociety; next, becauſe of the terror and confuſion that neceſſarily attends it; and, laſtly, becauſe in ſimple theft the thing ſtolen only changes it's maſter, but ſtill remains *in eſſe* for the benefit of the public, whereas by burning the very ſubſtance is abſolutely deſtroyed. It is alſo frequently more deſtructive than murder itſelf, of which too it is often the cauſe: ſince murder, atrocious as it is, ſeldom extends beyond the felonious act deſigned; whereas fire too frequently involves in the common calamity perſons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies.

For

For which reaſon the civil law [a] puniſhes with death ſuch as maliciouſly ſet fire to houſes in towns, and contiguous to others; but is more merciful to ſuch as only fire a cottage, or houſe, ſtanding by itſelf.

OUR Engliſh law alſo diſtinguiſhes with much accuracy upon this crime. And therefore we will enquire, firſt, what is ſuch a houſe as may be the ſubject of this offence; next, wherein the offence itſelf conſiſts, or what amounts to a burning of ſuch houſe; and, laſtly, how the offence is puniſhed.

1. NOT only the bare dwelling houſe, but all outhouſes that are parcel thereof, though not contiguous thereto, nor under the ſame roof, as barns and ſtables, may be the ſubject of arſon [b]. And this by the common law: which alſo accounted it felony to burn a ſingle barn in the field, if filled with hay or corn, though not parcel of the dwelling houſe [c]. The burning of a ſtack of corn was antiently likewiſe accounted arſon [d]. And indeed all the niceties and diſtinctions which we meet with in our books, concerning what ſhall, or ſhall not, amount to arſon, ſeem now to be taken away by a variety of ſtatutes; which will be mentioned in the next chapter, and have made the puniſhment of wilful burning equally extenſive as the miſchief. The offence of arſon (ſtrictly ſo called) may be committed by wilfully ſetting fire to one's own houſe, provided one's neighbour's houſe is thereby alſo burnt; but if no miſchief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's [e]. For by the common law no intention to commit a felony amounts to the ſame crime; though it does, in ſome caſes, by particular ſtatutes. However ſuch wilful firing one's own houſe, *in a town*, is a high miſdemeſnor, and puniſhable by fine, impriſonment, pillory, and perpetual ſureties for the good behaviour [f]. And if a landlord or reverſioner ſets fire

[a] *Ff.* 48. 19. 28. §. 12.
[b] 1 Hal. P. C. 567.
[c] 3 Inſt. 69.
[d] 1 Hawk. P. C. 105.
[e] Cro. Car. 377.
[f] 1 Hal. P. C. 568. 1 Hawk. P. C. 106.

to

to his own houſe, of which another is in poſſeſſion under a leaſe from himſelf or from thoſe whoſe eſtate he hath, it ſhall be accounted arſon; for, during the leaſe, the houſe is the property of the tenant[g].

2. As to what ſhall be ſaid a *burning*, ſo as to amount to arſon: a bare intent, or attempt to do it, by actually ſetting fire to an houſe, unleſs it abſolutely *burns*, does not fall within the deſcription of *incendit et combuſſit*; which were words neceſſary, in the days of law-latin, to all indictments of this ſort. But the burning and conſuming of any part is ſufficient; though the fire be afterwards extinguiſhed[h]. Alſo it muſt be a *malicious* burning; otherwiſe it is only a treſpaſs: and therefore no negligence or miſchance amounts to it. For which reaſon, though an unqualified perſon, by ſhooting with a gun, happens to ſet fire to the thatch of a houſe, this ſir Matthew Hale determines not to be felony, contrary to the opinion of former writers[i]. But by ſtatute 6 Ann. c. 31. any ſervant, negligently ſetting fire to a houſe or outhouſes, ſhall forfeit 100 *l*, or be ſent to the houſe of correction for eighteen months: in the ſame manner as the Roman law directed "*eos, qui negligenter ignes apud ſe* "*habuerint, fuſtibus vel flagellis caedi*[k]."

3. THE *puniſhment* of arſon was death by our antient Saxon laws[l]. And, in the reign of Edward the firſt, this ſentence was executed by a kind of *lex talionis*; for the incendiaries were burnt to death[m]: as they were alſo by the Gothic conſtitutions[n]. The ſtatute 8 Hen. VI. c. 6. made the wilful burning of houſes, under ſome ſpecial circumſtances therein mentioned, amount to the crime of high treaſon. But it was again reduced to felony by the general acts of Edward VI and queen Mary: and now the puniſhment of all capital felonies is uniform, namely, by ſuſpenſion. The offence of arſon was denied the benefit of clergy by ſtatute

[g] Foſt. 115.
[h] 1 Hawk. P. C. 106.
[i] 1 Hal. P. C. 569.
[k] *Ff.* 1. 15. 4.
[l] *LL. Inae. c.* 7.
[m] Britt. c. 9.
[n] Stiernh. *de jure Goth. l.* 3. *c.* 6.

21 Hen. VIII. c. 1. but that ſtatute was repealed by 1 Edw. VI. c. 12. and arſon was afterwards held to be ouſted of clergy, with reſpect to the principal offender, only by inference and deduction from the ſtatute 4 & 5 P. & M. c. 4. which expreſſly denied it to the acceſſory [o]; though now it is expreſſly denied to the principal alſo, by ſtatute 9 Geo. I. c. 22.

II. BURGLARY, or nocturnal houſebreaking, *burgi latrocinium*, which by our antient law was called *hameſecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence: not only becauſe of the abundant terror that it naturally carries with it, but alſo as it is a forcible invaſion and diſturbance of that right of habitation, which every individual might acquire even in a ſtate of nature; an invaſion, which in ſuch a ſtate, would be ſure to be puniſhed with death, unleſs the aſſailant were the ſtronger. But in civil ſociety, the laws alſo come in to the aſſiſtance of the weaker party: and, beſides that they leave him this natural right of killing the aggreſſor, if he can, (as was ſhewn in a former chapter [p]) they alſo protect and avenge him, in caſe the might of the aſſailant is too powerful. And the law of England has ſo particular and tender a regard to the immunity of a man's houſe, that it ſtiles it his caſtle, and will never ſuffer it to be violated with impunity: agreeing herein with the ſentiments of antient Rome, as expreſſed in the words of Tully [q]; "*quid enim ſanctius, quid omni religione muni-*" *tius, quam domus uniuſcujuſque civium?*" For this reaſon no doors can in general be broken open to execute any civil proceſs; though, in criminal cauſes, the public ſafety ſuperſedes the private. Hence alſo in part ariſes the animadverſion of the law upon eaves-droppers, nuſancers, and incendiaries: and to this principle it muſt be aſſigned, that a man may aſſemble people together lawfully (at leaſt if they do not exceed eleven) without danger of raiſing a riot, rout, or unlawful aſſembly, in order to

[o] 11 Rep. 35. 2 Hal. P. C. 346, 347. Foſter. 336.

[p] See pag. 180.

[q] *pro domo*, 41.

protect

protect and defend his house; which he is not permitted to do in any other case [r].

THE definition of a burglar, as given us by sir Edward Coke [s], is, "he that by night breaketh and entereth into a mansion-"house, with intent to commit a felony." In this definition there are four things to be considered; the *time*, the *place*, the *manner*, and the *intent*.

1. The *time* must be by night, and not by day; for in the day time there is no burglary. We have seen [t], in the case of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night, and what day, for this purpose: antiently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion seems to be, that if there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary [u]. But this does not extend to moonlight; for then many midnight burglaries would go unpunished: and besides, the malignity of the offence does not so properly arise from it's being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless.

2. As to the *place*. It must be, according to sir Edward Coke's definition, in a *mansion* house; and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei* [w]. But it does not seem absolutely necessary, that it should in all cases be a mansion-house; for it may also be committed by breaking the

[r] 1 Hal. P. C. 547.
[s] 3 Inst. 63.
See pag. 180, 181.
[u] 3 Inst. 63. 1 Hal. P. C. 550. 1 Hawk. P. C. 101.
[w] 3 Inst. 64.

gates

gates or walls of a *town* in the night [x]; though that perhaps ſir Edward Coke would have called the manſion-houſe of the garriſon or corporation. Spelman defines burglary to be, "*nocturna* "*diruptio alicujus habitaculi, vel eccleſiae, etiam murorum portarumve* "*burgi, ad feloniam perpetrandam.*" And therefore we may ſafely conclude, that the requiſite of it's being *domus manſionalis* is only in the burglary of a private houſe; which is the moſt frequent, and in which it is indiſpenſably neceſſary to form it's guilt, that it muſt be in a manſion or dwelling houſe. For no diſtant barn, warehouſe, or the like, are under the ſame privileges, nor looked upon as a man's caſtle of defence: nor is a breaking open of houſes wherein no man reſides, and which therefore for the time being are not manſion-houſes, attended with the ſame circumſtances of midnight terror. A houſe however, wherein a man ſometimes reſides, and which the owner hath only left for a ſhort ſeaſon, *animo revertendi*, is the object of burglary; though no one be in it, at the time of the fact committed [y]. And if the barn, ſtable, or warehouſe be parcel of the manſionhouſe, though not under the ſame roof or contiguous, a burglary may be committed therein; for the capital houſe protects and privileges all it's branches and appurtenants, if within the curtilage or homeſtall [z]. A chamber in a college or an inn of court, where each inhabitant hath a diſtinct property, is, to all other purpoſes as well as this, the manſion-houſe of the owner [a]. So alſo is a room or lodging, in any private houſe, the manſion for the time being of the lodger. The houſe of a corporation, inhabited in ſeparate apartments by the officers of the body corporate, is the manſion-houſe of the corporation, and not of the reſpective officers [b]. But if I hire a ſhop, parcel of another man's houſe, and work or trade in it, but never lie there; it is no dwellinghouſe, nor can burglary be committed therein: for by the leaſe it is ſevered from the reſt of the houſe, and therefore is not the dwellinghouſe of him who occupies the other part;

[x] Spelm. *Gloſſ. t. Burglary.* 1 Hawk. P. C. 103.

[y] 1 Hal. P. C. 566. Foſt. 77.

[z] 1 Hal. P. C. 558. 1 Hawk. P. C. 104.

[a] 1 Hal. P. C. 556.

[b] Foſter. 38, 39.

neither can I be ſaid to dwell therein, when I never lie there [c]. Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein [d]: for the law regards thus highly nothing but permanent edifices; a houſe, or church, the wall, or gate of a town; and it is the folly of the owner to lodge in ſo fragile a tenement: but his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon in the ſame circumſtances.

3. As to the *manner* of committing burglary: there muſt be both a breaking and an entry to complete it. But they need not be both done at once: for, if a hole be broken one night, and the ſame breakers enter the next night through the ſame, they are burglars [e]. There muſt be an actual breaking; not a mere legal *clauſum fregit*, (by leaping over inviſible ideal boundaries, which may conſtitute a civil treſpaſs) but a ſubſtantial and forcible irruption. As at leaſt by breaking, or taking out the glaſs of, or otherwiſe opening, a window; picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unlooſing any other faſtening which the owner has provided. But if a perſon leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein, it is no burglary: yet, if he afterwards unlocks an inner or chamber door, it is ſo [f]. But to come down a chimney is held a burglarious entry; for that is as much cloſed, as the nature of things will permit [g]. So alſo to knock at a door, and upon opening it to ruſh in, with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a conſtable to gain admittance, in order to ſearch for traitors, and then to bind the conſtable and rob the houſe; all theſe entries have been adjudged burglarious, though there was no actual breaking: for the law will not ſuffer itſelf to be trifled with by ſuch evaſions, eſpecially under the cloke of legal proceſs [h]. And ſo, if a ſervant

[c] 1 Hal. P. C. 558.
[d] 1 Hawk. P. C. 104.
[e] 1 Hal. P. C. 551.
[f] *Ibid.* 553.
[g] 1 Hawk. P. C. 102. 1 Hal. P. C. 552.
[h] 1 Hawk. P. C. 102.

opens

opens and enters his maſter's chamber door with a felonious deſign; or if any other perſon lodging in the ſame houſe, or in a public inn, opens and enters another's door, with ſuch evil intent; it is burglary. Nay, if the ſervant conſpires with a robber, and lets him into the houſe by night, this is burglary in both [i]: for the ſervant is doing an unlawful act, and the opportunity afforded him, of doing it with greater eaſe, rather aggravates than extenuates the guilt. As for the entry, any the leaſt degree of it, with any part of the body, or with an inſtrument held in the hand, is ſufficient: as, to ſtep over the threſhold, to put a hand or a hook in at a window to draw out goods, or a piſtol to demand one's money, are all of them burglarious entries [k]. The entry may be before the breaking, as well as after: for by ſtatute 12 Ann. c. 7. if a perſon enters into, or is within, the dwelling houſe of another, without breaking in, either by day or by night, with intent to commit felony, and ſhall in the night break out of the ſame, this is declared to be burglary; there having before been different opinions concerning it: lord Bacon [l] holding the affirmative, and ſir Matthew Hale [m] the negative. But it is univerſally agreed, that there muſt be both a breaking, either in fact or by implication, and alſo an entry, in order to complete the burglary.

4. As to the *intent*; it is clear, that ſuch breaking and entry muſt be with a felonious intent, otherwiſe it is only a treſpaſs. And it is the ſame, whether ſuch intention be actually carried into execution, or only demonſtrated by ſome attempt or overt act, of which the jury is to judge. And therefore ſuch a breach and entry of a houſe as has been before deſcribed, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary; whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law, or only created ſo by ſtatute; ſince

[i] 1 Hal. P. C. 553. 1 Hawk. P. C. 103. [l] Elem. 65.
[k] 1 Hal. P. C. 555. 1 Hawk. P. C. 103. [m] 1 Hal. P. C. 554. Foſt. 108.

that ſtatute, which makes an offence felony, gives it incidentally all the properties of a felony at common law [n].

THUS much for the nature of burglary; which is, as has been ſaid, a felony at common law, but within the benefit of clergy. The ſtatute however of 18 Eliz. c. 7. takes away clergy from the principals, and that of 3 & 4 W. & M. c. 9. from all acceſſories before the fact. And, in like manner, the laws of Athens, which puniſhed no ſimple theft with death, made burglary a capital crime [o].

[n] 1 Hawk. P. C. 105.

[o] Pott. Antiq. b. 1. c. 26.

CHAPTER THE SEVENTEENTH.

OF OFFENCES AGAINST PRIVATE PROPERTY.

THE next, and laſt, ſpecies of offences againſt private ſubjects, are ſuch as more immediately affect their property. Of which there are two, which are attended with a breach of the peace; *larciny*, and *malicious miſchief*: and one, that is equally injurious to the rights of property, but attended with no act of violence; which is the crime of *forgery*. Of theſe three in their order.

I. LARCINY, or *theft*, by contraction for latrociny, *latrocinium*, is diſtinguiſhed by the law into two ſorts; the one called *ſimple* larciny, or plain theft unaccompanied with any other atrocious circumſtance; and *mixt* or *compound* larciny, which alſo includes in it the aggravation of a taking from one's houſe or perſon.

AND, firſt, of *ſimple* larciny: which, when it is the ſtealing of goods above the value of twelvepence, is called *grand* larciny; when of goods to that value, or under, is *petit* larciny: offences, which are conſiderably diſtinguiſhed in their puniſhment, but not otherwiſe. I ſhall therefore firſt conſider the nature of ſimple larciny in general; and then ſhall obſerve the different degrees of puniſhment, inflicted on it's two ſeveral branches.

SIMPLE

SIMPLE larciny then is "the felonious taking, and carrying "away, of the perſonal goods of another." This offence certainly commenced then, whenever it was, that the bounds of property, or laws of *meum* and *tuum*, were eſtabliſhed. How far ſuch an offence can exiſt in a ſtate of nature, where all things are held to be common, is a queſtion that may be ſolved with very little difficulty. The diſturbance of any individual, in the occupation of what he has ſeiſed to his preſent uſe, ſeems to be the only offence of this kind incident to ſuch a ſtate. But, unqueſtionably, in ſocial communities, when property is eſtabliſhed, the neceſſity whereof we have formerly ſeen [a], any violation of that property is ſubject to be puniſhed by the laws of ſociety: though how far that puniſhment ſhould extend, is matter of conſiderable doubt. At preſent we will examine the nature of theft, or larciny, as laid down in the foregoing definition.

1. IT muſt be a *taking*. This implies the conſent of the owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon truſt, can ground a larciny. As if A lends B a horſe, and he rides away with him; or, if I ſend goods by a carrier, and he carries them away; theſe are no larcinies [b]. But if the carrier opens a bale or pack of goods, or pierces a veſſel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, theſe are larcinies [c]: for here the *animus furandi* is manifeſt; ſince in the firſt caſe he had otherwiſe no inducement to open the goods, and in the ſecond the truſt was determined, the delivery having taken it's effect. But bare non-delivery ſhall not of courſe be intended to ariſe from a felonious deſign; ſince that may happen from a variety of other accidents. Neither by the common law was it larciny in any ſervant to run away with the goods committed to him to keep, but only a breach of civil truſt. But by ſtatute 33 Hen. VI. c. 1. the ſervants of perſons

[a] See Vol. II. pag. 8, &c.
[b] 1 Hal. P. C. 504.
[c] 3 Inſt. 107.

deceaſed,

deceaſed, accuſed of embezzling their maſter's goods, may by writ out of chancery (iſſued by the advice of the chief juſtices and chief baron, or any two of them) and proclamation made thereupon, be ſummoned to appear perſonally in the court of king's bench, to anſwer their maſter's executors in any civil ſuit for ſuch goods; and ſhall, on default of appearance, be attainted of felony. And by ſtatute 21 Hen. VIII. c. 7. if any ſervant embezzles his maſter's goods to the value of forty ſhillings, it is made felony; except in apprentices, and ſervants under eighteen years old. But if he had not the poſſeſſion, but only the care and overſight of the goods, as the butler of plate, the ſhepherd of ſheep, and the like, the embezzling of them is felony at common law [d]. So if a gueſt robs his inn or tavern of a piece of plate, it is larciny; for he hath not the poſſeſſion delivered to him, but merely the uſe [e]: and ſo it is declared to be by ſtatute 3 & 4 W. & M. c. 9. if a lodger runs away with the goods from his ready furniſhed lodgings. Under ſome circumſtances alſo a man may be guilty of felony in taking his own goods: as if he ſteals them from a pawnbroker, or any one to whom he hath delivered and entruſted them, with intent to charge ſuch bailee with the value; or if he robs his own meſſenger on the road, with intent to charge the hundred with the loſs according to the ſtatute of Wincheſter [f].

2. THERE muſt not only be a taking, but a *carrying away*: *cepit et aſportavit* was the old law-latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a ſufficient aſportation, or carrying away. As if a man be leading another's horſe out of a cloſe, and be apprehended in the fact; or if a gueſt, ſtealing goods out of an inn, has removed them from his chamber down ſtairs; theſe have been adjudged ſufficient carryings away, to conſtitute a larciny [g]. Or if a thief, intending to ſteal plate, takes it out of a

[d] 1 Hal. P. C. 506.
[e] 1 Hawk. P. C. 90.
[f] Foſter. 123, 124.
[g] 3 Inſt. 108, 109.

cheſt

cheſt in which it was, and lays it down upon the floor, but is ſurprized before he can make his eſcape with it; this is larciny [h].

3. THIS taking, and carrying away, muſt alſo be *felonious*; that is, done *animo furandi:* or, as the civil law expreſſes it, *lucri cauſa* [i]. This requiſite, beſides excuſing thoſe who labour under incapacities of mind or will, (of whom we ſpoke ſufficiently at the entrance of this book [k]) indemnifies alſo mere treſpaſſers, and other petty offenders. As if a ſervant takes his maſter's horſe, without his knowlege, and brings him home again: if a neighbour takes another's plough, that is left in the field, and uſes it upon his own land, and then returns it: if, under colour of arrear of rent, where none is due, I diſtrein another's cattel, or ſeiſe them: all theſe are miſdemeſnors and treſpaſſes, but no felonies [l]. The ordinary diſcovery of a felonious intent is where the party doth it clandeſtinely; or, being charged with the fact, denies it. But this is by no means the only criterion of criminality: for in caſes that may amount to larciny the variety of circumſtances is ſo great, and the complications thereof ſo mingled, that it is impoſſible to recount all thoſe, which may evidence a felonious intent, or *animum furandi:* wherefore they muſt be left to the due and attentive conſideration of the court and jury.

4. THIS felonious taking and carrying away muſt be *of the perſonal goods of another:* for if they are things *real*, or ſavour of the realty, larciny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewiſe that adhere to the freehold, as corn, graſs, trees, and the like, or lead upon a houſe, no larciny could be committed by the rules of the common law; but the ſeverance of them was, and in many things is ſtill, merely a treſpaſs: which depended on a ſubtilty in the legal notions of

[h] 1 Hawk. P. C. 93.
[i] *Inſt.* 4. 1. 1.
[k] See pag. 20.
[l] 1 Hal. P. C. 509.

our

our anceſtors. Theſe things were parcel of the real eſtate; and therefore, while they continued ſo, could not by any poſſibility be the ſubject of theft, being abſolutely fixed and immoveable [m]. And if they were ſevered by violence, ſo as to be changed into moveables; and at the ſame time, by one and the ſame continued act, carried off by the perſon who ſevered them; they could never be ſaid to be taken *from* the *proprietor*, in this their newly acquired ſtate of mobility (which is eſſential to the nature of larciny) being never, as ſuch, in the actual or conſtructive poſſeſſion of any one, but of him who committed the treſpaſs. He could not in ſtrictneſs be ſaid to have taken what at that time were the perſonal goods of another, ſince the very act of taking was what turned them into perſonal goods. But if the thief ſevers them at *one* time, whereby the treſpaſs is completed, and they are converted into perſonal chattels, in the conſtructive poſſeſſion of him on whoſe ſoil they are left or laid; and comes again at *another* time, when they are ſo turned into perſonalty, and takes them away; it is larciny: and ſo it is, if the owner, or any one elſe, has ſevered them [n]. And now, by the ſtatute 4 Geo. II. c. 32. to ſteal, or ſever with intent to ſteal, any lead or iron fixed to a houſe, or in any court or garden thereunto belonging, is made felony, liable to tranſportation for ſeven years: and to ſteal, damage, or deſtroy underwood or hedges, and the like, to rob orchards or gardens of fruit growing therein, to ſteal or otherwiſe deſtroy any turnips or the roots of madder when growing, are [o] puniſhable criminally, by whipping, ſmall fines, impriſonment, and ſatisfaction to the party wronged, according to the nature of the offence. Moreover, the ſtealing by night of any trees, or of any roots, ſhrubs, or plants to the value of 5*s*, is by ſtatute 6 Geo. III. c. 36. made felony in the principals, aiders, and abettors, and in the purchaſers thereof knowing the ſame to be ſtolen: and by ſtatute 6 Geo. III. c. 48. the ſtealing of any timber trees therein ſpecified [p], and of any root, ſhrub,

[m] See Vol. II. pag. 16.

[n] 3 Inſt. 109. 1 Hal. P. C. 510.

[o] Stat. 43 Eliz. c. 7. 15 Car. II. c. 2. 23 Geo. II. c. 26. 31 Geo. II. c. 35. 6 Geo. III. c. 48. 9 Geo. III. c. 41.

[p] Oak, beech, cheſnut, walnut, aſh, elm, cedar, fir, aſp, lime, ſycamore, and birch.

or plant, by day or night, is liable to pecuniary penalties for the two firſt offences, and for the third is conſtituted a felony liable to tranſportation for ſeven years. Stealing ore out of mines is alſo no larciny, upon the ſame principle of adherence to the freehold; with an exception only to mines of black lead, the ſtealing of ore out of which is felony without benefit of clergy by ſtatute 25 Geo. II. c. 10. Upon nearly the ſame principle the ſtealing of writings relating to a real eſtate is no felony, but a treſpaſs [q]: becauſe they concern the land, or (according to our technical language) *favour* of the *realty*, and are conſidered as part of it by the law; ſo that they deſcend to the heir together with the land which they concern [r].

BONDS, bills, and notes, which concern mere *choſes in action*, were alſo at the common law held not to be ſuch goods whereof larciny might be committed; being of no intrinſic value [s], and not importing any property in the *poſſeſſion* of the perſon from whom they are taken. But by the ſtatute 2 Geo. II. c. 25. they are now put upon the ſame footing, with reſpect to larcinies, as the money they were meant to ſecure. And, by ſtatute 7 Geo. III. c. 50. if any officer or ſervant of the poſt-office ſhall ſecrete, embezzle, or deſtroy any letter or pacquet, containing any bank note or other valuable paper particularly ſpecified in the act, or ſhall ſteal the ſame out of any letter or pacquet, he ſhall be guilty of felony without benefit of clergy. Or, if he ſhall deſtroy any letter or pacquet with which he has received money for the poſtage, or ſhall advance the rate of poſtage on any letter or pacquet ſent by the poſt, and ſhall ſecrete the money received by ſuch advancement, he ſhall be guilty of ſingle felony. Larciny alſo could not at common law be committed of treaſure-trove, or wreck, till ſeiſed by the king or him who hath the franchiſe; for till ſuch ſeiſure no one hath a determinate property therein. But by ſtatute 26 Geo. II. c. 19. plundering, or ſtealing from, any ſhip in diſtreſs (whether wreck or no wreck) is felony without benefit of clergy: in like manner

[q] 1 Hal. P. C. 510. Stra. 1137.
[r] See Vol. II. pag. 438.
[s] 8 Rep. 33.

as,

as, by the civil law [s], this inhumanity is punished in the same degree as the most atrocious theft.

LARCINY also cannot be committed of such animals, in which there is no property either absolute or qualified; as of beasts that are *ferae naturae*, and unreclaimed, such as deer, hares, and conies, in a forest, chase, or warren; fish in an open river or pond; or wild fowls at their natural liberty [t]. But if they are reclaimed or confined, and may serve for food, it is otherwise, even at common law: for of deer so inclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larciny may be committed [u]. And now, by statute 9 Geo. I. c. 22. to kill or steal any deer in a forest, or other place, enclosed; to rob a warren; or to steal fish from a river or pond, being in this last case armed and disguised; these are felonies without benefit of clergy. And by statute 13 Car. II. c. 10. to steal deer in any forest, though unincloſed, is a forfeiture of 20 *l.* for the first offence, and by statute 10 Geo. II. c. 32. seven years transportation for the second offence: which punishment is also inflicted for the first offence upon such as come to hunt there, armed with offensive weapons. Also by statute 5 Geo. III. c. 14. the penalty of transportation for seven years is inflicted on persons stealing or taking fish in any water within a park, paddock, garden, orchard, or yard; and on the receivers, aiders, and abettors: and the like punishment, or whipping, fine, or imprisonment, is provided for the taking or killing of conies [w] in open warrens. And a forfeiture of five pounds to the owner of the fishery is made payable by persons taking or destroying (or *attempting* so to do) any fish in any river or other water within any inclosed ground being private property. Stealing hawks, in disobedience to the rules prescribed by the statute 37 Edw. III. c. 19. is also felony [x]. It is also said [y], that, if swans be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them,

[s] *Cod.* 6. 2. 18.
[t] 1 Hal. P. C. 511. Foſt. 366.
[u] 1 Hawk. P. C. 94. 1 Hal. P. C. 511.
[w] See ſtat. 22 & 23 Car II. c. 25.
[x] 3 Inſt. 98.
[y] Dalt. Juſt c. 156.

though unmarked, if in any private river or pond: otherwiſe it is only a treſpaſs. But, of all valuable domeſtic animals, as horſes, and of all animals *domitae naturae*, which ſerve for food, as ſwine, ſheep, poultry, and the like, larciny may be committed; and alſo of the fleſh of ſuch as are *ferae naturae*, when killed [z]. As to thoſe animals, which do not ſerve for food, and which therefore the law holds to have no intrinſic value, as dogs of all ſorts, and other creatures kept for whim and pleaſure, though a man may have a baſe property therein, and maintain a civil action for the loſs of them [a], yet they are not of ſuch eſtimation, as that the crime of ſtealing them amounts to larciny [b].

NOTWITHSTANDING however that no larciny can be committed, unleſs there be ſome property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larciny to ſteal it; and an indictment will lie, for the goods of a perſon unknown [c]. In like manner as, among the Romans, the *lex Hoſtilia de furtis* provided, that a proſecution for theft might be carried on without the intervention of the owner [d]. This is the caſe of ſtealing a ſhrowd out of a grave; which is the property of thoſe, whoever they were, that buried the deceaſed: but ſtealing the corpſe itſelf, which has no owner, (though a matter of great indecency) is no felony, unleſs ſome of the gravecloths be ſtolen with it [e]. Very different from the law of the Franks, which ſeems to have reſpected both as equal offences; when it directed that a perſon, who had dug a corpſe out of the ground in order to ſtrip it, ſhould be baniſhed from ſociety, and no one ſuffered to relieve his wants, till the relations of the deceaſed conſented to his readmiſſion [f].

HAVING thus conſidered the general nature of ſimple larciny, I come next to treat of it's *puniſhment*. Theft, by the Jewiſh law, was only puniſhed with a pecuniary fine, and ſatis-

[z] 1 Hal. P. C. 511.
[a] See Vol. II. pag. 393.
[b] 1 Hal. P. C. 512.
[c] *Ibid.*
[d] Gravin. *l.* 3. §. 106.
[e] See Vol. II. pag. 429.
[f] Monteſq. Sp. L. b. 30. ch. 19.

faction

faction to the party injured[g]. And in the civil law, till ſome very late conſtitutions, we never find the puniſhment capital. The laws of Draco at Athens puniſhed it with death: but his laws were ſaid to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulct. And ſo the Attic laws in general continued[h]; except that once, in a time of dearth, it was made capital to break into a garden, and ſteal figs: but this law, and the informers againſt the offence, grew ſo odious, that from them all malicious informers were ſtiled ſycophants; a name, which we have much perverted from it's original meaning. From theſe examples, as well as the reaſon of the thing, many learned and ſcrupulous men have queſtioned the propriety, if not lawfulneſs, of inflicting capital puniſhment for ſimple theft[i]. And certainly the natural puniſhment for injuries to property ſeems to be the loſs of the offender's own property: which ought to be univerſally the caſe, were all men's fortunes equal. But as thoſe, who have no property themſelves, are generally the moſt ready to attack the property of others, it has been found neceſſary inſtead of a pecuniary to ſubſtitute a corporal puniſhment: yet how far this corporal puniſhment ought to extend, is what has occaſioned the doubt. Sir Thomas More[j], and the marquis Beccaria[k], at the diſtance of more than two centuries, have very ſenſibly propoſed that kind of corporal puniſhment, which approaches the neareſt to a pecuniary ſatisfaction; *viz.* a temporary impriſonment, with an obligation to labour, firſt for the party robbed, and afterwards for the public, in works of the moſt ſlaviſh kind: in order to oblige the offender to repair, by his induſtry and diligence, the depredations

[g] Exod. c. xxii.

[h] Petit. *LL. Attic. l.* 7. *tit.* 5.

[i] *Eſt enim ad vindicanda furta nimis atrox, nec tamen ad refraenanda ſufficiens: quippe neque furtum ſimplex tam ingens facinus eſt, ut capite debeat plecti; neque ulla poena eſt tanta, ut ab latrociniis cohibeat eos, qui nullam aliam artem quaerendi victus habent.* (Mori *Utopia. edit. Glaſg.* 1750. *pag.* 21.)—*Denique, cum lex Moſaica, quanquam inclemens et aſpera, tamen pecunia furtum, haud morte, mulctavit; ne putemus Deum, in nova lege clementiae qua pater imperat filiis, majorem indulſiſſe nobis invicem ſaeviendi licentiam. Haec ſunt cur non liceat putem: quam vero ſit abſurdum, atque etiam perniciоſum reipublicae, furem atque homicidam ex aequo puniri, nemo eſt (opinor) qui neſciat. (Ibid.* 39.)

[j] *Utop. pag.* 42.

[k] ch. 22.

he

he has committed upon private property and public order. But, notwithſtanding all the remonſtrances of ſpeculative politicians and moraliſts, the puniſhment of theft ſtill continues, throughout the greateſt part of Europe, to be capital: and Puffendorf[l], together with ſir Matthew Hale[m], are of opinion that this muſt always be referred to the prudence of the legiſlature; who are to judge, ſay they, when crimes are become ſo enormous as to require ſuch ſanguinary reſtrictions[n]. Yet both theſe writers agree, that ſuch puniſhment ſhould be cautiouſly inflicted, and never without the utmoſt neceſſity.

OUR antient Saxon laws nominally puniſhed theft with death, if above the value of twelvepence: but the criminal was permitted to redeem his life by a pecuniary ranſom; as, among their anceſtors the Germans, by a ſtated number of cattle[o]. But in the ninth year of Henry the firſt, this power of redemption was taken away, and all perſons guilty of larciny above the value of twelvepence were directed to be hanged; which law continues in force to this day[p]. For though the inferior ſpecies of theft, or petit larciny, is only puniſhed by whipping at common law[q], or by ſtatute 4 Geo. I. c. 11. may perhaps be extended to tranſportation for ſeven years, yet the puniſhment of grand larciny, or the ſtealing above the value of twelvepence, (which ſum was the ſtandard in the time of king Athelſtan, eight hundred years ago) is at common law regularly death. Which, conſidering the great intermediate alteration in the price or denomination of money, is undoubtedly a very rigorous conſtitution; and made ſir Henry Spelman (above a century ſince, when money was at twice it's preſent rate) complain, that while every thing elſe was riſen in it's nominal value, and become dearer, the life of man had continually grown cheaper[r]. It is true, that the mercy of juries will often make them ſtrain a point, and bring in larciny to be under the value of twelvepence, when it is really of much greater

[l] L. of N. b. 8. c. 3.
[m] 1 Hal. P. C. 13.
[n] See pag. 9.
[o] Tac. *de mor. Germ. c.* 12.
[p] 1 Hal. P. C. 12. 3 Inſt. 53.
[q] 3 Inſt. 218.
[r] *Gloſſ.* 350.

value:

value: but this is a kind of pious perjury, and does not at all excuſe our common law in this reſpect from the imputation of ſeverity, but rather ſtrongly confeſſes the charge. It is likewiſe true, that, by the merciful extenſions of the benefit of clergy by our modern ſtatute law, a perſon who commits a ſimple larciny to the value of thirteen pence or thirteen hundred pounds, though guilty of a capital offence, ſhall be excuſed the pains of death: but this is only for the firſt offence. And in many caſes of ſimple larciny the benefit of clergy is taken away by ſtatute: as from horſeſtealing [s]; taking woollen cloth from off the tenters [t], or linen from the place of manufacture [v]; ſtealing ſheep or other cattle ſpecified in the acts [u]; thefts on navigable rivers above the value of forty ſhillings [w]; plundering veſſels in diſtreſs, or that have ſuffered ſhipwreck [x]; ſtealing letters ſent by the poſt [y]; and alſo ſtealing deer, hares, and conies under the peculiar circumſtances mentioned in the Waltham black act [z]. Which additional ſeverity is owing to the great malice and miſchief of the theft in ſome of theſe inſtances; and, in others, to the difficulties men would otherwiſe lie under to preſerve thoſe goods, which are ſo eaſily carried off. Upon which laſt principle the Roman law puniſhed more ſeverely than other thieves the *abigei*, or ſtealers of cattle [a]; and the *balnearii*, or ſuch as ſtole the cloaths of perſons who were waſhing in the public baths [b]: both which conſtitutions ſeem to be borrowed from the laws of Athens [c]. And ſo too the antient Goths puniſhed with unrelenting ſeverity thefts of cattle, or of corn that was reaped and left in the field: ſuch kind of property (which no human induſtry can ſufficiently guard) being eſteemed under the peculiar cuſtody of heaven [d]. And thus much for the offence of *ſimple* larciny.

[s] Stat. 1 Edw. VI. c. 12. 2 & 3 Edw. VI. c. 33. 31 Eliz. c. 12.
[t] Stat. 22 Car. II. c. 5.
[v] Stat. 18 Geo. II. c. 27.
[u] Stat. 14 Geo. II. c. 6. 15 Geo. II. c. 34.
[w] Stat. 24 Geo. II. c. 45.
[x] Stat. 12 Ann. ſt. 2. c. 18. 26 Geo. II. c. 19.
[y] Stat. 7. Geo. III. c. 50.
[z] Stat. 9 Geo. I. c. 22.
[a] *Ff.* 47. *t.* 14.
[b] *Ibid. t.* 17.
[c] Pott. Antiqu. b. 1. c. 26.
[d] Stiernh. *de jure Goth. l.* 3. *c.* 5.

MIXED,

MIXED, or *compound* larciny is ſuch as has all the properties of the former, but is accompanied with one of, or both, the aggravations of a taking from one's *houſe* or *perſon*. Firſt therefore of larciny from the *houſe*, and then of larciny from the *perſon*.

1. LARCINY from the *houſe*, though it ſeems (from the conſiderations mentioned in the preceding chapter [e]) to have a higher degree of guilt than ſimple larciny, yet is not at all diſtinguiſhed from the other at common law [f]: unleſs where it is accompanied with the circumſtance of breaking the houſe by night; and then we have ſeen that it falls under another deſcription, *viz.* that of burglary. But now by ſeveral acts of parliament (the hiſtory of which is very ingeniouſly deduced by a learned modern writer [g], who hath ſhewn them to have gradually ariſen from our improvements in trade and opulence) the benefit of clergy is taken from larcinies committed in an houſe in almoſt every inſtance. The multiplicity of which acts is apt to create ſome confuſion; but upon comparing them diligently we may collect, that the benefit of clergy is denied upon the following domeſtic aggravations of larciny; *viz.* Firſt, in all larcinies *above the value of twelvepence*, committed, 1. In a church or chapel, with or without violence, or breaking the ſame [h]: 2. In a booth or tent in a market or fair, in the day time or in the night, by violence or breaking the ſame; the owner or ſome of his family being therein [i]: 3. In a dwellinghouſe by day, by breaking the ſame, any perſon being therein [k]: 4. In a dwellinghouſe by day, without breaking the ſame, any perſon being therein and put in fear [l]: 5. In a dwellinghouſe by night, without breaking the ſame, the owner or ſome of his family being therein, and put in fear [m]. Secondly, in all larcinies *to the value of five ſhillings*, committed, 1. By breaking any dwel-

[e] See pag. 223.
[f] 1 Hawk. P. C. 98.
[g] Barr. 375, *&c.*
[h] Stat. 23 Hen. VIII. c. 1. 1 Edw. VI. c. 12.
[i] Stat. 5 & 6 Edw. VI. c. 9.
[k] Stat. 3 & 4 W. & M. c. 9.
[l] *Ibid.*
[m] Stat. 23 Hen. VIII. c. 1.

linghouſe,

linghouſe, or any outhouſe, ſhop, or warehouſe thereunto belonging, in the day time, although no perſon be therein [n]: 2. By privately ſtealing in any ſhop, warehouſe [o], coachhouſe, or ſtable, by day or by night; though the ſame be not broken open, and though no perſon be therein [p]. Laſtly, in all larcinies *to the value of forty ſhillings* from a dwellinghouſe, or it's outhouſes, without breaking in, and whether any perſon be therein or no [q].

2. LARCINY from the *perſon* is either by *privately* ſtealing; or by open and violent aſſault, which is uſually called *robbery*.

THE offence of *privately* ſtealing from a man's *perſon*, as by picking his pocket or the like, without his knowlege, was debarred of the benefit of clergy, ſo early as by the ſtatute 8 Eliz. c. 14. But then it muſt be ſuch a larciny, as ſtands in need of the benefit of clergy, *viz.* of above the value of twelve-pence; elſe the offender ſhall not have judgment of death. For the ſtatute creates no new offence; but only takes away the benefit of clergy, which was a matter of grace, and leaves the thief to the regular judgment of the antient law [r]. This ſeverity (for a moſt ſevere law it certainly is) ſeems to be owing to the eaſe with which ſuch offences are committed, and the difficulty of guarding againſt them: beſides that this is an infringement of property, in the manual occupation or corporal poſſeſſion of the owner, which was an offence even in a ſtate of nature. And therefore the *ſaccularii*, or cutpurſes, were more ſeverely puniſhed than common thieves by the Roman and Athenian laws [s].

OPEN and violent larciny from the *perſon*, or *robbery*, the *rapina* of the civilians, is the felonious and forcible taking, from the perſon of another, of goods or money to any value, by putting him in fear [t]. 1. There muſt be a taking, otherwiſe it is no robbery. A mere attempt to rob was indeed held to be felony,

[n] Stat. 39 Eliz. c. 15.
[o] See Foſter 78. Barr. 379.
[p] Stat. 10 & 11 W. III. c. 23.
[q] Stat. 12. Ann. c. 7.
[r] 1 Hawk. P. C. 98.
[s] *Ff.* 47. 11. 7. Pott. Antiqu. l. 1. c. 26. 1 Hawk. P. C. 95.

ſo late as Henry the fourth's time [u]: but afterwards it was taken to be only a miſdemeſnor, and puniſhable with fine and impriſonment; till the ſtatute 7 Geo. II. c. 21. which makes it a felony tranſportable for ſeven years. If the thief, having once taken a purſe, returns it, ſtill it is a robbery: and ſo it is whether the taking be ſtrictly from the perſon of another, or in his preſence only; as where a robber by menaces and violence puts a man in fear, and drives away his ſheep or his cattle before his face [w]. 2. It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery [x]. 3. Laſtly, the taking muſt be by force, or a previous putting in fear; which makes the violation of the perſon more atrocious than privately ſtealing. For, according to the maxim of the civil law [y], "*qui vi rapuit, fur improbior eſſe videtur.*" This previous putting in fear is the criterion that diſtinguiſhes robbery from other larcinies. For if one privately ſteals ſixpence from the perſon of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is ſubſequent [z]: neither is it capital, as privately ſtealing, being under the value of twelvepence. Yet this putting in fear does not imply, that any great degree of terror or affright in the party robbed is neceſſary to conſtitute a robbery: it is ſufficient that ſo much force, or threatening by word or geſture, be uſed, as might create an apprehenſion of danger, or oblige a man to part with his property without or againſt his conſent [a]. Thus, if a man be knocked down without previous warning, and ſtripped of his property while ſenſeleſs, though ſtrictly he cannot be ſaid to be *put in fear*, yet this is undoubtedly a robbery. Or, if a perſon with a ſword drawn begs an alms, and I give it him through miſtruſt and apprehenſion of violence, this is a felonious robbery [b]. So if, under a pretence of ſale, a man forcibly extorts money from another, neither ſhall this ſubterfuge avail him. But it is doubted [c], whether the forcing a higler, or other chapman, to ſell his wares, and giving

[u] 1 Hal. P. C. 532.
[w] 1 Hal. P. C. 533.
[x] 1 Hawk. P. C. 97.
[y] *Ff.* 4. 2. 14. §. 12.
[z] 1 Hal. P. C. 534.
[a] Foſt. 128.
[b] 1 Hawk. P. C. 96.
[c] *Ibid.* 97.

him

him the full value of them, amounts to ſo heinous a crime as robbery.

THIS ſpecies of larciny is debarred of the benefit of clergy by ſtatute 23 Hen. VIII. c. 1. and other ſubſequent ſtatutes; not indeed in general, but only when committed in or near the king's highway. A robbery therefore in a diſtant field, or footpath, was not puniſhed with death[d]; but was open to the benefit of clergy, till the ſtatute 3 & 4 W. & M. c. 9. which takes away clergy from robbery whereſoever committed.

II. MALICIOUS *miſchief*, or damage, is the next ſpecies of injury to private property, which the law conſiders as a public crime. This is ſuch as is done, not *animo furandi*, or with an intent of gaining by another's loſs; which is ſome, though a weak, excuſe: but either out of a ſpirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arſon; for as that affects the habitation, ſo this does the other property, of individuals. And therefore any damage ariſing from this miſchievous diſpoſition, though only a treſpaſs at common law, is now by a multitude of ſtatutes made penal in the higheſt degree. Of theſe I ſhall extract the contents in order of time.

AND, firſt, by ſtatute 22 Hen. VIII. c. 11. perverſely and maliciouſly to cut down or deſtroy the powdike, in the fens of Norfolk and Ely, is felony. By ſtatute 43 Eliz. c. 13. (for preventing rapine on the northern borders) to burn any barn or ſtack of corn or grain; or to prey, or make ſpoil, of the perſons or goods of the ſubject upon deadly feud, in the four northern counties of Northumberland, Weſtmorland, Cumberland, and Durham; or to give or take any money or contribution, there called *blackmail*, to ſecure ſuch goods from rapine; is felony without benefit of clergy. By ſtatute 22 & 23 Car. II. c. 7. to burn any ricks or ſtacks of corn, hay, or grain, barns, houſes, buildings, or kilns; or maliciouſly, unlawfully, and willingly to

[d] 1 Hal. P. C. 535.

kill any horſes, ſheep, or other cattle, in the night time, is felony; but the offender may make his election to be tranſported for ſeven years: and to maim or hurt ſuch cattle is a treſpaſs, for which treble damages ſhall be recovered. By ſtatute 1 Ann. ſt. 2. c. 9. captains and mariners belonging to ſhips, and deſtroying the ſame, to the prejudice of the owners, (and by 4 Geo. I. c. 12. to the prejudice of inſurers alſo) are guilty of felony without benefit of clergy. And by ſtatute 12 Ann. c. 18. making any hole in a ſhip in diſtreſs, or ſtealing her pumps, or wilfully doing any thing tending to the immediate loſs of ſuch ſhip, is felony without benefit of clergy. By ſtatute 1 Geo. I. c. 48. maliciouſly to ſet on fire any underwood, wood, or coppice, is made ſingle felony. By ſtatute 6 Geo. I. c. 23. the wilful and malicious tearing, cutting, ſpoiling, burning, or defacing of the garments or cloaths of any perſon paſſing in the ſtreets or highways, is felony. This was occaſioned by the inſolence of certain weavers and others; who, upon the introduction of ſome Indian faſhions prejudicial to their own manufactures, made it their practice to caſt *aqua fortis* in the ſtreets upon ſuch as wore them. By ſtatute 9 Geo. I. c. 22. commonly called the Waltham black-act, occaſioned by the devaſtations committed near Waltham in Hampſhire, by perſons in diſguiſe or with their faces blacked; (who ſeem to have reſembled the Roberdſmen, or followers of Robert Hood, that in the reign of Richard the firſt committed great outrages on the borders of England and Scotland [e];) by this black act, I ſay, which has in part been mentioned under the ſeveral heads of riots, mayhem, and larciny, it is farther enacted, that unlawfully, riotouſly, tumultuouſly, and forcibly to demoliſh or to pull down, or to begin to demoliſh or pull down, any church, chapel, or meetinghouſe; or any dwellinghouſe, barn, ſtable, or outhouſe; or unlawfully and maliciouſly to ſet fire to any houſe, barn, or outhouſe, (which in both caſes is extended by ſtatute 9 Geo. III. c. 29. to all kinds of mills) or to any hovel, cock, mow, or ſtack of corn, ſtraw, hay, or wood; or to break down the head of any fiſhpond, whereby the fiſh ſhall be loſt; or to kill, maim, or wound any

[e] 3 Inſt. 197.

cattle;

cattle; or to cut down or deſtroy, any trees planted in an avenue, or growing in a garden, orchard, or plantation, for ornament, ſhelter, or profit; all theſe malicious acts are felonies without benefit of clergy: and the hundred ſhall be chargeable for the damages, unleſs the offender be convicted. In like manner by the Roman law to cut down trees, and eſpecially vines, was puniſhed in the ſame degree as robbery [f]. By ſtatutes 6 Geo. II. c. 37. and 10 Geo. II. c. 32. it is alſo made felony without the benefit of clergy, maliciouſly to cut down any river or ſea bank, whereby lands may be overflowed; or to cut any hop-binds growing in a plantation of hops, or wilfully and maliciouſly to ſet fire to any mine or delph of coal. By ſtatute 28 Geo. II. c. 19. to ſet fire to any goſs, furze, or fern, growing in any foreſt or chaſe, is ſubject to a fine of five pounds. By ſtatute 6 Geo. III. c. 36 & 48. wilfully to ſpoil or deſtroy any timber or other trees, roots, ſhrubs, or plants, is for the two firſt offences liable to pecuniary penalties; and for the third if in the day time, and even for the firſt if at night, the offender ſhall be guilty of felony, and liable to tranſportation for ſeven years. And by ſtatute 9 Geo. III. c. 29. wilfully and maliciouſly to burn or deſtroy any engine or other machines, therein ſpecified, belonging to any mine; or any fences for incloſures purſuant to any act of parliament, is made ſingle felony, and puniſhable with tranſportation for ſeven years, in the offender, his adviſers, and procurers. And theſe are the puniſhments of malicious miſchief.

III. FORGERY, or the *crimen falſi*, is an offence, which was puniſhed by the civil law with deportation or baniſhment, and ſometimes with death [g]. It may with us be defined (at common law) to be, "the fraudulent making or alteration of a writing to "the prejudice of another man's right:" for which the offender may ſuffer fine, impriſonment, and pillory. And alſo, by a variety of ſtatutes, a more ſevere puniſhment is inflicted on the offender in many particular caſes, which are ſo multiplied of late as almoſt to become general. I ſhall mention the principal inſtances.

[f] *Ff.* 47. 7. 2. [g] *Inſt.* 4. 18. 7.

BY

BY ſtatute 5 Eliz. c. 14. to forge or make, or knowingly to publiſh or give in evidence, any forged deed, court roll, or will, with intent to affect the right of real property, either freehold or copyhold, is puniſhed by a forfeiture to the party grieved of double coſts and damages; by ſtanding in the pillory, and having both his ears cut off, and his noſtrils ſlit, and ſeared; by forfeiture to the crown of the profits of his lands, and by perpetual impriſonment. For any forgery relating to a term of years, or annuity, bond, obligation, acquittance, releaſe, or diſcharge of any debt or demand of any perſonal chattels, the ſame forfeiture is given to the party grieved; and on the offender is inflicted the pillory, loſs of one of his ears, and half a year's impriſonment: the ſecond offence in both caſes being felony without benefit of clergy.

BESIDES this general act, a multitude of others, ſince the revolution, (when paper credit was firſt eſtabliſhed) have inflicted capital puniſhment on the forging or altering of bank bills or notes, or other ſecurities [h]; of bills of credit iſſued from the exchequer [i]; of ſouth ſea bonds, &c [k]; of lottery orders [l]; of army or navy debentures [m]; of Eaſt India bonds [n]; of writings under ſeal of the London, or royal exchange, aſſurance [o]; of a letter of attorney or other power to receive or transfer ſtock or annuities, and on the perſonating a proprietor thereof, to receive or transfer ſuch annuities, ſtock, or dividends [p]: alſo on the uttering or publiſhing, as true, any counterfeited ſeaman's will or powers [q]: to which may be added, though not ſtrictly reducible to this head, the counterfeiting of mediterranean paſſes, under the hands of the lords of the admiralty, to protect one from the piratical ſtates of Barbary [r]; the forging or imitating any ſtamps to defraud the ſtamp office [s]; and the forging any marriage regiſter

[h] Stat. 7 & 8 W. III. c. 31. 8 & 9 W. III. c. 20. 11 Geo. I. c. 9. 12 Geo. I. c. 32. 15 Geo. II. c. 13.

[i] See the ſeveral acts for iſſuing them.

[k] Stat. 9 Ann. c. 21. 6 Geo. I. c. 4. & 11. 12 Geo. I. c. 32.

[l] See the ſeveral acts for the lotteries.

[m] Stat. 5 Geo. I. c. 14. 9 Geo. I. c. 5.

[n] Stat. 12 Geo. I. c. 32.

[o] Stat. 6 Geo. I. c. 18.

[p] Stat. 8 Geo. I. c. 22. 9 Geo. I. c. 12.

[q] Stat. 9 Geo. III. c. 30.

[r] Stat. 4 Geo. II. c. 18.

[s] See the ſeveral ſtamp acts.

or

or licence[t]: all which are by distinct acts of parliament made felonies without benefit of clergy. And by statute 31 Geo. II. c. 32. forging or counterfeiting any stamp or mark to denote the standard of gold and silver plate, and certain other offences of the like tendency, are made felony, but not without benefit of clergy.

THERE are also two other general laws, with regard to forgery; the one 2 Geo. II. c. 35. whereby the first offence in forging or publishing any forged deed, will, writing obligatory, bill of exchange, promissory note, indorsement or assignment thereof, or any acquittance or receipt for money or goods, with intention to defraud any person, is made felony without benefit of clergy. And by statute 7 Geo. II. c. 22. it is equally penal to forge or utter a counterfeit acceptance of a bill of exchange, or the number of any accountable receipt for any note, bill, or any other security for money; or any warrant or order for the payment of money, or delivery of goods. So that, I believe, through the number of these general and special provisions, there is now hardly a case possible to be conceived, wherein forgery, that tends to defraud, whether in the name of a real or fictitious person[u], is not made a capital crime.

THESE are the principal infringements of the rights of property; which were the last species of offences against individuals or private subjects, which the method of our distribution has led us to consider. We have before examined the nature of all offences against the public, or commonwealth; against the king or supreme magistrate, the father and protector of that community; against the universal law of all civilized nations; together with some of the more atrocious offences, of publicly pernicious consequence, against God and his holy religion. And these several heads comprehend the whole circle of crimes and misdemesnors, with the punishment annexed to each, that are cognizable by the laws of England.

[t] Stat. 26 Geo. II. c. 33. [u] Foft. 116, &c.

CHAPTER THE EIGHTEENTH.

OF THE MEANS OF PREVENTING OFFENCES.

WE are now arrived at the fifth general branch or head, under which I propoſed to conſider the ſubject of this book of our commentaries; *viz.* the means of *preventing* the commiſſion of crimes and miſdemeſnors. And really it is an honour, and almoſt a ſingular one, to our Engliſh laws, that they furniſh a title of this ſort: ſince *preventive* juſtice is upon every principle, of reaſon, of humanity, and of ſound policy, preferable in all reſpects to *puniſhing* juſtice [a]; the execution of which, though neceſſary, and in it's conſequences a ſpecies of mercy to the commonwealth, is always attended with many harſh and diſagreeable circumſtances.

THIS preventive juſtice conſiſts in obliging thoſe perſons, whom there is probable ground to ſuſpect of future miſbehaviour, to ſtipulate with and to give full aſſurance to the public, that ſuch offence as is apprehended ſhall not happen; by finding pledges or ſecurities for keeping the peace, or for their good behaviour. This requiſition of ſureties has been ſeveral times mentioned before, as part of the penalty inflicted upon ſuch as have been guilty of certain groſs miſdemeſnors: but there alſo it muſt be underſtood rather as a caution againſt the repetition of the offence, than any immediate pain or puniſhment. And

[a] Beccar. ch. 41.

indeed,

indeed, if we conſider all human puniſhments in a large and extended view, we ſhall find them all rather calculated to prevent future crimes, than to expiate the paſt: ſince, as was obſerved in a former chapter[b], all puniſhments inflicted by temporal laws may be claſſed under three heads; ſuch as tend to the amendment of the offender himſelf, or to deprive him of any power to do future miſchief, or to deter others by his example: all of which conduce to one and the ſame end, of preventing future crimes, whether that be effected by amendment, diſability, or example. But the caution, which we ſpeak of at preſent, is ſuch as is intended merely for prevention, without any crime actually committed by the party, but ariſing only from a probable ſuſpicion, that ſome crime is intended or likely to happen; and conſequently it is not meant as any degree of puniſhment, unleſs perhaps for a man's imprudence in giving juſt ground of apprehenſion.

BY the Saxon conſtitution theſe ſureties were always at hand, by means of king Alfred's wiſe inſtitution of decennaries or frankpledges; wherein, as has more than once been obſerved[c], the whole neighbourhood or tithing of freemen were mutually pledges for each others good behaviour. But, this great and general ſecurity being now fallen into diſuſe and neglected, there hath ſucceeded to it the method of making ſuſpected perſons find particular and ſpecial ſecurities for their future conduct: of which we find mention in the laws of king Edward the confeſſor[d]; "*tradat fidejuſſores de pace et legalitate tuenda.*" Let us therefore conſider, firſt, what this ſecurity is; next, who may take or demand it; and, laſtly, how it may be diſcharged.

1. THIS ſecurity conſiſts in being bound, with one or more ſureties, in a recognizance or obligation to the king, entered on record, and taken in ſome court or by ſome judicial officer; whereby the parties acknowlege themſelves to be indebted to the crown in the ſum required; (for inſtance 100 *l.*) with condition

[b] See pag. 11. [c] See Vol. I. pag. 113. [d] *cap.* 18.

to be void and of none effect, if the party ſhall appear in court on ſuch a day, and in the mean time ſhall keep the peace: either generally, towards the king, and all his liege people; or particularly alſo, with regard to the perſon who craves the ſecurity. Or, if it be for the good behaviour, then on condition that he ſhall demean and behave himſelf well, (or be of good behaviour) either generally or ſpecially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a juſtice of the peace, muſt be certified to the next ſeſſions, in purſuance of the ſtatute 3 Hen. VII. c. 1. and if the condition of ſuch recognizance be broken, by any breach of the peace in the one caſe, or any miſbehaviour in the other, the recognizance becomes forfeited or abſolute; and, being *eſtreated* or extracted (taken out from among the other records) and ſent up to the exchequer, the party and his ſureties, having now become the king's abſolute debtors, are ſued for the ſeveral ſums in which they are reſpectively bound.

2. ANY juſtices of the peace, by virtue of their commiſſion, or thoſe who are *ex officio* conſervators of the peace, as was mentioned in a former volume [e], may demand ſuch ſecurity according to their own diſcretion: or it may be granted at the requeſt of any ſubject, upon due cauſe ſhewn, provided ſuch demandant be under the king's protection; for which reaſon it hath been formerly doubted, whether Jews, Pagans, or perſons convicted of a *praemunire*, were intitled thereto [f]. Or, if the juſtice is averſe to act, it may be granted by a mandatory writ, called a *ſupplicavit*, iſſuing out of the court of king's bench or chancery; which will compel the juſtice to act, as a miniſterial and not as a judicial officer: and he muſt make a return to ſuch writ, ſpecifying his compliance, under his hand and ſeal [g]. But this writ is ſeldom uſed: for, when application is made to the ſuperior courts, they uſually take the recognizances there, under the directions of the ſtatute 21 Jac. I. c. 8. And indeed a peer or

[e] See Vol. I. pag. 350.
[f] 1 Hawk. P. C. 120.
[g] F. N. B. 80. 2 P. Wms. 202.

peereſs

peereſs cannot be bound over in any other place, than the courts of king's bench or chancery: though a juſtice of the peace has a power to require ſureties of any other perſon, being *compos mentis* and under the degree of nobility, whether he be a fellow juſtice or other magiſtrate, or whether he be merely a private man[h]. Wives may demand it againſt their huſbands; or huſbands, if neceſſary, againſt their wives[j]. But feme-coverts, and infants under age, ought to find ſecurity by their friends only, and not to be bound themſelves: for they are incapable of engaging themſelves to anſwer any debt; which, as we obſerved, is the nature of theſe recognizances or acknowlegements.

3. A RECOGNIZANCE may be diſcharged, either by the demiſe of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which ſuch recognizance is certified by the juſtices (as the quarter ſeſſions, aſſiſes, or king's bench) if they ſee ſufficient cauſe: or if he at whoſe requeſt it was granted, if granted upon a private account, will releaſe it, or does not make his appearance to pray that it may be continued[i].

THUS far what has been ſaid is applicable to both ſpecies of recognizances, for the *peace*, and for the *good behaviour*; *de pace, et legalitate, tuenda*, as expreſſed in the laws of king Edward. But as theſe two ſpecies of ſecurities are in ſome reſpects different, eſpecially as to the cauſe of granting, or the means of forfeiting them; I ſhall now conſider them ſeparately: and firſt, ſhall ſhew for what cauſe ſuch a recognizance, with ſureties for the *peace*, is grantable; and then, how it may be forfeited.

1. ANY juſtice of the peace may, *ex officio*, bind all thoſe to keep the peace, who in his preſence make any affray; or threaten to kill or beat another; or contend together with hot

[h] 1 Hawk. P. C. 127.
[i] 1 Hawk. P. C. 129.
[j] 2 Stra. 1207.

and angry words; or go about with unuſual weapons or attendance, to the terror of the people; and all ſuch as he knows to be common barretors; and ſuch as are brought before him by the conſtable for a breach of the peace in his preſence; and all ſuch perſons, as, having been before bound to the peace, have broken it and forfeited their recognizances[k]. Alſo, wherever any private man hath juſt cauſe to fear, that another will burn his houſe, or do him a corporal injury, by killing, impriſoning, or beating him; or that he will procure others ſo to do; he may demand ſurety of the peace againſt ſuch perſon: and every juſtice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm; and will ſhew that he has juſt cauſe to be ſo, by reaſon of the other's menaces, attempts, or having lain in wait for him; and will alſo farther ſwear, that he does not require ſuch ſurety out of malice or for mere vexation[l]. This is called *ſwearing the peace* againſt another: and, if the party does not find ſuch ſureties, as the juſtice in his diſcretion ſhall require, he may immediately be committed till he does[m].

2. SUCH recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an aſſault, or menace, to the perſon of him who demanded it, if it be a ſpecial recognizance: or, if the recognizance be general, by any unlawful action whatſoever, that either is or tends to a breach of the peace; or, more particularly, by any one of the many ſpecies of offences which were mentioned as crimes againſt the public peace in the eleventh chapter of this book; or, by any private violence committed againſt any of his majeſty's ſubjects. But a bare treſpaſs upon the lands or goods of another, which is a ground for a civil action, unleſs accompanied with a wilful breach of the peace, is no forfeiture of the recognizance[n]. Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, ſo as to forfeit one's recognizance

[k] 1 Hawk. P. C. 126.
[l] *Ibid.* 127.
[m] *Ibid.* 128.
[n] *Ibid.* 131.

(being

(being looked upon to be merely the effect of unmeaning heat and paſſion), unleſs they amount to a challenge to fight[o].

THE other ſpecies of recognizance, with ſureties, is for the *good abearance*, or *good behaviour*. This includes ſecurity for the peace, and ſomewhat more: we will therefore examine it in the ſame manner as the other.

1. FIRST then, the juſtices are empowered by the ſtatute 34 Edw. III. c. 1. to bind over to the good behaviour towards the king and his people, all them *that be not of good fame*, wherever they be found; to the intent that the people be not troubled nor endamaged, nor the peace diminiſhed, nor merchants and others, paſſing by the highways of the realm, be diſturbed nor put in the peril which may happen by ſuch offenders. Under the general words of this expreſſion, *that be not of good fame*, it is holden that a man may be bound to his good behaviour for cauſes of ſcandal, *contra bonos mores*, as well as *contra pacem*; as, for haunting bawdy houſes with women of bad fame; or for keeping ſuch women in his own houſe; or for words tending to ſcandalize the government, or in abuſe of the officers of juſtice, eſpecially in the execution of their office. Thus alſo a juſtice may bind over all night-walkers; eaves-droppers; ſuch as keep ſuſpicious company, or are reported to be pilferers or robbers; ſuch as ſleep in the day, and wake on the night; common drunkards; whoremaſters; the putative fathers of baſtards; cheats; idle vagabonds; and other perſons, whoſe miſbehaviour may reaſonably bring them within the general words of the ſtatute, as perſons not of good fame: an expreſſion, it muſt be owned, of ſo great a latitude, as leaves much to be determined by the diſcretion of the magiſtrate himſelf. But, if he commits a man for want of ſureties, he muſt expreſs the cauſe thereof with convenient certainty; and take care that ſuch cauſe be a good one[p].

[o] 1 Hawk. P. C. 130.

[p] *Ibid.* 132.

2. A RE-

2. A RECOGNIZANCE for the good behaviour may be forfeited by all the ſame means, as one for the ſecurity of the peace may be; and alſo by ſome others. As, by going armed with unuſual attendance, to the terror of the people; by ſpeaking words tending to ſedition; or, by committing any of thoſe acts of miſbehaviour, which the recognizance was intended to prevent. But not by barely giving freſh cauſe of ſuſpicion of that which perhaps may never actually happen [q]: for, though it is juſt to compel ſuſpected perſons to give ſecurity to the public againſt miſbehaviour that is apprehended; yet it would be hard, upon ſuch ſuſpicion, without the proof of any actual crime, to puniſh them by a forfeiture of their recognizance.

[q] 1 Hawk. P. C. 133.

CHAPTER THE NINETEENTH.

OF COURTS OF A CRIMINAL JURISDICTION.

THE ſixth, and laſt, object of our enquiries will be the method of *inflicting* thoſe *puniſhments*, which the law has annexed to particular offences; and which I have conſtantly ſubjoined to the deſcription of the crime itſelf. In the diſcuſſion of which I ſhall purſue much the ſame general method, that I followed in the preceding book, with regard to the redreſs of civil injuries: by, firſt, pointing out the ſeveral *courts* of criminal juriſdiction, wherein offenders may be proſecuted to puniſhment; and by, ſecondly, deducing down in their natural order, and explaining, the ſeveral *proceedings* therein.

FIRST then, in reckoning up the ſeveral *courts* of criminal juriſdiction, I ſhall, as in the former caſe, begin with an account of ſuch, as are of a *public* and *general* juriſdiction throughout the whole realm; and, afterwards, proceed to ſuch, as are only of a *private* and *ſpecial* juriſdiction, and confined to ſome particular parts of the kingdom.

I. IN our enquiries into the criminal courts of *public* and *general* juriſdiction, I muſt in one reſpect purſue a different order from that in which I conſidered the civil tribunals. For there, as the ſeveral courts had a gradual ſubordination to each other,

other, the ſuperior correcting and reforming the errors of the inferior, I thought it beſt to begin with the loweſt, and ſo aſcend gradually to the courts of appeal, or thoſe of the moſt extenſive powers. But as it is contrary to the genius and ſpirit of the law of England, to ſuffer any man to be tried twice for the ſame offence in a criminal way, eſpecially if acquitted upon the firſt trial; therefore theſe criminal courts may be ſaid to be all independent of each other: at leaſt ſo far, as that the ſentence of the loweſt of them can never be controlled or reverſed by the higheſt juriſdiction in the kingdom, unleſs for error in matter of law, apparent upon the face of the record; though ſometimes cauſes may be removed from one to the other before trial. And therefore as, in theſe courts of criminal cognizance, there is not the ſame chain and dependence as in the others, I ſhall rank them according to their dignity, and begin with the higheſt of all; *viz.*

1. THE high court of *parliament*; which is the ſupreme court in the kingdom, not only for the making, but alſo for the execution, of laws; by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attaint particular perſons of treaſon or felony, or to inflict pains and penalties, beyond or contrary to the common law, to ſerve a ſpecial purpoſe, I ſpeak not of them; being to all intents and purpoſes new laws, made *pro re nata*, and by no means an execution of ſuch as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a proſecution of the already known and eſtabliſhed law, and has been frequently put in practice; being a preſentment to the moſt high and ſupreme court of criminal juriſdiction by the moſt ſolemn grand inqueſt of the whole kingdom[a]. A commoner cannot however be impeached before the lords for any capital offence,

[a] 1 Hal. P. C. *150.

but

but only for high miſdeſmeſnors[b]: a peer may be impeached for any crime. And they uſually (in caſe of an impeachment of a peer for treaſon) addreſs the crown to appoint a lord high ſteward, for the greater dignity and regularity of their proceedings; which high ſteward was formerly elected by the peers themſelves, though he was generally commiſſioned by the king[c]; but it hath of late years been ſtrenuouſly maintained[d], that the appointment of an high ſteward in ſuch caſes is not indiſpenſably neceſſary, but that the houſe may proceed without one. The articles of impeachment are a kind of bills of indictment, found by the houſe of commons, and afterwards tried by the lords; who are in caſes of miſdemeſnors conſidered not only as their own peers, but as the peers of the whole nation. This is a cuſtom derived to us from the conſtitution of the antient Germans; who in their great councils ſometimes tried capital accuſations relating to the public: "*licet apud concilium accuſare quoque, et diſcrimen capitis intendere*[e]." And it has a peculiar propriety in the Engliſh conſtitution; which has much improved upon the antient model imported hither from the continent.

[b] When, in 4 Edw. III. the king demanded the earls, barons, and peers, to give judgment againſt Simon de Bereford, who had been a notorious accomplice in the treaſons of Roger earl of Mortimer, they came before the king in parliament, and ſaid all with one voice, that the ſaid Simon was not their *peer*; and therefore they were not bound to judge him as a peer of the land. And when afterwards, in the ſame parliament, they were prevailed upon, in reſpect of the notoriety and heinouſneſs of his crimes, to receive the charge and to give judgment againſt him, the following proteſt and proviſo was entered on the parliament-roll. "And it is aſſented and accorded by "our lord the king, and all the great men, "in full parliament, that albeit the peers, "as judges of the parliament, have taken "upon them in the preſence of our lord the "king to make and render the ſaid judg-"ment; yet the peers who now are, or "ſhall be in time to come, be not bound or "charged to render judgment upon others "than peers; nor that the peers of the land "have power to do this, but thereof ought "ever to be diſcharged and acquitted: and "that the aforeſaid judgment now rendered "be not drawn to example or conſequence "in time to come, whereby the ſaid peers "may be charged hereafter to judge others "than their peers, contrary to the laws of "the land, if the like caſe happen, which "God forbid." (*Rot. Parl.* 4 *Edw. III. n.* 2 & 6. 2 Brad. Hiſt. 190. Selden. judic. in parl. ch. 1.)

[c] 1 Hal. P. C. 350.

[d] Lords Journ. 12 May 1679. Com. Journ. 15 May 1679. Foſt. 142, &c.

[e] Tacit. *de mor. Germ.* 12.

For, though in general the union of the legiſlative and judicial powers ought to be moſt carefully avoided[f], yet it may happen that a ſubject, intruſted with the adminiſtration of public affairs, may infringe the rights of the people, and be guilty of ſuch crimes, as the ordinary magiſtrate either dares not or cannot puniſh. Of theſe the repreſentatives of the people, or houſe of commons, cannot properly *judge*; becauſe their conſtituents are the parties injured: and can therefore only *impeach*. But before what court ſhall this impeachment be tried? Not before the ordinary tribunals, which would naturally be ſwayed by the authority of ſo powerful an accuſer. Reaſon therefore will ſuggeſt, that this branch of the legiſlature, which repreſents the people, muſt bring it's charge before the other branch, which conſiſts of the nobility, who have neither the ſame intereſts, nor the ſame paſſions as popular aſſemblies[g]. This is a vaſt ſuperiority, which the conſtitution of this iſland enjoys, over thoſe of the Grecian or Roman republics; where the people were at the ſame time both judges and accuſers. It is proper that the nobility ſhould judge, to inſure juſtice to the accuſed; as it is proper that the people ſhould accuſe, to inſure juſtice to the commonwealth. And therefore, among other extraordinary circumſtances attending the authority of this court, there is one of a very ſingular nature, which was inſiſted on by the houſe of commons in the caſe of the earl of Danby in the reign of Charles II[h]; and is now enacted by ſtatute 12 & 13 W. III. c. 2. that no pardon under the great ſeal ſhall be pleadable to an impeachment by the commons of Great Britain in parliament[i].

2. THE court of the *lord high ſteward* of Great Britain[k] is a court inſtituted for the trial of peers, indicted for treaſon or felony, or for miſpriſion of either[l]. The office of this great magiſtrate is very antient; and was formerly hereditary, or at

[f] See Vol. I. pag. 269.
[g] Monteſq. Sp. L. xi. 6.
[h] Com. Journ. 5 May 1679.
[i] See chap. 31.
[k] 4 Inſt. 58. 2 Hawk. P. C. 5. 421.
[l] 1 Bulſtr. 198.

leaſt

leaſt held for life, or *dum bene ſe geſſerit :* but now it is uſually, and hath been for many centuries paſt [m], granted *pro hac vice* only; and it hath been the conſtant practice (and therefore ſeems now to have become neceſſary) to grant it to a lord of parliament, elſe he is incapable to try ſuch delinquent peer [n]. When ſuch an indictment is therefore found by a grand jury of freeholders in the king's bench, or at the aſſiſes before the juſtices of *oyer* and *terminer*, it is to be removed by a writ of *certiorari* into the court of the lord high ſteward, which only has power to determine it. A peer may plead a pardon before the court of king's bench, and the judges have power to allow it; in order to prevent the trouble of appointing an high ſteward, merely for the purpoſe of receiving ſuch plea. But he may not plead, in that inferior court, any other plea; as *guilty*, or *not guilty*, of the indictment; but only in this court: becauſe, in conſequence of ſuch plea, it is poſſible that judgment of death might be awarded againſt him. The king therefore, in caſe a peer be indicted of treaſon, felony, or miſpriſion, creates a lord high ſteward *pro hac vice* by commiſſion under the great ſeal; which recites the indictment ſo found, and gives his grace power to receive and try it *ſecundum legem et conſuetudinem Angliae*. Then, when the indictment is regularly removed, by writ of *certiorari*, commanding the inferior court to certify it up to him, the lord high ſteward directs a precept to a ſerjeant at arms, to ſummon the lords to attend and try the indicted peer. This precept was formerly iſſued to ſummon only eighteen or twenty, ſelected from the body of the peers: then the number came to be indefinite; and the cuſtom was, for the lord high ſteward to ſummon as many as he thought proper, (but of late years not leſs than twenty three [o]) and that thoſe lords only ſhould ſit upon the trial: which threw a monſtrous weight of

[m] Pryn. on 4 Inſt. 46.

[n] *Quand un* ſeigneur de parlement *ſerra arrein de treaſon ou felony, le roy par ſes lettres patents ſera un grand et ſage* ſeigneur *d'eſtre le grand ſeneſchal d' Angleterre : qui —— doit faire un precept —— pur faire venir xx* ſeigneurs, *ou xviii, &c.* (Yearb. 13 *Hen. VIII.* 11.) See Staundf. P. C. 152. 3 Inſt. 28. 4 Inſt. 59. 2 Hawk. P. C. 5. Barr. 234.

[o] Kelynge. 56.

power into the hands of the crown, and this it's great officer, of ſelecting only ſuch peers as the then predominant party ſhould moſt approve of. And accordingly, when the earl of Clarendon fell into diſgrace with Charles II, there was a deſign formed to prorogue the parliament, in order to try him by a ſelect number of peers; it being doubted whether the whole houſe could be induced to fall in with the views of the court [p]. But now, by ſtatute 7 W. III. c. 3. upon all trials of peers for treaſon or miſpriſion, all the peers who have a right to ſit and vote in parliament ſhall be ſummoned, at leaſt twenty days before ſuch trial, to appear and vote therein; and every lord appearing ſhall vote in the trial of ſuch peer, firſt taking the oaths of allegiance and ſupremacy, and ſubſcribing the declaration againſt popery.

DURING the ſeſſion of parliament the trial of an indicted peer is not properly in the court of the lord high ſteward, but before the court laſt-mentioned, of our lord the *king in parliament* [q]. It is true, a lord high ſteward is always appointed in that caſe, to regulate and add weight to the proceedings; but he is rather in the nature of a ſpeaker *pro tempore*, or chairman of the court, than the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high ſteward has a vote with the reſt, in right of his peerage. But in the court of the lord high ſteward, which is held in the receſs of parliament, he is the ſole judge in matters of law, as the lords triors are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court, ſo he has no right to intermix with them in giving any vote upon the trial [r]. Therefore, upon the conviction and attainder of a peer for murder in full parliament, it hath been holden by the judges [s], that in caſe the day appointed in the judgment for execution ſhould lapſe before execution done, a new time of execution may be appointed by either the high court of parliament, during it's

[p] Carte's life of Ormonde. Vol. 2.
[q] Foſt. 141.
[r] State Trials, Vol. IV. 214. 232, 3.
[s] Foſt. 139.

ſitting,

ſitting, though no high ſteward be exiſting; or, in the receſs of parliament, by the court of king's bench, the record being removed into that court.

IT has been a point of ſome controverſy, whether the biſhops have now a right to ſit in the court of the lord high ſteward, to try indictments of treaſon and miſpriſion. Some incline to imagine them included under the general words of the ſtatute of king William, "all peers, who have a right to ſit and vote in parliament:" but the expreſſion had been much clearer, if it had been, "all "*lords*," and not, "all *peers*;" for though biſhops, on account of the baronies annexed to their biſhopricks, are clearly lords of parliament, yet, their blood not being ennobled, they are not univerſally allowed to be peers with the temporal nobility: and perhaps this word might be inſerted purpoſely with a view to exclude them. However, there is no inſtance of their ſitting on trials for capital offences, even upon impeachments or indictments in full parliament, much leſs in the court we are now treating of; for indeed they uſually voluntarily withdraw, but enter a proteſt declaring their right to ſtay. It is certain that, in the eleventh chapter of the conſtitutions of Clarendon, made in parliament 11 Hen. II. they are expreſſly excluded from ſitting and voting in trials of life or limb: "*epiſcopi, ſicut caeteri baro-* "*nes, debent intereſſe judiciis cum baronibus, quouſque perveniatur* "*ad diminutionem membrorum, vel ad mortem:*" and Becket's quarrel with the king hereupon was not on account of the exception, (which was agreeable to the canon law) but of the general rule, that compelled the biſhops to attend at all. And the determination of the houſe of lords in the earl of Danby's caſe[t], which hath ever ſince been adhered to, is conſonant to theſe conſtitutions; "that the lords ſpiritual have a right to ſtay and "ſit in court in capital caſes, till the court proceeds to the vote "of guilty, or not guilty." It muſt be noted, that this reſolution extends only to trials *in full parliament:* for to the court of the lord high ſteward (in which no vote can be given, but mere-

[t] Lords Journ. 15 May 1679.

by

ly that of guilty or not guilty) no biſhop, as ſuch, ever was or could be ſummoned; and though the ſtatute of king William regulates the proceedings in that court, as well as in the court of parliament, yet it never intended to new-model or alter it's conſtitution; and conſequently does not give the lords ſpiritual any right in caſes of blood which they had not before[u]. And what makes their excluſion more reaſonable, is, that they have no right to be tried themſelves in the court of the lord high ſteward[w], and therefore ſurely ought not to be judges there. For the privilege of being thus tried depends upon nobility of blood, rather than a ſeat in the houſe; as appears from the trials of popiſh lords, of lords under age, and (ſince the union) of the Scots nobility, though not in the number of the ſixteen; and from the trials of females, ſuch as the queen conſort or dowager, and of all peereſſes by birth; and peereſſes by marriage alſo, unleſs they have, when dowagers, diſparaged themſelves by taking a commoner to their ſecond huſband.

3. THE court of *king's bench*[x], concerning the nature of which we partly enquired in the preceding book[y], was (we may remember) divided into a *crown* ſide, and a *plea* ſide. And on the crown ſide, or crown office, it takes cognizance of all criminal cauſes, from high treaſon down to the moſt trivial miſdemeſnor or breach of the peace. Into this court alſo indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar, or at *niſi prius*, by a jury of the county out of which the indictment is brought. The judges of this court are the ſupreme coroners of the kingdom. And the court itſelf is the principal court of criminal juriſdiction (though the two former are of greater dignity) known to the laws of England. For which reaſon by the coming of the court of king's bench into any county, (as it was removed to Oxford on account of the ſickneſs in 1665) all former commiſſions of *oyer* and *ter-*

[u] Foſt. 248.

[w] Bro. *Abr. t. Trial.* 142.

[x] 4 Inſt. 70. 2 Hal. P. C. 2. 2 Hawk. P. C. 6.

[y] See Vol. III. pag. 41.

miner,

miner, and general gaol delivery, are at once abſorbed and determined *ipſo facto:* in the ſame manner as by the old Gothic and Saxon conſtitutions, "*jure vetuſto obtinuit, quieviſſe omnia inferiora* "*judicia, dicente jus rege*[z].

INTO this court of king's bench hath reverted all that was good and ſalutary of the juriſdiction of the court of *ſtar-chamber, camera ſtellata*[a]: which was a court of very antient original[b], but new-modelled by ſtatutes 3 Hen. VII. c. 1. and 21 Hen. VIII. c. 20. conſiſting of divers lords ſpiritual and temporal, being privy counſellors, together with two judges of the courts of common law, without the intervention of any jury. Their juriſdiction extended legally over riots, perjury, miſbe-

[z] Stiernhook. *l.* 1. *c.* 2.

[a] This is ſaid (Lamb. *Arch.* 154.) to have been ſo called, either from the Saxon word ȝteoȝan, to *ſteer* or govern; or from it's puniſhing the *crimen ſtellionatus*, or coſenage; or becauſe the room wherein it ſate, the old council chamber of the palace of Weſtminſter, (Lamb. 148.) which is now converted into the lottery office, and forms the eaſtern ſide of new palace-yard, was full of windows; or (to which ſir Edward Coke, 4 Inſt. 66. accedes) becauſe haply the roof thereof was at the firſt garniſhed with gilded ſtars. As all theſe are merely conjectures, (for no ſtars are ſaid to have remained in the roof ſo late as the reign of queen Elizabeth) I ſhall venture to propoſe another conjectural etymology, as plauſible perhaps as any of them. It is well known that, before the baniſhment of the Jews under Edward I, their contracts and obligations were denominated in our antient records *ſtarra* or *ſtarrs*, from a corruption of the Hebrew word, *ſhetâr*, a covenant. (Tovey's *Angl. judaic.* 32. Selden. tit. of hon. ii. 34. *Uxor Ebraic.* i. 14.) Theſe ſtarrs, by an ordinance of Richard the firſt, preſerved by Hoveden, were commanded to be enrolled and depoſited in cheſts under three keys in certain places; one, and the moſt conſiderable, of which was in the king's exchequer at Weſtminſter: and no ſtarr was allowed to be valid, unleſs it were found in ſome of the ſaid repoſitaries. (Madox hiſt. exch. c. vii. §. 4, 5, 6.) The room at the exchequer, where the cheſts containing theſe ſtarrs were kept, was probably called the *ſtarr-chamber*; and, when the Jews were expelled the kingdom, was applied to the uſe of the king's council, when ſitting in their judicial capacity. To confirm this; the firſt time the ſtar-chamber is mentioned in any record, (*Rot. clauſ.* 41 *Edw. III. m.* 13.) it is ſaid to have been ſituated near the receipt of the exchequer: that the king's council, his chancellor, treaſurer, juſtices, and other ſages, were aſſembled *en la chaumbre des eſteilles pres la reſceipt al Weſtminſter*. For in proceſs of time, when the meaning of the Jewiſh *ſtarrs* was forgotten, the word *ſtar-chamber* was naturally rendered in law-french, *la chaumbre des eſteilles*, and in law-latin, *camera ſtellata*; which continued to be the ſtile in latin till the diſſolution of that court.

[b] Lamb. *Arch.* 156.

haviour

haviour of ſheriffs, and other notorious miſdemeſnors, contrary to the laws of the land. Yet this was afterwards (as lord Clarendon informs us[c]) ſtretched "to the aſſerting of all proclamations, and orders of ſtate; to the vindicating of illegal commiſſions, and grants of monopolies; holding for honourable that which pleaſed, and for juſt that which profited, and becoming both a court of law to determine civil rights, and a court of revenue to enrich the treaſury: the council table by proclamations enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited; and the ſtar-chamber, which conſiſted of the ſame perſons in different rooms, cenſuring the breach and diſobedience to thoſe proclamations by very great fines, impriſonments, and corporal ſeverities: ſo that any diſreſpect to any acts of ſtate, or to the perſons of ſtateſmen, was in no time more penal, and the foundations of right never more in danger to be deſtroyed." For which reaſons, it was finally aboliſhed by ſtatute 16 Car. I. c. 10. to the general joy of the whole nation[d].

4. THE court of *chivalry*[e], of which we alſo formerly ſpoke[f] as a military court, or court of honour, when held before the earl marſhal only, is alſo a criminal court, when held before the lord high conſtable of England jointly with the earl marſhal. And then it has juriſdiction over pleas of life and member, ariſing in matters of arms and deeds of war, as well out of the realm as within it. But the criminal, as well as civil

[c] Hiſt. of Reb. book 1 & 3.

[d] The juſt odium, into which this tribunal had fallen before it's diſſolution, has been the occaſion that few memorials have reached us of it's nature, juriſdiction, and practice; except ſuch as, on account of their enormous oppreſſion, are recorded in the hiſtories of the times. There are however to be met with ſome reports of it's proceedings in manuſcript; of which the author hath one, for the firſt three years of king Charles: and there is in the Britiſh Muſeum (Harl. MSS. Vol. I. no. 1226.) a very full, methodical, and accurate account of the conſtitution and courſe of this court, compiled by William Hudſon of Gray's Inn, an eminent practitioner therein.

[e] 4 Inſt. 123. 2 Hawk. P. C. 9.

[f] See Vol. III. pag. 68.

part

part of it's authority, is fallen into entire diſuſe: there having been no permanent high conſtable of England (but only *pro hac vice* at coronations and the like) ſince the attainder and execution of Stafford duke of Buckingham in the thirteenth year of Henry VIII; the authority and charge, both in war and peace, being deemed too ample for a ſubject: ſo ample, that when the chief juſtice Fineux was aſked by king Henry the eighth, how far they extended, he declined anſwering; and ſaid, the deciſion of that queſtion belonged to the law of arms, and not to the law of England [g].

5. THE high court of *admiralty* [h], held before the lord high admiral of England, or his deputy, ſtiled the judge of the admiralty, is not only a court of civil, but alſo of criminal, juriſdiction. This court hath cognizance of all crimes and offences committed either upon the ſea, or on the coaſts, out of the body or extent of any Engliſh county; and, by ſtatute 15 Ric. II. c. 3. of death and mayhem happening in great ſhips being and hovering in the main ſtream of great rivers, below the bridges of the ſame rivers, which are then a ſort of ports or havens; ſuch as are the ports of London and Gloceſter, though they lie at a great diſtance from the ſea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exerciſe of a criminal juriſdiction therein was contrary to the genius of the law of England; inaſmuch as a man might be there deprived of his life by the opinion of a ſingle judge, without the judgment of his peers. And beſides, as innocent perſons might thus fall a ſacrifice to the caprice of a ſingle man, ſo very groſs offenders might, and did frequently, eſcape puniſhment: for the rule of the civil law is, how reaſonably I ſhall not at preſent enquire, that no judgment of death can be given againſt offenders, without proof by two witneſſes, or a confeſſion of the fact by themſelves. This was always a great offence to the Engliſh nation: and therefore in the eighth year of Henry VI it was endeavoured to apply a remedy in parli-

[g] Duck *de authorit. jur. civ.*

[h] 4 Inſt. 134. 147.

ament; which then miſcarried for want of the royal aſſent. However, by the ſtatute 28 Hen. VIII. c. 15. it was enacted, that theſe offences ſhould be tried by commiſſioners, nominated by the lord chancellor; namely, the admiral, or his deputy, and three or four more; (among whom two common law judges are conſtantly appointed, who in effect try all the priſoners) the indictment being firſt found by a grand jury of twelve men, and afterwards tried by another jury, as at common law: and that the courſe of proceedings ſhould be according to the law of the land. This is now the only method of trying marine felonies in the court of admiralty: the judge of the admiralty ſtill preſiding therein, juſt as the lord mayor preſides at the ſeſſions in London.

THESE five courts may be held in any part of the kingdom, and their juriſdiction extends over crimes that ariſe throughout the whole of it, from one end to the other. What follow are alſo of a general nature, and univerſally diffuſed over the nation, but yet are of a local juriſdiction, and confined to particular diſtricts. Of which ſpecies is,

6. THE court of *oyer* and *terminer*, and general *gaol delivery*[1]: which is held before the king's commiſſioners, among whom are uſually two judges of the courts at Weſtminſter, twice in every year in every county of the kingdom; except the four northern ones, where it is held only once, and London and Middleſex, wherein it is held eight times. This was ſlightly mentioned in the preceding book[k]. We then obſerved, that, at what is uſually called the aſſiſes, the judges ſit by virtue of five ſeveral authorities: two of which, the commiſſion of *aſſiſe* and it's attendant juriſdiction of *niſi prius*, being principally of a civil nature, were then explained at large; to which I ſhall only add, that theſe juſtices have, by virtue of ſeveral ſtatutes, a criminal juriſdiction alſo, in certain ſpecial caſes[l]. The third,

[i] 4 Inſt. 162. 168. 2 Hal. P. C. 22. 32. 2 Hawk. P. C. 14. 23.

[k] See Vol. III. pag. 58.

[l] 2 Hal. P. C. 39. 2 Hawk. P. C. 28.

which

which is the commiſſion of the *peace*, was alſo treated of in a former volume [m], when we enquired into the nature and office of a juſtice of the peace. I ſhall only add, that all the juſtices of the peace of any county, wherein the aſſiſes are held, are bound by law to attend them, or elſe are liable to a fine; in order to return recognizances, &c. and to aſſiſt the judges in ſuch matters as lie within their knowlege and juriſdiction, and in which ſome of them have probably been concerned, by way of previous examination. But the fourth authority is the commiſſion of *oyer* and *terminer* [n], to hear and determine all treaſons, felonies, and miſdemeſnors. This is directed to the judges and ſeveral others; but the judges only are of the *quorum*, ſo that the reſt cannot act without them. The words of the commiſſion are, "to enquire, hear, and determine:" ſo that by virtue of this commiſſion they can only proceed upon an indictment found at the ſame aſſiſes; for they muſt firſt enquire, by means of the grand jury or inqueſt, before they are empowered to hear and determine by the help of the petit jury. Therefore they have beſides, fifthly, a commiſſion of general *gaol delivery* [o]; which empowers them to try and deliver every priſoner, who ſhall be in the gaol when the judges arrive at the circuit town, whenever indicted, or for whatever crime committed. It was antiently the courſe to iſſue ſpecial writs of gaol delivery for each particular priſoner, which were called the writs *de bono et malo* [p]: but, theſe being found inconvenient and oppreſſive, a *general* commiſſion for all the priſoners has long been eſtabliſhed in their ſtead. So that, one way or other, the gaols are cleared, and all offenders tried, puniſhed, or delivered, twice in every year: a conſtitution of ſingular uſe and excellence. Sometimes alſo, upon urgent occaſions, the king iſſues a ſpecial or extraordinary commiſſion of *oyer* and *terminer*, and *gaol delivery*, confined to thoſe offences which ſtand in need of immediate inquiry and puniſhment: upon which the courſe of proceeding is the ſame, as upon general and ordinary commiſſions. Formerly it was held,

[m] See Vol. I. pag. 351.
[n] See appendix, § 1.
[o] *Ibid.*
[p] 2 Inſt. 43.

in purſuance of the ſtatutes 8 Ric. II. c. 2. and 33 Hen. VIII. c. 4. that no judge or other lawyer could act in the commiſſion of *oyer* and *terminer*, or in that of gaol delivery, within his own county, where he was born or inhabited; in like manner as they are prohibited from being judges of aſſiſe and determining civil cauſes. But that local partiality, which the jealouſy of our anceſtors was careful to prevent, being judged leſs likely to operate in the trial of crimes and miſdemeſnors, than in matters of property and diſputes between party and party, it was thought proper by the ſtatute 12 Geo. II. c. 27. to allow any man to be a juſtice of *oyer* and *terminer* and general gaol delivery within any county of England.

7. THE court of general *quarter ſeſſions* of the peace[q] is a court that muſt be held in every county, once in every quarter of a year; which by ſtatute 2 Hen. V. c. 4. is appointed to be in the firſt week after michaelmas-day; the firſt week after the epiphany; the firſt week after the cloſe of eaſter; and in the week after the tranſlation of ſaint Thomas the martyr, or the ſeventh of July. It is held before two or more juſtices of the peace, one of which muſt be of the *quorum*. The juriſdiction of this court by ſtatute 34 Edw. III. c. 1. extends to the trying and determining all felonies and treſpaſſes whatſoever: though they ſeldom, if ever, try any greater offence than ſmall felonies within the benefit of clergy; their commiſſion providing, that, if any caſe of difficulty ariſes, they ſhall not proceed to judgment, but in the preſence of one of the juſtices of the courts of king's bench or common pleas, or one of the judges of aſſiſe. And therefore murders, and other capital felonies, are uſually remitted for a more ſolemn trial to the aſſiſes. They cannot alſo try any new-created offence, without expreſs power given them by the ſtatute which creates it[r]. But there are many offences, and particular matters, which by particular ſtatutes belong properly to this juriſdiction, and ought to be proſecuted in this

[q] 4 Inſt. 170. 2 Hal. P. C. 42. 2 Hawk. P. C. 32.

[r] 4 Mod. 379. Salk. 406. Lord Raym. 1144.

court:

court: as, the ſmaller miſdemeſnors againſt the public or commonwealth, not amounting to felony; and eſpecially offences relating to the game, highways, alehouſes, baſtard children, the ſettlement and proviſion for the poor, vagrants, ſervants wages, apprentices, and popiſh recuſants [f]. Some of theſe are proceeded upon by indictment; and others in a ſummary way by motion and order thereupon: which order may for the moſt part, unleſs guarded againſt by particular ſtatutes, be removed into the court of king's bench, by writ of *certiorari facias*, and be there either quaſhed or confirmed. The records or rolls of the ſeſſions are committed to the cuſtody of a ſpecial officer denominated the *cuſtos rotulorum*, who is always a juſtice of the *quorum*; and among them of the *quorum* (ſaith Lambard [s]) a man for the moſt part eſpecially picked out, either for wiſdom, countenance, or credit. The nomination of the *cuſtos rotulorum* (who is the principal *civil* officer in the county, as the lord lieutenant is the chief in *military* command) is by the king's ſign manual: and to him the nomination of the clerk of the peace belongs; which office he is expreſſly forbidden to ſell for money [t].

IN moſt corporation towns there are quarter ſeſſions kept before juſtices of their own, within their reſpective limits: which have exactly the ſame authority as the general quarter ſeſſions of the county, except in a very few inſtances; one of the moſt conſiderable of which is the matter of appeals from orders of removal of the poor, which, though they be from the orders of corporation juſtices, muſt be to the ſeſſions of the county, by ſtatute 8 & 9 W. III. c. 30. In both corporations and counties at large, there is ſometimes kept a ſpecial or petty ſeſſion, by a few juſtices, for diſpatching ſmaller buſineſs in the neighbourhood between the times of the general ſeſſions; as, for licencing alehouſes, paſſing the accounts of pariſh officers, and the like.

[f] See Lambard's *eirenarcha*, and Burn's juſtice.

[s] b. 4. c. 3.

[t] Stat. 37 Hen. VIII. c. 1. 1 W. & M. ſt. 1. c. 21.

8. THE

8. THE *ſheriff's tourn* [u], or rotation, is a court of record, held twice every year within a month after eaſter and michaelmas, before the ſheriff, in different parts of the county; being indeed only the turn of the ſheriff to keep a court-leet in each reſpective hundred [w]. This therefore is the great court-leet of the county, as the county court is the court-baron: for out of this, for the eaſe of the ſheriff, was taken

9. THE *court-leet*, or *view of frankpledge* [x], which is a court of record, held once in the year and not oftener [y], within a particular hundred, lordſhip, or manor, before the ſteward of the leet; being the king's court granted by charter to the lords of thoſe hundreds or manors. It's original intent was to view the frank pledges, that is, the freemen within the liberty; who (we may remember [z]) according to the inſtitution of the great Alfred, were all mutually pledges for the good behaviour of each other. Beſides this, the preſervation of the peace, and the chaſtiſement of divers minute offences againſt the public good, are the objects both of the court-leet and the ſheriff's tourn: which have exactly the ſame juriſdiction, one being only a larger ſpecies of the other; extending over more territory, but not over more cauſes. All freeholders within the precinct are obliged to attend them, and all perſons commorant therein; which commorancy conſiſts in uſually lying there: a regulation, which owes it's original to the laws of king Canute [a]. But perſons under twelve and above ſixty years old, peers, clergymen, women, and the king's tenants in antient demeſne, are excuſed from attendance there: all others being bound to appear upon the jury, if required, and make their due preſentments. It was alſo antiently the cuſtom to ſummon all the king's ſubjects, as they reſpectively grew to years of diſcretion and ſtrength, to come to

[u] 4 Inſt. 259. 2 Hal. P. C. 69. 2 Hawk. P. C. 55.
[w] Mirr. c. 1. §. 13 & 16.
[x] 4 Inſt. 261. 2 Hawk. P. C. 72.
[y] Mirror. c. 1. §. 10.
[z] See Vol. III. pag. 113.
[a] *part.* 2. *c.* 19.

the

the court-leet, and there take the oath of allegiance to the king. The other general buſineſs of the leet and tourn, was to preſent by jury all crimes whatſoever that happened within their juriſdiction; and not only to preſent, but alſo to puniſh, all trivial miſdemeſnors, as all trivial debts were recoverable in the court-baron, and county court: juſtice, in theſe minuter matters of both kinds, being brought home to the doors of every man by our antient conſtitution. Thus in the Gothic conſtitution, the *haereda*, which anſwered to our court-leet, "*de omnibus quidem* "*cognoſcit, non tamen de omnibus judicat*[b]." The objects of their juriſdiction are therefore unavoidably very numerous: being ſuch as in ſome degree, either leſs or more, affect the public weal, or good governance of the diſtrict in which they ariſe; from common nuſances and other material offences againſt the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the tourn and the leet have been for a long time in a declining way: a circumſtance, owing in part to the diſcharge granted by the ſtatute of Marlbridge, 52 Hen. III. c. 10. to all prelates, peers, and clergymen from their attendance upon theſe courts; which occaſioned them to grow into diſrepute. And hence it is that their buſineſs hath for the moſt part gradually devolved upon the quarter ſeſſions: which it is particularly directed to do in ſome caſes by ſtatute 1 Edw. IV. c. 2.

10. THE court of the *coroner*[c] is alſo a court of record, to enquire, when any one dies in priſon, or comes to a violent or ſudden death, by what manner he came to his end. And this he is only entitled to do *ſuper viſum corporis*. Of the coroner and his office we treated at large in a former volume[d], among the public officers and miniſters of the kingdom; and therefore ſhall not here repeat our enquiries: only mentioning his court, by way of regularity, among the criminal courts of the nation.

[b] Stiernh. *de jur. Goth. l.* 1. *c.* 2.
[c] 4 Inſt. 271. 2 Hal. P. C. 53. 2 Hawk. P. C. 42.
[d] See Vol. I. pag. 349.

11. THE

11. THE court of the *clerk of the market*[e] is incident to every fair and market in the kingdom, to puniſh miſdemeſnors therein; as a court of *pie poudre* is, to determine all diſputes relating to private or civil property. The object of this juriſdiction[f] is principally the cognizance of weights and meaſures, to try whether they be according to the true ſtandard thereof, or no: which ſtandard was antiently committed to the cuſtody of the biſhop, who appointed ſome clerk under him to inſpect the abuſe of them more narrowly; and hence this officer, though now uſually a layman, is called the *clerk* of the market[g]. If they be not according to the ſtandard, then, beſides the puniſhment of the party by fine, the weights and meaſures themſelves ought to be burnt. This is the moſt inferior court of criminal juriſdiction in the kingdom; though the objects of it's coercion were eſteemed among the Romans of ſuch importance to the public, that they were committed to the care of ſome of their moſt dignified magiſtrates, the curule aediles.

II. THERE are a few other criminal courts of greater dignity than many of theſe, but of a more confined and partial juriſdiction; extending only to ſome particular places, which the royal favour, confirmed by act of parliament, has diſtinguiſhed by the privilege of having peculiar courts of their own, for the puniſhment of crimes and miſdemeſnors ariſing within the bounds of their cognizance. Theſe, not being univerſally diſperſed, or of general uſe, as the former, but confined to one ſpot, as well as to a determinate ſpecies of cauſes, may be denominated private or ſpecial courts of criminal juriſdiction.

I SPEAK not here of eccleſiaſtical courts; which puniſh ſpiritual ſins, rather than temporal crimes, by penance, contrition, and excommunication, *pro ſalute animae:* or, which is looked upon as equivalent to all the reſt, by a ſum of money to the of-

[e] 4 Inſt. 273.
[f] See ſtat. 17 Car. II. c. 19. 22 Car. II. c. 8. 23 Car. II. c. 12.
[g] Bacon of Engliſh Gov. b. 1. c. 8.

ficers

ficers of the court by way of commutation of penance. Of theſe we diſcourſed ſufficiently in the preceding book [h]. I am now ſpeaking of ſuch courts as proceed according to the courſe of the common law; which is a ſtranger to ſuch unaccountable barterings of public juſtice.

1. AND, firſt, the court of the *lord ſteward, treaſurer*, or *comptroller* of the king's *houſhold* [i], was inſtituted by ſtatute 3 Hen. VII. c. 14. to enquire of felony by any of the king's ſworn ſervants, in the checque roll of the houſhold, under the degree of a lord, in confederating, compaſſing, conſpiring, and imagining the death or deſtruction of the king, or any lord or other of his majeſty's privy council, or the lord ſteward, treaſurer, or comptroller of the king's houſe. The enquiry, and trial thereupon, muſt be by a jury according to the courſe of the common law, conſiſting of twelve ſad men (that is, ſober and diſcreet perſons) of the king's houſhold.

2. THE court of the *lord ſteward* of the king's *houſhold*, or (in his abſence) of the treaſurer, comptroller, and ſteward of the *marſhalſea* [k], was erected by ſtatute 33 Hen. VIII. c. 12. with a juriſdiction to enquire of, hear, and determine, all treaſons, miſpriſions of treaſon, murders, manſlaughters, bloodſhed, and other malicious ſtrikings; whereby blood ſhall be ſhed in any of the palaces and houſes of the king, or in any other houſe where the royal perſon ſhall abide. The proceedings are alſo by jury, both a grand and a petit one, as at common law, taken out of the officers and ſworn ſervants of the king's houſhold. The form and ſolemnity of the proceſs, particularly with regard to the execution of the ſentence for cutting off the hand, which is part of the puniſhment for ſhedding blood in the king's court, is very minutely ſet forth in the ſaid ſtatute 33 Hen. VIII. and the ſeveral offices of the ſervants of the houſhold in and about ſuch execution are de-

[h] See Vol. III. pag. 61.
[i] 4 Inſt. 133.
[k] *Ibid.* 2 Hal. P. C. 7.

ſcribed; from the ſerjeant of the wood-yard, who furniſhes the chopping-block, to the ſerjeant farrier, who brings hot irons to ſear the ſtump.

3. As in the preceding book[1] we mentioned the courts of the two univerſities, or their chancellor's courts, for the redreſs of civil injuries; it will not be improper now to add a ſhort word concerning the juriſdiction of their criminal courts, which is equally large and extenſive. The chancellor's court of Oxford (with which univerſity the author hath been chiefly converſant, though probably that of Cambridge hath alſo a ſimilar juriſdiction) hath authority to determine all cauſes of property, wherein a privileged perſon is one of the parties, except only cauſes of freehold; and alſo all criminal offences or miſdemeſnors, under the degree of treaſon, felony, or mayhem. The prohibition of meddling with freehold ſtill continues: but the trial of treaſon, felony, and mayhem, by a particular charter is committed to the univerſity juriſdiction in another court, namely, the court of the *lord high ſteward* of the *univerſity*.

FOR by the charter of 7 Jun. 2 Hen. IV. (confirmed, among the reſt, by the ſtatute 13 Eliz. c. 29.) cognizance is granted to the univerſity of Oxford of all indictments of treaſons, inſurrections, felony, and mayhem, which ſhall be found in any of the king's courts againſt a ſcholar or privileged perſon; and they are to be tried before the high ſteward of the univerſity, or his deputy, who is to be nominated by the chancellor of the univerſity for the time being. But, when his office is called forth into action, ſuch high ſteward muſt be approved by the lord high chancellor of England; and a ſpecial commiſſion under the great ſeal is given to him, and others, to try the indictment then depending, according to the law of the land and

[1] See Vol. III. pag. 83.

the

the privileges of the ſaid univerſity. When therefore an indictment is found at the aſſiſes, or elſewhere, againſt any ſcholar of the univerſity, or other privileged perſon, the vice-chancellor may claim the cognizance of it; and (when claimed in due time and manner) it ought to be allowed him by the judges of aſſiſe: and then it comes to be tried in the high ſteward's court. But the indictment muſt firſt be found by a grand jury, and then the cognizance claimed: for I take it that the high ſteward cannot proceed originally *ad inquirendum*; but only, after inqueſt in the common law courts, *ad audiendum et determinandum*. Much in the ſame manner, as, when a peer is to be tried in the court of the lord high ſteward of Great Britain, the indictment muſt firſt be found at the aſſiſes, or in the court of king's bench, and then (in conſequence of a writ of *certiorari*) tranſmitted to be finally heard and determined before his grace the lord high ſteward and the peers.

WHEN the cognizance is ſo allowed, if the offence be *inter minora crimina*, or a miſdemeſnor only, it is tried in the chancellor's court by the ordinary judge. But if it be for treaſon, felony, or mayhem, it is then, and then only, to be determined before the high ſteward, under the king's ſpecial commiſſion to try the ſame. The proceſs of the trial is this. The high ſteward iſſues one precept to the ſheriff of the county, who thereupon returns a panel of eighteen freeholders; and another precept to the bedells of the univerſity, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio univerſitatis gaudentes:*" and by a jury formed *de medietate*, half of freeholders, and half of matriculated perſons, is the indictment to be tried; and that in the guildhall of the city of Oxford. And if execution be neceſſary to be awarded, in conſequence of finding the party guilty, the ſheriff of the county muſt execute the univerſity proceſs; to which he is annually bound by an oath.

I HAVE been the more minute in deſcribing theſe proceedings, as there has happily been no occaſion to reduce them into practice for more than a century paſt; though it is not a right that merely reſts *in ſcriptis* or theory, but has formerly often been carried into execution. There are many inſtances, one in the reign of queen Elizabeth, two in that of James the firſt, and two in that of Charles the firſt, where indictments for murder have been challenged by the vice-chancellor at the aſſiſes, and afterwards tried before the high ſteward by jury. The commiſſions under the great ſeal, the ſheriff's and bedell's panels, and all the other proceedings on the trial of the ſeveral indictments, are ſtill extant in the archives of that univerſity.

CHAPTER THE TWENTIETH.

OF SUMMARY CONVICTIONS.

WE are next, according to the plan I have laid down, to take into conſideration the proceedings in the courts of criminal juriſdiction, in order to the puniſhment of offences. Theſe are plain, eaſy, and regular; the law not admitting any fictions, as in civil cauſes, to take place where the life, the liberty, and the ſafety of the ſubject are more immediately brought into jeopardy. And theſe proceedings are diviſible into two kinds; *ſummary*, and *regular*: of the former of which I ſhall briefly ſpeak, before we enter upon the latter, which will require a more thorough and particular examination.

BY a *ſummary* proceeding I mean principally ſuch as is directed by ſeveral acts of parliament (for the common law is a ſtranger to it, unleſs in the caſe of contempts) for the conviction of offenders, and the inflicting of certain penalties created by thoſe acts of parliament. In theſe there is no intervention of a jury, but the party accuſed is acquitted or condemned by the ſuffrage of ſuch perſon only, as the ſtatute has appointed for his judge. An inſtitution deſigned profeſſedly for the greater eaſe of the ſubject, by doing him ſpeedy juſtice, and by not harraſſing the freeholders with frequent and troubleſome attendances to try every minute offence. But it has of late

late been ſo far extended, as, if a check be not timely given, to threaten the diſuſe of our admirable and truly Engliſh trial by jury, unleſs only in capital caſes. For,

I. OF this ſummary nature are all trials of offences and frauds contrary to the laws of the *exciſe*, and other branches of the *revenue:* which are to be enquired into and determined by the commiſſioners of the reſpective departments, or by juſtices of the peace in the country; officers, who are all of them appointed and removeable at the diſcretion of the crown. And though ſuch convictions are abſolutely neceſſary for the due collection of the public money, and are a ſpecies of mercy to the delinquents, who would be ruined by the expenſe and delay of frequent proſecutions by indictment; and though ſuch has uſually been the *conduct* of the commiſſioners, as ſeldom (if ever) to afford juſt grounds to complain of oppreſſion; yet when we again [a] conſider the various and almoſt innumerable branches of this revenue, which may be in their turns the ſubjects of fraud, or at leaſt complaints of fraud, and of courſe the objects of this ſummary and arbitrary juriſdiction; we ſhall find that the *power* of theſe officers of the crown over the property of the people is increaſed to a very formidable height.

II. ANOTHER branch of ſummary proceedings is that before *juſtices of the peace*, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many diſorderly offences; ſuch as common ſwearing, drunkenneſs, vagrancy, idleneſs, and a vaſt variety of others, for which I muſt refer the ſtudent to the juſtice-books formerly cited [b], and which uſed to be formerly puniſhed by the verdict of a jury in the court-leet. This change in the adminiſtration of juſtice hath however had ſome miſchievous effects; as, 1. The almoſt entire diſuſe and contempt of the court-leet, and ſheriff's tourn, the king's antient courts of common law, formerly much rever-

[a] See Vol. I. pag. 318, &c.

[b] Lambard and Burn.

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ed and reſpected. 2. The burthenſome increaſe of the buſineſs of a juſtice of the peace, which diſcourages ſo many gentlemen of rank and character from acting in the commiſſion; from an apprehenſion that the duty of their office would take up too much of that time, which they are unwilling to ſpare from the neceſſary concerns of their families, the improvement of their underſtandings, and their engagements in other ſervices of the public. Though if *all* gentlemen of fortune had it both in their power, and inclinations, to act in this capacity, the buſineſs of a juſtice of the peace would be more divided, and fall the leſs heavy upon individuals: which would remove what in the preſent ſcarcity of magiſtrates is really an objection ſo formidable, that the country is greatly obliged to any gentleman of figure, who will undertake to perform that duty, which in conſequence of his rank in life he owes more peculiarly to his country. However, this backwardneſs to act as magiſtrates, ariſing greatly from this increaſe of ſummary juriſdiction, is productive of, 3. A third miſchief: which is, that this truſt, when ſlighted by gentlemen, falls of courſe into the hands of thoſe who are not ſo; but the mere tools of office. And then the extenſive power of a juſtice of the peace, which even in the hands of men of honour is highly formidable, will be proſtituted to mean and ſcandalous purpoſes, to the low ends of ſelfiſh ambition, avarice, or perſonal reſentment. And from theſe ill conſequences we may collect the prudent foreſight of our antient lawgivers, who ſuffered neither the property nor the puniſhment of the ſubject to be determined by the opinion of any one or two men; and we may alſo obſerve the neceſſity of not deviating any farther from our antient conſtitution, by ordaining new penalties to be inflicted upon ſummary convictions.

THE proceſs of theſe ſummary convictions, it muſt be owned, is extremely ſpeedy. Though the courts of common law have thrown in one check upon them, by making it neceſſary to *ſummon* the party accuſed before he is condemned. This is now held

held to be an indiſpenſable requiſite [c]: though the juſtices long ſtruggled the point; forgetting that rule of natural reaſon expreſſed by Seneca,

"*Qui ſtatuit aliquid, parte inaudita altera,*
"*Aequom licet ſtatuerit, haud aequus fuit.*"

A rule, to which all municipal laws, that are founded on the principles of juſtice, have ſtrictly conformed: the Roman law requiring a citation at the leaſt; and our own common law never ſuffering any fact (either civil or criminal) to be tried, till it has previouſly compelled an appearance by the party concerned. After this ſummons, the magiſtrate, in ſummary proceedings, may go on to examine one or more witneſſes, as the ſtatute may require, upon oath; and then make his conviction of the offender, in writing: upon which he uſually iſſues his warrant, either to apprehend the offender, in caſe corporal puniſhment is to be inflicted on him; or elſe to levy the penalty incurred, by diſtreſs and ſale of his goods. This is, in general, the method of ſummary proceedings before a juſtice or juſtices of the peace: but for particulars we muſt have recourſe to the ſeveral ſtatutes, which create the offence, or inflict the puniſhment; and which uſually chalk out the method by which offenders are to be convicted. Otherwiſe they fall of courſe under the general rule, and can only be convicted by indictment or information at the common law.

III. To this head, of ſummary proceedings, may alſo be properly referred the method, immemorially uſed by the ſuperior courts of juſtice, of puniſhing contempts by *attachment*, and the ſubſequent proceedings thereon.

THE contempts, that are thus puniſhed, are either *direct*, which openly inſult or reſiſt the powers of the courts, or the perſons of the judges who preſide there; or elſe are *conſequential*,

[c] Salk. 181. 2 Lord Raym. 1405.

which

which (without ſuch groſs inſolence or direct oppoſition) plainly tend to create an univerſal diſregard of their authority. The principal inſtances, of either ſort, that have been uſually[d] puniſhed by attachment, are chiefly of the following kinds. 1. Thoſe committed by inferior judges and magiſtrates: by acting unjuſtly, oppreſſively, or irregularly, in adminiſtring thoſe portions of juſtice which are intruſted to their diſtribution; or by diſobeying the king's writs iſſuing out of the ſuperior courts, by proceeding in a cauſe after it is put a ſtop to or removed by writ of prohibition, *certiorari*, error, *ſuperſedeas*, and the like. For, as the king's ſuperior courts (and eſpecially the court of king's bench) have a general ſuper-intendance over all inferior juriſdictions, any corrupt or iniquitous practices of ſubordinate judges are contempts of that ſuper-intending authority, whoſe duty it is to keep them within the bounds of juſtice. 2. Thoſe committed by ſheriffs, bailiffs, gaolers, and other officers of the court: by abuſing the proceſs of the law, or deceiving the parties, by any acts of oppreſſion, extortion, colluſive behaviour, or culpable neglect of duty. 3. Thoſe committed by attorneys and ſolicitors, who are alſo officers of the reſpective courts: by groſs inſtances of fraud and corruption, injuſtice to their clients, or other diſhoneſt practice. For the mal-practice of the officers reflects ſome diſhonour on their employers: and, if frequent or unpuniſhed, creates among the people a diſguſt againſt the courts themſelves. 4. Thoſe committed by jurymen, in collateral matters relating to the diſcharge of their office: ſuch as making default, when ſummoned; refuſing to be ſworn, or to give any verdict; eating or drinking without the leave of the court, and eſpecially at the coſt of either party; and other miſbehaviours or irregularities of a ſimilar kind: but not in the mere exerciſe of their judicial capacities, as by giving a falſe or erroneous verdict. 5. Thoſe committed by witneſſes: by making default when ſummoned, refuſing to be ſworn or examined, or prevaricating in their evidence when ſworn. 6. Thoſe committed by parties to any ſuit

[d] 2 Hawk. P. C. 142, &c.

or proceeding before the court: as by diſobedience to any rule or order, made in the progreſs of a cauſe; by non-payment of coſts awarded by the court upon a motion; or by non-obſervance of awards duly made by arbitrators or umpires, after having entered into a rule for ſubmitting to ſuch determination[e]. 7. Thoſe committed by any other perſons, under the degree of a peer: and even by peers themſelves, when enormous and accompanied with violence, ſuch as forcible *reſcous* and the like[f]; or when they import a diſobedience to the king's great prerogative writs, of prohibition, *habeas corpus*[g], and the reſt. Some of theſe contempts may ariſe in the face of the court; as by rude and contumelious behaviour; by obſtinacy, perverſeneſs, or prevarication; by breach of the peace, or any wilful diſturbance whatever: others in the abſence of the party; as by diſobeying or treating with diſreſpect the king's writ, or the rules or proceſs of the court; by perverting ſuch writ or proceſs to the purpoſes of private malice, extortion, or injuſtice; by ſpeaking or writing contemptuouſly of the court, or judges, acting in their judicial capacity; by printing falſe accounts (or even true ones without proper permiſſion) of cauſes then depending in judgment; and by any thing in ſhort that demonſtrates a groſs want of that regard and reſpect, which when once courts of juſtice are deprived of, their authority (ſo neceſſary for the good order of the kingdom) is intirely loſt among the people.

THE proceſs of attachment, for theſe and the like contempts, muſt neceſſarily be as antient as the laws themſelves. For laws, without a competent authority to ſecure their adminiſtration from diſobedience and contempt, would be vain and nugatory. A power therefore in the ſupreme courts of juſtice to ſuppreſs ſuch contempts, by an immediate attachment of the offender, reſults from the firſt principles of judicial eſtabliſhments, and muſt be an inſeparable attendant upon every ſuperior tribunal.

[e] See Vol. III. pag. 17.
[f] Styl. 277. 2 Hawk. P. C. 152.
[g] 4 Burr. 632. Lords Journ. 7 Febr. 8 Jun. 1757.

Accord-

Accordingly we find it actually exerciſed, as early as the annals of our law extend. And, though a very learned author[h] ſeems inclinable to derive this proceſs from the ſtatute of Weſtm. 2. 13 Edw. I. c. 39. (which ordains, that in caſe the proceſs of the king's courts be *reſiſted* by the power of any great man, the ſheriff ſhall chaſtiſe the reſiſters by impriſonment, "*a qua non* "*deliberentur ſine ſpeciali praecepto domini regis:*" and if the ſheriff himſelf be reſiſted, he ſhall certify to the court the names of the principal offenders, their aiders, conſenters, commanders, and favourers, and by a ſpecial writ judicial they ſhall be *attached* by their bodies to appear before the court, and if they be convicted thereof they ſhall be puniſhed at the king's pleaſure, without any interfering by any other perſon whatſoever) yet he afterwards more juſtly concludes, that it is a part of the *law of the land*; and, as ſuch, is *confirmed* by the ſtatute of *magna carta*.

IF the contempt be committed in the face of the court, the offender may be inſtantly apprehended and impriſoned, at the diſcretion of the judges, without any farther proof or examination. But in matters that ariſe at a diſtance, and of which the court cannot have ſo perfect a knowlege, unleſs by the confeſſion of the party or the teſtimony of others, if the judges upon *affidavit* ſee ſufficient ground to ſuſpect that a contempt has been committed, they either make a rule on the ſuſpected party to ſhew cauſe why an attachment ſhould not iſſue againſt him[i]; or, in very flagrant inſtances of contempt, the attachment iſſues in the firſt inſtance[k]; as it alſo does, if no ſufficient cauſe be ſhewn to diſcharge, and thereupon the court confirms and makes abſolute, the original rule. This proceſs of attachment is merely intended to bring the party into court: and, when there, he muſt either ſtand committed, or put in bail, in order to anſwer upon oath to ſuch *interrogatories* as ſhall be adminiſtred to him, for the better information of the court with reſpect to the cir-

[h] Gilb. Hiſt. C. P. ch. 3.
[i] Styl. 277.
[k] Salk. 84. Stra. 185. 564.

cumſtances of the contempt. Theſe interrogatories are in the nature of a charge or accuſation, and muſt by the courſe of the court be exhibited within the firſt four days[l]: and, if any of the interrogatories is improper, the defendant may refuſe to anſwer it, and move the court to have it ſtruck out[m]. If the party can clear himſelf upon oath, he is diſcharged; but, if perjured, may be proſecuted for the perjury[n]. If he confeſſes the contempt, the court will proceed to correct him by fine, or impriſonment, or both, and ſometimes by a corporal or infamous puniſhment[o]. If the contempt be of ſuch a nature, that, when the fact is once acknowleged, the court can receive no farther information by interrogatories than it is already poſſeſſed of, (as in the caſe of a *reſcous*[p]) the defendant may be admitted to make ſuch ſimple acknowlegement, and receive his judgment, without anſwering to any interrogatories: but if he wilfully and obſtinately refuſes to anſwer, or anſwers in an evaſive manner, he is then clearly guilty of a high and repeated contempt, to be puniſhed at the diſcretion of the court.

IT cannot have eſcaped the attention of the reader, that this method, of making the defendant anſwer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other inſtance[q]; and ſeems indeed to have been derived to the courts of king's bench and common pleas through the medium of the courts of equity. For the whole proceſs of the courts of equity, in the ſeveral ſtages of a cauſe, and finally to enforce their decrees, was, till the introduction of ſequeſtrations, in the nature of a proceſs of contempt; acting only *in perſonam* and not *in rem*. And there, after the party in contempt has anſwered the interrogatories, ſuch his anſwer may be contradicted and diſproved by *affidavits* of the adverſe party: whereas in the courts of law, the admiſſion of the party to purge himſelf by oath is more favourable to his liberty,

[l] 6 Mod. 73.
[m] Stra. 444.
[n] 6 Mod. 73.
[o] Cro. Car. 146.
[p] The king *v.* Elkins. M. 8 Geo. III. B. R.
[q] See Vol. III. pag. 100, 101.

though

though perhaps not leſs dangerous to his conſcience; for, if he clears himſelf by his anſwers, the complaint is totally diſmiſſed. And, with regard to this ſingular mode of trial, thus admitted in this one particular inſtance, I ſhall only for the preſent obſerve; that as the proceſs by attachment in general appears to be extremely antient[r], and has ſince the reſtoration been confirmed by an expreſs act of parliament[s], ſo the method of examining the delinquent himſelf upon oath, with regard to the comtempt alleged, is at leaſt of as high antiquity[t], and by long and immemorial uſage is now become the law of the land.

[r] Yearb. 22 Edw. IV. 29.
[s] Stat. 13 Car. II. ſt. 2. c. 2. §. 4.
[t] M. 5 Edw. IV. rot. 75. cited in Raſt. Ent. 268. pl. 5.

CHAPTER THE TWENTY FIRST.

OF ARRESTS.

WE are now to conſider the regular and ordinary method of proceeding in the courts of criminal juriſdiction; which may be diſtributed under twelve general heads, following each other in a progreſſive order: *viz.* 1. Arreſt; 2. Commitment, and bail; 3. Proſecution; 4. Proceſs; 5. Arraignment, and it's incidents; 6. Plea, and iſſue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and it's conſequences; 10. Reverſal of judgment; 11. Reprieve, or pardon; 12. Execution: all which will be diſcuſſed in the ſubſequent part of this book.

FIRST then, of an *arreſt:* which is the apprehending or reſtraining of one's perſon, in order to be forthcoming to anſwer an alleged or ſuſpected crime. To this arreſt all perſons whatſoever are, without diſtinction, equally liable to all criminal caſes: but no man is to be arreſted, unleſs charged with ſuch a crime, as will at leaſt juſtify holding him to bail, when taken. And, in general, an arreſt may be made four ways: 1. By warrant: 2. By an officer without warrant: 3. By a private perſon alſo without warrant: 4. By an hue and cry.

1. A WARRANT

1. A WARRANT may be granted in extraordinary caſes by the privy council, or ſecretaries of ſtate[a]; but ordinarily by juſtices of the peace. This they may do in any caſes where they have a juriſdiction over the offence; in order to compel the perſon accuſed to appear before them[b]: for it would be abſurd to give them power to examine an offender, unleſs they had alſo a power to compel him to attend, and ſubmit to ſuch examination. And this extends undoubtedly to all treaſons, felonies, and breaches of the peace; and alſo to all ſuch offences as they have power to puniſh by ſtatute. Sir Edward Coke indeed[c] hath laid it down, that a juſtice of the peace cannot iſſue a warrant to apprehend a felon upon bare ſuſpicion; no, not even till an indictment be actually found: and the contrary practice is by others[d] held to be grounded rather upon connivance, than the expreſs rule of law; though now by long cuſtom eſtabliſhed. A doctrine, which would in moſt caſes give a looſe to felons to eſcape without puniſhment; and therefore ſir Matthew Hale hath combated it with invincible authority, and ſtrength of reaſon: maintaining, 1. That a juſtice of peace hath power to iſſue a warrant to apprehend a perſon *accuſed* of felony, though not yet *indicted*[e]; and 2. That he may alſo iſſue a warrant to apprehend a perſon *ſuſpected* of felony, though the original ſuſpicion be not in himſelf, but in the party that prays his warrant; becauſe he is a competent judge of the probability offered to him of ſuch ſuſpicion. But in both caſes it it fitting to examine upon oath the party requiring a warrant, as well to aſcertain that there *is* a felony or other crime actually committed, without which no warrant ſhould be granted; as alſo to *prove* the cauſe and probability of ſuſpecting the party, againſt whom the warrant is prayed[f]. This warrant ought to be under the hand and ſeal of the juſtice, ſhould ſet forth the time and place of making, and the cauſe for which it is made,

[a] 1 Lord Raym. 65.
[b] 2 Hawk. P. C. 84.
[c] 4 Inſt. 176.
[d] 2 Hawk. P. C. 84.
[e] 2 Hal. P. C. 108.
[f] *Ibid.* 110.

and

and ſhould be directed to the conſtable, or other peace officer, requiring him to bring the party either generally before *any* juſtice of the peace for the county, or only before the juſtice who granted it; the warrant in the latter caſe being called a *ſpecial* warrant[g]. A *general* warrant to apprehend all perſons ſuſpected, without naming or particularly deſcribing any perſon in ſpecial, is illegal and void for it's uncertainty[h]; for it is the duty of the magiſtrate, and ought not to be left to the officer, to judge of the ground of ſuſpicion. And a warrant to apprehend all perſons, guilty of a crime therein ſpecified, is no legal warrant: for the point, upon which it's authority reſts, is a fact to be decided on a ſubſequent trial; namely, whether the perſon apprehended thereupon be really guilty or not. It is therefore in fact *no* warrant at all: for it will not juſtify the officer who acts under it[i]; whereas a warrant, properly penned, (even though the magiſtrate who iſſues it ſhould exceed his juriſdiction) will, by ſtatute 24 Geo. II. c. 44. at all events indemnify the officer, who executes the ſame miniſterially. And, when a warrant is received by the officer, he is bound to execute it, ſo far as the juriſdiction of the magiſtrate and himſelf extends. A warrant from the chief, or other, juſtice of the court of king's bench extends all over the kingdom: and is *teſte*'d, or dated, *England*; not Oxfordſhire, Berks, or other particular county. But the warrant of a juſtice of the peace in one county, as Yorkſhire, muſt be backed, that is, ſigned by a juſtice of the

[g] 2 Hawk. P. C. 85.

[h] 1 Hal. P. C. 580. 2 Hawk. P. C. 82.

[i] A practice had obtained in the ſecretaries office ever ſince the reſtoration, grounded on ſome clauſes in the acts for regulating the preſs, of iſſuing *general* warrants to take up (without naming any perſon in particular) the authors, printers and publiſhers of ſuch obſcene or ſeditious libels, as were particularly ſpecified in the warrant. When thoſe acts expired in 1694, the ſame practice was inadvertently continued, in every reign and under every adminiſtration, except the four laſt years of queen Anne, down to the year 1763: when ſuch a warrant being iſſued to apprehend the authors, printers and publiſhers of a certain ſeditious libel, it's validity was diſputed; and the warrant was adjudged by the whole court of king's bench to be void, in the caſe of Money *v.* Leach. *Trin. 5 Geo. III. B. R.* After which the iſſuing of ſuch general warrants was declared illegal by a vote of the houſe of commons. (Com. Journ. 22 Apr. 1766.)

peace

peace in another, as Middleſex, before it can be executed there. Formerly, regularly ſpeaking, there ought to have been a freſh warrant in every freſh county; but the practice of backing warrants had long prevailed without law, and was at laſt authorized by ſtatutes 23 Geo. II. c. 26. and 24 Geo. II. c. 55.

2. ARRESTS by *officers, without warrant*, may be executed, 1. By a juſtice of the peace; who may himſelf apprehend, or cauſe to be apprehended, by word only, any perſon committing a felony or breach of the peace in his preſence [k]. 2. The ſheriff, and 3. The coroner, may apprehend any felon within the county without warrant. 4. The conſtable, of whoſe office we formerly ſpoke [l], hath great original and inherent authority with regard to arreſts. He may, without warrant, arreſt any one for a breach of the peace, and carry him before a juſtice of the peace. And, in caſe of felony actually committed, or a dangerous wounding whereby felony is like to enſue, he may upon probable ſuſpicion arreſt the felon; and for that purpoſe is authorized (as upon a juſtice's warrant) to break open doors, and even to kill the felon if he cannot otherwiſe be taken; and, if he or his aſſiſtants be killed in attempting ſuch arreſt, it is murder in all concerned [m]. 5. Watchmen, either thoſe appointed by the ſtatute of Wincheſter, 13 Edw. I. c. 4. to keep watch and ward in all towns from ſunſetting to ſunriſing, or ſuch as are mere aſſiſtants to the conſtable, may *virtute officii* arreſt all offenders, and particularly nightwalkers, and commit them to cuſtody till the morning [n].

3. ANY private perſon (and *a fortiori* a peace officer) that is preſent when any felony is committed, is bound by the law to arreſt the felon; on pain of fine and impriſonment, if he eſcapes through the negligence of the ſtanders by [o]. And they may juſtify breaking open doors upon following ſuch felon: and if *they kill*

[k] 1 Hal. P. C. 86.
[l] See Vol. I. pag. 355.
[m] 2 Hal. P. C. 88—96.
[n] *Ibid.* 98.
[o] 2 Hawk. P. C. 74.

him, provided he cannot be otherwiſe taken, it is juſtifiable; though if *they are killed* in endeavouring to make ſuch arreſt, it is murder [p]. Upon probable ſuſpicion alſo a private perſon may arreſt the felon, or other perſon ſo ſuſpected [q], but he cannot juſtify breaking open doors to do it; and if either party kill the other in the attempt, it is manſlaughter, and no more [r]. It is no more, becauſe there is no malicious deſign to kill: but it amounts to ſo much, becauſe it would be of moſt pernicious conſequence, if, under pretence of ſuſpecting felony, any private perſon might break open a houſe, or kill another; and alſo becauſe ſuch arreſt upon ſuſpicion is barely *permitted* by the law, and not *enjoined*, as in the caſe of thoſe who are preſent when a felony is committed.

4. THERE is yet another ſpecies of arreſt, wherein both officers and private men are concerned, and that is upon an *hue* and *cry* raiſed upon a felony committed. An hue (from *huer*, to ſhout) and cry, *hutefium et clamor*, is the old common law proceſs of purſuing, with horn and with voice, all felons, and ſuch as have dangerouſly wounded another [s]. It is alſo mentioned by ſtatute Weſtm. 1. 3 Edw. I. c. 9. and 4 Edw. I. *de officio coronatoris*. But the principal ſtatute, relative to this matter, is that of Wincheſter, 13 Edw. I. c. 1 & 4. which directs, that from thenceforth every country ſhall be ſo well kept, that, immediately upon robberies and felonies committed, freſh ſuit ſhall be made from town to town, and from county to county; and that hue and cry ſhall be raiſed upon the felons, and they that keep the town ſhall follow with hue and cry, with all the town and the towns near; and ſo hue and cry ſhall be made from town to town, until they be taken and delivered to the ſheriff. And, that ſuch hue and cry may more effectually be made, the hundred is bound by the ſame ſtatute, c. 3. to anſwer for all robberies therein committed, unleſs they take the felon; which is the foundation of an action againſt the hun-

[p] 2 Hal. P. C. 77.
[q] Stat. 30 Geo. II. c. 24.
[r] 2 Hal. P. C. 82, 83.
[s] Bracton. *l.* 3. *tr.* 2. *c.* 1. §. 1. Mirr. c. 2. §. 6.

hundred[t], in caſe of any loſs by robbery. By ſtatute 27 Eliz. c. 13. no hue and cry is ſufficient, unleſs made with both horſemen and footmen. And by ſtatute 8 Geo. II. c. 16. the conſtable or like officer refuſing or neglecting to make hue and cry, forfeits 5 *l.*: and the whole vill or diſtrict is ſtill in ſtrictneſs liable to be amerced, according to the law of Alfred, if any felony be committed therein and the felon eſcapes. An inſtitution, which hath long prevailed in many of the eaſtern countries, and hath in part been introduced even into the Mogul empire, about the beginning of the laſt century; which is ſaid to have effectually delivered that vaſt territory from the plague of robbers, by making in ſome places the villages, in others the officers of juſtice, reſponſible for all the robberies committed within their reſpective diſtricts[u]. Hue and cry[w] may be raiſed either by precept of a juſtice of the peace, or by a peace officer, or by any private man that knows of a felony. The party raiſing it muſt acquaint the conſtable of the vill with all the circumſtances which he knows of the felony, and the perſon of the felon; and thereupon the conſtable is to ſearch his own town, and raiſe all the neighbouring vills, and make purſuit with horſe and foot: and in the proſecution of ſuch hue and cry, the conſtable and his attendants have the ſame powers, protection, and indemnification, as if acting under the warrant of a juſtice of the peace. But if a man wantonly or maliciouſly raiſes a hue and cry, without cauſe, he ſhall be ſeverely puniſhed as a diſturber of the public peace[x].

IN order to encourage farther the apprehending of certain felons, rewards and immunities are beſtowed on ſuch as bring them to juſtice, by divers acts of parliament. The ſtatute 4 & 5 W. & M. c. 8. enacts, that ſuch as apprehend a highwayman, and proſecute him to conviction, ſhall receive a reward of 40 *l.* from the public; to be paid to them (or, if killed

[t] See Vol. III. pag. 160.
[u] Mod. Un. Hiſt. vi. 383. vii. 156.
[w] 2 Hal. P. C. 100—104.
[x] 1 Hawk. P. C. 75.

in the endeavour to take him, their executors) by the ſheriff of the county: to which the ſtatute 8 Geo. II. c. 16. ſuperadds 10 *l.* to be paid by the hundred indemnified by ſuch taking. By ſtatute 10 & 11 W. III. c. 23. any perſon apprehending and proſecuting to conviction a felon guilty of burglary or private larciny to the value of 5*s.* from any ſhop, warehouſe, coachhouſe, or ſtable, ſhall be excuſed from all pariſh offices. And by ſtatute 5 Ann. c. 31. any perſon ſo apprehending and proſecuting a burglar, or felonious houſebreaker, (or, if killed in the attempt, his executors) ſhall be entitled to a reward of 40 *l.*

CHAPTER THE TWENTY SECOND.

OF COMMITMENT AND BAIL.

WHEN a delinquent is arreſted by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a juſtice of the peace. And how he is there to be treated, I ſhall next ſhew, under the ſecond head, of *commitment* and *bail*.

THE juſtice, before whom ſuch priſoner is brought, is bound immediately to examine the circumſtances of the crime alleged: and to this end by ſtatute 2 & 3 Ph. & M. c. 10. he is to take in writing the examination of ſuch priſoner, and the information of thoſe who bring him: which, Mr. Lambard obſerves [a], was the firſt warrant given for the examination of a felon in the Engliſh law. For, at the common law, *nemo tenebatur prodere ſeipſum*; and his fault was not to be wrung out of himſelf, but rather to be diſcovered by other means, and other men. If upon this enquiry it manifeſtly appears, either that no ſuch crime was committed, or that the ſuſpicion entertained of the priſoner was wholly groundleſs, in ſuch caſes only it is lawful totally to diſcharge him. Otherwiſe he muſt either be committed to priſon, or give bail; that is, put in ſecurities for his appearance, to anſwer

[a] *Eirenarch.* b. 2. c. 7.

the

the charge againſt him. This commitment therefore being only for ſafe cuſtody, wherever bail will anſwer the ſame intention, it ought to be taken; as in moſt of the inferior crimes: but in felonies, and other offences of a capital nature, no bail can be a ſecurity equivalent to the actual cuſtody of the perſon. For what is there that a man may not be induced to forfeit, to ſave his own life? and what ſatisfaction or indemnity is it to the public, to ſeize the effects of them who have bailed a murderer, if the murderer himſelf be ſuffered to eſcape with impunity? Upon a principle ſimilar to which, the Athenian magiſtrates, when they took a ſolemn oath, never to keep a citizen in bonds that could give three ſureties of the ſame quality with himſelf, did it with an exception to ſuch as had embezzled the public money, or been guilty of treaſonable practices [b]. What the nature of bail is, hath been ſhewn in the preceding book [c]; *viz.* a delivery, or bailment, of a perſon to his ſureties, upon their giving (together with himſelf) ſufficient ſecurity for his appearance: he being ſuppoſed to continue in their friendly cuſtody, inſtead of going to gaol. In civil caſes we have ſeen that every defendant is bailable; but in criminal matters it is otherwiſe. Let us therefore enquire, in what caſes the party accuſed ought, or ought not, to be admitted to bail.

AND, firſt, to refuſe or delay to bail any perſon bailable, is an offence againſt the liberty of the ſubject, in any magiſtrate, by the common law [d]; as well as by the ſtatute Weſtm. 1. 3 Edw. I. c. 15. and the *habeas corpus* act, 31 Car. II. c. 2. And leſt the intention of the law ſhould be fruſtrated by the juſtices requiring bail to a greater amount than the nature of the caſe demands, it is expreſſly declared by ſtatute 1 W. & M. ſt. 2. c. 1. that exceſſive bail ought not to be required: though what bail ſhall be called exceſſive, muſt be left to the courts, on conſidering the circumſtances of the caſe, to determine. And on the other hand, if the magiſtrate takes inſufficient bail, he is liable

[b] Pott. Antiq. b. 1. c. 18.
[c] See Vol. III. pag. 290.
[d] 2 Hawk. P. C. 90.

to

to be fined, if the criminal doth not appear [e]. Bail may be taken either in court, or in ſome particular caſes by the ſheriff, coroner, or other magiſtrate; but moſt uſually by the juſtices of the peace. Regularly, in all offences either againſt the common law or act of parliament, that are below felony, the offender ought to be admitted to bail, unleſs it be prohibited by ſome ſpecial act of parliament [f]. In order therefore more preciſely to aſcertain what offences *are* bailable,

LET us next ſee, who may *not* be admitted to bail, or, what offences are *not* bailable. And here I ſhall not conſider any one of thoſe caſes in which bail is ouſted by ſtatute, from priſoners *convicted* of particular offences; for then ſuch impriſonment without bail is part of their ſentence and puniſhment. But, where the impriſonment is only for ſafe cuſtody *before* the conviction, and not for puniſhment *afterwards*, in ſuch caſes bail is ouſted or taken away, wherever the offence is of a very enormous nature: for then the public is entitled to demand nothing leſs than the higheſt ſecurity that can be given; *viz.* the body of the accuſed, in order to enſure that juſtice ſhall be done upon him, if guilty. Such perſons therefore, as the author of the mirror obſerves [g], have no other ſureties but the four walls of the priſon. By the antient common law, before [h] and ſince [i] the conqueſt, all felonies were bailable, till murder was excepted by ſtatute: ſo that perſons might be admitted to bail before conviction almoſt in every caſe. But the ſtatute Weſtm. 1. 3 Edw. I. c. 15. takes away the power of bailing in treaſon, and in divers inſtances of felony. The ſtatute 1 & 2 Ph. & Mar. c. 13. gives farther regulations in this matter: and upon the whole we may collect [k], that no juſtices of the peace can bail, 1. Upon an accuſation of treaſon: nor, 2. Of murder: nor,

[e] 2 Hawk. P. C. 89.
[f] 2 Hal. P. C. 127.
[g] c. 2. §. 24.
[h] 2 Inſt. 189.
[i] *In omnibus placitis de felonia ſolet accuſatus per plegios dimitti, praeterquam in placito de homicidio, ubi ad terrorem aliter ſtatutum eſt.* (Glanv. *l.* 14. *c.* 1.)
[k] 2 Inſt. 186. 2 Hal. P. C. 129.

3. In

3. In caſe of manſlaughter, if the priſoner be clearly the ſlayer, and not barely ſuſpected to be ſo; or if any indictment be found againſt him: nor, 4. Such as, being committed for felony, have broken priſon; becauſe it not only carries a preſumption of guilt, but is alſo ſuperadding one felony to another: 5. Perſons outlawed: 6. Such as have abjured the realm: 7. Approvers, of whom we ſhall ſpeak in a ſubſequent chapter, and perſons by them accuſed: 8. Perſons taken with the mainour, or in the fact of felony: 9. Perſons charged with arſon: 10. Excommunicated perſons, taken by writ *de excommunicato capiendo:* all which are clearly not admiſſible to bail. Others are of a dubious nature, as, 11. Thieves openly defamed and known: 12. Perſons charged with other felonies, or manifeſt and enormous offences, not being of good fame: and 13. Acceſſories to felony, that labour under the ſame want of reputation. Theſe ſeem to be in the diſcretion of the juſtices, whether bailable or not. The laſt claſs are ſuch as *muſt* be bailed upon offering ſufficient ſurety; as, 14. Perſons of good fame, charged with a bare ſuſpicion of manſlaughter, or other inferior homicide: 15. Such perſons, being charged with petit larciny or any felony, not before ſpecified: or, 16. With being acceſſory to any felony. Laſtly, it is agreed that the court of king's bench (or any judge thereof in time of vacation) may bail for any crime whatſoever, be it treaſon [1], murder, or any other offence, according to the circumſtances of the caſe. And herein the wiſdom of the law is very manifeſt. To allow bail to be taken commonly for ſuch enormous crimes, would greatly tend to elude the public juſtice: and yet there are caſes, though they rarely happen, in which it would be hard and unjuſt to confine a man in priſon, though accuſed even of the greateſt offence. The law has therefore provided one court, and only one, which has a diſcretionary power of bailing in any caſe: except only, even to this high juriſdiction, and of courſe to all inferior ones, ſuch perſons as

[1] In the reign of queen Elizabeth it was the unanimous opinion of the judges, that no court could bail upon a commitment, for a charge of high treaſon, by any of the queen's privy council. (1 Anderſ. 298.)

are

are committed by either houſe of parliament, ſo long as the ſeſſion laſts; or ſuch as are committed for contempts by any of the king's ſuperior courts of juſtice.

UPON the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the juſtice, or warrant under his hand and ſeal, containing the cauſe of his commitment; there to abide till delivered by due courſe of law [m]. But this impriſonment, as has been ſaid, is only for ſafe cuſtody, and not for puniſhment: therefore, in this dubious interval between the commitment and trial, a priſoner ought to be uſed with the utmoſt humanity; and neither be loaded with needleſs fetters, or ſubjected to other hardſhips than ſuch as are abſolutely requiſite for the purpoſe of confinement only: though, what are ſo requiſite, muſt too often be left to the diſcretion of the gaolers; who are frequently a mercileſs race of men, and, by being converſant in ſcenes of miſery, ſteeled againſt any tender ſenſation. Yet the law will not juſtify them in fettering a priſoner, unleſs where he is unruly, or has attempted an eſcape [n]: this being the humane language of our antient lawgivers [o], "*cuſtodes poenam ſibi commiſſorum non augeant, nec eos torqueant; ſed omni ſaevitia remota, pietateque adhibita, judicia debite exequantur.*"

[m] 2 Hal. P. C. 122.
[n] 2 Inſt. 381. 3 Inſt. 34.
[o] Flet. *l.* 1. *c.* 26.

CHAPTER THE TWENTY THIRD.

OF THE SEVERAL MODES OF PROSECUTION.

THE next ſtep towards the puniſhment of offenders is their proſecution, or the manner of their formal accuſation. And this is either upon a previous finding of the fact by an inqueſt or grand jury; or without ſuch previous finding. The former way is either by *preſentment*, or *indictment*.

I. A preſentment, *generally* taken, is a very comprehenſive term; including not only preſentments properly ſo called, but alſo inquiſitions of office, and indictments by a grand jury. A preſentment, *properly* ſpeaking, is the notice taken by a grand jury of any offence from their own knowlege or obſervation [a], without any bill of indictment laid before them at the ſuit of the king. As, the preſentment of a nuſance, a libel, and the like; upon which the officer of the court muſt afterwards frame an indictment, before the party preſented as the author can be put to anſwer it. An inquiſition of office is the act of a jury, ſummoned by the proper officer to enquire of matters relating to the crown, upon evidence laid before them. Some of theſe are in themſelves convictions, and cannot afterwards be traverſed or denied; and therefore the inqueſt, or jury, ought to hear all

[a] Lamb. *Eirenarch.* *l.* 4. *c.* 5.

that

that can be alleged on both ſides. Of this nature are all inquiſitions of *ſelo de ſe*; of flight in perſons accuſed of felony; of deodands, and the like; and preſentments of petty offences in the ſheriff's tourn or court-leet, whereupon the preſiding officer may ſet a fine. Other inquiſitions may be afterwards traverſed and examined; as particularly the coroner's inquiſition of the death of a man, when it finds any one guilty of homicide: for in ſuch caſes the offender ſo preſented muſt be arraigned upon this inquiſition, and may diſpute the truth of it; which brings it to a kind of indictment, the moſt uſual and effectual means of proſecution, and into which we will therefore enquire a little more minutely.

II. AN *indictment*[b] is a written accuſation of one or more perſons of a crime or miſdemeſnor, preferred to, and preſented upon oath by, a grand jury. To this end the ſheriff of every county is bound to return to every ſeſſion of the peace, and every commiſſion of *oyer* and *terminer*, and of general gaol delivery, twenty four good and lawful men of the county, ſome out of every hundred, to enquire, preſent, do, and execute all thoſe things, which on the part of our lord the king ſhall then and there be commanded them[c]. They ought to be freeholders, but to what amount is uncertain[d]: which ſeems to be *caſus omiſſus*, and as proper to be ſupplied by the legiſlature as the qualifications of the petit jury; which were formerly equally vague and uncertain, but are now ſettled by ſeveral acts of parliament. However, they are uſually gentlemen of the beſt figure in the county. As many as appear upon this panel, are ſworn upon the grand jury, to the amount of twelve at the leaſt, and not more than twenty three; that twelve may be a majority. Which number, as well as the conſtitution itſelf, we find exactly deſcribed, ſo early as the laws of king Ethelred[e]. "*Exeant* "*ſeniores duodecim thani, et praefectus cum eis, et jurent ſuper* "*ſanctuarium quod eis in manus datur, quod nolint ullum innocentem*

[b] See appendix. §. 1.
[c] 2 Hal. P. C. 154.
[d] *Ibid.* 155.
[e] Wilk. *LL. Angl. Sax.* 117.

"*accuſare, nec aliquem noxium celare*". In the time of king Richard the firſt (according to Hoveden) the proceſs of electing the grand jury, ordained by that prince, was as follows: four knights were to be taken from the county at large, who choſe two more out of every hundred; which two aſſociated to themſelves ten other principal freemen, and thoſe twelve were to anſwer concerning all particulars relating to their own diſtrict. This number was probably found too large and inconvenient; but the traces of this inſtitution ſtill remain, in that ſome of the jury muſt be ſummoned out of every hundred. This grand jury are previouſly inſtructed in the articles of their enquiry, by a charge from the judge who preſides upon the bench. They then withdraw, to ſit and receive indictments, which are preferred to them in the name of the king, but at the ſuit of any private proſecutor; and they are only to hear evidence on behalf of the proſecution: for the finding of an indictment is only in the nature of an enquiry or accuſation, which is afterwards to be tried and determined; and the grand jury are only to enquire upon their oaths, whether there be ſufficient cauſe to call upon the party to anſwer it. A grand jury however ought to be thoroughly perſuaded of the truth of an indictment, ſo far as their evidence goes; and not to reſt ſatisfied merely with remote probabilities: a doctrine, that might be applied to very oppreſſive purpoſes[f].

THE grand jury are ſworn to enquire, only for the body of the county, *pro corpore comitatus*; and therefore they cannot regularly enquire of a fact done out of that county for which they are ſworn, unleſs particularly enabled by act of parliament. And to ſo high a nicety was this matter antiently carried, that where a man was wounded in one county, and died in another, the offender was at common law indictable in neither, becauſe no complete act of felony was done in any one of them: but by ſtatute 2 & 3 Edw. VI. c. 24. he is now indictable in the county where the party died. And ſo in ſome other caſes: as particularly,

[f] State Trials. IV. 183.

larly, where treaſon is committed out of the realm, it may be enquired of in any county within the realm, as the king ſhall direct, in purſuance of ſtatutes 26 Hen. VIII. c. 13. 35 Hen. VIII. c. 2. and 5 & 6 Edw. VI. c. 11. But, in general, all offences muſt be enquired into as well as tried in the county where the fact is committed.

WHEN the grand jury have heard the evidence, if they think it a groundleſs accuſation, they uſed formerly to endorſe on the back of the bill, "*ignoramus*;" or, we know nothing of it; intimating, that though the facts might poſſibly be true, that truth did not appear to them: but now, they aſſert in Engliſh, more abſolutely, "not a true bill;" and then the party is diſcharged without farther anſwer. But a freſh bill may afterwards be preferred to a ſubſequent grand jury. If they are ſatisfied of the truth of the accuſation, they then endorſe upon it, "a "true bill;" antiently, "*billa vera*." The indictment is then ſaid to be found, and the party ſtands indicted. But, to find a bill, there muſt at leaſt twelve of the jury agree: for ſo tender is the law of England of the lives of the ſubjects, that no man can be convicted at the ſuit of the king of any capital offence, unleſs by the unanimous voice of twenty four of his equals and neighbours: that is, by twelve at leaſt of the grand jury, in the firſt place, aſſenting to the accuſation; and afterwards, by the whole petit jury, of twelve more, finding him guilty upon his trial. But, if twelve of the grand jury aſſent, it is a good preſentment, though ſome of the reſt diſagree [g]. And the indictment, when ſo found, is publicly delivered into court.

INDICTMENTS muſt have a preciſe and ſufficient certainty. By ſtatute 1 Hen. V. c. 5. all indictments muſt ſet forth the chriſtian name, ſirname, and addition of the ſtate and degree, myſtery, town, or place, and the county of the offender: and all this to identify his *perſon*. The *time*, and *place*, are alſo to be aſcertained, by naming the day, and townſhip, in which the fact was committed: though a miſtake in theſe points is in general

[g] 2 Hal. P. C. 161.

not

not held to be material, provided the *time* be laid previous to the finding of the indictment, and the *place* to be within the jurisdiction of the court. But sometimes the *time* may be very material, where there is any limitation in point of time assigned for the prosecution of offenders; as by the statute 7 Will. III. c. 3. which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned (except an assassination designed or attempted on the person of the king) unless the bill of indictment be found within three years after the offence committed [h]: and, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The *offence* itself must also be set forth with clearness and certainty: and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done, "treasonably, and against his allegiance;" antiently "*proditorie* "*et contra ligeantiae suae debitum:*" else the indictment is void. In indictments for murder, it is necessary to say that the party indicted "murdered," not "killed" or "slew," the other; which till the late statute was expressed in Latin by the word "*murdra-* "*vit* [i]." In all indictments for felonies, the adverb "feloniously, "*felonice*," must be used; and for burglaries also, "*burglariter*," or in English, "burglariously:" and all these to ascertain the intent. In rapes, the word "*rapuit*," or "ravished," is necessary, and must not be expressed by any periphrasis; in order to render the crime certain. So in larcinies also, the words "*felo-* "*nice cepit et asportavit*, feloniously took and carried away," are necessary to every indictment; for these only can express the very offence. Also in indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature: but if it goes through the body, then it's dimensions are immaterial, for that is apparently sufficient to have been the cause of

[h] Foft. 249. [i] See Vol. III. pag. 321.

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the death. Alſo where a limb, or the like, is abſolutely cut off, there ſuch deſcription is impoſſible[k]. Laſtly, in indictments the *value* of the thing, which is the ſubject or inſtrument of the offence, muſt ſometimes be expreſſed. In indictments for larcinies this is neceſſary, that it may appear whether it be grand or petit larciny; and whether entitled or not to the benefit of clergy: in homicide of all ſorts it is neceſſary; as the weapon, with which it is committed, is forfeited to the king as a deodand.

THE remaining methods of proſecution are without any previous finding by a jury, to fix the authoritative ſtamp of veriſimilitude upon the accuſation. One of theſe, by the common law, was when a thief was taken *with the mainour*, that is, with the thing ſtolen upon him, *in manu*. For he might, when ſo detected *flagrante delicto*, be brought into court, arraigned, and tried, without indictment: as by the Daniſh law he might be taken and hanged upon the ſpot, without accuſation or trial[l]. But this proceeding was taken away by ſeveral ſtatutes in the reign of Edward the third[m]: though in Scotland a ſimilar proceſs remains to this day[n]. So that the only ſpecies of proceeding at the ſuit of the king, without a previous indictment or preſentment by a grand jury, now ſeems to be that of *information*.

III. INFORMATIONS are of two ſorts; firſt, thoſe which are partly at the ſuit of the king, and partly at that of a ſubject; and ſecondly, ſuch as are only in the name of the king. The former are uſually brought upon penal ſtatutes, which inflict a penalty upon conviction of the offender, one part to the uſe of the king, and another to the uſe of the informer; and are a ſort of *qui tam* actions, (the nature of which was explained in a former volume[o]) only carried on by a criminal inſtead of a civil proceſs: upon which I ſhall therefore only obſerve, that

[k] 5 Rep. 122.
[l] Stiernh. *de jure Sueon. l.* 3 *c.* 5.
[m] 2 Hal. P. C. 149.
[n] Lord Kayms. I. 331.
[o] See Vol. III. pag. 160.

by

by the ſtatute 31 Eliz. c. 5. no proſecution upon any penal ſtatute, the ſuit and benefit whereof are limited in part to the king and in part to the proſecutor, can be brought by any common informer after one year is expired ſince the commiſſion of the offence; nor on behalf of the crown after the lapſe of two years longer; nor, where the forfeiture is originally given only to the king, can ſuch proſecution be had after the expiration of two years from the commiſſion of the offence.

THE informations, that are exhibited in the name of the king alone, are alſo of two kinds: firſt, thoſe which are truly and properly his own ſuits, and filed *ex officio* by his own immediate officer, the attorney general: ſecondly, thoſe in which, though the king is the nominal proſecutor, yet it is at the relation of ſome private perſon or common informer; and they are filed by the king's coroner and attorney in the court of king's bench, uſually called the maſter of the crown-office, who is for this purpoſe the ſtanding officer of the public. The objects of the king's own proſecutions, filed *ex officio* by his own attorney general, are properly ſuch enormous miſdemeſnors, as peculiarly tend to diſturb or endanger his government, or to moleſt or affront him in the regular diſcharge of his royal functions. For offences ſo high and dangerous, in the puniſhment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate proſecution, without waiting for any previous application to any other tribunal. A power ſo neceſſary, not only to the eaſe and ſafety but even to the very exiſtence of the executive magiſtrate, was originally reſerved in the great plan of the Engliſh conſtitution, which has wiſely provided for the due preſervation of all it's parts. The objects of the other ſpecies of informations, filed by the maſter of the crown-office upon the complaint or relation of a private ſubject, are any groſs and notorious miſdemeſnors, riots, batteries, libels, and other immoralities of an atrocious kind[p], not peculiarly tending to diſturb

[p] 2 Hawk. P. C. 260.

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the government (for thoſe are left to the care of the attorney general) but which, on account of their magnitude or pernicious example, deſerve the moſt public animadverſion. And when an information is filed, either thus, or by the attorney general *ex officio*, it muſt be tried by a petit jury of the county where the offence ariſes: after which, if the defendant be found guilty, he muſt reſort to the court for his puniſhment.

THERE can be no doubt but that this mode of proſecution, by information (or ſuggeſtion) filed on record by the king's attorney general, or by his coroner or maſter of the crown-office in the court of king's bench, is as antient as the common law itſelf[q]. For as the king was bound to proſecute, or at leaſt to lend the ſanction of his name to a proſecutor, whenever a grand jury informed him upon their oaths that there was a ſufficient ground for inſtituting a criminal ſuit; ſo, when theſe his immediate officers were otherwiſe ſufficiently aſſured that a man had committed a groſs miſdemeſnor, either perſonally againſt the king or his government, or againſt the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that information to the court of king's bench by a ſuggeſtion on record, and to carry on the proſecution in his majeſty's name. But theſe informations (of every kind) are confined by the conſtitutional law to mere miſdemeſnors only: for, wherever any capital offence is charged, the ſame law requires that the accuſation be warranted by the oath of twelve men, before the party ſhall be put to anſwer it. And, as to thoſe offences, in which informations were allowed as well as indictments, ſo long as they were confined to this high and reſpectable juriſdiction, and were carried on in a legal and regular courſe in his majeſty's court of king's bench, the ſubject had no reaſon to complain. The ſame notice was given, the ſame proceſs was iſſued, the ſame pleas were allowed, the ſame trial by jury was had, the ſame judgment was given by the ſame judges, as if the proſecution had originally been by indictment. But

[q] 1 Show. 118.

when the ſtatute 3 Hen. VII. c. 1. had extended the juriſdiction of the court of ſtar-chamber, the members of which were the ſole judges of the law, the fact, and the penalty; and when the ſtatute 11 Hen. VII. c. 3. had permitted informations to be brought by any informer upon any penal ſtatute, not extending to life or member, at the aſſiſes or before the juſtices of the peace, who were to hear and determine the ſame according to their own diſcretion; then it was, that the legal and orderly juriſdiction of the court of king's bench fell into diſuſe and oblivion, and Empſon and Dudley (the wicked inſtruments of king Henry VII) by hunting out obſolete penalties, and this tyrannical mode of proſecution, with other oppreſſive devices[r], continually haraſſed the ſubject and ſhamefully inriched the crown. The latter of theſe acts was ſoon indeed repealed by ſtatute 1 Hen. VIII. c. 6. but the court of ſtar-chamber continued in high vigour, and daily increaſing it's authority, for more than a century longer; till finally aboliſhed by ſtatute 16 Car. I. c. 10.

UPON this diſſolution the old common law[s] authority of the court of king's bench, as the *cuſtos morum* of the nation, being found neceſſary to reſide ſomewhere for the peace and good government of the kingdom, was again revived in practice[t]. And it is obſervable, that, in the ſame act of parliament which aboliſhed the court of ſtar-chamber, a conviction by information is expreſſly reckoned up, as one of the legal modes of conviction of ſuch perſons, as ſhould offend a third time againſt the proviſions of that ſtatute[u]. It is true, ſir Matthew Hale, who preſided in this court ſoon after the time of ſuch revival, is ſaid[w] to have been no friend to this method of proſecution: and, if ſo, the reaſon of ſuch his diſlike was probably the ill uſe, which the maſter of the crown-office then made of his authority, by permitting the ſubject to be harraſſed with vexatious informations,

[r] 1 And. 157.
[s] 5 Mod. 464.
[t] Styl. Rep. 217. 245. Styl. pract. Reg. *tit.* Information. pag. 187. (edit. 1657.) 2 Sid. 71. 1 Sid. 152.
[u] Stat. 16 Car. I. c. 10. §. 6.
[w] 5 Mod. 460.

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whenever applied to by any malicious or revengeful profecutor; rather than his doubt of their legality, or propriety upon urgent occafions[x]. For the power of filing informations, without any control, then refided in the breaft of the maſter: and, being filed in the name of the king, they ſubjected the profecutor to no coſts, though on trial they proved to be groundleſs. This oppreſſive uſe of them, in the times preceding the revolution, occaſioned a ſtruggle, ſoon after the acceſſion of king William[y], to procure a declaration of their illegality by the judgment of the court of king's bench. But ſir John Holt, who then preſided there, and all the judges, were clearly of opinion, that this proceeding was grounded on the common law, and could not be then impeached. And, in a few years afterwards, a more temperate remedy was applied in parliament, by ſtatute 4 & 5 W. & M. c. 18. which enacts, that the clerk of the crown ſhall not file any information without expreſs direction from the court of king's bench: and that every profecutor, permitted to promote ſuch information, ſhall give ſecurity by a recognizance of twenty pounds (which now ſeems to be too ſmall a ſum) to profecute the ſame with effect; and to pay coſts to the defendant, in caſe he be acquitted thereon, unleſs the judge, who tries the information, ſhall certify there was reaſonable cauſe for filing it; and, at all events, to pay coſts, unleſs the information ſhall be tried within a year after iſſue joined. But there is a proviſo in this act, that it ſhall not extend to any other informations, than thoſe which are exhibited by the maſter of the crown-office: and, conſequently, informations at the king's own ſuit, filed by his attorney general, are no way reſtrained thereby.

THERE is one ſpecies of informations, ſtill farther regulated by ſtatute 9 Ann. c. 20. *viz.* thoſe in the nature of a writ of *quo warranto*; which was ſhewn, in the preceding volume[z], to be a remedy given to the crown againſt ſuch as had uſurped or intruded into any office or franchiſe. The modern information

[x] 1 Saund. 301. 1 Sid. 174. Farr. 361. 1 Show. 106.
[y] M. 1 W. & M. 5 Mod. 459. Comb. 141. [z] See Vol. III. pag. 262.

tends to the ſame purpoſe as the antient writ, being generally made uſe of to try the civil rights of ſuch franchiſes; though it is commenced in the ſame manner as other informations are, by leave of the court, or at the will of the attorney-general: being properly a criminal proſecution, in order to fine the defendant for his uſurpation, as well as to ouſt him from his office; yet uſually conſidered at preſent as merely a civil proceeding.

THESE are all the methods of proſecution at the ſuit of the king. There yet remains another, which is merely at the ſuit of the ſubject, and is called an *appeal*.

IV. AN appeal, in the ſenſe wherein it is here uſed, does not ſignify any complaint to a ſuperior court of an injuſtice done by an inferior one, which is the general uſe of the word; but it here means an original ſuit, at the time of it's firſt commencement [a]. An appeal therefore, when ſpoken of as a criminal proſecution, denotes an accuſation by a private ſubject againſt another, for ſome heinous crime; demanding puniſhment on account of the particular injury ſuffered, rather than for the offence againſt the public. As this method of proſecution is ſtill in force, I cannot omit to mention it: but, as it is very little in uſe, on account of the great nicety required in conducting it, I ſhall treat of it very briefly; referring the ſtudent for more particulars to other voluminous compilations [b].

THIS private proceſs, for the puniſhment of public crimes, had probably it's original in thoſe times, when a private pecuniary ſatisfaction, called a *weregild*, was conſtantly paid to the party injured, or his relations, to expiate enormous offences. This was a cuſtom derived to us, in common with other northern nations [c], from our anceſtors, the antient Germans; among

[a] It is derived from the French, "*appeller*," the verb active, which ſignifies to call upon, ſummon, or challenge one; and not the verb neuter, which ſignifies the ſame as the ordinary ſenſe of "appeal" in Engliſh.

[b] 2 Hawk. P. C. ch. 23.

[c] Stiernh. *de jure Sueon. l.* 3. *c.* 4.

whom

whom according to Tacitus[d], "*luitur homicidium certo armento-*
"*rum ac pecorum numero; recipitque ſatisfactionem univerſa do-*
"*mus*[e]." In the ſame manner by the Iriſh Brehon law, in caſe of murder, the Brehon or judge was uſed to compound between the murderer, and the friends of the deceaſed who proſecuted him, by cauſing the malefactor to give unto them, or to the child or wife of him that was ſlain, a recompenſe which they called an *eriach*[f]. And thus we find in our Saxon laws (particularly thoſe of king Athelſtan[g]) the ſeveral weregilds for homicide eſtabliſhed in progreſſive order, from the death of the ceorl or peaſant, up to that of the king himſelf[h]. And in the laws of king Henry I[i], we have an account of what other offences were then redeemable by weregild, and what were not ſo[k]. As therefore, during the continuance of this cuſtom, a proceſs was certainly given, for recovering the weregild by the party to whom it was due; it ſeems that, when theſe offences by degrees grew no longer redeemable, the private proceſs was ſtill continued, in order to inſure the infliction of puniſhment upon the offender, though the party injured was allowed no pecuniary compenſation for the offence.

BUT, though appeals were thus in the nature of proſecutions for ſome atrocious injury committed more immediately againſt an individual, yet it alſo was antiently permitted, that any ſub-

[d] *de M. G. c.* 21.

[e] And in another place, (*c.* 12.) "*De-*
"*lictis, pro modo poenarum, equorum pecorum-*
"*que numero convicti mulctantur. Pars mulctae*
"*regi vel civitati; pars ipſi qui vindicatur,*
"*vel propinquis ejus, exſolvitur.*"

[f] Spenſer's ſtate of Ireland, pag. 1513. *edit.* Hughes.

[g] *Judic. Civit. Lund.* Wilk. 71.

[h] The weregild of a ceorl was 266 thrymſas, that of the king 30000; each thrymſa being equal to about a ſhilling of our preſent money. The weregild of a ſubject was paid entirely to the relations of the party ſlain: but that of the king was divided; one half being paid to the public, the other to the royal family.

[i] c. 12.

[k] In Turkey this principle is ſtill carried ſo far, that even murder is never proſecuted by the officers of the government, as with us. It is the buſineſs of the next relations, and them only, to revenge the ſlaughter of their kinſmen; and if they rather chooſe (as they generally do) to compound the matter for money, nothing more is ſaid about it. (Lady M. W. Montague. lett. 42.)

ject might appeal another ſubject of high-treaſon, either in the courts of common law[l], or in parliament, or (for treaſons committed beyond the ſeas) in the court of the high conſtable and marſhal. The cognizance of appeals in the latter ſtill continues in force; and ſo late as 1631 there was a trial by battel awarded in the court of chivalry, on ſuch an appeal of treaſon[m]: but the firſt was *virtually* aboliſhed[n] by the ſtatutes 5 Edw. III. c. 9. and 25 Edw. III. c. 24. and the ſecond *expreſſly* by ſtatute 1 Hen. IV. c. 14. So that the only appeals now in force, for things done within the realm, are appeals of felony and mayhem.

AN appeal of *felony* may be brought for crimes committed either againſt the parties themſelves, or their relations. The crimes againſt the parties themſelves are *larciny*, *rape*, and *arſon*. And for theſe, as well as for *mayhem*, the perſons robbed, raviſhed, maimed, or whoſe houſes are burnt, may inſtitute this private proceſs. The only crime againſt one's relation, for which an appeal can be brought, is that of *killing* him, by either murder or manſlaughter. But this cannot be brought by every relation: but only by the wife for the death of her huſband, or by the heir male for the death of his anceſtor; which heirſhip was alſo confined, by an ordinance of king Henry the firſt, to the four neareſt degrees of blood[o]. It is given to the wife, on account of the loſs of her huſband: therefore, if ſhe marries again, before or pending her appeal, it is loſt and gone; or, if ſhe marries after judgment, ſhe ſhall not demand execution. The heir, as was ſaid, muſt alſo be heir male, and ſuch a one as was the next heir by the courſe of the common law, at the time of the killing of the anceſtor. But this rule has three exceptions: 1. If the perſon killed leaves an innocent wife, ſhe only, and not the heir, ſhall have the appeal: 2. If there be no wife, and the heir be accuſed of the murder, the perſon, who next to him would have been heir male, ſhall bring the appeal: 3. If the

[l] Britt. c. 22.

[m] By Donald lord Rea againſt David Ramſey. (Ruſhw. vol. 2. part. 2. pag. 112.)

[n] 1 Hal. P. C. 349.

[o] Mirr. c. 2. § 7.

wife

wife kills her huſband, the heir may appeal her of the death. And, by the ſtatute of Glouceſter, 6 Edw. I. c. 9. all appeals of death muſt be ſued within a year and a day after the completion of the felony by the death of the party: which ſeems to be only declaratory of the old common law; for in the Gothic conſtitutions we find the ſame "*praeſcriptio annalis, quae currit "adverſus actorem, ſi de homicida ei non conſtat intra annum a caede "facta, nec quenquam interea arguat et accuſet*[p]."

THESE appeals may be brought, previous to any indictment; and, if the appellee be acquitted thereon, he cannot be afterwards indicted for the ſame offence. In like manner as by the old Gothic conſtitution, if any offender gained a verdict in his favour, when proſecuted by the party injured, he was alſo underſtood to be acquitted of any crown proſecution for the ſame offence[q]: but, on the contrary, if he made his peace with the king, ſtill he might be proſecuted at the ſuit of the party. And ſo, with us, if a man be acquitted on an indictment of murder, or found guilty, and pardoned by the king, ſtill he may, by virtue of ſtatute 3 Hen. VII. c. 1. be proſecuted by appeal for the ſame felony, not having as yet been puniſhed for it: though, if he hath been found guilty of manſlaughter on an indictment, and hath had the benefit of clergy, and ſuffered the judgment of the law, he cannot afterwards be appealed. For it is a maxim of law, that "*nemo bis punitur pro eodem delicto.*"

IF the appellee be found guilty, he ſhall ſuffer the ſame judgment, as if he had been convicted by indictment: but with this remarkable difference; that on an indictment, which is at the ſuit of the king, the king may pardon and remit the execution; on an appeal, which is at the ſuit of a private ſubject, to make an atonement for the private wrong, the king can no more pardon it, than he can remit the damages recovered on an action of battery[r]. In like manner as, while the weregild continued to

[p] Stiernh. *de jure Goth. l.* 3. *c.* 4.
[q] *Ibid. l.* 1. *c.* 5.
[r] 2 Hawk. P. C. 392.

be

be paid as a fine for homicide, it could not be remitted by the king's authority [s]. And the antient uſage was, ſo late as Henry the fourth's time, that all the relations of the ſlain ſhould drag the appellee to the place of execution [t]: a cuſtom, founded upon that ſavage ſpirit of family reſentment, which prevailed univerſally through Europe, after the r ruption of the northern nations, and is peculiarly attended to in their ſeveral codes of law; and which prevails even now among the wild and untutored inhabitants of America: as if the finger of nature had pointed it out to mankind, in their rude and uncultivated ſtate [v]. However, the puniſhment of the offender may be remitted and diſcharged by the concurrence of all parties intereſted; and as the king by his pardon may fruſtrate an indictment, ſo the appellant by his releaſe may diſcharge an appeal [u]: *nam quilibet poteſt renunciare "juri, pro ſe introducto."*

THESE are the ſeveral methods of proſecution inſtituted by the laws of England for the puniſhment of offences; of which that by indictment is the moſt general. I ſhall therefore confine my ſubſequent obſervations principally to this method of proſecution; remarking by the way the moſt material variations that may ariſe, from the method of proceeding by either information or appeal.

[s] *LL. Edm.* §. 3.
[t] *M.* 11 *Hen. IV.* 12. 3 Inſt. 131.
[v] Robertſon Cha. V. i. 43.
[u] 1 Hal. P. C. 9.

CHAPTER THE TWENTY FOURTH.

OF PROCESS UPON AN INDICTMENT.

WE are next, in the fourth place, to enquire into the manner of iſſuing *proceſs*, after indictment found, to bring in the accuſed to anſwer it. We have hitherto ſuppoſed the offender to be in cuſtody before the finding of the indictment; in which caſe he is immediately to be arraigned thereon. But if he hath fled, or ſecretes himſelf, in capital caſes; or hath not, in ſmaller miſdemeſnors, been bound over to appear at the aſſiſes or ſeſſions, ſtill an indictment may be preferred againſt him in his abſence; ſince, were he preſent, he could not be heard before the grand jury againſt it. And, if it be found, then proceſs muſt iſſue to bring him into court; for the indictment cannot be tried, unleſs he perſonally appears: according to the rules of equity in all, and the expreſs proviſion of ſtatute 28 Edw. III. c. 3. in capital, caſes; that no man ſhall be put to death, without being brought to anſwer by due proceſs of law.

THE proper proceſs on an indictment for any petty miſdemeſnor, or on a penal ſtatute, is a writ of *venire facias*, which is in the nature of a ſummons to cauſe the party to appear. And if by the return to ſuch *venire* it appears, that the party hath lands in the county whereby he may be diſtreined, then a *diſtreſs infinite* ſhall be iſſued from time to time till he appears.

But if the ſheriff returns that he hath no lands in his bailiwick, then (upon his non-appearance) a writ of *capias* ſhall iſſue, which commands the ſheriff to take his body, and have him at the next aſſiſes; and if he cannot be taken upon the firſt *capias*, a ſecond, and a third ſhall iſſue, called an *alias*, and a *pluries capias*. But, on indictments for treaſon or felony, a *capias* is the firſt proceſs: and, for treaſon or homicide, only one ſhall be allowed to iſſue [a], or two in the caſe of other felonies, by ſtatute 25 Edw. III. c. 14. though the uſage is to iſſue only one in any felony; the proviſions of this ſtatute being in moſt caſes found impracticable [b]. And ſo, in the caſe of miſdemeſnors, it is now the uſual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant. But if he abſconds, and it is thought proper to purſue him to an outlawry, then a greater exactneſs is neceſſary. For, in ſuch caſe, after the ſeveral writs have iſſued in a regular number, according to the nature of the reſpective crimes, without any effect, the offender ſhall be put in the *exigent* in order to his outlawry: that is, he ſhall be exacted, proclaimed, or required to ſurrender, at five county courts; and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requiſition, then he is adjudged to be *outlawed*, or put out of the protection of the law; ſo that he is incapable of taking the benefit of it in any reſpect, either by bringing actions or otherwiſe.

THE puniſhment for outlawries upon indictments for miſdemeſnors, is the ſame as for outlawries upon civil actions; (of which, and the previous proceſs by writs of *capias*, *exigi facias*, and *proclamation*, we ſpoke in the preceding book [c]) *viz.* forfeiture of goods and chattels. But an outlawry in treaſon or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country [d]. His life is however ſtill under the protection of

[a] See appendix. §. 1.
[b] 2 Hal. P. C. 195.
[c] See Vol. III. pag. 283, 4.
[d] 2 Hal. P. C. 205.

the

the law, as hath formerly been obſerved [e]: and though antiently an outlawed felon was ſaid to have *caput lupinum*, and might be knocked on the head like a wolf, by any one that ſhould meet him [f]; becauſe, having renounced all law, he was to be dealt with as in a ſtate of nature, when every one that ſhould find him might ſlay him: yet now, to avoid ſuch inhumanity, it is holden that no man is intitled to kill him wantonly or wilfully; but in ſo doing is guilty of murder [g], unleſs it happens in the endeavour to apprehend him [h]. For any perſon may arreſt an outlaw on a criminal proſecution, either of his own head, or by writ or warrant of *capias utlagatum*, in order to bring him to execution. But ſuch outlawry may be frequently reverſed by writ of error; the proceedings therein being (as it is fit they ſhould be) exceedingly nice and circumſtantial; and, if any ſingle minute point be omitted or miſconducted, the whole outlawry is illegal, and may be reverſed: upon which reverſal the party accuſed is admitted to plead to, and defend himſelf againſt, the indictment.

THUS much for proceſs to bring in the offender after indictment found; during which ſtage of the proſecution it is, that writs of *certiorari facias* are uſually had, though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal juriſdiction into the court of king's bench; which is the ſovereign ordinary court of juſtice in cauſes criminal. And this is frequently done for one of theſe four purpoſes; either, 1. To conſider and determine the validity of appeals or indictments and the proceedings thereon; and to quaſh or confirm them as there is cauſe: or, 2. Where it is ſurmiſed that a partial or inſufficient trial will probably be had in the court below, the indictment is removed, in order to have the priſoner or defendant tried at the bar of the court of king's bench, or before the juſtices of *niſi prius*: or, 3. It is ſo removed, in order to plead the king's pardon there: or, 4. To iſſue proceſs of

[e] See pag. 178.
[f] Mirr. c. 4. §. 4. Co. Litt. 128.
[g] 1 Hal. P. C. 497.
[h] Bracton. *fol.* 125.

outlawry againſt the offender, in thoſe counties or places where the proceſs of the inferior judges will not reach him [i]. Such writ of *certiorari*, when iſſued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwiſe, ſuperſedes the juriſdiction of ſuch inferior court, and makes all ſubſequent proceedings therein entirely erroneous and illegal; unleſs the court of king's bench remands the record to the court below, to be there tried and determined. A *certiorari* may be granted at the inſtance of either the proſecutor or the defendant: the former as a matter of right, the latter as a matter of diſcretion; and therefore it is ſeldom granted to remove indictments from the juſtices of gaol delivery, or after iſſue joined or confeſſion of the fact in any of the courts below [k].

AT this ſtage of proſecution alſo it is, that indictments found by the grand jury againſt a peer muſt in conſequence of a writ of *certiorari* be certified and tranſmitted into the court of parliament, or into that of the lord high ſteward of Great Britain; and that, in places of excluſive juriſdiction, as the two univerſities, indictments muſt be delivered (upon challenge and claim of cognizance) to the courts therein eſtabliſhed by charter, and confirmed by act of parliament, to be there reſpectively tried and determined.

[i] 2 Hal. P. C. 210.

[k] 2 Hawk. P. C. 287. 4 Burr. 749.

CHAPTER THE TWENTY FIFTH.

OF ARRAIGNMENT, AND IT'S INCIDENTS.

WHEN the offender either appears voluntarily to an indictment, or was before in cuſtody, or is brought in upon criminal proceſs to anſwer it in the proper court, he is immediately to be *arraigned* thereon; which is the fifth ſtage of criminal proſecution.

To arraign, is nothing elſe but to call the priſoner to the bar of the court, to anſwer the matter charged upon him in the indictment [a]. The priſoner is to be called to the bar by his name; and it is laid down in our antient books [b], that, though under an indictment of the higheſt nature, he muſt be brought to the bar without irons, or any manner of ſhackles or bonds; unleſs there be evident danger of an eſcape, and then he may be ſecured with irons. But yet in Layer's caſe, *A. D.* 1722. a difference was taken between the time of arraignment, and the time of trial; and accordingly the priſoner ſtood at the bar in chains during the time of his arraignment [c].

[a] 2 Hal. P. C. 216.

[b] Bract. *l.* 3. *de coron. c.* 18. §. 3. Mirr. *c.* 5. *ſect.* 1. §. 54. Flet. *l.* 1. *c.* 31. §. 1. Brit. *c.* 5. Staundf. P. C. 78. 3 Inſt. 34. Kel. 10. 2 Hal. P. C. 219. 2 Hawk. P. C. 308.

[c] State Trials. VI. 230.

WHEN

WHEN he is brought to the bar, he is called upon by name to hold up his hand: which, though it may ſeem a trifling circumſtance, yet is of this importance, that by the holding up of his hand *conſtat de perſona*, and he owns himſelf to be of that name by which he is called [d]. However it is not an indiſpenſable ceremony; for, being calculated merely for the purpoſe of identifying the perſon, any other acknowlegement will anſwer the purpoſe as well: therefore, if the priſoner obſtinately and contemptuouſly refuſes to hold up his hand, but confeſſes he is the perſon named, it is fully ſufficient [e].

THEN the indictment is to be read to him diſtinctly in the Engliſh tongue (which was law, even while all other proceedings were in Latin) that he may fully underſtand his charge. After which it is to be demanded of him, whether he be guilty of the crime, whereof he ſtands indicted, or not guilty. By the old common law the acceſſory could not be arraigned till the principal was attainted; and therefore, if the principal had never been indicted at all, had ſtood mute, had challenged above thirty five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the acceſſory in any of theſe caſes could not be arraigned: for *non conſtitit* whether any felony was committed or no, till the principal was attainted; and it might ſo happen that the acceſſory ſhould be convicted one day, and the principal acquitted the next, which would be abſurd. However, this abſurdity could only happen, where it was poſſible, that a trial of the principal might be had, ſubſequent to that of the acceſſory: and therefore the law ſtill continues, that the acceſſory ſhall not be tried, ſo long as the principal remains liable to be tried hereafter. But by ſtatute 1 Ann. c. 9. if the principal be once convicted, and before attainder, (that is, before he receives judgment of death or outlawry) he is delivered by pardon, the benefit of clergy, or otherwiſe; or if the principal ſtands mute, or challenges peremptorily

[d] 2 Hal. P. C. 219. [e] Raym. 408.

above

above the legal number of jurors, ſo as never to be convicted at all; in any of theſe caſes, in which no ſubſequent trial can be had of the principal, the acceſſory may be proceeded againſt, as if the principal felon had been attainted; for there is no danger of future contradiction. And upon the trial of the acceſſory, as well after as before the conviction of the principal, it ſeems to be the better opinion, and founded on the true ſpirit of juſtice [f], that the acceſſory is at liberty (if he can) to controvert the guilt of his ſuppoſed principal, and to prove him innocent of the charge, as well in point of fact as in point of law.

WHEN a criminal is arraigned, he either *ſtands mute*, or *confeſſes* the fact; which circumſtances we may call *incidents* to the arraignment: or elſe he *pleads* to the indictment, which is to be conſidered as the next ſtage of proceedings. But, firſt, let us obſerve theſe incidents to the arraignment, of ſtanding mute, or confeſſion.

I. REGULARLY a priſoner is ſaid to ſtand mute, when, being arraigned for treaſon or felony, he either, 1. Makes no anſwer at all: or, 2. Anſwers foreign to the purpoſe, or with ſuch matter as is not allowable; and will not anſwer otherwiſe: or, 3. Upon having pleaded not guilty, refuſes to put himſelf upon the country [g]. If he ſays nothing, the court ought *ex officio* to impanel a jury, to enquire whether he ſtands obſtinately mute, or whether he be dumb *ex viſitatione Dei*. If the latter appears to be the caſe, the judges of the court (who are to be of counſel for the priſoner, and to ſee that he hath law and juſtice) ſhall proceed to the trial, and examine all points as if he had pleaded not guilty [h]. But whether judgment of death can be given againſt ſuch a priſoner, who hath never pleaded, and can ſay nothing in arreſt of judgment, is a point yet undetermined [i].

[f] Foſter. 365, &c.
[g] 2 Hal. P. C. 316.
[h] 2 Hawk. P. C. 327.
[i] 2 Hal. P. C. 317.

IF

IF he be found to be obſtinately mute, (which a priſoner hath been held to be, that hath cut out his own tongue [k],) then, if it be on an indictment of high treaſon, it is clearly ſettled that ſtanding mute is equivalent to a conviction, and he ſhall receive the ſame judgment and execution [l]. And as in this the higheſt crime, ſo alſo in the loweſt ſpecies of felony, *viz.* in petit larciny, and in all miſdemeſnors, ſtanding mute is equivalent to conviction. But upon appeals or indictments for other felonies, or petit treaſon, he ſhall not be looked upon as convicted, ſo as to receive judgment for the felony; but ſhall, for his obſtinacy, receive the terrible ſentence of *penance*, or *peine forte et dure*.

BEFORE this is pronounced the priſoner ought to have not only *trina admonitio*, but alſo a convenient reſpite of a few hours, and the ſentence ſhould be diſtinctly read to him, that he may know his danger [m]: and, after all, if he continues obſtinate, and his offence is clergyable, he ſhall have the benefit of his clergy allowed him; even though he is too ſtubborn to pray it [n]. Thus tender has the modern law been of inflicting this dreadful puniſhment: but if no other means will prevail, and the priſoner (when charged with a capital felony) continues ſtubbornly mute, the judgment is then given againſt him, without any diſtinction of ſex or degree. A judgment, which the law has purpoſely ordained to be exquiſitely ſevere, that by that very means it might rarely be put in execution.

THE rack, or queſtion, to extort a confeſſion from criminals, is a practice of a different nature: *this* being only uſed to compel a man to put himſelf upon his trial; *that* being a ſpecies of trial in itſelf. And the trial by rack is utterly unknown to the law of England; though once when the dukes of Exeter and Suffolk, and other miniſters of Henry VI, had laid a deſign to introduce the civil law into this kingdom as the rule of govern-

[k] 3 Inſt. 178.
[l] 2 Hawk. P. C. 329. 2 Hal. P. C. 317.
[m] 2 Hal. P. C. 320.
[n] 2 Hal. P. C. 321. 2 Hawk. P. C. 332.

ment,

ment, for a beginning thereof they erected a rack for torture; which was called in deriſion the duke of Exeter's daughter, and ſtill remains in the tower of London[o]: where it was occaſionally uſed as an engine of ſtate, not of law, more than once in the reign of queen Elizabeth[p]. But when, upon the aſſaſſination of Villiers duke of Buckingham by Felton, it was propoſed in the privy council to put the aſſaſſin to the rack, in order to diſcover his accomplices; the judges, being conſulted, declared unanimouſly, to their own honour and the honour of the Engliſh law, that no ſuch proceeding was allowable by the laws of England[q]. It ſeems aſtoniſhing that this uſage, of adminiſtring the torture, ſhould be ſaid to ariſe from a tenderneſs to the lives of men: and yet this is the reaſon given for it's introduction in the civil law, and it's ſubſequent adoption by the French and other foreign nations[r]: *viz.* becauſe the laws cannot endure that any man ſhould die upon the evidence of a falſe, or even a ſingle, witneſs; and therefore contrived this method that innocence ſhould manifeſt itſelf by a ſtout denial, or guilt by a plain confeſſion. Thus rating a man's virtue by the hardineſs of his conſtitution, and his guilt by the ſenſibility of his nerves! — But there needs only to ſtate accurately[s], in order moſt effectually to expoſe, this inhuman ſpecies of mercy: the uncertainty of which, as a teſt and criterion of truth, was long ago very elegantly pointed out by Tully; though he lived in a ſtate wherein is was uſual to torture ſlaves in order to furniſh evidence: "*tamen*, ſays he, *illa tormenta gubernat dolor, moderatur natura cujuſque tum animi tum corporis, regit quaeſitor, flectit libido, corrumpit ſpes, infirmat metus; ut in tot rerum anguſtiis nihil veritati loci relinquatur*[t]."

[o] 3 Inſt. 35.

[p] Barr. 69. 385.

[q] Ruſhw. Coll. i. 638.

[r] *Cod. l.* 9. *t.* 41. *l.* 8. & *t.* 47. *l.* 16. Forteſc. *de L. L. Angl. c.* 22.

[s] The marquis Beccaria, (ch. 16.) in an exquiſite piece of raillery, has propoſed this problem, with a gravity and preciſion that are truly mathematical: "the force of the "muſcles and the ſenſibility of the nerves "of an innocent perſon being given, it is "required to find the degree of pain, ne- "ceſſary to make him confeſs himſelf guilty "of a given crime."

[t] *Pro Sulla.* 28.

THE Engliſh judgment of penance for ſtanding mute [v] is as follows: that the priſoner ſhall be remanded to the priſon from whence he came; and put into a low, dark chamber; and there be laid on his back, on the bare floor, naked, unleſs where decency forbids; that there be placed upon his body as great a weight of iron as he can bear, and more; that he ſhall have no ſuſtenance, ſave only, on the firſt day, three morſels of the worſt bread; and, on the ſecond day, three draughts of ſtanding water, that ſhall be neareſt to the priſon door; and in this ſituation this ſhall be alternately his daily diet, *till he dies*, as the judgment now runs, though formerly it was, *till he anſwered* [u].

IT hath been doubted whether this puniſhment ſubſiſted at the common law [w], or was introduced in conſequence of the ſtatute Weſtm. 1. 3 Edw. I. c. 12. [x] which ſeems to be the better opinion. For not a word of it is mentioned in Glanvil or Bracton, or in any antient author, caſe, or record, (that hath yet been produced) previous to the reign of Edward I: but there are inſtances on record in the reign of Henry III [y], where perſons accuſed of felony, and ſtanding mute, were tried in a particular manner, by two ſucceſſive juries, and convicted; and it is aſſerted by the judges in 8 Hen. IV. that, by the common law before the ſtatute, ſtanding mute on an appeal amounted to a conviction of the felony [z]. This ſtatute of Edward I directs ſuch perſons, "as will not put themſelves upon inqueſts of fe-"lonies before the judges at the ſuit of the king, to be put "into hard and ſtrong priſon *(ſoient mys en la priſone fort et dure)* "as thoſe which refuſe to be at the common law of the land." And, immediately after this ſtatute, the form of the judgment appears in Fleta and Britton to have been only a very ſtrait con-

[v] 2 Hal. P. C. 319. 2 Hawk. P. C. 329.
[u] Britton. *c.* 4. & 22. Flet. *l.* 1. *c.* 34. §. 33.
[w] 2 Inſt. 179. 2 Hal. P. C. 322. 2 Hawk. P. C. 330.
[x] Staundf. P. C. 149. Barr. 65.
[y] Emlyn on 2 Hal. P. C. 322.
[z] *Al common ley, avant le ſtatute de Weſt.* 1. *c.* 12. *ſi aſcun uſt eſtre appeal, et uſt eſtre mute, il ſerra convict de felony. (M.* 8 *Hen. IV.* 2.)

finement

finement in priſon, with hardly any degree of ſuſtenance; but no weight is directed to be laid upon the body, ſo as to haſten the death of the miſerable ſufferer: and indeed any ſurcharge of puniſhment on perſons adjudged to penance, ſo as to ſhorten their lives, is reckoned by Horne in the mirror[a] as a ſpecies of criminal homicide: to which we may add, that the record of 35 Edw. I. (cited by a learned author[b]) moſt clearly proves, that the priſoner might then poſſibly ſubſiſt for forty days under this lingering puniſhment. I ſhould therefore imagine that the practice of loading him with weights, or, as it is uſually called, *preſſing him to death*, was gradually introduced between the reign of Edward I and 8 Hen. IV, when it firſt appears upon our books[c]; and was intended as a ſpecies of mercy to the delinquent, by delivering him the ſooner from his torment: and hence I preſume it alſo was, that the duration of the penance was then firſt[d] altered; and inſtead of continuing *till he anſwered*, it was directed to continue *till he died*, which muſt very ſoon happen under an enormous preſſure.

THE uncertainty of it's original, the doubts that may be conceived of it's legality, and the repugnance of it's theory (for it rarely is carried into practice) to the humanity of the laws of England, all ſeem to require a legiſlative abolition of this cruel proceſs, and a reſtitution of the antient common law; whereby the ſtanding mute in felony, as well as in treaſon and in treſpaſs, amounted to a confeſſion of the charge. Or, if the corruption of the blood and the conſequent eſcheat in felony were removed, the *peine forte et dure* might ſtill remain, as a monument of the ſavage rapacity, with which the lordly tyrants of feodal antiquity hunted after eſcheats and forfeitures; but no man would ever be tempted to undergo ſuch a horrid alternative. For the law is, that by ſtanding mute, and ſuffering this heavy penance, the judgment, and of courſe the corruption of the blood and eſcheat of the *lands*, are ſaved in felony and petit treaſon;

[a] ch. 1. §. 9.
[b] Barr. 62.
[c] Yearb. 8 Hen. IV. 1.
[d] *Et fuit dit, que le contrarie avoit eſtre fait devant ces heures.* (*Ibid.* 2.)

though not the forfeiture of the *goods:* and therefore this lingering puniſhment was probably introduced, in order to extort a plea; without which it was held that no judgment of death could be given, and ſo the lord loſt his eſcheat. But notwithſtanding theſe terrors, ſome hardy delinquents, conſcious of their guilt, and yet touched with a tender regard for their children, have rather choſen to ſubmit to this painful death, than the eaſier judgment upon conviction, which might expoſe their offspring not only to preſent want, but to future incapacities of inheritance. But in high treaſon, as ſtanding mute is equivalent to a conviction, the ſame judgment, the ſame corruption of blood, and the ſame forfeitures attend it, as in other caſes of conviction[e]. And thus much for the demeſnor of a priſoner upon his arraignment, by ſtanding mute.

II. THE other incident to arraignments, excluſive of the plea, is the priſoner's *confeſſion* of the indictment. Upon a ſimple and plain confeſſion, the court hath nothing to do but to award judgment: but it is uſually very backward in receiving and recording ſuch confeſſion, out of tenderneſs to the life of the ſubject; and will generally adviſe the priſoner to retract it, and plead to the indictment[f].

BUT there is another ſpecies of confeſſion, which we read much of in our antient books, of a far more complicated kind, which is called *approvement*. And that is when a perſon, indicted of treaſon or felony, and arraigned for the ſame, doth confeſs the fact before plea pleaded; and appeals or accuſes others, his accomplices, of the ſame crime, in order to obtain his pardon. In this caſe he is called an *approver* or prover, *probator*, and the party appealed or accuſed is called the *appellee*. Such approvement can only be in capital offences; and it is, as it were, equivalent to an indictment, ſince the appellee is equally called upon to anſwer it: and if he hath no reaſonable and legal exceptions to make to the perſon of the approver, which indeed

[e] 2 Hawk. P. C. 331.

[f] 2 Hal. P. C. 225.

are

are very numerous, he muſt put himſelf upon his trial, either by battel, or by the country; and, if vanquiſhed or found guilty, muſt ſuffer the judgment of the law, and the approver ſhall have his pardon, *ex debito juſtitiae*. On the other hand, if the appellee be conqueror, or acquitted by the jury, the approver ſhall receive judgment to be hanged, upon his own confeſſion of the indictment; for the condition of his pardon has failed, *viz.* the convicting of ſome other perſon, and therefore his conviction remains abſolute.

BUT it is purely in the diſcretion of the court to permit the approver thus to appeal, or not; and, in fact, this courſe of admitting approvements hath been long diſuſed: for the truth was, as ſir Matthew Hale obſerves, that more miſchief hath ariſen to good men by theſe kind of approvements, upon falſe and malicious accuſations of deſperate villains, than benefit to the public by the diſcovery and conviction of real offenders. And therefore, in the times when ſuch appeals were more frequently admitted, great ſtrictneſs and nicety were held therein[g]: though, ſince their diſcontinuance, the doctrine of approvements is become a matter of more curioſity than uſe. I ſhall only obſerve, that all the good, whatever it be, that can be expected from this method of approvement, is fully provided for in the caſes of robbery, burglary, houſebreaking, and larciny to the value of five ſhillings from ſhops, warehouſes, ſtables, and coachhouſes, by ſtatutes 4 & 5 W. & M. c. 8. 10 & 11 W. III. c. 23. and 5 Ann. c. 31. which enact, that, if any ſuch felon, being out of priſon, ſhall diſcover two or more perſons, who have committed the like felonies, ſo as they may be convicted thereof; he ſhall in moſt caſes receive a reward of 40*l*, and in general be intitled a pardon of all capital offences, excepting only murder and treaſon. And if any ſuch perſon, having felonioufly ſtolen any lead, iron, or other metals, ſhall diſcover and convict two offenders of having illegally bought or received the ſame, he ſhall by virtue of ſtatute 29 Geo. II. c. 30. be pardoned for all *ſuch* felonies committed before ſuch diſcovery.

[g] 2 Hal. P. C. ch. 29. 2 Hawk. P. C. ch. 24.

CHAPTER THE TWENTY SIXTH.

OF PLEA, AND ISSUE.

WE are now to conſider the plea of the priſoner, or defenſive matter alleged by him on his arraignment, if he does not confeſs, or ſtand mute. This is either, 1. A plea to the juriſdiction; 2. A demurrer; 3. A plea in abatement; 4. A ſpecial plea in bar; or, 5. The general iſſue.

FORMERLY there was another plea, now abrogated, that of *ſanctuary*; which is however neceſſary to be lightly touched upon, as it may give ſome light to many parts of our antient law: it being introduced and continued during the ſuperſtitious veneration, that was paid to conſecrated ground in the times of popery. Firſt then, it is to be obſerved, that if a perſon accuſed of any crime (except treaſon, wherein the crown, and ſacrilege, wherein the church, was too nearly concerned) had fled to any church or church-yard, and within forty days after went in ſackcloth and confeſſed himſelf guilty before the coroner, and declared all the particular circumſtances of the offence; and thereupon took the oath in that caſe provided, *viz.* that he abjured the realm, and would depart from thence forthwith at the port that ſhould be aſſigned him, and would never return without leave from the king; he by this means ſaved his life, if he obſerved the conditions of the oath, by going with a croſs in his hand and with all

all convenient ſpeed, to the port aſſigned, and embarking. For if, during this forty days privilege of ſanctuary, or in his road to the ſea ſide, he was apprehended and arraigned in any court for this felony, he might plead the privilege of ſanctuary, and had a right to be remanded, if taken out againſt his will [a]. But by this abjuration his blood was attainted, and he forfeited all his goods and chattels [b]. The immunity of theſe privileged places was very much abridged by the ſtatutes 27 Hen. VIII. c. 19. and 32 Hen. VIII. c. 12. And now, by the ſtatute 21 Jac. I. c. 28. all privilege of ſanctuary, and abjuration conſequent thereupon, is utterly taken away and aboliſhed.

FORMERLY alſo the benefit of clergy uſed to be pleaded before trial or conviction, and was called a *declinatory* plea; which was the name alſo given to that of ſanctuary [c]. But, as the priſoner upon a trial has a chance to be acquitted, and totally diſcharged; and, if convicted of a clergyable felony, is entitled equally to his clergy after as before conviction; this courſe is extremely diſadvantageous: and therefore the benefit of clergy is now very rarely pleaded; but, if found requiſite, is prayed by the convict before judgment is paſſed upon him.

I PROCEED therefore to the five ſpecies of pleas, beforementioned.

I. A PLEA to the *juriſdiction*, is where an indictment is taken before a court, that hath no cognizance of the offence; as if a man be indicted for a rape at the ſheriff's tourn, or for treaſon at the quarter ſeſſions: in theſe or ſimilar caſes, he may except to the juriſdiction of the court, without anſwering at all to the crime alleged [d].

II. A DEMURRER to the indictment. This is incident to criminal caſes, as well as civil, when the fact as alleged is allowed

[a] Mirr. c. 1. §. 13. 2 Hawk. P. C. 335.
[b] 2 Hawk. P. C. 52.
[c] 2 Hal. P. C. 236.
[d] *Ibid.* 256.

to

to be true, but the priſoner joins iſſue upon ſome point of law in the indictment, by which he inſiſts that the fact, as ſtated, is no felony, treaſon, or whatever the crime is alleged to be. Thus, for inſtance, if a man be indicted for *feloniouſly* ſtealing a greyhound; which is an animal in which no valuable property can he had, and therefore it is not felony, but only a civil treſpaſs, to ſteal it: in this caſe the party indicted may demur to the indictment; denying it to be felony, though he confeſſes the act of taking it. Some have held[e], that if, on demurrer, the point of law be adjudged *againſt* the priſoner, he ſhall have judgment and execution, as if convicted by verdict. But this is denied by others[f], who hold, that in ſuch caſe he ſhall be directed and received to plead the general iſſue, not guilty, after a demurrer determined againſt him. Which appears the more reaſonable, becauſe it is clear, that if the priſoner freely diſcovers the fact in court, and refers it to the opinion of the court, whether it be felony, or no; and upon the fact thus ſhewn it appears to be felony; the court will not record the confeſſion, but admit him afterwards to plead not guilty[g]. And this ſeems to be a caſe of the ſame nature, being for the moſt part a miſtake in point of law, and in the conduct of his pleading; and, though a man by miſpleading may in ſome caſes loſe his property, yet the law will not ſuffer him by ſuch niceties to loſe his life. However, upon this doubt, demurrers to indictments are ſeldom uſed: ſince the ſame advantages may be taken upon a plea of not guilty; or afterwards, in arreſt of judgment, when the verdict has eſtabliſhed the fact.

III. A PLEA in *abatement* is principally for a *miſnoſmer*, a wrong name, or a falſe addition to the priſoner. As, if *James* Allen, *gentleman*, is indicted by the name of *John* Allen, *eſquire*, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an eſquire. And, if either fact is found by a jury, then the indictment ſhall be abated, as

[e] 2 Hal. P. C. 257.
[f] 2 Hawk. P. C. 334.
[g] 2 Hal. P. C. 225.

writs

writs or declarations may be in civil actions; of which we ſpoke at large, in the preceding volume[h]. But, in the end, there is little advantage accruing to the priſoner by means of theſe dilatory pleas; becauſe, if the exception be allowed, a new bill of indictment may be framed, according to what the priſoner in his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he, who takes advantage of a flaw, muſt at the ſame time ſhew how it may be amended. Let us therefore next conſider a more ſubſtantial kind of plea, *viz.*

IV. SPECIAL pleas in *bar*; which go to the merits of the indictment, and give a reaſon why the priſoner ought not to anſwer it at all, nor put himſelf upon his trial for the crime alleged. Theſe are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas, which may be pleaded in bar of an appeal[i]: but theſe are applicable to both appeals and indictments.

1. FIRST, the plea of *auterfoits acquit*, or a former acquittal, is grounded on this univerſal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the ſame offence. And hence it is allowed as a conſequence, that when a man is once fairly found not guilty upon any indictment, or other proſecution, he may plead ſuch acquittal in bar of any ſubſequent accuſation for the ſame crime. Therefore an acquittal on an appeal is a good bar to an indictment of the ſame offence. And ſo alſo was an acquittal on an indictment a good bar to an appeal, by the common law[k]: and therefore, in favour of appeals, a general practice was introduced, not to try any perſon on an indictment of homicide, till after the year and day, within which appeals may be brought, were paſt; by which time it often happened that the witneſſes died, or the whole was forgotten. To remedy which inconvenience, the ſtatute 3 Hen. VII. c. 1. enacts,

[h] See Vol. III. pag. 302.
[i] 2 Hawk. P. C. ch. 23.
[k] *Ibid.* 373.

that indictments ſhall be proceeded on, immediately, at the king's ſuit, for the death of a man, without waiting for bringing an appeal; and that the plea, of *auterfoits acquit* on an indictment, ſhall be no bar to the proſecuting of any appeal.

2. SECONDLY, the plea of *auterfoits convict*, or a former conviction for the ſame identical crime, though no judgment was ever given, or perhaps will be, (being ſuſpended by the benefit of clergy or other cauſes) is a good plea in bar to an indictment. And this depends upon the ſame principle as the former, that no man ought to be twice brought in danger of his life for one and the ſame crime[l]. Hereupon it has been held, that a conviction of manſlaughter, on an appeal, is a bar even in another appeal, and much more in an indictment, of murder; for the fact proſecuted is the ſame in both, though the offences differ in colouring and in degree. It is to be obſerved, that the pleas of *auterfoits acquit*, and *auterfoits convict*, or a former acquittal, and former conviction, muſt be upon a proſecution for the ſame identical act and crime. But the caſe is otherwiſe, in

3. THIRDLY, the plea of *auterfoits attaint*, or a former attainder; which is a good plea in bar, whether it be for the ſame or any other felony. For wherever a man is attainted of felony, by judgment of death either upon a verdict or confeſſion, by outlawry, or heretofore by abjuration; and whether upon an appeal or an indictment; he may plead ſuch attainder in bar to any ſubſequent indictment or appeal, for the ſame or for any other felony[m]. And this becauſe, generally, ſuch proceeding on a ſecond proſecution cannot be to any purpoſe; for the priſoner is dead in law by the firſt attainder, his blood is already corrupted, and he hath forfeited all that he had: ſo that it is abſurd and ſuperfluous to endeavour to attaint him a ſecond time. But to this general rule however, as to all others, there are ſome exceptions; wherein, *ceſſante ratione, ceſſat et ipſa lex.* As, 1. Where the former attainder is reverſed for error, for then it

[l] 2 Hawk. P. C. 377. [m] *Ibid.* 375.

is

is the ſame as if it had never been. And the ſame reaſon holds, where the attainder is reverſed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. 2. Where the attainder was upon indictment, ſuch attainder is no bar to an appeal: for the prior ſentence is pardonable by the king; and if that might be pleaded in bar of the appeal, the king might in the end defeat the ſuit of the ſubject, by ſuffering the prior ſentence to ſtop the proſecution of a ſecond, and then, when the time of appealing is elapſed, granting the delinquent a pardon. 3. An attainder in felony is no bar to an indictment of treaſon: becauſe not only the judgment and manner of death are different, but the forfeiture is more extenſive, and the land goes to different perſons. 4. Where a perſon attainted of one felony, as robbery, is afterwards indicted as principal in another, as murder, to which there are alſo acceſſories, proſecuted at the ſame time; in this caſe it is held, that the plea of *auterfoits attaint* is no bar, but he ſhall be compelled to take his trial, for the ſake of public juſtice: becauſe the acceſſories to ſuch ſecond felony cannot be convicted till after the conviction of the principal. And from theſe inſtances we may collect that the plea of *auterfoits attaint* is never good, but when a ſecond trial would be quite ſuperfluous.

4. LASTLY, a *pardon* may be pleaded in bar; as at once deſtroying the end and purpoſe of the indictment, by remitting that puniſhment, which the proſecution is calculated to inflict. There is one advantage that attends pleading a pardon in bar, or in arreſt of judgment, *before* ſentence is paſt; which gives it by much the preference to pleading it *after* ſentence or attainder. This is, that by ſtopping the judgment it ſtops the attainder, and prevents the corruption of the blood: which, when once corrupted by attainder, cannot afterwards be reſtored, otherwiſe than by act of parliament. But, as the title of pardons is applicable to other ſtages of proſecution; and they have their reſpective force and efficacy, as well after as before conviction, outlawry, or attainder; I ſhall therefore reſerve the more minute

nute conſideration of them, till I have gone through every other title, except only that of execution.

BEFORE I conclude this head of ſpecial pleas in bar, it will be neceſſary once more to obſerve; that, though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea, and cannot reſort to another if that be determined againſt him; (as, if on an action of debt the defendant pleads a general releaſe, and no ſuch releaſe can be proved, he cannot afterwards plead the general iſſue, *nil debet*, as he might at firſt: for he has made his election what plea to abide by, and it was his own folly to chuſe a rotten defence) though, I ſay, this ſtrictneſs is obſerved in civil actions, *quia intereſt reipublicae ut ſit finis litium:* yet in criminal proſecutions, *in favorem vitae*, as well upon appeal as indictment, when a priſoner's plea in bar is found againſt him upon iſſue tried by a jury, or adjudged againſt him in point of law by the court; ſtill he ſhall not be concluded or convicted thereon, but ſhall have judgment of *reſpondeat ouſter*, and may plead over to the felony the general iſſue, not guilty [n]. For the law allows many pleas by which a priſoner may eſcape death; but only one plea, in conſequence whereof it can be inflicted; *viz.* on the general iſſue, after an impartial examination and deciſion of the facts, by the unanimous verdict of a jury. It remains therefore that I conſider,

V. THE general iſſue, or plea of *not guilty* [o], upon which plea alone the priſoner can receive his final judgment of death. In caſe of an indictment of felony or treaſon, there can be no ſpecial juſtification put in by way of plea. As, on an indictment for murder, a man cannot *plead* that it was in his own defence againſt a robber on the highway, or a burglar; but he muſt plead the general iſſue, not guilty, and give this ſpecial matter in evidence. For (beſides that theſe pleas do in effect amount to the general iſſue; ſince, if true, the priſoner is moſt clearly not guilty) as the facts in treaſon are laid to be done *pro-*

[n] 2 Hal. P. C. 239.

[o] See appendix, §. 1.

ditorie

ditorie et contra ligeantiae ſuae debitum; and, in felony, that the killing was done *felonice*; theſe charges, of a traiterous or felonious intent, are the points and very *giſt* of the indictment, and muſt be anſwered directly, by the general negative, not guilty; and the jury upon the evidence will take notice of any defenſive matter, and give their verdict accordingly, as effectually as if it were, or could be, ſpecially pleaded. So that this is, upon all accounts, the moſt advantageous plea for the priſoner [p].

WHEN the priſoner hath thus pleaded not guilty, *non culpabilis*, or *nient culpable*; which was formerly uſed to be abbreviated upon the minutes, thus, "*non* (or *nient*) *cul.*" the clerk of the aſſiſe, or clerk of the arraigns, on behalf of the crown replies, that the priſoner is guilty, and that he is ready to prove him ſo. This is done by two monoſyllables in the ſame ſpirit of abbreviation, "*cul. prît.*" which ſignifies firſt that the priſoner is guilty, (*cul. culpable*, or *culpabilis*) and then that the king is ready to prove him ſo; *prît*, *praeſto ſum*, or *paratus verificare*. This is therefore a replication on behalf of the king *viva voce* at the bar; which was formerly the courſe in all pleadings, as well in civil as in criminal cauſes. And that was done in the conciſeſt manner: for when the pleader intended to demur, he expreſſed his demurrer in a ſingle word, "*judgment*;" ſignifying that he demanded judgment whether the writ, declaration, plea, *&c.* either in form or matter, were ſufficiently good in law: and if he meant to reſt on the truth of the facts pleaded, he expreſſed that alſo in a ſingle ſyllable, "*prît*;" ſignifying that he was ready to prove his aſſertions: as may be obſerved from the yearbooks and other antient repoſitories of law [q]. By this replication the king and the priſoner are therefore at iſſue: for we may remember, in our ſtrictures upon pleadings in the preceding book [r], it was obſerved, that when the parties come to a fact, which is affirmed on one ſide and denied on the other, then they are ſaid to be at iſſue in point of fact: which is evidently

[p] 2 Hal. P. C. 258.

[q] North's life of lord Guildford. 98.

[r] See Vol. III. pag. 312.

the

the caſe here, in the plea of *non cul.* by the priſoner; and the replication of *cul.* by the clerk. And we may alſo remember, that the uſual concluſion of all affirmative pleadings, as this of *cul.* or *guilty* is, was by an averment in theſe words, "and this "he is *ready* to verify; *et hoc paratus eſt verificare:*" which ſame thing is here expreſſed by the ſingle word, "*prît.*"

How our courts came to expreſs a matter of this importance in ſo odd and obſcure a manner, "*rem tantam tam negligenter,*" can hardly be pronounced with certainty. It may perhaps, however, be accounted for by ſuppoſing, that theſe were at firſt ſhort notes, to help the memory of the clerk, and remind him what he was to reply; or elſe it was the ſhort method of taking down in court, upon the minutes, the replication and averment; "*cul.* "*prît:*" which afterwards the ignorance of ſucceeding clerks adopted for the very words to be by them ſpoken [s].

BUT however it may have ariſen, the joining of iſſue (which, though now uſually entered on the record [t], is no otherwiſe joined [u] in any part of the proceedings) ſeems to be clearly the meaning of this obſcure expreſſion [w]; which has puzzled our moſt ingenious etymologiſts, and is commonly underſtood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the priſoner, by aſking him, "*culprit*, "how wilt thou be tried?" for immediately upon iſſue joined it is enquired of the priſoner, by what trial he will make his innocence appear. This form has at preſent reference to appeals and approvements only, wherein the appellee has his choice, either to try the accuſation by battel or by jury. But upon in-

[s] Of this ignorance we may ſee daily inſtances, in the abuſe of two legal terms of antient French; one, the prologue to all proclamations, "*oyez*, or hear ye," which is generally pronounced moſt unmeaningly "O yes:" the other, a more pardonable miſtake, *viz.* when a jury are all ſworn, the officer bids the crier number them, for which the word in law-french is, "*coun-*"*tez*;" but we now hear it pronounced in very good Engliſh, "count theſe."

[t] See appendix, §. 1.

[u] 2 Hawk. P. C. 399.

[w] 2 Hal. P. C. 258.

dictments,

dictments, ſince the abolition of ordeal, there can be no other trial but that by jury, *per pais*, or by the country: and therefore, if the priſoner refuſes to put himſelf upon the inqueſt in the uſual form, that is, to anſwer that he will be tried by God and the country [x], if a commoner; and, if a peer, by God and his peers [y]; the indictment, if in treaſon, is taken *pro confeſſo*: and the priſoner, in caſes of felony, is adjudged to ſtand mute, and, if he perſeveres in his obſtinacy, ſhall be condemned to the *peine fort et dure*.

WHEN the priſoner has thus put himſelf upon his trial, the clerk anſwers in the humane language of the law, which always hopes that the party's innocence rather than his guilt may appear, "God ſend thee a good deliverance." And then they proceed, as ſoon as conveniently may be, to the trial; the manner of which will be conſidered at large in the next chapter.

[x] A learned author, who is very ſeldom miſtaken in his conjectures, has obſerved that the proper anſwer is "*by God* or *the country*," that is, either by *ordeal* or by *jury*; becauſe the queſtion ſuppoſes an option in the priſoner. And certainly it gives ſome countenance to this obſervation, that the trial by *ordeal* uſed formerly to be called *judicium Dei*. But it ſhould ſeem, that when the queſtion gives the priſoner an option, his anſwer muſt be poſitive; and not in the disjunctive, which returns the option back to the proſecutor.

[y] Kelynge. 57. State Trials, *paſſim*.

CHAPTER THE TWENTY SEVENTH.

OF TRIAL, AND CONVICTION.

THE ſeveral methods of trial and conviction of offenders, eſtabliſhed by the laws of England, were formerly more numerous than at preſent, through the ſuperſtition of our Saxon anceſtors: who, like other northern nations, were extremely addicted to divination; a character, which Tacitus obſerves of the antient Germans [a]. They therefore invented a conſiderable number of methods of purgation or trial, to preſerve innocence from the danger of falſe witneſſes, and in conſequence of a notion that God would always interpoſe miraculouſly, to vindicate the guiltleſs.

I. THE moſt antient ſpecies of trial was that by *ordeal*; which was peculiarly diſtinguiſhed by the appellation of *judicium Dei*; and ſometimes *vulgaris purgatio*, to diſtinguiſh it from the canonical purgation, which was by the oath of the party. This was of two ſorts [b], either *fire*-ordeal, or *water*-ordeal; the former being confined to perſons of higher rank, the latter to the common people [c]. Both theſe might be performed by deputy:

[a] *de mor. Germ.* 10.

[b] Mirr. c. 3. §. 23.

[c] *Tenetur ſe purgare is qui accuſatur, per Dei judicium; ſcilicet, per calidum ferrum, vel per aquam, pro diverſitate conditionis hominum: per ferrum calidum, ſi fuerit homo liber; per aquam, ſi fuerit ruſticus.* (Glanv. *l.* 14. *c.* 1.)

but

but the principal was to anſwer for the ſucceſs of the trial; the deputy only venturing ſome corporal pain, for hire, or perhaps for friendſhip [d]. Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red hot iron, of one, two, or three pounds weight; or elſe by walking, barefoot, and blindfold, over nine redhot plowſhares, laid lengthwiſe at unequal diſtances: and if the party eſcaped being hurt, he was adjudged innocent; but if it happened otherwiſe, as without colluſion it uſually did, he was then condemned as guilty. However, by this latter method queen Emma, the mother of Edward the confeſſor, is mentioned to have cleared her character, when ſuſpected of familiarity with Alwyn biſhop of Wincheſter [e].

WATER-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and eſcaping unhurt thereby: or by caſting the perſon ſuſpected into a river or pond of cold water; and, if he floated therein without any action of ſwimming, it was deemed an evidence of his guilt; but, if he ſunk, he was acquitted. It is eaſy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity ſtill practiſed in many countries to diſcover witches, by caſting them into a pool of water, and drowning them to prove their innocence. And in the Eaſtern empire the fire-ordeal was uſed to the ſame purpoſe by the emperor Theodore Laſcaris; who, attributing his ſickneſs to magic, cauſed all thoſe whom he ſuſpected to handle the hot iron: thus joining (as has been well remarked [f]) to the moſt dubious crime in the world, the moſt dubious proof of innocence.

AND indeed this purgation by ordeal ſeems to have been very antient, and very univerſal, in the times of ſuperſtitious barbarity. It was known to the antient Greeks: for in the Antigone of

[d] This is ſtill expreſſed in that common form of ſpeech, of "going through fire and "water to ſerve another."

[e] Tho. Rudborne *Hiſt. maj. Winton. l.* 4. *c.* 1.

[f] Sp. L. b. 12. c. 5.

Sophocles[g], a perſon, ſuſpected by Creon of a miſdemeſnor, declares himſelf ready "to handle hot iron and to walk over fire," in order to manifeſt his innocence; which, the ſcholiaſt tells us, was then a very uſual purgation. And Grotius[h] gives us many inſtances of water-ordeal in Bithynia, Sardinia, and other places. There is alſo a very peculiar ſpecies of water-ordeal, ſaid to prevail among the Indians on the coaſt of Malabar; where a perſon accuſed of any enormous crime is obliged to ſwim over a large river abounding with crocodiles, and, if he eſcapes unhurt, he is reputed innocent. As in Siam, beſides the uſual methods of fire and water-ordeal, both parties are ſometimes expoſed to the fury of a tiger let looſe for that purpoſe: and, if the beaſt ſpares either, that perſon is accounted innocent; if neither, both are held to be guilty; but if he ſpares both, the trial is incomplete, and they proceed to a more certain criterion[i].

ONE cannot but be aſtoniſhed at the folly and impiety of pronouncing a man guilty, unleſs he was cleared by a miracle; and of expecting that all the powers of nature ſhould be ſuſpended, by an immediate interpoſition of providence to ſave the innocent, whenever it was preſumptuouſly required. And yet in England, ſo late as king John's time, we find grants to the biſhops and clergy to uſe the *judicium ferri, aquae, et ignis*[k]. And, both in England and Sweden, the clergy preſided at this trial, and it was only performed in the churches or in other conſecrated ground: for which Stiernhook[l] gives the reaſon; "*non defuit illis operae et laboris pretium; ſemper enim ab ejuſ-*
"*modi judicio aliquid lucri ſacerdotibus obveniebat.*" But, to give it it's due praiſe, we find the canon law very early declaring againſt trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "*cum ſit contra praeceptum Domini, non tentabis*
"*Dominum Deum tuum*[m]." Upon this authority, though the

[g] v. 270.
[h] On Numb. v. 17.
[i] Mod. Univ. Hiſt. vii. 266.
[k] Spelm. *Gloſſ.* 435.
[l] *de jure Sueonum, l.* 1. *c.* 8.
[m] *Decret. part.* 2 *cauſ.* 2. *qu.* 5. *diſt.* 7. *Decretal. lib.* 3. *tit.* 50. *c.* 9. *& Gloſſ. ibid.*

canons

canons themſelves were of no validity in England, it was thought proper (as had been done in Denmark above a century before [n]) to diſuſe and aboliſh this trial entirely in our courts of juſtice, by an act of parliament in 3 Hen. III. according to ſir Edward Coke [o], or rather by an order of the king in council [p].

II. ANOTHER ſpecies of purgation, ſomewhat ſimilar to the former, but probably ſprung from a preſumptuous abuſe of revelation in the ages of dark ſuperſtition, was the *corſned*, or morſel of execration: being a piece of cheeſe or bread, of about an ounce in weight, which was conſecrated with a form of exorciſm; deſiring of the Almighty that it might cauſe convulſions and paleneſs, and find no paſſage, if the man was really guilty; but might turn to health and nouriſhment, if he was innocent [q]: as the water of jealouſy among the Jews [r] was, by God's eſpecial appointment, to cauſe the belly to ſwell and the thigh to rot, if the woman was guilty of adultery. This corſned was then given to the ſuſpected perſon; who at the ſame time alſo received the holy ſacrament [s]: if indeed the corſned was not, as ſome have ſuſpected, the ſacramental bread itſelf; till the ſubſequent invention of tranſubſtantiation preſerved it from profane uſes with a more profound reſpect than formerly. Our hiſtorians aſſure us, that Godwin, earl of Kent in the reign of king Edward the confeſſor, abjuring the death of the king's brother, at laſt appealed to his corſned, "*per buccellam deglutiendam abjuravit* [t]," which ſtuck in his throat and killed him. This cuſtom has been long ſince gradually aboliſhed, though the remembrance of it ſtill ſubſiſts in certain phraſes of abjuration retained among the common people [u].

[n] Mod. Un. Hiſt. xxxii. 105.

[o] 9 Rep. 32.

[p] 1 Rym. *Fœd.* 228. Spelm. *Gloſſ.* 326. 2 Pryn. Rec. Append. 20. Seld. *Eadm. fol.* 48.

[q] Spelm. *Gl.* 439.

[r] Numb. ch. v.

[s] *LL. Canut. c.* 6.

[t] Ingulph.

[u] As, "I will take the ſacrament upon it; may this morſel be my laſt;" and the like.

HOWEVER we cannot but remark, that though in European countries this cuſtom moſt probably aroſe from an abuſe of revealed religion, yet credulity and ſuperſtition will, in all ages and in all climates, produce the ſame or ſimilar effects. And therefore we ſhall not be ſurprized to find, that in the kingdom of Pegu there ſtill ſubſiſts a trial by the corſned, very ſimilar to that of our anceſtors, only ſubſtituting raw rice inſtead of bread [w]. And, in the kingdom of Monomopata, they have a method of deciding lawſuits equally whimſical and uncertain. The witneſs for the plaintiff chews the bark of a tree, endued with an emetic quality; which, being ſufficiently maſticated, is then infuſed in water, which is given the defendant to drink. If his ſtomach rejects it, he is condemned: if it ſtays with him, he is abſolved, unleſs the plaintiff will drink ſome of the ſame water; and, if it ſtays with him alſo, the ſuit is left undetermined [x].

THESE two antiquated methods of trial were principally in uſe among our Saxon anceſtors. The next, which ſtill remains in force, though very rarely in uſe, owes it's introduction among us to the princes of the Norman line. And that is

III. THE trial by *battel*, duel, or ſingle combat: which was another ſpecies of preſumptuous appeals to providence, under an expectation that heaven would unqueſtionably give the victory to the innocent or injured party. The nature of this trial in caſes of civil injury, upon iſſue joined in a writ of right, was fully diſcuſſed in the preceding book [y]: to which I have only to add, that the trial by battel may be demanded at the election of the appellee, in either an appeal or an approvement; and that it is carried on with equal ſolemnity as that on a writ of right: but with this difference, that there each party might hire a champion, but here they muſt fight in their proper perſons. And therefore if the appellant or approver be a woman, a prieſt, an infant, or

[w] Mod. Univ. Hiſt. vii. 129.
[x] *Ibid.* xv. 464.
[y] See Vol. III. pag. 337.

of

of the age of ſixty, or lame, or blind, he or ſhe may counterplead and refuſe the wager of battel; and compel the appellee to put himſelf upon the country. Alſo peers of the realm, bringing an appeal, ſhall not be challenged to wage battel, on account of the dignity of their perſons; nor the citizens of London, by ſpecial charter, becauſe fighting ſeems foreign to their education and employment. So likewiſe if the crime be notorious; as if the thief be taken with the *mainour*, or the murderer in the room with a bloody knife, the appellant may refuſe the tender of battel from the appellee [z]; for it is unreaſonable that an innocent man ſhould ſtake his life againſt one who is already half-convicted.

THE form and manner of waging battel upon appeals are much the ſame as upon a writ of right; only the oaths of the two combatants are vaſtly more ſtriking and ſolemn [a]. The appellee, when appealed of felony, pleads *not guilty*, and throws down his glove, and declares he will defend the ſame by his body: the appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the book in his right hand, and in his left the right hand of his antagoniſt, ſwears to this effect. "*Hoc* "*audi, homo, quem per manum teneo,*" *&c:* "hear this, O man "whom I hold by the hand, who calleſt thyſelf John by the "name of baptiſm, that I, who call myſelf Thomas by the name "of baptiſm, did not felonioufly murder thy father, William "by name, nor am any way guilty of the ſaid felony. So help "me God, and the ſaints; and this I will defend againſt thee "by my body, as this court ſhall award." To which the appellant replies, holding the bible and his antagoniſt's hand in the ſame manner as the other: "hear this, O man whom I hold "by the hand, who calleſt thyſelf Thomas by the name of bap-"tiſm, that thou art perjured; and therefore perjured, becauſe "that thou felonioufly didſt murder my father, William by "name. So help me God and the ſaints; and this I will prove

[z] 2 Hawk. P. C. 427.

[a] Flet. l. 1. c. 34. 2 Hawk. P. C. 426.

"againſt

"againſt thee by my body, as this court ſhall award [b]." The battel is then to be fought with the ſame weapons, *viz.* batons, the ſame ſolemnity, and the ſame oath againſt amulets and ſorcery, that are uſed in the civil combat: and if the appellee be ſo far vanquiſhed, that he cannot or will not fight any longer, he ſhall be adjudged to be hanged immediately; and then, as well as if he be killed in battel, providence is deemed to have determined in favour of the truth, and his blood ſhall be attainted. But if he kills the appellant, or can maintain the fight from ſunriſing till the ſtars appear in the evening, he ſhall be acquitted. So alſo if the appellant becomes recreant, and pronounces the horrible word of *craven*, he ſhall loſe his *liberam legem*, and become infamous; and the appellee ſhall recover his damages, and alſo be for ever quit, not only of the appeal, but of all indictments likewiſe for the ſame offence.

IV. THE fourth method of trial uſed in criminal caſes is that by the peers of Great Britain, in the court of parliament, or the court of the lord high ſteward, when a peer is capitally indicted. Of this enough has been ſaid in a former chapter [c]; to which I ſhall now only add, that, in the method and regulations of it's proceedings, it differs little from the trial *per patriam*, or by jury: except that the peers need not all agree in their verdict; but the greater number, conſiſting of twelve at the leaſt, will conclude, and bind the minority [d].

V. THE trial by jury, or the country, *per patriam*, is alſo that trial by the peers of every Engliſhman, which, as the grand bulwark of his liberties, is ſecured to him by the great

[b] There is a ſtriking reſemblance between this proceſs, and that of the court of *Areopagus* at Athens, for murder; wherein the proſecutor and priſoner were both ſworn in the moſt ſolemn manner: the proſecutor, that he was related to the deceaſed (for none but near relations were permitted to proſecute in that court) and that the priſoner was the cauſe of his death; the priſoner, that he was innocent of the charge againſt him. (Pott. Antiqu. b. 1. c. 19.)

[c] See pag. 259.

[d] Kelynge. 56. Stat. 7 W. III. c. 3. §. 11. Foſter. 247.

charter [e]:

charter [e]: "*nullus liber homo capiatur, vel impriſonetur, aut exulet, "aut aliquo alio modo deſtruatur, niſi per legale judicium parium "ſuorum, vel per legem terrae.*"

THE antiquity and excellence of this trial, for the ſettling of civil property, has before been explained at large [f]. And it will hold much ſtronger in criminal caſes; ſince, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in ſuits between the king and the ſubject, than in diſputes between one individual and another, to ſettle the metes and boundaries of private property. Our law has therefore wiſely placed this ſtrong and twofold barrier, of a preſentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. It was neceſſary, for preſerving the admirable ballance of our conſtitution, to veſt the executive power of the laws in the prince: and yet this power might be dangerous and deſtructive to that very conſtitution, if exerted without check or control, by juſtices of *oyer* and *terminer* occaſionally named by the crown; who might then, as in France or Turkey, impriſon, diſpatch, or exile any man that was obnoxious to the government, by an inſtant declaration, that ſuch is their will and pleaſure. But the founders of the Engliſh laws have with excellent forecaſt contrived, that no man ſhould be called to anſwer to the king for any capital crime, unleſs upon the preparatory accuſation of twelve or more of his fellow ſubjects, the grand jury: and that the truth of every accuſation, whether preferred in the ſhape of indictment, information, or appeal, ſhould afterwards be confirmed by the unanimous ſuffrage of twelve of his equals and neighbours, indifferently choſen, and ſuperior to all ſuſpicion. So that the liberties of England cannot but ſubſiſt, ſo long as this *palladium* remains ſacred and inviolate, not only from all open attacks, (which none will be ſo hardy as to make) but alſo from all ſecret machinations, which may ſap and undermine it; by introducing new and arbitrary methods of trial, by juſtices of

[e] 9 Hen. III. c. 29.

[f] See Vol. III. pag. 379.

the

the peace, commiſſioners of the revenue, and courts of conſcience. And however *convenient* theſe may appear at firſt, (as doubtleſs all arbitrary powers, well executed, are the moſt *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of juſtice, are the price that all free nations muſt pay for their liberty in more ſubſtantial matters; that theſe inroads upon this ſacred bulwark of the nation are fundamentally oppoſite to the ſpirit of our conſtitution; and that, though begun in trifles, the precedent may gradually increaſe and ſpread, to the utter diſuſe of juries in queſtions of the moſt momentous concern.

WHAT was ſaid of juries in general, and the trial thereby, in *civil* caſes, will greatly ſhorten our preſent remarks, with regard to the trial of *criminal* ſuits; indictments, informations, and appeals: which trial I ſhall conſider in the ſame method that I did the former; by following the order and courſe of the proceedings themſelves, as the moſt clear and perſpicuous way of treating it.

WHEN therefore a priſoner on his arraignment has pleaded *not guilty*, and for his trial hath put himſelf upon the country, which country the jury are, the ſheriff of the county muſt return a panel of jurors, *liberos et legales homines, de vicineto*; that is, freeholders, without juſt exception, and of the *viſne* or neighbourhood; which is interpreted to be of the county where the fact is committed [g]. If the proceedings are before the court of king's bench, there is time allowed, between the arraignment and the trial, for a jury to be impanelled by writ of *venire facias* to the ſheriff, as in civil cauſes: and the trial in caſe of a miſdemeſnor is had at *niſi prius*, unleſs it be of ſuch conſequence as to merit a trial at bar; which is always invariably had when the priſoner is tried for any capital offence. But, before commiſſioners of *oyer* and *terminer* and gaol delivery, the ſheriff by virtue of a general precept directed to him beforehand, returns

[g] 2 Hal. P. C. 264. 2 Hawk. P. C. 403.

to

to the court a panel of forty eight jurors, to try all felons that may be called upon their trial at that ſeſſion: and therefore it is there uſual to try all felons immediately, or ſoon, after their arraignment. But it is not cuſtomary, nor agreeable to the general courſe of proceedings, unleſs by conſent of parties, to try perſons indicted of ſmaller miſdemeſnors at the ſame court in which they have pleaded *not guilty*, or *traverſed* the indictment. But they uſually give ſecurity to the court, to appear at the next aſſiſes or ſeſſion, and then and there to try the traverſe, giving notice to the proſecutor of the ſame.

IN caſes of high treaſon, whereby corruption of blood may enſue, or miſpriſion of ſuch treaſon, it is enacted by ſtatute 7 W. III. c. 3. firſt, that no perſon ſhall be tried for any ſuch treaſon, except an attempt to aſſaſſinate the king, unleſs the indictment be found within three years after the offence committed: next, that the priſoner ſhall have a copy of the indictment, but not the names of the witneſſes, five days at leaſt before the trial; that is, upon the true conſtruction of the act, before his arraignment[h]; for then is his time to take any exceptions thereto, by way of plea or demurrer: thirdly, that he ſhall alſo have a copy of the panel of jurors two days before his trial: and, laſtly, that he ſhall have the ſame compulſive proceſs to bring in his witneſſes *for* him, as was uſual to compel their appearance *againſt* him. And, by ſtatute 7 Ann. c. 21. (which did not take place till after the deceaſe of the late pretender) all perſons, indicted for high treaſon or miſpriſion thereof, ſhall have not only a copy of the indictment, but a liſt of all the witneſſes to be produced, and of the jurors impanelled, with their profeſſions and places of abode, delivered to him ten days before the trial, and in the preſence of two witneſſes; the better to prepare him to make his challenges and defence. But this laſt act, ſo far as it affected indictments for the inferior ſpecies of high treaſon, reſpecting the coin and the royal ſeals, is repealed by the ſtatute 6 Geo. III. c. 53. elſe it had been im-

[h] Foſt. 230.

poſſible to have tried thoſe offences in the ſame circuit in which they are indicted: for ten clear days, between the finding and the trial of the indictment, will exceed the time uſually allotted for any ſeſſion of *oyer* and *terminer*[i]. And no perſon indicted for felony is, or (as the law ſtands) ever can be, entitled to ſuch copies, before the time of his trial[k].

WHEN the trial is called on, the jurors are to be ſworn, as they appear, to the number of twelve, unleſs they are challenged by the party.

CHALLENGES may here be made, either on the part of the king, or on that of the priſoner; and either to the whole array, or to the ſeparate polls, for the very ſame reaſons that they may be made in civil cauſes[l]. For it is here at leaſt as neceſſary, as there, that the ſheriff or returning officer be totally indifferent; that where an alien is indicted, the jury ſhould be *de medietate*, or half foreigners; (which does not indeed hold in treaſons[m], aliens being very improper judges of the breach of allegiance to the king) that on every panel there ſhould be a competent number of hundredors; and that the particular jurors ſhould be *omni exceptione majores*; not liable to objection either *propter honoris reſpectum*, *propter defectum*, *propter affectum*, or *propter delictum*.

CHALLENGES upon any of the foregoing accounts are ſtiled challenges *for cauſe*; which may be without ſtint in both criminal and civil trials. But in criminal caſes, or at leaſt in capital ones, there is, *in favorem vitae*, allowed to the priſoner an arbitrary and capricious ſpecies of challenge to a certain number of jurors, without ſhewing any cauſe at all; which is called a *peremptory* challenge: a proviſion full of that tenderneſs and humanity to priſoners, for which our Engliſh laws are juſtly famous. This is grounded on two reaſons. 1. As every one

[i] Foſt. 250.
[k] 2 Hawk. P. C. 410.
[l] See Vol. III. pag. 359.
[m] 2 Hawk. P. C. 420. 2 Hal. P. C. 271

muſt

muſt be ſenſible, what ſudden impreſſions and unaccountable prejudices we are apt to conceive upon the bare looks and geſtures of another; and how neceſſary it is, that a priſoner (when put to defend his life) ſhould have a good opinion of his jury, the want of which might totally diſconcert him; the law wills not that he ſhould be tried by any one man againſt whom he has conceived a prejudice, even without being able to aſſign a reaſon for ſuch his diſlike. 2. Becauſe, upon challenges for cauſe ſhewn, if the reaſon aſſigned prove inſufficient to ſet aſide the juror, perhaps the bare queſtioning his indifference may ſometimes provoke a reſentment; to prevent all ill conſequences from which, the priſoner is ſtill at liberty, if he pleaſes, peremptorily to ſet him aſide.

THIS privilege, of peremptory challenges, though granted to the priſoner, is denied to the king by the ſtatute 33 Edw. I. ſt. 4. which enacts, that the king ſhall challenge no jurors without aſſigning a cauſe certain, to be tried and approved by the court. However it is held, that the king need not aſſign his cauſe of challenge, till all the panel is gone through, and unleſs there cannot be a full jury without the perſons ſo challenged. And then, and not ſooner, the king's counſel muſt ſhew the cauſe: otherwiſe the juror ſhall be ſworn [n].

THE peremptory challenges of the priſoner muſt however have ſome reaſonable boundary; otherwiſe he might never be tried. This reaſonable boundary is ſettled by the common law to be the number of thirty five; that is, one under the number of three full juries. For the law judges that five and thirty are fully ſufficient to allow the moſt timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all. And therefore it dealt with one, who peremptorily challenges above thirty five, and will not retract his challenge, as with one who ſtands mute or refuſes his trial; by ſentencing him to the

[n] 2 Hawk. P. C. 413. 2 Hal. P. C. 271.

peine forte et dure in felony, and by attainting him in treaſon [o]. And ſo the law ſtands at this day with regard to treaſon, of any kind.

BUT by ſtatute 22 Hen.VIII. c. 14. (which, with regard to felonies, ſtands unrepealed by ſtatute 1 & 2 Ph. & Mar. c. 10.) by this ſtatute, I ſay, no perſon, arraigned for felony, can be admitted to make any more than *twenty* peremptory challenges. But how if the priſoner will peremptorily challenge twenty one? what ſhall be done? The old opinion was, that judgment of *peine forte et dure* ſhould be given, as where he challenged thirty ſix at the common law [p]: but the better opinion ſeems to be [q], that ſuch challenge ſhall only be diſregarded and overruled. Becauſe, firſt, the common law doth not inflict the judgment of penance for challenging twenty one, neither doth the ſtatute inflict it; and ſo heavy a judgment ſhall not be impoſed by implication. Secondly, the words of the ſtatute are, "that he be "not *admitted* to challenge more than twenty;" the evident conſtruction of which is, that any farther challenge ſhall be diſallowed or prevented: and therefore, being null from the beginning, and never in fact a challenge, it can ſubject the priſoner to no puniſhment; but the juror ſhall be regularly ſworn.

IF, by reaſon of challenges or the default of the jurors, a ſufficient number cannot be had of the original panel, a *tales* may be awarded as in civil cauſes [r], till the number of twelve is ſworn, "well and truly to try, and true deliverance make, be-"tween our ſovereign lord the king, and the priſoner whom "they have in charge; and a true verdict to give, according to "their evidence."

WHEN the jury is ſworn, if it be a cauſe of any conſequence, the indictment is uſually opened, and the evidence marſhalled, examined, and enforced by the counſel for the crown, or proſe-

[o] 2 Hal. P. C. 268.
[p] 2 Hawk. P. C. 414.
[q] 3 Inſt. 227. 2 Hal. P. C. 270.
[r] See Vol. III. pag. 364.

cution.

cution. But it is a ſettled rule at common law, that no counſel ſhall be allowed a priſoner upon his trial, upon the general iſſue, in any capital crime, unleſs ſome point of law ſhall ariſe proper to be debated[s]. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly underſtood, that the judge ſhall be counſel for the priſoner; that is, ſhall ſee that the proceedings againſt him are legal and ſtrictly regular[t]) ſeems to be not at all of a piece with the reſt of the humane treatment of priſoners by the Engliſh law. For upon what face of reaſon can that aſſiſtance be denied to ſave the life of a man, which yet is allowed him in proſecutions for every petty treſpaſs? Nor indeed is it ſtrictly ſpeaking a part of our antient law: for the mirrour[u], having obſerved the neceſſity of counſel in civil ſuits, "who know how to forward and defend "the cauſe, by the rules of law and cuſtoms of the realm," immediately afterwards ſubjoins; "and more neceſſary are they "for defence upon indictments and appeals of felony, than upon "other venial cauſes[w]." And, to ſay the truth, the judges themſelves are ſo ſenſible of this defect in our modern practice, that they ſeldom ſcruple to allow a priſoner counſel to ſtand by

[s] 2 Hawk. P. C. 400.

[t] Sir Edward Coke (3 Inſt. 137.) gives another additional reaſon for this refuſal, "becauſe the evidence to convict a priſoner "ſhould be ſo manifeſt, as it could not be "contradicted." It was therefore thought too dangerous an experiment, to let an advocate try, whether it could be contradicted or no.

[u] c. 3. §. 1.

[w] Father Parſons the jeſuit, and after him biſhop Ellys, (of Engliſh liberty. ii. 26.) have imagined, that the benefit of counſel to plead for them was firſt denied to priſoners by a law of Henry I, meaning (I preſume) chapters 47 and 48 of the code which is uſually attributed to that prince. "*De cauſis criminalibus vel capitalibus nemo* "*quaerat conſilium; quin implacitatus ſtatim* "*perneget, ſine omni petitione conſilii.——In* "*aliis omnibus poteſt et debet uti conſilio.*" But this *conſilium*, I conceive, ſignifies only an *imparlance*, and the *petitio conſilii* is *craving leave to imparl*; (See Vol. III. pag. 298.) which is not allowable in any criminal proſecution. This will be manifeſt by comparing this law with a co-temporary paſſage in the *grand couſtumier* of Normandy, (ch. 85.) which ſpeaks of imparlances in perſonal actions. "*Apres ce, eſt tenu le* "*querelle a reſpondre; et aura congie de ſoy* "*conſeiller, s'il le demande: et, quand il ſera* "*conſeille, il peut nyer le faict dont il eſt ac-* "*cuſe.*" Or, as it ſtands in the Latin text, (*edit.* 1539.) "*Querelatus autem poſtea tene-* "*tur reſpondere; et habebit licentiam conſu-* "*lendi, ſi requirat: habito autem conſilio, de-* "*bet factum negare quo accuſatus eſt.*"

him

him at the bar, and inſtruct him what queſtions to aſk, or even to aſk queſtions for him, with reſpect to matters of fact: for as to matters of law, ariſing on the trial, they are *intitled* to the aſſiſtance of counſel. But ſtill this is a matter of too much importance to be left to the good pleaſure of any judge, and is worthy the interpoſition of the legiſlature; which has ſhewn it's inclination to indulge priſoners with this reaſonable aſſiſtance, by enacting in ſtatute 7 W. III. c. 3. that perſons *indicted* for ſuch high treaſon, as works a corruption of the blood, or miſpriſion thereof, may make their full defence by counſel, not exceeding two, to be named by the priſoner and aſſigned by the court or judge: and this indulgence, by ſtatute 20 Geo. II. c. 30. is extended to parliamentary *impeachments* for high treaſon, which were excepted in the former act.

THE doctrine of evidence upon pleas of the crown is, in moſt reſpects, the ſame as that upon civil actions. There are however a few leading points, wherein, by ſeveral ſtatutes and reſolutions, a difference is made between civil and criminal evidence.

FIRST, in all caſes of high treaſon, petit treaſon, and miſpriſion of treaſon, by ſtatutes 1 Edw. VI. c. 12. 5 & 6 Edw. VI. c. 11. and 1 & 2 Ph. & Mar. c. 10. *two* lawful witneſſes are required to convict a priſoner; except in caſes of coining[x], and counterfeiting the ſeals; or unleſs the party ſhall willingly and without violence confeſs the ſame. By ſtatute 7 W. III. c. 3. in proſecutions for thoſe treaſons to which that act extends, the ſame rule is again enforced, with this addition, that the confeſſion of the priſoner, which ſhall countervail the neceſſity of ſuch proof, muſt be in open court; and it is declared that both witneſſes muſt be to the ſame overt act of treaſon, or one to one overt act, and the other to another overt act of the ſame ſpecies of treaſon[y], and not of diſtinct heads or kinds: and no evidence ſhall be admitted to prove any overt act not expreſſly laid in the

[x] 1 Hal. P. C. 297.

[y] See St. Tr. II. 144. Foſter. 235.

indict-

indictment. And therefore in ſir John Fenwick's caſe, in king William's time, where there was but one witneſs, an act of parliament [z] was made on purpoſe to attaint him of treaſon, and he was executed [a]. But in almoſt every other accuſation one poſitive witneſs is ſufficient. Baron Monteſquieu lays it down for a rule [b], that thoſe laws which condemn a man to death *in any caſe* on the depoſition of a ſingle witneſs, are fatal to liberty: and he adds this reaſon, that the witneſs who affirms, and the accuſed who denies, make an equal ballance [c]; there is a neceſſity therefore to call in a third man to incline the ſcale. But this ſeems to be carrying matters too far: for there are ſome crimes, in which the very privacy of their nature excludes the poſſibility of having more than one witneſs: muſt theſe therefore eſcape unpuniſhed? Neither indeed is the bare denial of the perſon accuſed equivalent to the poſitive oath of a diſintereſted witneſs. In caſes of indictments for perjury, this doctrine is better founded; and there our law adopts it: for one witneſs is not allowed to convict a man indicted for perjury; becauſe then there is only one oath againſt another [d]. In caſes of treaſon alſo there is the accuſed's oath of allegiance, to counterpoiſe the information of a ſingle witneſs; and that may perhaps be one reaſon why the law requires a double teſtimony to convict him: though the principal reaſon, undoubtedly, is to ſecure the ſubject from being ſacrificed to fictitious conſpiracies, which have been the engines of profligate and crafty politicians in all ages.

SECONDLY, though from the reverſal of colonel Sidney's attainder by act of parliament in 1689 [e] it may be collected [f], that the mere ſimilitude of hand-writing in two papers ſhewn to a jury, without other concurrent teſtimony, is no evidence that both were written by the ſame perſon; yet undoubtedly the teſtimony of witneſſes, well acquainted with the party's

[z] Stat. 8 W. III. c. 4.
[a] St. Tr. V. 40.
[b] Sp. L. b. 12. c. 3.
[c] Beccar. c. 13.
[d] 10 Mod. 194.
[e] St. Tr. VIII. 472.
[f] 2 Hawk. P. C. 431.

hand,

hand, that they believe the paper in queſtion to have been written by him, is evidence to be left to a jury[g].

THIRDLY, by the ſtatute 21 Jac. I. c. 27. a mother of a baſtard child, concealing it's death, muſt prove by one witneſs that the child was born dead; otherwiſe ſuch concealment ſhall be evidence of her having murdered it[h].

FOURTHLY, all preſumptive evidence of felony ſhould be admitted cautiouſly: for the law holds, that it is better that ten guilty perſons eſcape, than that one innocent ſuffer. And ſir Matthew Hale in particular[j] lays down two rules, moſt prudent and neceſſary to be obſerved: 1. Never to convict a man for ſtealing the goods of a perſon unknown, merely becauſe he will give no account how he came by them, unleſs an actual felony be proved of ſuch goods: and, 2. Never to convict any perſon of murder or manſlaughter, till at leaſt the body be found dead; on account of two inſtances he mentions, where perſons were executed for the murder of others, who were then alive, but miſſing.

LASTLY, it was an antient and commonly received practice[i], (derived from the civil law, and which alſo to this day obtains in the kingdom of France[k]) that, as counſel was not allowed to any priſoner accuſed of a capital crime, ſo neither ſhould he be ſuffered to exculpate himſelf by the teſtimony of any witneſſes. And therefore it deſerves to be remembered, to the honour of Mary I, (whoſe early ſentiments, till her marriage with Philip of Spain, ſeem to have been humane and generous[l]) that when ſhe appointed ſir Richard Morgan chief juſtice of the common-pleas, ſhe injoined him, "that notwithſtanding the old error,

[g] Lord Preſton's caſe. *A. D.* 1690. St. Tr. IV. 453. Francia's caſe. *A. D.* 1716. St. Tr. VI. 69. Layer's caſe. *A. D.* 1722. *ibid.* 279. Henzey's caſe. *A. D.* 1758. 4 Burr. 644.

[h] See pag. 198.

[j] 2 Hal. P. C. 290.

[i] St. Tr. I. *paſſim.*

[k] Domat. publ. law. b. 3. t. 1. Monteſq. Sp. L. b. 29. c. 11.

[l] See pag. 17.

"which

" which did not admit any witneſs to ſpeak, or any other matter " to be heard, in favour of the adverſary, her majeſty being " party; her highneſs' pleaſure was, that whatſoever could be " brought in favour of the ſubject ſhould be admitted to be " heard: and moreover, that the juſtices ſhould not perſuade " themſelves to ſit in judgment otherwiſe for her highneſs than " for her ſubject[m] Afterwards, in one particular inſtance (when embezzling the queen's military ſtores was made felony by ſtatute 31 Eliz. c. 4.) it was provided that any perſon, impeached for ſuch felony, " ſhould be received and admitted to make any " lawful proof that he could, by lawful witneſs or otherwiſe, " for his diſcharge and defence:" and in general the courts grew ſo heartily aſhamed of a doctrine ſo unreaſonable and oppreſſive, that a practice was gradually introduced of examining witneſſes for the priſoner, but not upon oath[n]: the conſequence of which ſtill was, that the jury gave leſs credit to the priſoner's evidence, than to that produced by the crown. Sir Edward Coke[o] proteſts very ſtrongly againſt this tyrannical practice: declaring that he never read in any act of parliament, book-caſe, or record, that in criminal caſes the party accuſed ſhould not have witneſſes ſworn for him; and therefore there was not ſo much as *ſcintilla juris* againſt it[p]. And the houſe of commons were ſo ſenſible of this abſurdity, that, in the bill for aboliſhing hoſtilities between England and Scotland[q], when felonies committed by Engliſhmen in Scotland were ordered to be tried in one of the three northern counties, they inſiſted on a clauſe, and carried it[r] againſt the efforts of both the crown and the houſe of lords, againſt the practice of the courts in England, and the expreſs law of Scotland[s], " that in all ſuch trials, for the better diſco- " very of the truth, and the better information of the con- " ſciences of the jury and juſtices, there ſhall be allowed to the

[m] Holingſh. 1112. St. Tr. I. 72.
[n] 2 Bulſtr. 147. Cro. Car. 292.
[o] 3 Inſt. 79.
[p] See alſo 2 Hal. P. C. 283. and his ſummary. 264.
[q] Stat. 4 Jac. I. c. 1.
[r] Com. Journ. 4, 5, 12, 13, 15, 29, 30 Jun. 1607.
[s] *Ibid.* 4 Jun. 1607.

" party arraigned the benefit of ſuch credible witneſſes, to be " examined upon oath, as can be produced for his clearing and " juſtification." At length by the ſtatute 7 W. III. c. 3. the ſame meaſure of juſtice was eſtabliſhed throughout all the realm, in caſes of treaſon within the act: and it was afterwards declared by ſtatute 1 Ann. ſt. 2. c. 9. that in all caſes of treaſon and felony, all witneſſes *for* the priſoner ſhould be examined upon oath, in like manner as the witneſſes *againſt* him.

WHEN the evidence on both ſides is cloſed, the jury cannot be diſcharged till they have given in their verdict; but are to conſider of it, and deliver it in, with the ſame forms, as upon civil cauſes: only they cannot, in a criminal caſe, give a *privy* verdict [t]. But an open verdict may be either general, guilty, or not guilty; or ſpecial, ſetting forth all the circumſtances of the caſe, and praying the judgment of the court, whether, for inſtance, on the facts ſtated, it be murder, manſlaughter, or no crime at all. This is where they *doubt* the matter of law, and therefore *chuſe* to leave it to the determination of the court; though they have an unqueſtionable right of determining upon all the circumſtances, and finding a general verdict, if they think proper ſo to hazard a breach of their oaths: and, if their verdict be notoriouſly wrong, they may be puniſhed and the verdict ſet aſide by attaint at the ſuit of the king; but not at the ſuit of the priſoner [u]. But the practice, heretofore in uſe, of fining, impriſoning, or otherwiſe puniſhing jurors, merely at the diſcretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconſtitutional, and illegal: and is treated as ſuch by ſir Thomas Smith, two hundred years ago; who accounted " ſuch doings to be very violent, tyrannical, and contrary to the " liberty and cuſtom of the realm of England [w]." For, as ſir Matthew Hale well obſerves [x], it would be a moſt unhappy caſe for the judge himſelf, if the priſoner's fate depended upon his directions:---unhappy alſo for the priſoner; for, if the judge's

[t] 2 Hal. P. C. 300. 2 Hawk. P. C. 439.
[u] 2 Hal. P. C. 310.
[w] Smith's commonw. l. 3. c. 1.
[x] 2 Hal. P. C. 313.

opi-

opinion muſt rule the verdict, the trial by jury would be uſeleſs. Yet in many inſtances [y], where contrary to evidence the jury have found the priſoner guilty, their verdict hath been mercifully ſet aſide, and a new trial granted by the court of king's bench; for in ſuch caſe, as hath been ſaid, it cannot be ſet right by attaint. But there hath yet been no inſtance of granting a new trial, where the priſoner was *acquitted* upon the firſt [z].

IF the jury therefore find the priſoner not guilty, he is then for ever quit and diſcharged of the accuſation [a]; except he be appealed of felony within the time limited by law. But if the jury find him guilty [b], he is then ſaid to be *convicted* of the crime whereof he ſtands indicted. Which conviction may accrue two ways; either by his confeſſing the offence and pleading guilty; or by his being found ſo by the verdict of his country.

WHEN the offender is thus convicted, there are two collateral circumſtances that immediately ariſe. 1. On a conviction, in general, for any felony, the reaſonable expenſes of proſecution are by ſtatute 25 Geo. II. c. 36. to be allowed to the proſecutor out of the county ſtock, if he petitions the judge for that purpoſe; and by ſtatute 27 Geo. II. c. 3. poor perſons, bound over to give evidence, are likewiſe entitled to be paid their charges, as well without conviction as with it. 2. On a conviction of larciny in particular, the proſecutor ſhall have reſtitution of his goods, by virtue of the ſtatute 21 Hen. VIII. c. 11. For by the common law there was no reſtitution of goods upon an indictment, becauſe it is at the ſuit of the king only; and therefore the party was enforced to bring an appeal of rob-

[y] 1 Lev. 9. T. Jones. 163. St. Tr. X. 416.

[z] 2 Hawk. P. C. 442.

[a] The civil law in ſuch caſe only diſcharges him from the ſame accuſer, but not from the ſame accuſation, (*Ff.* 48. 2. 7. §. 2.)

[b] In the Roman republic, when the priſoner was convicted of any capital offence by his judges, the form of pronouncing that conviction was ſomething peculiarly delicate: not that he was guilty, but that he had not been enough upon his guard; "*parum cauiſſe videtur.*" (*Feſtus.* 325.)

bery, in order to have his goods again [c]. But, it being conſidered that the party, proſecuting the offender by indictment, deſerves to the full as much encouragement as he who proſecutes by appeal, this ſtatute was made, which enacts, that if any perſon be convicted of larciny by the evidence of the party robbed, he ſhall have full reſtitution of his money, goods, and chattels; or the value of them out of the offender's goods, if he has any, by a writ to be granted by the juſtices. And this writ of reſtitution ſhall reach the goods ſo ſtolen, notwithſtanding the property [d] of them is endeavoured to be altered by ſale in market overt [e]. And, though this may ſeem ſomewhat hard upon the buyer, yet the rule of law is that "*ſpoliatus debet, ante omnia, reſtitui;*" eſpecially when he has uſed all the diligence in his power to convict the felon. And, ſince the caſe is reduced to this hard neceſſity, that either the owner or the buyer muſt ſuffer; the law prefers the right of the owner, who has done a meritorious act by purſuing a felon to condign puniſhment, to the right of the buyer, whoſe merit is only negative, that he has been guilty of no unfair tranſaction. Or elſe, ſecondly, without ſuch writ of reſtitution, the party may peaceably retake his goods, wherever he happens to find them [f], unleſs a new property be fairly acquired therein. Or, laſtly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover againſt him for his goods; and recover a ſatisfaction in damages. But ſuch action lies not before proſecution; for ſo felonies would be made up and healed [g]: and alſo recaption is unlawful, if it be done with intention to ſmother or compound the larciny; it then becoming the heinous offence of theft-bote, as was mentioned in a former chapter [h].

IT is not uncommon, when a perſon is convicted of a miſdemeſnor, which principally and more immediately affects ſome individual, as a battery, impriſonment, or the like, for the court

[c] 3 Inſt. 242.
[d] See Vol. II. pag. 450.
[e] 1 Hal. P. C. 543.
[f] See Vol. III. pag. 4.
[g] 1 Hal. P. C. 546.
[h] See pag. 133.

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to permit the defendant to *ſpeak with the proſecutor*, before any judgment is pronounced; and, if the proſecutor declares himſelf ſatisfied, to inflict but a trivial puniſhment. This is done, to reimburſe the proſecutor his expenſes, and make him ſome private amends, without the trouble and circuity of a civil action. But it ſurely is a dangerous practice: and, though it may be intruſted to the prudence and diſcretion of the judges in the ſuperior courts of record, it ought never to be allowed in local or inferior juriſdictions, ſuch as the quarter-ſeſſions; where proſecutions for aſſaults are by this means too frequently commenced, rather for private lucre than for the great ends of public juſtice. Above all, it ſhould never be ſuffered, where the teſtimony of the proſecutor himſelf is neceſſary to convict the defendant: for by this means, the rules of evidence are entirely ſubverted; the proſecutor becomes in effect a plaintiff, and yet is ſuffered to bear witneſs for himſelf. Nay even a voluntary forgiveneſs, by the party injured, ought not in true policy to intercept the ſtroke of juſtice. "This," ſays an elegant writer [i], (who pleads with equal ſtrength for the *certainty* as for the *lenity* of puniſhment) "may be an act of good-nature and humanity, but it is contrary "to the good of the public. For, although a private citizen "may diſpenſe with ſatisfaction for his private injury, he cannot "remove the neceſſity of public example. The right of puniſh-"ing belongs not to any one individual in particular, but to the "ſociety in general, or the ſovereign who repreſents that ſociety: "and a man may renounce his own portion of this right, but "he cannot give up that of others."

[i] Becc. ch. 46.

CHAPTER THE TWENTY EIGHTH.

OF THE BENEFIT OF CLERGY.

AFTER trial and conviction, the judgment of the court regularly follows, unleſs ſuſpended or arreſted by ſome intervening circumſtance; of which the principal is *the benefit of clergy:* a title of no ſmall curioſity as well as uſe; and concerning which I ſhall therefore enquire, 1. Into it's original, and the various mutations which this privilege of clergy has ſuſtained. 2. To what perſons it is to be allowed at this day. 3. In what caſes. 4. The conſequences of allowing it.

I. CLERGY, the *privilegium clericale*, or in common ſpeech *the benefit of clergy*, had it's original from the pious regard paid by chriſtian princes to the church in it's infant ſtate; and the ill uſe which the popiſh eccleſiaſtics ſoon made of that pious regard. The exemptions, which they granted to the church, were principally of two kinds: 1. Exemption of *places*, conſecrated to religious duties, from criminal arreſts, which was the foundation of ſanctuaries: 2. Exemption of the *perſons* of clergymen from criminal proceſs before the ſecular judge in a few particular caſes, which was the true original and meaning of the *privilegium clericale*.

BUT

BUT the clergy, encreaſing in wealth, power, honour, number, and intereſt, began ſoon to ſet up for themſelves: and that which they obtained by the favour of the civil government, they now claimed as their inherent right; and as a right of the higheſt nature, indefeaſible, and *jure divino* [a]. By their canons therefore and conſtitutions they endeavoured at, and where they met with eaſy princes obtained, a vaſt extenſion of theſe exemptions: as well in regard to the crimes themſelves, of which the liſt became quite univerſal [b]; as in regard to the perſons exempted, among whom were at length comprehended not only every little ſubordinate officer belonging to the church or clergy, but even many that were totally laymen.

IN England however, although the uſurpations of the pope were very many and grievous, till Henry the eighth entirely exterminated his ſupremacy, yet a total exemption of the clergy from ſecular juriſdiction could never be thoroughly effected, though often endeavoured by the clergy [c]: and therefore, though the antient *privilegium clericale* was in *ſome* capital caſes, yet it was not *univerſally*, allowed. And in thoſe particular caſes, the uſe was for the biſhop or ordinary to demand his clerks to be remitted out of the king's courts, as ſoon as they were indicted: concerning the allowance of which demand there was for many years a great uncertainty [d]: till at length it was finally ſettled in the reign of Henry the ſixth, that the priſoner ſhould firſt be arraigned; and might either *then* claim his benefit of clergy, by way of declinatory plea; or, *after conviction*, by way of arreſting judgment. This latter way is moſt uſually practiſed, as it is more to the ſatisfaction of the court to have the crime previouſly aſcertained by confeſſion or the verdict of a jury; and alſo as it is more advantageous to the priſoner himſelf, who may

[a] The principal argument, upon which they founded this exemption, was that text of ſcripture; "touch not mine anointed, and "do my prophets no harm." (Keilw. 181.)

[b] See Vol. III. pag. 62.

[c] Keilw. 180.

[d] 2 Hal. P. C. 377.

poſſibly

poſſibly be acquitted, and ſo need not the benefit of his clergy at all.

ORIGINALLY the law was held, that no man ſhould be admitted to the privilege of clergy, but ſuch as had the *habitum et tonſuram clericalem*[e]. But in proceſs of time a much wider and more comprehenſive criterion was eſtabliſhed: every one that could read (a mark of great learning in thoſe days of ignorance and her ſiſter ſuperſtition) being accounted a clerk or *clericus*, and allowed the benefit of clerkſhip, though neither initiated in holy orders, nor trimmed with the clerical tonſure. But when learning, by means of the invention of printing, and other concurrent cauſes, began to be more generally diffeminated than formerly; and reading was no longer a competent proof of clerkſhip, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale:* and therefore by ſtatute 4 Hen. VII. c. 13. a diſtinction was once more drawn between mere lay ſcholars, and clerks that were really in orders. And, though it was thought reaſonable ſtill to mitigate the ſeverity of the law with regard to the former, yet they were not put upon the ſame footing with actual clergy; being ſubjected to a ſlight degree of puniſhment, and not allowed to claim the clerical privilege more than once. Accordingly the ſtatute directs, that no perſon, once admitted to the benefit of clergy, ſhall be admitted thereto a ſecond time, unleſs he produces his orders: and, in order to diſtinguiſh their perſons, all laymen who are allowed this privilege ſhall be burnt with a hot iron in the brawn of the left thumb. This diſtinction between learned laymen, and real clerks in orders, was aboliſhed for a time by the ſtatutes 28 Hen. VIII. c. 1, and 32 Hen. VIII. c. 3. but is held[f] to have been virtually reſtored by ſtatute 1 Edw. VI. c. 12. which ſtatute alſo enacts that lords of parliament, and peers of the realm, may have the benefit of their peerage, equivalent to that of clergy, for the firſt offence, (although they cannot read, and

[e] 2 Hal. P. C. 372. M. Paris, *A. D.* 1259. [f] Hob. 294.

See Vol. I. pag. 24.

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without being burnt in the hand) for all offences then clergyable to commoners, and alſo for the crimes of houſebreaking, high-way robbery, horſe-ſtealing, and robbing of churches.

AFTER this burning the laity, and before it the real clergy, were diſcharged from the ſentence of the law in the king's courts, and delivered over to the ordinary, to be dealt with according to the eccleſiaſtical canons. Whereupon the ordinary, not ſatisfied with the proofs adduced in the profane ſecular court, ſet himſelf formally to work to make a purgation of the offender by a new canonical trial; although he had been previouſly convicted by his country, or perhaps by his own confeſſion. This trial was held before the biſhop in perſon, or his deputy; and by a jury of twelve clerks: and there, firſt, the party himſelf was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who ſwore they believed he ſpoke the truth; then, witneſſes were to be examined upon oath, but on behalf of the priſoner only; and, laſtly, the jury were to bring in their verdict upon oath, which uſually acquitted the priſoner: otherwiſe, if a clerk, he was degraded, or put to penance [g]. A learned judge, in the beginning of the laſt century [h], remarks with much indignation the vaſt complication of perjury and ſubornation of perjury, in this ſolemn farce of a mock trial; the witneſſes, the compurgators, and the jury, being all of them partakers in the guilt: the delinquent party alſo, though convicted before on the cleareſt evidence, and conſcious of his own offence, yet was permitted and almoſt compelled to ſwear himſelf not guilty: nor was the good biſhop himſelf, under whoſe countenance this ſcene of wickedneſs was daily tranſacted, by any means exempt from a ſhare of it. And yet by this purgation the party was reſtored to his credit, his liberty, his lands, and his capacity of purchaſing afreſh, and was entirely made a new and an innocent man.

[g] 3 P. Wm. 447. Hob. 289.

[h] Hob. 291.

THIS ſcandalous proſtitution of oaths, and the forms of juſtice, in the almoſt conſtant acquittal of felonious clerks by purgation, was the occaſion, that, upon very heinous and notorious circumſtances of guilt, the temporal courts would not truſt the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *abſque purgatione facienda:* in which ſituation the clerk convict could not make purgation; but was to continue in priſon during life, and was incapable of acquiring any perſonal property, or receiving the profits of his lands, unleſs the king ſhould pleaſe to pardon him. Both theſe courſes were in ſome degree exceptionable; the latter being perhaps too rigid, as the former was productive of the moſt abandoned perjury. As therefore theſe mock trials took their riſe from factious and popiſh tenets, tending to exempt one part of the nation from the general municipal law; it became high time, when the reformation was thoroughly eſtabliſhed, to aboliſh ſo vain and impious a ceremony.

ACCORDINGLY the ſtatute 18. Eliz. c. 7. enacts, that, for the avoiding of ſuch perjuries and abuſes, after the offender has been allowed his clergy, he ſhall not be delivered to the ordinary, as formerly; but, upon ſuch allowance and burning in the hand, he ſhall forthwith be enlarged and delivered out of priſon; with proviſo, that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued, for above a century, unaltered; except only that the ſtatute 21 Jac. I. c. 6. allowed, that women convicted of ſimple larcinies under the value of ten ſhillings ſhould, (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, and whipped, ſtocked, or impriſoned for any time not exceeding a year. And a ſimilar indulgence, by the ſtatutes 3 & 4 W. & M. c. 9. and 4 & 5 W. & M. c. 24. was extended to women, guilty of any clergyable felony whatſoever; who were allowed once to claim the benefit of *the ſtatute*, in like manner as men might claim the benefit of *clergy*, and

and to be diſcharged upon being burned in the hand, and impriſoned for any time not exceeding a year. All women, all peers, and all male commoners who could read, were therefore diſcharged in ſuch felonies; abſolutely, if clerks in orders; and for the firſt offence, upon burning in the hand, if lay: yet all liable (excepting peers) if the judge ſaw occaſion, to impriſonment not exceeding a year. And thoſe men, who could not read, if under the degree of peerage, were hanged.

AFTERWARDS indeed it was conſidered, that education and learning were no extenuations of guilt, but quite the reverſe: and that, if the puniſhment of death for ſimple felony was too ſevere for thoſe who had been liberally inſtructed, it was, *a fortiori*, too ſevere for the ignorant alſo. And thereupon by ſtatute 5 Ann. c. 6. it was enacted, that the benefit of clergy ſhould be granted to all thoſe who were intitled to aſk it, without requiring them to read by way of conditional merit. And experience having ſhewn, that ſo very univerſal a lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony; and that, though capital puniſhments were too rigorous for theſe inferior offences, yet no puniſhment at all (or next to none, as branding or whipping) was as much too gentle; it was enacted by the ſame ſtatute, 5 Ann. c. 6. that when any perſon is convicted of any theft or larciny, and burnt in the hand for the ſame, he ſhall alſo be committed to the houſe of correction or public workhouſe, to be there kept to hard labour for any time not leſs than ſix months, and not exceeding two years; with a power of inflicting a double confinement in caſe of the party's eſcape from the firſt. And it is alſo enacted by the ſtatutes 4 Geo. I. c. 11. and 6 Geo. I. c. 23. that when any perſons ſhall be convicted of any larciny, either grand or petit, or any felonious ſtealing or taking of money or goods and chattels, either from the perſon or the houſe of any other, or in any other manner, *and who by the law ſhall be entitled to the benefit of clergy*, and liable only to the penalties of burning in the hand or whipping, the court in their diſcretion, inſtead of ſuch burning in the hand or

whipping, may direct such offenders to be transported to America for seven years: and, if they return or are seen at large in this kingdom within that time, it shall be felony without benefit of clergy.

IN this state does the benefit of clergy at present stand; very considerably different from it's original institution: the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients; and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.

FROM the whole of this detail we may collect, that, however in times of ignorance and superstition that monster in true policy may for a while subsist, of a body of men, residing in the bowels of a state, and yet independent of it's laws; yet, when learning and rational religion have a little enlightened mens minds, society can no longer endure an absurdity so gross, as must destroy it's very fundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to the united will of the community. This united will is declared in the laws of the land: and that united force is exerted in their due, and universal, execution.

II. I AM next to enquire, to what *persons* the benefit of clergy is to be allowed at this day: and this must be chiefly collected from what has been observed in the preceding article. For, upon the whole, we may pronounce, that all clerks in orders are, without any branding, and of course without any transportation, (for that is only substituted in lieu of the other) to be admitted to this privilege, and immediately discharged, or at most only confined for one year: and this as often as they offend [i]. Again, all lords of parliament and peers of the realm, by the statute 1 Edw. VI. c. 12. shall be discharged in all clergyable and other felonies,

[i] 2 Hal. P. C. 375.

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provided for by the act, without any burning in the hand, in the same manner, as real clerks convict: but this is only for the first offence. Lastly, all the commons of the realm, not in orders, whether male *or female*, shall for the first offence be discharged of the punishment of felonies, within the benefit of clergy; upon being burnt in the hand, and suffering a discretionary imprisonment; or, in case of larciny, upon being transported for seven years, if the court shall think proper. It hath been said, that Jews, and other infidels and heretics, were not capable of the benefit of clergy, till after the statute 5 Ann. c. 6. as being under a legal incapacity for orders [k]. But I much question whether this was ever ruled for law, since the re-introduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the case, the Jews are still in the same predicament, which every day's experience will contradict: the statute of queen Anne having certainly made no alteration in this respect; it only dispensing with the necessity of reading in those persons, who, in case they could read, were before the act entitled to the benefit of their clergy.

III. THE third point to be considered is, for what *crimes* the *privilegium clericale*, or benefit of clergy, is to be allowed. And, it is to be observed, that neither in high treason, nor in petit larciny, nor in any mere misdemesnors, it was indulged at the common law; and therefore we may lay it down for a rule, that it was allowable only in petit treason and felonies: which for the most part became legally intitled to this indulgence by the statute *de clero*, 25 Edw. III. st. 3. c. 4. which provides, that clerks convict for treasons or felonies, touching other persons than the king himself or his royal majesty, shall have the privilege of holy church. But yet it was not allowable in all felonies whatsoever: for in some it was denied even by the common law, viz. *insidiatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or destroying and ravaging a country [l]; and *combustio domorum*, or arson, that is, the burning of houses [m]; all which

[k] 2 Hal. P. C. 373. 2 Hawk. P. C. 338. Fost. 306.

[l] 2 Hal. P. C. 333.

[m] 1 Hal. P. C. 346.

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are a kind of hoſtile acts, and in ſome degree border upon treaſon. And farther, all theſe identical crimes, together with petit treaſon, and very many other acts of felony, are ouſted of clergy by particular acts of parliament; which have in general been mentioned under the particular offences to which they belong, and therefore need not be here recapitulated. Of all which ſtatutes for excluding clergy I ſhall only obſerve, that they are nothing elſe but the reſtoring of the law to the ſame rigor of capital puniſhment in the firſt offence, that it exerted before the *privilegium clericale* was at all indulged; and which it ſtill exerts upon a ſecond offence in almoſt all kinds of felonies, unleſs committed by clerks actually in orders. We may alſo remark, that by the marine law, as declared in ſtatute 28 Hen. VIII. c. 15. the benefit of clergy is not allowed in any caſe whatſoever. And therefore when offences are committed within the admiralty-juriſdiction, which would be clergyable if committed by land, the conſtant courſe is to acquit and diſcharge the priſoner [n]. And laſtly, under this head of enquiry, we may obſerve the following rules: 1. That in all felonies, whether new created or by common law, clergy is now allowable, unleſs taken away by expreſs words of an act of parliament [o]. 2. That, where clergy is taken away from the principal, it is not of courſe taken away from the acceſſory, unleſs he be alſo particularly included in the words of the ſtatute [p]. 3. That, when the benefit of clergy is taken away from the *offence*, (as in caſe of murder, buggery, robbery, rape, and burglary) a principal in the ſecond degree, aiding and abetting the crime, is as well excluded from his clergy as he that is principal in the firſt degree: but, 4. That, where it is only taken away from the *perſon committing* the offence, (as in the caſe of ſtabbing, or committing larciny in a dwelling houſe, or privately from the perſon) his aiders and abetters are not excluded; through the tenderneſs of the law, which hath determined that ſuch ſtatutes ſhall be taken literally [q].

[n] Moor. 756. Foſt. 288.
[o] 2 Hal. P. C. 330.
[p] 2 Hawk. P. C. 342.
[q] 1 Hal. P. C. 529. Foſter. 356.

IV. LASTLY,

IV. LASTLY, we are to enquire what the conſequences are to the party, of allowing him this benefit of clergy. I ſpeak not of the branding, impriſonment, or tranſportation; which are rather concomitant conditions, than conſequences of receiving this indulgence. The conſequences are ſuch as affect his preſent intereſt, and future credit and capacity: as having been once a felon, but now purged from that guilt by the privilege of clergy; which operates as a kind of ſtatute pardon.

AND, we may obſerve, 1. That by his conviction he forfeits all his goods to the king; which, being once veſted in the crown, ſhall not afterwards be reſtored to the offender[r]. 2. That, after conviction, and till he receives the judgment of the law, by branding or the like, or elſe is pardoned by the king, he is to all intents and purpoſes a felon, and ſubject to all the diſabilities and other incidents of a felon[s]. 3. That, after burning or pardon, he is diſcharged for ever of that, and all other felonies before committed, within the benefit of clergy; but not of felonies from which ſuch benefit is excluded: and this by ſtatutes 8 Eliz. c. 4. and 18 Eliz. c. 7. 4. That by the burning, or pardon of it, he is reſtored to all capacities and credits, and the poſſeſſion of his lands, as if he had never been convicted[t]. 5. That what is ſaid with regard to the advantages of commoners and laymen, ſubſequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all. For they have the ſame privileges, without any burning, which others are intitled to after it[u].

[r] 2 Hal. P. C. 388.
[s] 3 P. Wms. 487.
[t] 2 Hal. P. C. 389. 5 Rep. 110.
[u] 2 Hal. P. C. 389, 390.

CHAPTER THE TWENTY NINTH.

OF JUDGMENT, AND IT'S CONSEQUENCES.

WE are now to conſider the next ſtage of criminal proſecution, after trial and conviction are paſt, in ſuch crimes and miſdemeſnors, as are either too high or too low to be included within the benefit of clergy: which is that of *judgment*. For when, upon a capital charge, the jury have brought in their verdict guilty, in the preſence of the priſoner; he is either immediately, or at a convenient time ſoon after, aſked by the court, if he has any thing to offer why judgment ſhould not be awarded againſt him. And in caſe the defendant be found guilty of a miſdemeſnor, (the trial of which may, and does uſually, happen in his abſence, after he has once appeared) a *capias* is awarded and iſſued, to bring him in to receive his judgment; and, if he abſconds, he may be proſecuted even to outlawry. But whenever he appears in perſon, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in *arreſt* or ſtay of judgment: as for want of ſufficient certainty in ſetting forth either the perſon, the time, the place, or the offence. And, if the objections be valid, the whole proceedings ſhall be ſet aſide; but the party may

may be indicted again [a]. And we may take notice, 1. That none of the ſtatutes of *jeofails* [b], for amendment of errors, extend to indictments or proceedings in criminal caſes; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil caſes are. 2. That, in favour of life, great ſtrictneſs has at all times been obſerved, in every point of an indictment. Sir Matthew Hale indeed complains, "that this "ſtrictneſs is grown to be a blemiſh and inconvenience in the "law, and the adminiſtration thereof: for that more offenders "eſcape by the over-eaſy ear given to exceptions in indictments, "than by their own innocence; and many times groſs murders, "burglaries, robberies, and other heinous and crying offences, "remain unpuniſhed by theſe unſeemly niceties; to the reproach "of the law, to the ſhame of the government, to the encouragement of villany, and to the diſhonour of God [c]." And yet, notwithſtanding this laudable zeal, no man was more tender of life than this truly excellent judge.

A PARDON alſo, as has been before ſaid, may be pleaded in arreſt of judgment: and it has the ſame advantage when pleaded here, as when pleaded upon arraignment; *viz.* the ſaving the attainder, and of courſe the corruption of blood: which nothing can reſtore but parliament, when a pardon is not pleaded till after ſentence. And certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as ſoon as poſſible.

PRAYING the benefit of clergy may alſo be ranked among the motions in arreſt of judgment; of which we ſpoke largely in the preceding chapter.

IF all theſe reſources fail, the court muſt pronounce that judgment, which the law hath annexed to the crime, and which hath been conſtantly mentioned, together with the crime itſelf,

[a] 4 Rep. 45.
[b] See Vol. III. pag. 406.
[c] 2 Hal. P. C. 193.

in ſome or other of the former chapters. Of theſe ſome are capital, which extend to the life of the offender, and conſiſt generally in being hanged by the neck till dead; though in very atrocious crimes other circumſtances of terror, pain, or diſgrace are ſuperadded: as, in treaſons of all kinds, being drawn or dragged to the place of execution; in high treaſon affecting the king's perſon or government, embowelling alive, beheading, and quartering; and in murder, a public diſſection. And, in caſe of any treaſon committed by a female, the judgment is to be burned alive. But the humanity of the Engliſh nation has authorized, by a tacit conſent, an almoſt general mitigation of ſuch part of theſe judgments as ſavour of torture or cruelty: a ſledge or hurdle being uſually allowed to ſuch traitors as are condemned to be drawn; and there being very few inſtances (and thoſe accidental or by negligence) of any perſon's being embowelled or burned, till previouſly deprived of ſenſation by ſtrangling. Some puniſhments conſiſt in exile or baniſhment, by abjuration of the realm, or tranſportation to the American colonies: others in loſs of liberty, by perpetual or temporary impriſonment. Some extend to confiſcation, by forfeiture of lands, or moveables, or both, or of the profits of lands for life: others induce a diſability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occaſion a mutilation or diſmembring, by cutting off the hand or ears: others fix a laſting ſtigma on the offender, by ſlitting the noſtrils, or branding in the hand or face. Some are merely pecuniary, by ſtated or diſcretionary fines: and laſtly there are others, that conſiſt principally in their ignominy, though moſt of them are mixed with ſome degree of corporal pain; and theſe are inflicted chiefly for crimes, which ariſe from indigence, or which render even opulence diſgraceful. Such as whipping, hard labour in the houſe of correction, the pillory, the ſtocks, and the ducking-ſtool.

DISGUSTING as this catalogue may ſeem, it will afford pleaſure to an Engliſh reader, and do honour to the Engliſh law,

law, to compare it with that ſhocking apparatus of death and torment, to be met with in the criminal codes of almoſt every other nation in Europe. And it is moreover one of the glories of our Engliſh law, that the nature, though not always the quantity or degree, of puniſhment is *aſcertained* for every offence; and that it is not left in the breaſt of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every ſubject alike, without reſpect of perſons. For, if judgments were to be the private opinions of the judge, men would then be ſlaves to their magiſtrates; and would live in ſociety, without knowing exactly the conditions and obligations which it lays them under. And beſides, as this prevents oppreſſion on the one hand, ſo on the other it ſtifles all hopes of impunity or mitigation; with which an offender might flatter himſelf, if his puniſhment depended on the humour or diſcretion of the court. Whereas, where an eſtabliſhed penalty is annexed to crimes, the criminal may read their certain conſequence in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions.

THE diſcretionary fines and diſcretionary length of impriſonment, which our courts are enabled to impoſe, may ſeem an exception to this rule. But the general nature of the puniſhment, *viz.* by fine or impriſonment, is in theſe caſes fixed and determinate: though the duration and quantity of each muſt frequently vary, from the aggravations or otherwiſe of the offence, the quality and condition of the parties, and from innumerable other circumſtances. The *quantum*, in particular, of pecuniary fines neither can, nor ought to be, aſcertained by any invariable law. The value of money itſelf changes from a thouſand cauſes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the twelve tables at Rome fined every perſon, that ſtruck another, five and twenty *denarii:* this, in the more opulent days of the empire, grew to be a puniſhment of ſo little conſideration, that Aulus Gellius tells a ſtory of one Lucius Neratius, who made it is

diverſion to give a blow to whomever he pleaſed, and then tender them the legal forfeiture. Our ſtatute law has not therefore often aſcertained the quantity of fines, nor the common law ever; it directing ſuch an offence to be puniſhed by fine, in general, without ſpecifying the certain ſum: which is fully ſufficient, when we conſider, that however unlimited the power of the court may ſeem, it is far from being wholly arbitrary; but it's diſcretion is regulated by law. For the bill of rights [d] has particularly declared, that exceſſive fines ought not to be impoſed, nor cruel and unuſual puniſhments inflicted: (which had a retroſpect to ſome unprecedented proceedings in the court of king's bench, in the reign of king James the ſecond) and the ſame ſtatute farther declares, that all grants and promiſes of fines and forfeitures of particular perſons, before conviction, are illegal and void. Now the bill of rights was only declaratory, throughout, of the old conſtitutional law of the land: and accordingly we find it expreſſly holden, long before [e], that all ſuch previous grants are void; ſince thereby many times undue means, and more violent proſecution, would be uſed for private lucre, than the quiet and juſt proceeding of law would permit.

THE reaſonableneſs of fines in criminal caſes has alſo been uſually regulated by the determination of *magna carta* [f], concerning amercements for miſbehaviour in matters of civil right. "*Liber homo non amercietur pro parvo delicto, niſi ſecun-*
"*dum modum ipſius delicti; et pro magno dilicto, ſecundum magni-*
"*tudinem delicti; ſalvo contenemento ſuo: et mercator eodem modo,*
"*ſalva mercandiſa ſua; et villanus eodem modo amercietur, ſalvo*
"*wainagio ſuo.*" A rule, that obtained even in Henry the ſecond's time [g], and means only, that no man ſhall have a larger amercement impoſed upon him, than his circumſtances or perſonal eſtate will bear: ſaving to the landholder his contenement, or land; to the trader his merchandize; and to the countryman his wainage, or team and inſtruments of huſbandry. In order

[d] Stat. 1 W. & M. ſt 2. c. 2.
[e] 2 Inſt. 48.
[f] *cap.* 14.
[g] Glanv. *l.* 9. *c.* 8 & 11.

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to aſcertain which, the great charter alſo directs, that the amercement, which is always inflicted in general terms ("*ſit in miſericordia*") ſhall be ſet, *ponatur*, or reduced to a certainty, by the oath of a jury. This method, of liquidating the amercement to a preciſe ſum, is uſually done in the court-leet and court-baron by *affeerors*, or jurors ſworn to *affeere*, that is, tax and moderate, the *general* amercement according to the *particular* circumſtances of the offence and the offender. In imitation of which, in courts ſuperior to theſe, the antient practice was to enquire by a jury, when a fine was impoſed upon any man, "*quantum inde regi dare valeat per annum, ſalva ſuſtentatione ſua, et uxoris, et liberorum ſuorum*[h]." And, ſince the diſuſe of ſuch inqueſt, it is never uſual to aſſeſs a larger fine than a man is able to pay, without touching the implements of his livelyhood; but to inflict corporal puniſhment, or a ſtated impriſonment, which is better than an exceſſive fine, for that amounts to impriſonment for life. And this is the reaſon why fines in the king's court are frequently denominated ranſoms, becauſe the penalty muſt otherwiſe fall upon a man's perſon, unleſs it be redeemed or ranſomed by a pecuniary fine[i]: according to an antient maxim, *qui non habet in crumena luat in corpore*. Yet, where any ſtatute ſpeaks both of fine and ranſom, it is holden, that the ranſom ſhall be treble to the fine at leaſt[i].

WHEN ſentence of death, the moſt terrible and higheſt judgment in the laws of England, is pronounced, the immediate inſeparable conſequence by the common law is *attainder*. For when it is now clear beyond all diſpute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monſter and a bane to human ſociety, the law ſets a note of infamy upon him, puts him out of it's protection, and takes no farther care of him than barely to ſee him executed. He is then called attaint, *attinctus*, ſtained, or blackened. He is no longer of any credit or reputation; he cannot be a witneſs in

[h] Gilb. Exch. c. 5. Mirr. c. 5. §. 3. Lamb. *Eirenarch.* 575.

[i] Dyer. 232.

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any court; neither is he capable of performing the functions of another man: for, by an anticipation of his puniſhment, he is already dead in law [k]. This is after *judgment*: for there is great difference between a man *convicted*, and *attainted*; though they are frequently through inaccuracy confounded together. After conviction only, a man is liable to none of theſe diſabilities: for there is ſtill in contemplation of law a poſſibility of his innocence. Something may be offered in arreſt of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the preſent conviction may be quaſhed: he may obtain a pardon, or be allowed the benefit of clergy; both which ſuppoſe ſome latent ſparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conſpire to prove him completely guilty; and there is not the remoteſt poſſibility left of any thing to be ſaid in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon ſuch circumſtances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for abſconding or fleeing from juſtice, which tacitly confeſſes the guilt. And therefore either upon judgment of outlawry, or of death, for treaſon or felony, a man ſhall be ſaid to be attainted.

THE conſequences of attainder are forfeiture, and corruption of blood.

I. FORFEITURE is twofold; of real, and perſonal, eſtates. Firſt, as to real eſtates: by attainder in high treaſon [l] a man forfeits to the king all his lands and tenements of inheritance, whether fee-ſimple or fee-tail, and all his rights of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards, to be for ever veſted in the crown: and alſo the profits of all lands and tenements, which he had in his own right for life or years, ſo long as ſuch intereſt

[k] 3 Inſt. 213.

[l] Co. Litt. 392. 3 Inſt. 19. 1 Hal. P. C. 240. 2 Hawk. P. C. 448.

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ſhall ſubſiſt. This forfeiture relates backwards to the time of the treaſon committed; ſo as to avoid all intermediate ſales and incumbrances [m], but not thoſe before the fact: and therefore a wife's jointure is not forfeitable for the treaſon of her huſband; becauſe ſettled upon her previous to the treaſon committed. But her dower is forfeited, by the expreſs proviſion of ſtatute 5 & 6 Edw. VI. c. 11. And yet the huſband ſhall be tenant by the curteſy of the wife's lands, if the wife be attainted of treaſon [n]: for that is not prohibited by the ſtatute. But, though after attainder the forfeiture relates back to the time of the treaſon committed, yet it does not take effect unleſs an attainder be had, of which it is one of the fruits: and therefore, if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands; for he never was attainted of treaſon [o].

THE natural juſtice of forfeiture or confiſcation of property, for treaſon [p], is founded in this conſideration: that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connexions with ſociety; and hath no longer any right to thoſe advantages, which before belonged to him purely as a member of the community: among which *ſocial* advantages the right of transferring or tranſmitting property to others is one of the chief. Such forfeitures moreover, whereby his poſterity muſt ſuffer as well as himſelf, will help to reſtrain a man, not only by the ſenſe of his duty, and dread of perſonal puniſhment, but alſo by his paſſions and natural affections; and will intereſt every dependent and relation he has, to keep him from offending: according to that beautiful ſentiment of Cicero [q], "*nec vero me fugit quam ſit acerbum, parentum ſcelera filiorum* "*poenis lui: ſed hoc praeclare legibus comparatum eſt, ut caritas* "*liberorum amiciores parentes reipublicae redderet.*" And there-

[m] 3 Inſt. 211.
[n] 1 Hal. P. C. 359.
[o] Co. Litt. 13.
[p] See Vol. I. pag. 299.
[q] *ad Brutum, ep.* 12.

fore

fore Aulus Caſcellius, a Roman lawyer in the time of the triumvirate, uſed to boaſt that he had two reaſons for deſpiſing the power of the tyrants; his old age, and his want of children: for children are pledges to the prince of the father's obedience[r]. Yet many nations have thought, that this poſthumous puniſhment ſavours of hardſhip to the innocent; eſpecially for crimes that do not ſtrike at the very root and foundation of ſociety, as treaſon againſt the government expreſſly does. And therefore, though confiſcations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius in every other inſtance but that of treaſon thought it more juſt, "*ibi eſſe* "*poenam, ubi et noxa eſt*;" and ordered that "*peccata ſuos te-* "*neant auctores, nec ulterius progrediatur metus, quam reperiatur* "*delictum*[s]:" and Juſtinian alſo made a law to reſtrain the puniſhment of relations[t]; which directs the forfeiture to go, except in the caſe of *crimen majeſtatis*, to the next of kin to the delinquent. On the other hand the Macedonian laws extended even the capital puniſhment of treaſon, not only to the children but to all the relations of the delinquent[u]: and of courſe their eſtates muſt be alſo forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle[v], (copied almoſt *verbatim* from Juſtinian's code[w]) the lives of the ſons of ſuch as conſpire to kill an elector are ſpared, as it is expreſſed, by the emperor's *particular bounty*. But they are deprived of all their effects and rights of ſucceſſion, and are rendered incapable of any honour eccleſiaſtical or civil: "to the end that, "being always poor and neceſſitous, they may for ever be accom- "panied by the infamy of their father; may languiſh in conti- "nual indigence; and may find (ſays this mercileſs edict) their "puniſhment in living, and their relief in dying."

WITH us in England, forfeiture of lands and tenements to the crown for treaſon is by no means derived from the feodal

[r] Gravin. 1. §. 68.
[s] *Cod.* 9. 47. 22.
[t] *Nov.* 134. *c.* 13.
[u] Qu. Curt. *l.* 6.
[v] *cap.* 24.
[w] *l.* 9. *t.* 8. *l.* 5.

policy,

policy, (as has been already obſerved [x]) but was antecedent to the eſtabliſhment of that ſyſtem in this iſland; being tranſmitted from our Saxon anceſtors [y], and forming a part of the antient Scandinavian conſtitution [z]. But in ſome treaſons relating to the coin, (which, as we formerly obſerved, ſeem rather a ſpecies of the *crimen falſi*, than the *crimen laeſae majeſtatis*) it is provided by the ſeveral modern ſtatutes which conſtitute the offence, that it ſhall work no forfeiture of lands. And, in order to aboliſh ſuch hereditary puniſhment intirely, it was enacted by ſtatute 7 Ann. c. 21. that, after the deceaſe of the late pretender, no attainder for treaſon ſhould extend to the diſinheriting of any heir, nor to the prejudice of any perſon, other than the traitor himſelf. By which, the law of forfeitures for high treaſon would by this time have been at an end, had not a ſubſequent ſtatute intervened to give them a longer duration. The hiſtory of this matter is ſomewhat ſingular and worthy obſervation. At the time of the union, the crime of treaſon in Scotland was, by the Scots law, in many reſpects different from that of treaſon in England; and particularly in it's conſequence of forfeitures of intailed eſtates, which was more peculiarly Engliſh: yet it ſeemed neceſſary, that a crime ſo nearly affecting government ſhould, both in it's eſſence and conſequences, be put upon the ſame footing in both parts of the united kingdoms. In new-modelling theſe laws, the Scotch nation and the Engliſh houſe of commons ſtruggled hard, partly to maintain, and partly to acquire, a total immunity from forfeiture and corruption of blood: which the houſe of lords as firmly reſiſted. At length a compromiſe was agreed to, which is eſtabliſhed by this ſtatute, *viz.* that the ſame crimes, and no other, ſhould be treaſon in Scotland that are ſo in England; and that the Engliſh forfeitures and corruption of blood, ſhould take place in Scotland, till the death of the then pretender; and then ceaſe throughout the whole of Great Britain [a]: the lords artfully propoſing this temporary clauſe, in

[x] See Vol. II. pag. 251.
[y] *LL. Aelfr. c. 4. Canut. c. 54.*
[z] Stiernh. *de jure Goth. l. 2. c. 6. & l. 3. c. 3.*
[a] Burnet's Hiſt. *A. D.* 1709.

hopes (it is ſaid [b]) that the prudence of ſucceeding parliaments would make it perpetual [c]. This has partly been done by the ſtatute 17 Geo. II. c. 39. (made in the year preceding the late rebellion) the operation of theſe indemnifying clauſes being thereby ſtill farther ſuſpended, till the death of the ſons of the pretender [d].

IN petit treaſon and felony, the offender alſo forfeits all his chattel intereſts abſolutely, and the profits of all eſtates of freehold during life; and, after his death, all his lands and tenements in fee-ſimple (but not thoſe in tail) to the crown, for a very ſhort period of time: for the king ſhall have them for a year and a day, and may commit therein what waſte he pleaſes; which is called the king's *year*, *day*, and *waſte* [e]. Formerly the king had only a liberty of committing waſte on the lands of felons, by pulling down their houſes, extirpating their gardens, ploughing their meadows, and cutting down their woods. And a puniſhment of a ſimilar ſpirit appears to have obtained in the oriental countries, from the decrees of Nebuchadnezzar and Cyrus in the books of Daniel [f] and Ezra [g]; which, beſides the pain of death inflicted on the delinquents there ſpecified, ordain, "that their houſes "ſhall be made a dunghill." But this tending greatly to the prejudice of the public, it was agreed in the reign of Henry the firſt, in this kingdom, that the king ſhould have the profits of the land for one year and a day, in lieu of the deſtruction he was otherwiſe at liberty to commit [h]: and therefore *magna carta* [i] provides, that the king ſhall only hold ſuch lands for a year and day, and then reſtore them to the lord of the fee; without any mention made of waſte. But the ſtatute 17 Edw. II. *de praerogativa regis*, ſeems to ſuppoſe, that the king ſhall have his year,

[b] Conſid. on the law of forfeiture. 6.

[c] See Foſt. 250.

[d] The juſtice and expediency of this proviſion were defended at the time, with much learning and ſtrength of argument, in the *conſiderations on the law of forfeiture*, firſt publiſhed *A. D.* 1744. (See Vol. I. pag. 244.)

[e] 2 Inſt. 37.

[f] ch. iii. v. 29.

[g] ch. vi. v. 11.

[h] Mirr. c. 4. §. 16. Flet. *l.* 1. *c.* 28.

[i] 9 *Hen. III. c.* 22.

day,

day, *and* waſte; and not the year and day *inſtead of* waſte. Which ſir Edward Coke (and the author of the mirror, before him) very juſtly look upon as an encroachment, though a very antient one, of the royal prerogative [k]. This year, day, and waſte are now uſually compounded for; but otherwiſe they regularly belong to the crown: and, after their expiration, the land would naturally have deſcended to the heir, (as in gavelkind tenure it ſtill does) did not it's feodal quality intercept ſuch deſcent, and give it by way of eſcheat to the lord. Theſe forfeitures for felony do alſo ariſe only upon attainder; and therefore a *felo de ſe* forfeits no lands of inheritance or freehold, for he never is attainted as a felon [l]. They likewiſe relate back to the time of the offence committed, as well as forfeitures for treaſon; ſo as to avoid all intermediate charges and conveyances. This may be hard upon ſuch as have unwarily engaged with the offender: but the cruelty and reproach muſt lie on the part, not of the law, but of the criminal; who has thus knowingly and diſhoneſtly involved others in his own calamities.

THESE are all the forfeitures of real eſtates, created by the common law, as conſequential upon attainders by judgment of death or outlawry. I here omit the particular forfeitures created by the ſtatutes of *praemunire* and others: becauſe I look upon them rather as a *part* of the judgment and penalty, inflicted by the reſpective ſtatutes, than as *conſequences* of ſuch judgment; as in treaſon and felony they are. But I ſhall juſt mention, under this diviſion of real eſtates, the forfeiture of the profits of lands during life: which extends to two other inſtances, beſides thoſe already ſpoken of; miſpriſion of treaſon [m], and ſtriking in Weſtminſter-hall, or drawing a weapon upon a judge there, ſitting the king's courts of juſtice [n].

THE forfeiture of goods and chattels accrues in every one of the higher kinds of offence: in high treaſon or miſpriſion

[k] Mirr. c. 5. §. 2. 2 Inſt. 37.
[l] 3 Inſt. 55.
[m] *Ibid.* 218.
[n] *Ibid.* 141.

thereof, petit treaſon, felonies of all ſorts whether clergyable or not, ſelf-murder or felony *de ſe*, petty larciny, ſtanding mute, and the above-mentioned offence of ſtriking in Weſtminſter-hall. For *flight* alſo, on an accuſation of treaſon, felony, or even petit larciny, whether the party be found guilty or acquitted, if the jury find the flight, the party ſhall forfeit his goods and chattels: for the very flight is an offence, carrying with it a ſtrong preſumption of guilt, and is at leaſt an endeavour to elude and ſtifle the courſe of juſtice preſcribed by the law. But the jury very ſeldom find the flight: forfeiture being looked upon, ſince the vaſt increaſe of perſonal property of late years, as rather too large a penalty for an offence, to which a man is prompted by the natural love of liberty.

THERE is a remarkable difference or two between the forfeiture of lands and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before: goods and chattels are forfeited by *conviction*. Becauſe in many of the caſes where goods are forfeited, there never is any attainder; which happens only where judgment of death or outlawry is given: therefore in thoſe caſes the forfeiture muſt be upon conviction, or not at all; and, being neceſſarily upon conviction in thoſe, it is ſo ordered in all other caſes, for the law loves uniformity. 2. In outlawries for treaſon or felony, lands are forfeited only by the judgment: but the goods and chattels are forfeited by a man's being firſt put in the *exigent*, without ſtaying till he is *quinto exactus*, or finally outlawed; for the ſecreting himſelf ſo long from juſtice, is conſtrued a flight in law [o]. 3. The forfeiture of lands has relation to the time of the fact committed, ſo as to avoid all ſubſequent ſales and incumbrances: but the forfeiture of goods and chattels has no relation backwards; ſo that thoſe only which a man has at the time of conviction ſhall be forfeited. Therefore a traitor or felon may *bona fide* ſell any of his chattels, real or perſonal, for the ſuſtenance of himſelf and family between the fact and conviction [p]: for perſonal property is of ſo fluctua-

[o] 3 Inſt. 232.

[p] 2 Hawk. P. C. 454.

ting

ting a nature, that it paſſes through many hands in a ſhort time; and no buyer could be ſafe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treaſon or felony. Yet if they be colluſively and not *bona fide* parted with, merely to defraud the crown, the law (and particularly the ſtatute 13 Eliz. c. 5.) will reach them; for they are all the while truly and ſubſtantially the goods of the offender: and as he, if acquitted, might recover them himſelf, as not parted with for a good conſideration; ſo, in caſe he happens to be convicted, the law will recover them for the king.

II. ANOTHER immediate conſequence of attainder is the *corruption of blood*, both upwards and downwards; ſo that an attainted perſon can neither inherit lands or other hereditaments from his anceſtors, nor retain thoſe he is already in poſſeſſion of, nor tranſmit them by deſcent to any heir; but the ſame ſhall eſcheat to the lord of the fee, ſubject to the king's ſuperior right of forfeiture: and the perſon attainted ſhall alſo obſtruct all deſcents to his poſterity, wherever they are obliged to derive a title through him to a remoter anceſtor[q].

THIS is one of thoſe notions which our laws have adopted from the feodal conſtitutions, at the time of the Norman conqueſt; as appears from it's being unknown in thoſe tenures which are indiſputably Saxon, or gavelkind: wherein, though by treaſon, according to the antient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of deſcents, enſues; and on judgment of mere felony no eſcheat accrues to the lord. And therefore, as every other oppreſſive mark of feodal tenure is now happily worn away in theſe kingdoms, it is to be hoped, that this *corruption of blood*, with all it's connected conſequences, not only of preſent eſcheat, but of future incapacities of inheritance even to the twentieth generation, may in proceſs of time be aboliſhed by act of parliament: as it ſtands upon a very different footing from the forfeiture of lands for

[q] See Vol. II. pag. 251.

high

high treaſon, affecting the king's perſon or government. And indeed the legiſlature has, from time to time, appeared very inclinable to give way to ſo equitable a proviſion; by enacting, that, in treaſons reſpecting the papal ſupremacy [r] and counterfeiting the public coin [s], and in many of the new-made felonies, created ſince the reign of Henry the eighth by act of parliament, corruption of blood ſhall be ſaved. But as in ſome of the acts for creating felonies (and thoſe not of the moſt atrocious kind) this ſaving was neglected, or forgotten, to be made, it ſeems to be highly reaſonable and expedient to antiquate the whole of this doctrine by one undiſtinguiſhing law: eſpecially as by the afore-mentioned ſtatute of 7 Ann. c. 21. (the operation of which is poſtponed by ſtatute 17 Geo. II. c. 39.) after the death of the ſons of the late pretender, no attainder for treaſon will extend to the diſinheriting any heir, nor the prejudice of any perſon, other than the offender himſelf; which virtually aboliſhes all corruption of blood for treaſon, though (unleſs the legiſlature ſhould interpoſe) it will ſtill continue for many ſorts of felony.

[r] Stat. 5 Eliz. c. 1.

[s] Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

CHAPTER THE THIRTIETH.

OF REVERSAL OF JUDGMENT.

WE are next to conſider how judgments, with their ſeveral connected conſequences, of attainder, forfeiture, and corruption of blood, may be ſet aſide. There are two ways of doing this; either by falſifying or reverſing the judgment, or elſe by reprieve or pardon.

A JUDGMENT may be falſified, reverſed, or voided, in the firſt place, *without a writ of error*, for matters foreign to or *dehors* the record, that is, not apparent upon the face of it; ſo that they cannot be aſſigned for error in the ſuperior court, which can only judge from what appears in the record itſelf: and therefore, if the whole record be not certified, or not truly certified, by the inferior court, the party injured thereby (in both civil and criminal caſes) may allege a *diminution* of the record, and cauſe it to be rectified. Thus, if any judgment whatever be given by perſons, who had no good commiſſion to proceed againſt the perſon condemned, it is void; and may be falſified by ſhewing the ſpecial matter, without writ of error. As, where a commiſſion iſſues to A and B, and twelve others, or any two of them, of which A or B ſhall be one, to take and try indictments; and any of the other twelve proceed without the interpoſition

ſition or preſence of either A, or B: in this caſe all proceedings, trials, convictions, and judgments are void for want of a proper authority in the commiſſioners, and may be falſified upon bare inſpection without the trouble of a writ of error [a]; it being a high miſdemeſnor in the judges ſo proceeding, and little (if any thing) ſhort of murder in them all, in caſe the perſon ſo attainted be executed and ſuffer death. So likewiſe if a man purchaſes land of another; and afterwards the vendor is, either by outlawry, or his own confeſſion, convicted and attainted of treaſon or felony previous to the ſale or alienation; whereby ſuch land becomes liable to forfeiture or eſcheat: now, upon any trial, the purchaſor is at liberty, without bringing any writ of error, to falſify not only the time of the felony or treaſon ſuppoſed, but the very point of the felony or treaſon itſelf; and is not concluded by the confeſſion or the outlawry of the vendor; though the vendor himſelf is concluded, and not ſuffered now to deny the fact, which he has by confeſſion or flight acknowleged. But if ſuch attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falſify or contradict the *fact* of the crime committed; though he is at liberty to prove a miſtake in *time*, or that the offence was committed after the alienation, and not before [b].

SECONDLY, a judgment may be reverſed, *by writ of error:* which lies from all inferior criminal juriſdictions to the court of king's bench, and from the king's bench to the houſe of peers; and may be brought for notorious miſtakes in the judgment or other parts of the record: as where a man is found guilty of perjury and receives the judgment of felony, or for other leſs palpable errors; ſuch as any irregularity, omiſſion, or want of form in the proceſs of outlawry, or proclamations; the want of a proper *addition* to the defendant's name, according to the ſtatute of additions; for not properly naming the ſheriff or other officer of the court, or not duly deſcribing where his county court was held; for laying an offence, committed in the time of

[a] 2 Hawk. P. C. 459. [b] 3 Inſt. 231. 1 Hal. P. C. 361.

the

the late king, to be done againſt the peace of the preſent; and for many other ſimilar cauſes, which (though allowed out of tenderneſs to life and liberty) are not much to the credit or advancement of the national juſtice. Theſe writs of error, to reverſe judgments in caſe of miſdemeſnors, are not to be allowed of courſe, but on ſufficient probable cauſe ſhewn to the attorney-general; and then they are underſtood to be grantable of common right, and *ex debito juſtitiae*. But writs of error to reverſe attainders in capital caſes are only allowed *ex gratia*; and not without expreſs warrant under the king's ſign manual, or at leaſt by the conſent of the attorney-general [c]. Theſe therefore can rarely be brought by the party himſelf, eſpecially where he is attainted for an offence againſt the ſtate: but they may be brought by his heir, or executor, after his death, in more favourable times; which may be ſome conſolation to his family. But the eaſier, and more effectual way, is

LASTLY, to reverſe the attainder by act of parliament. This may be and hath been frequently done, upon motives of compaſſion, or perhaps the zeal of the times, after a ſudden revolution in the government, without examining too cloſely into the truth or validity of the errors aſſigned. And ſometimes, though the crime be univerſally acknowleged and confeſſed, yet the merits of the criminal's family ſhall after his death obtain a reſtitution in blood, honours, and eſtate, or ſome, or one of them, by act of parliament; which (ſo far as it extends) has all the effect of reverſing the attainder, without caſting any reflections upon the juſtice of the preceding ſentence.

THE effect of falſifying, or reverſing, an outlawry is that the party ſhall be in the ſame plight as if he had appeared upon the *capias:* and, if it be before plea pleaded, he ſhall be put to plead to the indictment; if after conviction, he ſhall receive the ſentence of the law: for all the other proceedings, except only the proceſs of outlawry for his non-appearance, remain good and

[c] 1 Vern. 170. 175.

effectual as before. But when judgment, pronounced upon conviction, is falſified or reverſed, all former proceedings are abſolutely ſet aſide, and the party ſtands as if he had never been at all accuſed; reſtored in his credit, his capacity, his blood, and his eſtates: with regard to which laſt, though they be granted away by the crown, yet the owner may enter upon the grantee, with as little ceremony as he might enter upon a diſſeiſor [d]. But he ſtill remains liable to another proſecution for the ſame offence: for, the firſt being erroneous, he never was in jeopardy thereby.

[d] 2 Hawk. P. C. 462.

CHAPTER THE THIRTY FIRST.

OF REPRIEVE, AND PARDON.

THE only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

I. A REPRIEVE, from *reprendre*, to take back, is the withdrawing of a ſentence for an interval of time; whereby the execution is ſuſpended. This may be, firſt, *ex arbitrio judicis*; either before or after judgment: as, where the judge is not ſatisfied with the verdict, or the evidence is ſuſpicious, or the indictment is inſufficient, or he is doubtful whether the offence be within clergy; or ſometimes if it be a ſmall felony, or any favourable circumſtances appear in the criminal's character, in order to give room to apply to the crown for either an abſolute or conditional pardon. Theſe arbitrary reprieves may be granted or taken off by the juſtices of gaol delivery, although their ſeſſion be finiſhed, and their commiſſion expired: but this rather by common uſage, than of ſtrict right [a].

REPRIEVES may alſo be *ex neceſſitate legis*: as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cauſe to ſtay the judgment, yet it is to reſpite the execution till ſhe be delivered. This is a mercy dictated by the

[a] 2 Hal. P. C. 412.

law of nature, *in favorem prolis*; and therefore no part of the bloody proceedings, in the reign of queen Mary, hath been more juſtly deteſted than the cruelty, that was exerciſed in the iſland of Guernſey, of burning a woman big with child: and, when through the violence of the flames the infant ſprang forth at the ſtake, and was preſerved by the byſtanders, after ſome deliberation of the prieſts who aſſiſted at the ſacrifice, they caſt it again into the fire as a young heretic [b]. A barbarity which they never learned from the laws of *antient* Rome; which direct [c], with the ſame humanity as our own, "*quod praegnantis* "*mulieris damnatae poena differatur, quoad pariat:*" which doctrine has alſo prevailed in England, as early as the firſt memorials of our law will reach [d]. In caſe this plea be made in ſtay of execution, the judge muſt direct a jury of twelve matrons or diſcreet women to enquire the fact: and if they bring in their verdict *quick with child* (for barely, *with child*, unleſs it be alive in the womb, is not ſufficient) execution ſhall be ſtaid generally till the next ſeſſion; and ſo from ſeſſion to ſeſſion, till either ſhe is delivered, or proves by the courſe of nature not to have been with child at all. But if ſhe once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, ſhe ſhall not be intitled to the benefit of a farther reſpite for that cauſe [e]. For ſhe may now be executed before the child is quick in the womb; and ſhall not, by her own incontinence, evade the ſentence of juſtice.

ANOTHER cauſe of regular reprieve is, if the offender become *non compos*, between the judgment and the award of execution [f]: for regularly, as was formerly [g] obſerved, though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he ſhall not be indicted; if after indictment, he ſhall not be convicted; if after conviction, he ſhall not receive judgment; if after judgment, he ſhall not be ordered for exe-

[b] Fox, Acts and Mon.
[c] *Ff.* 48. 19. 3.
[d] Flet. *l.* 1. *c.* 38.
[e] 1 Hal. P. C. 369.
[f] *Ibid.* 370.
[g] See pag. 24.

cution:

cution: for "*furiosus solo furore punitur*," and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege, why execution should not be awarded against him: and, if he appears to be insane, the judge in his discretion may and ought to reprieve him. Or, the party may *plead* in bar of execution; which plea may be either pregnancy, the king's pardon, an act of grace, or diversity of person, *viz.* that he is not the same that was attainted, and the like. In this last case a jury shall be impanelled to try this collateral issue, namely, the identity of his person; and not whether guilty or innocent; for that has been decided before. And in these collateral issues the trial shall be *instanter*[h], and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person attainted[i]: neither shall any peremptory challenges of the jury be allowed the prisoner[k]; though formerly such challenges were held to be allowable, whenever a man's life was in question[l].

II. If neither pregnancy, insanity, non-identity, nor other plea will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious *pardon*; the granting of which is the most amiable prerogative of the crown. Laws (says an able writer) cannot be framed on principles of compassion to guilt: yet justice, by the constitution of England, is bound to be administred in mercy: this is promised by the king in his coronation oath, and it is that act of his government, which is the most personal, and most entirely his own[m]. The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is mercy. His power of par-

[h] 1 Sid. 72.
[i] Fost. 42.
[k] 1 Lev. 61. Fost. 42. 46.
[l] Staundf. P. C. 163. Co. Litt. 157. Hal. Sum. 259.
[m] Law of Forfeit. 99.

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doning was ſaid by our Saxon anceſtors [n] to be derived *a lege ſuae dignitatis:* and it is declared in parliament, by ſtatute 27 Hen. VIII. c. 24. that no other perſon hath power to pardon or remit any treaſon or felonies whatſoever; but that the king hath the whole and ſole power thereof, united and knit to the imperial crown of this realm.

THIS is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magiſtrate, who has it in his power to extend mercy, wherever he thinks it is deſerved: holding a court of equity in his own breaſt, to ſoften the rigour of the general law, in ſuch criminal caſes as merit an exemption from puniſhment. Pardons (according to ſome theoriſts [o]) ſhould be excluded in a perfect legiſlation, where puniſhments are mild but certain: for that the clemency of the prince ſeems a tacit diſapprobation of the laws. But the excluſion of pardons muſt neceſſarily introduce a very dangerous power in the judge or jury, that of conſtruing the criminal law by the ſpirit inſtead of the letter [p]; or elſe it muſt be holden, what no man will ſeriouſly avow, that the ſituation and circumſtances of the offender (though they alter not the eſſence of the crime) ought to make no diſtinction in the puniſhment. In democracies, however, this power of pardon can never ſubſiſt; for there nothing higher is acknowleged than the magiſtrate who adminiſters the laws: and it would be impolitic for the power of judging and of pardoning to center in one and the ſame perſon. This (as the preſident Monteſquieu obſerves [q]) would oblige him very often to contradict himſelf, to make and to unmake his deciſions: it would tend to confound all ideas of right among the maſs of the people; as they would find it difficult to tell, whether a priſoner were diſcharged by his innocence, or obtained a pardon through favour. In Holland therefore, if there be no ſtadtholder, there is no power of pardoning lodged in any other member of the ſtate. But in monarchies the king acts in

[n] *LL. Edw. Conf. c.* 18.
[o] Beccar. ch. 46.
[p] *Ibid.* ch. 4.
[q] Sp. L. b. 6. c. 5.

a ſupe-

a ſuperior ſphere; and, though he regulates the whole government as the firſt mover, yet he does not appear in any of the diſagreeable or invidious parts of it. Whenever the nation ſee him perſonally engaged, it is only in works of legiſlature, magnificence, or compaſſion. To him therefore the people look up as the fountain of nothing but bounty and grace; and theſe repeated acts of goodneſs, coming immediately from his own hand, endear the ſovereign to his ſubjects, and contribute more than any thing to root in their hearts that filial affection, and perſonal loyalty, which are the ſure eſtabliſhment of a prince.

UNDER this head, of pardons, let us briefly conſider, 1. The *object* of pardon: 2. The *manner* of pardoning: 3. The method of *allowing* a pardon: 4. The *effect* of ſuch pardon, when allowed.

1. AND, firſt, the king may pardon all offences merely againſt the crown, or the public; excepting, 1. That, to preſerve the liberty of the ſubject, the committing any man to priſon out of the realm, is by the *habeas corpus* act, 31 Car. II. c. 2. made a *praemunire*, unpardonable even by the king. Nor, 2. Can the king pardon, where private juſtice is principally concerned in the proſecution of offenders: "*non poteſt rex gratiam facere* "*cum injuria et damno aliorum*[r]." Therefore in appeals of all kinds (which are the ſuit, not of the king, but of the party injured) the proſecutor may releaſe, but the king cannot pardon[s]. Neither can he pardon a common nuſance, while it remains unredreſſed, or ſo as to prevent an abatement of it; though afterwards he may remit the fine: becauſe, though the proſecution is veſted in the king to avoid multiplicity of ſuits, yet (during it's continuance) this offence ſavours more of the nature of a *private* injury to each individual in the neighbourhood, than of a *public* wrong[t]. Neither, laſtly, can the king pardon an offence againſt a popular or penal ſtatute, after information brought:

[r] 3 Inſt. 236.
[s] *Ibid.* 237.
[t] 2 Hawk. P. C. 391.

for

for thereby the informer hath acquired a private property in his part of the penalty [u].

THERE is alſo a reſtriction of a peculiar nature, that affects the prerogative of pardoning, in caſe of parliamentary impeachments; *viz.* that the king's pardon cannot be *pleaded* to any ſuch impeachment, ſo as to impede the inquiry, and ſtop the proſecution of great and notorious offenders. Therefore when, in the reign of Charles the ſecond, the earl of Danby was impeached by the houſe of commons of high treaſon and other miſdemeſnors, and pleaded the king's pardon in bar of the ſame, the commons alleged [w], "that there was no precedent, that ever any pardon "was granted to any perſon impeached by the commons of high "treaſon, or other high crimes, *depending the impeachment*;" and therefore reſolved [x], "that the pardon ſo pleaded was illegal and "void, and ought not to be allowed *in bar* of the impeachment "of the commons of England:" for which reſolution they aſſigned [y] this reaſon to the houſe of lords, "that the ſetting up a "pardon to be a *bar* of an impeachment defeats the whole uſe "and effect of impeachments: for ſhould this point be admit-"ted, or ſtand doubted, it would totally diſcourage the exhibit-"ing any for the future; whereby the chief inſtitution for the "preſervation of the government would be deſtroyed." Soon after the revolution, the commons renewed the ſame claim, and voted [z], "that a pardon is not *pleadable in bar* of an impeach-"ment." And, at length, it was enacted by the act of ſettlement, 12 & 13 W. III. c. 2. "that no pardon under the great ſeal "of England ſhall be *pleadable* to an impeachment by the commons "in parliament." But, after the impeachment has been ſolemnly heard and determined, it is not underſtood that the king's royal grace is farther reſtrained or abridged: for, after the impeachment and attainder of the ſix rebel lords in 1715, three of them

[u] 3 Inſt. 238.
[w] Com. Journ. 28 Apr. 1679.
[x] *Ibid.* 5 May 1679.
[y] *Ibid.* 26 May 1679.
[z] *Ibid.* 6 Jun. 1689.

were

were from time to time reprieved by the crown, and at length received the benefit of the king's moſt gracious pardon.

2. As to the *manner* of pardoning: it is a general rule, that, wherever it may reaſonably be preſumed the king is deceived, the pardon is void [a]. Therefore any ſuppreſſion of truth, or ſuggeſtion of falſhood, in a charter of pardon, will vitiate the whole; for the king was misinformed [b]. General words have alſo a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony; (for it is preſumed the king knew not of thoſe proceedings) but the conviction or attainder muſt be particularly mentioned [c]: and a pardon of felonies will not include piracy [d]; for that is no felony puniſhable at the common law. It is alſo enacted by ſtatute 13 Ric. II. ſt. 2. c. 1. that no pardon for treaſon, murder, or rape, ſhall be allowed, unleſs the offence be particularly ſpecified therein; and particularly in murder it ſhall be expreſſed, whether it was committed by lying in wait, aſſault, or malice prepenſe. Upon which ſir Edward Coke obſerves [e], that it was not the intention of the parliament that the king ſhould ever pardon murder under theſe aggravations; and therefore they prudently laid the pardon under theſe reſtrictions, becauſe they did not conceive it poſſible that the king would ever excuſe an offence by name, which was attended with ſuch high aggravations. And it is remarkable enough, that there is no precedent of a pardon in the regiſter for any other homicide, than that which happens *ſe defendendo* or *per infortunium*: to which two ſpecies the king's pardon was expreſſly confined by the ſtatutes 2 Edw. III. c. 2. and 14 Edw. III. c. 15. which declare that no pardon of homicide ſhall be granted, but only where the king may do it *by the oath of his crown*; that is to ſay, where a man ſlayeth another in his own defence, or by misfortune. But the ſtatute of Richard the ſecond, before-mentioned, enlarges by implication the royal power; provided the king is not deceived in the intended object

[a] 2 Hawk. P. C. 383.
[b] 3 Inſt. 238.
[c] 2 Hawk. P. C. 383.
[d] 1 Hawk. P. C. 99.
[e] 3 Inſt 236.

of his mercy. And therefore pardons of murder were always granted with a *non obſtante* of the ſtatute of king Richard, till the time of the revolution; when, the doctrine of *non obſtante*'s ceaſing, it was doubted whether murder could be pardoned generally: but it was determined by the court of king's bench [f], that the king may pardon on an indictment of murder, as well as a ſubject may diſcharge an appeal. Under theſe and a few other reſtrictions, it is a general rule, that a pardon ſhall be taken moſt beneficially *for* the ſubject, and moſt ſtrongly againſt the king.

A PARDON may alſo be *conditional*: that is, the king may extend his mercy upon what terms he pleaſes; and may annex to his bounty a condition either precedent or ſubſequent, on the performance whereof the validity of the pardon will depend: and this by the common law [g]. Which prerogative is daily exerted in the pardon of felons, on condition of tranſportation to ſome foreign country (uſually to ſome of his majeſty's colonies and plantations in America) for life, or for a term of years; ſuch tranſportation or baniſhment [h] being allowable and warranted by the *habeas corpus* act, 31 Car. II. c. 2. §. 14. and rendered more eaſy and effectual by ſtatute 8 Geo. III. c. 15.

3. WITH regard to the manner of *allowing* pardons; we may obſerve, that a pardon by act of parliament is more beneficial than by the king's charter: for a man is not bound to plead it, but the court muſt *ex officio* take notice of it [i]; neither can he loſe the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon [k]. The king's charter of pardon muſt be ſpecially pleaded, and that at a proper time: for if a man is indicted, and has a pardon in his pocket, and afterwards puts himſelf upon his trial by pleading the general iſſue, he has waived the benefit of ſuch pardon [l]. But, if a man avails himſelf

[f] Salk. 499.
[g] 2 Hawk. P. C. 394.
[h] Tranſportation is ſaid (Barr. 352.) to have been firſt inflicted, as a puniſhment, by ſtatute 39 Eliz. c. 4.
[i] Foſt. 43.
[k] 2 Hawk. P. C. 397.
[l] *Ibid.* 396.

thereof

thereof as ſoon as by courſe of law he may, a pardon may either be pleaded upon arraignment, or in arreſt of judgment, or in the preſent ſtage of proceedings, in bar of execution. Antiently, by ſtatute 10 Edw. III. c. 2. no pardon of felony could be allowed, unleſs the party found ſureties for the good behaviour before the ſheriff and coroners of the county [m]. But that ſtatute is repealed by the ſtatute 5 & 6 W. & M. c. 13. which, inſtead thereof, gives the judges of the court a diſcretionary power to bind the criminal, pleading ſuch pardon, to his good behaviour, with two ſureties, for any term not exceeding ſeven years.

4. LASTLY, the *effect* of ſuch pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not ſo much to reſtore his former, as to give him a new, credit and capacity. But nothing can reſtore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and tranſcendent power of parliament. Yet if a perſon attainted receives the king's pardon, and afterwards hath a ſon, that ſon may be heir to his father; becauſe the father, being made a new man, might tranſmit new inheritable blood: though, had he been born before the pardon, he could never have inherited at all [n].

[m] Salk. 499.

[n] See Vol. II. pag. 254.

CHAPTER THE THIRTY SECOND.

OF EXECUTION.

THERE now remains nothing to ſpeak of, but *execution*; the completion of human puniſhment. And this, in all caſes, as well capital as otherwiſe, muſt be performed by the legal officer, the ſheriff or his deputy; whoſe warrant for ſo doing was antiently by precept under the hand and ſeal of the judge, as it is ſtill practiſed in the court of the lord high ſteward, upon the execution of a peer [a]: though, in the court of the peers in parliament, it is done by writ from the king [b]. Afterwards it was eſtabliſhed [c], that, in caſe of life, the judge may command execution to be done without any writ. And now the uſage is, for the judge to ſign the calendar, or liſt of all the priſoners' names, with their ſeparate judgments in the margin, which is left with the ſheriff. As, for a capital felony, it is written oppoſite to the priſoner's name, "let him be hanged by the "neck;" formerly, in the days of Latin and abbreviation [d], "*ſuſ. per coll.*" for "*ſuſpendatur per collum.*" And this is the only warrant that the ſheriff has, for ſo material an act as taking away the life of another [e]. It may certainly afford matter of ſpeculation, that in civil cauſes there ſhould be ſuch a variety of writs of execution to recover a trifling debt, iſſued in the king's name, and under the ſeal of the court, without which the ſheriff

[a] 2 Hal. P. C. 409.
[b] See appendix. §. 5.
[c] Finch. L. 478.
[d] Staundf. P. C. 182.
[e] 5 Mod. 22.

riff cannot legally ſtir one ſtep; and yet that the execution of a man, the moſt important and terrible taſk of any, ſhould depend upon a marginal note.

THE ſheriff, upon receipt of his warrant, is to do execution within a convenient time; which in the country is alſo left at large. In London indeed a more ſolemn and becoming exactneſs is uſed, both as to the warrant of execution, and the time of executing thereof: for the recorder, after reporting to the king in perſon the caſe of the ſeveral priſoners, and receiving his royal pleaſure, that the law muſt take it's courſe, iſſues his warrant to the ſheriffs; directing them to do execution on the day and at the place aſſigned[f]. And, in the court of king's bench, if the priſoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution; either ſpecifying the time and place[g], or leaving it to the diſcretion of the ſheriff[h]. And, throughout the kingdom, by ſtatute 25 Geo. II. c. 37. it is enacted that, in caſe of murder, the judge ſhall in his ſentence direct execution to be performed on the next day but one after ſentence paſſed[i]. But, otherwiſe, the time and place of execution are by law no part of the judgment[k]. It has been well obſerved[l], that it is of great importance, that the puniſhment ſhould follow the crime as early as poſſible; that the proſpect of gratification or advantage, which tempts a man to commit the crime, ſhould inſtantly awake the attendant idea of puniſhment. Delay of execution ſerves only to ſeparate theſe ideas; and then the execution itſelf affects the minds of the ſpectators rather as a terrible ſight, than as the neceſſary conſequence of tranſgreſſion.

THE ſheriff cannot alter the manner of the execution by ſubſtituting one death for another, without being guilty of felony himſelf, as has been formerly ſaid[m]. It is held alſo by ſir Ed-

[f] See appendix, §. 4.
[g] St. Trials. VI. 332. Foſt. 43.
[h] See appendix, §. 3.
[i] See pag. 202.
[k] So held by the twelve judges, Mich. 10 Geo. III.
[l] Beccar. ch. 19.
[m] See pag. 179.

ward

ward Coke [n] and ſir Matthew Hale [o], that even the king cannot change the puniſhment of the law, by altering the hanging or burning into beheading; though, when beheading is part of the ſentence, the king may remit the reſt. And, notwithſtanding ſome examples to the contrary, ſir Edward Coke ſtoutly maintains, that "*judicandum eſt legibus, non exemplis.*" But others have thought [p], and more juſtly, that this prerogative, being founded in mercy and immemorially exerciſed by the crown, is part of the common law. For hitherto, in every inſtance, all theſe exchanges have been for more merciful kinds of death; and how far this may alſo fall within the king's power of granting conditional pardons, (*viz.* by remitting a ſevere kind of death, on condition that the criminal ſubmits to a milder) is a matter that may bear conſideration. It is obſervable, that when lord Stafford was executed for the popiſh plot in the reign of king Charles the ſecond, the then ſheriffs of London, having received the king's writ for beheading him, petitioned the houſe of lords, for a command or order from their lordſhips, how the ſaid judgment ſhould be executed: for, he being proſecuted by impeachment, they entertained a notion (which is ſaid to have been countenanced by lord Ruſſel) that the king could not pardon any part of the ſentence [q]. The lords reſolved [r], that the ſcruples of the ſheriffs were unneceſſary, and declared, that the king's writ ought to be obeyed. Diſappointed of raiſing a flame in that aſſembly, they immediately ſignified [s] to the houſe of commons by one of the members, that they were not ſatisfied as to the power of the ſaid writ. That houſe took two days to conſider of it; and then [t] ſullenly reſolved, that the houſe was *content* that the ſheriff do execute lord Stafford by ſevering his head from his body. It is farther related, that when afterwards the ſame lord Ruſſel was condemned for high treaſon upon indictment, the king, while he remitted the ignominious part of the

[n] 3 Inſt. 52.
[o] 2 Hal. P. C. 412.
[p] Foſt. 270.
[q] 2 Hume Hiſt. of G. B. 328.
[r] Lords Journ. 21 Dec. 1680.
[s] Com. Journ. 21 Dec. 1680.
[t] *Ibid.* 23 Dec. 1680.

ſentence,

ſentence, obſerved, "that his lordſhip would now find he was "poſſeſſed of that prerogative, which in the caſe of lord Staf-"ford he had denied him[u]." One can hardly determine (at this diſtance from thoſe turbulent times) which moſt to diſapprove of, the indecent and ſanguinary zeal of the ſubject, or the cool and cruel ſarcaſm of the ſovereign.

To conclude: it is clear, that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the ſheriff muſt hang him again[w]. For the former hanging was no execution of the ſentence; and, if a falſe tenderneſs were to be indulged in ſuch caſes, a multitude of colluſions might enſue. Nay, even while abjurations were in force[x], ſuch a criminal, ſo reviving, was not allowed to take ſanctuary and abjure the realm; but his fleeing to ſanctuary was held an eſcape in the officer[y].

AND, having thus arrived at the *laſt* ſtage of criminal proceedings, or execution, the end and completion of human *puniſhment*, which was the ſixth and laſt head to be conſidered under the diviſion of *public wrongs*, the fourth and laſt object of the laws of England; it may now ſeem high time to put a period to theſe commentaries, which, the author is very ſenſible, have already ſwelled to too great a length. But he cannot diſmiſs the ſtudent, for whoſe uſe alone theſe rudiments were originally compiled, without endeavouring to recall to his memory ſome principal outlines of the legal conſtitution of this country; by a ſhort hiſtorical review of the moſt conſiderable revolutions, that have happened in the laws of England, from the earlieſt to the preſent times. And this taſk he will attempt to diſcharge, however imperfectly, in the next or concluding chapter.

[u] 2 Hume. 360.
[w] 2 Hal. P. C. 412. 2 Hawk. P. C. 463.
[x] See pag. 326.
[y] Fitzh. *Abr. t. corone.* 335. Finch. L. 467.

CHAPTER THE THIRTY THIRD.

OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENTS, OF THE LAWS OF ENGLAND.

BEFORE we enter on the ſubject of this chapter, in which I propoſe, by way of ſupplement to the whole, to attempt an hiſtorical review of the moſt remarkable changes and alterations, that have happened in the laws of England, I muſt firſt of all remind the ſtudent, that the riſe and progreſs of many principal points and doctrines have been already pointed out in the courſe of theſe commentaries, under their reſpective diviſions: theſe having therefore been particularly diſcuſſed already, it cannot be expected that I ſhould re-examine them with any degree of minuteneſs; which would be a moſt tedious undertaking. What I therefore at preſent propoſe, is only to mark out ſome outlines of an Engliſh juridical hiſtory, by taking a chronological view of the ſtate of our laws, and their ſucceſſive mutations at different periods of time.

THE ſeveral periods, under which I ſhall conſider the ſtate of our legal polity, are the following ſix: 1. From the earlieſt times to the Norman conqueſt: 2. From the Norman conqueſt to the reign of king Edward the firſt: 3. From thence to the refor-

reformation: 4. From the reformation to the reſtoration of king Charles the ſecond: 5. From thence to the revolution in 1688: 6. From the revolution to the preſent time.

I. AND, firſt, with regard to the antient Britons, the *aborigines* of our iſland, we have ſo little handed down to us concerning them with any tolerable certainty, that our enquiries here muſt needs be very fruitleſs and defective. However, from Caeſar's account of the tenets and diſcipline of the antient Druids in Gaul, in whom centered all the learning of theſe weſtern parts, and who were, as he tells us, ſent over to Britain, (that is, to the iſland of Mona or Angleſey) to be inſtructed; we may collect a few points, which bear a great affinity and reſemblance to ſome of the modern doctrines of our Engliſh law. Particularly, the very notion itſelf of an oral unwritten law, delivered down from age to age, by cuſtom and tradition merely, ſeems derived from the practice of the Druids, who never committed any of their inſtructions to writing: poſſibly for want of letters; ſince it is remarkable that in all the antiquities, unqueſtionably Britiſh, which the induſtry of the moderns has diſcovered, there is not in any of them the leaſt trace of any character or letter to be found. The partible quality alſo of lands, by the cuſtom of gavelkind, which ſtill obtains in many parts of England, and did univerſally over Wales till the reign of Henry VIII, is undoubtedly of Britiſh original. So likewiſe is the antient diviſion of the goods of an inteſtate between his widow and children, or next of kin; which has ſince been revived by the ſtatute of diſtributions. And we may alſo remember an inſtance of a ſlighter nature mentioned in the preſent volume, where the ſame cuſtom has continued from Caeſar's time to the preſent; that of burning a woman guilty of the crime of petit treaſon by killing her huſband.

THE great variety of nations, that ſucceſſively broke in upon and deſtroyed both the Britiſh inhabitants and conſtitution, the

Romans, the Picts, and, after them, the various clans of Saxons and Danes, muſt neceſſarily have cauſed great confuſion and uncertainty in the laws and antiquities of the kingdom; as they were very ſoon incorporated and blended together, and therefore, we may ſuppoſe, mutually communicated to each other their reſpective uſages [a], in regard to the rights of property and the puniſhment of crimes. So that it is morally impoſſible to trace out, with any degree of accuracy, *when* the ſeveral mutations of the common law were made, or what was the reſpective original of thoſe ſeveral cuſtoms we at preſent uſe, by any chemical reſolution of them to their firſt and component principles. We can ſeldom pronounce, that *this* cuſtom was derived from the Britons; *that* was left behind by the Romans; *this* was a neceſſary precaution againſt the Picts; *that* was introduced by the Saxons, diſcontinued by the Danes, but afterwards reſtored by the Normans.

WHEREVER this can be done, it is matter of great curioſity, and ſome uſe: but this can very rarely be the caſe; not only from the reaſon above-mentioned, but alſo from many others. Firſt, from the nature of traditional laws in general; which, being accommodated to the exigences of the times, ſuffer by degrees inſenſible variations in practice [b]: ſo that, though upon compariſon we plainly diſcern the alteration of the law from what it was five hundred years ago, yet it is impoſſible to define the preciſe period in which that alteration accrued, any more than we can diſcern the changes of the bed of a river, which varies it's ſhores by continual decreaſes and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and it's government: which alone, though it had been diſturbed by no foreign invaſions, would make it an impoſſible thing to ſearch out the original of it's laws; unleſs we had as authentic monuments thereof, as the Jews had by the hand of Moſes [c].

[a] Hal. Hiſt. C. L. 62.
[b] *Ibid.* 57.
[c] *Ibid.* 59.

Thirdly

Thirdly, this uncertainty of the true origin of particular cuſtoms muſt alſo in part have ariſen from the means, whereby chriſtianity was propagated among our Saxon anceſtors in this iſland; by learned foreigners brought over from Rome and other countries: who undoubtedly carried with them many of their own national cuſtoms; and probably prevailed upon the ſtate to abrogate ſuch uſages as were inconſiſtent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cauſe, that we find not only ſome rules of the moſaical, but alſo of the imperial and pontificial laws, blended and adopted into our own ſyſtem.

A FARTHER reaſon may alſo be given for the great variety, and of courſe the uncertain original, of our antient eſtabliſhed cuſtoms; even after the Saxon government was firmly eſtabliſhed in this iſland: *viz.* the ſubdiviſion of the kingdom into an heptarchy, conſiſting of ſeven independent kingdoms, peopled and governed by different clans and colonies. This muſt neceſſarily create an infinite diverſity of laws: even though all thoſe colonies, of Jutes, Angles, proper Saxons, and the like, originally ſprung from the ſame mother country, the great northern hive; which poured forth it's warlike progeny, and ſwarmed all over Europe, in the ſixth and ſeventh centuries. This multiplicity of laws will neceſſarily be the caſe in ſome degree, where any kingdom is cantoned out into provincial eſtabliſhments; and not under one common diſpenſation of laws, though under the ſame ſovereign power. Much more will it happen, where ſeven unconnected ſtates are to form their own conſtitution and ſuperſtructure of government, though they all begin to build upon the ſame or ſimilar foundations.

WHEN therefore the Weſt-Saxons had ſwallowed up all the reſt, and King Alfred ſucceeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a moſt great and neceſſary work, which he is ſaid to have executed in as maſterly a manner.

No leſs than to new-model the conſtitution; to rebuild it on a plan that ſhould endure for ages; and, out of it's old diſcordant materials, which were heaped upon each other in a vaſt and rude irregularity, to form one uniform and well connected whole. This he effected, by reducing the whole kingdom under one regular and gradual ſubordination of government, wherein each man was anſwerable to his immediate ſuperior for his own conduct and that of his neareſt neighbours: for to him we owe that maſterpiece of judicial polity, the ſubdiviſion of England into tithings, and hundreds, if not into counties; all under the influence and adminiſtration of one ſupreme magiſtrate, the king; in whom, as in a general reſervoir, all the executive authority of the law was lodged, and from whom juſtice was diſperſed to every part of the nation by diſtinct, yet communicating, ducts and chanels: which wiſe inſtitution has been preſerved for near a thouſand years unchanged, from Alfred's to the preſent time. He alſo, like another Theodoſius, collected the various cuſtoms that he found diſperſed in the kingdom, and reduced and digeſted them into one uniform ſyſtem or code of laws, in his dom bec, or *liber judicialis*. This he compiled for the uſe of the court-baron, hundred, and county court, the court-leet, and ſheriff's tourn; tribunals, which he eſtabliſhed, for the trial of all cauſes civil and criminal, in the very diſtricts wherein the complaint aroſe: all of them ſubject however to be inſpected, controlled, and kept within the bounds of the univerſal or common law, by the king's own courts; which were then itinerant, being kept in the king's palace, and removing with his houſhold in thoſe royal progreſſes, which he continually made from one end of the kingdom to the other.

THE Daniſh invaſion and conqueſt, which introduced new foreign cuſtoms, was a ſevere blow to this noble fabric: but a plan, ſo excellently concerted, could never be long thrown aſide. So that, upon the expulſion of theſe intruders, the Engliſh returned to their antient law: retaining however ſome few of the cuſtoms of their late viſitants; which went under the name of *Dane*

Dane-Lage: as the code compiled by Alfred was called the *Weſt-Saxon-Lage*; and the local conſtitutions of the antient kingdom of Mercia, which obtained in the counties neareſt to Wales, and probably abounded with many Britiſh cuſtoms, were called the *Mercen-Lage*. And theſe three laws were, about the beginning of the eleventh century, in uſe in different counties of the realm: the provincial polity of counties, and their ſubdiviſions, having never been altered or diſcontinued through all the ſhocks and mutations of government, from the time of it's firſt inſtitution; though the laws and cuſtoms therein uſed, have (as we ſhall ſee) often ſuffered conſiderable changes.

FOR king Edgar, (who beſides his military merit, as founder of the Engliſh navy, was alſo a moſt excellent civil governor) obſerving the ill effects of three diſtinct bodies of laws, prevailing at once in ſeparate parts of his dominions, projected and begun, what his grandſon king Edward the confeſſor afterwards completed; *viz.* one uniform digeſt or body of laws, to be obſerved throughout the whole kingdom: being probably no more than a revival of king Alfred's code, with ſome improvements ſuggeſted by neceſſity and experience; particularly the incorporating ſome of the Britiſh or rather Mercian cuſtoms, and alſo ſuch of the Daniſh as were reaſonable and approved, into the *Weſt-Saxon-Lage*, which was ſtill the groundwork of the whole. And this appears to me the beſt ſupported and moſt plauſible conjecture (for certainty is not to be expected) of the riſe and original of that admirable ſyſtem of maxims and unwritten cuſtoms, which is now known by the name of the *common* law, as extending it's authority univerſally over all the realm; and which is doubtleſs of Saxon parentage.

AMONG the moſt remarkable of the Saxon laws we may reckon, 1. The conſtitution of parliaments, or rather, general aſſemblies of the principal and wiſeſt men in the nation; the *wittena-gemote*, or *commune concilium* of the antient Germans; which was not yet reduced to the forms and diſtinctions of our modern

modern parliament: without whoſe concurrence however, no new law could be made, or old one altered. 2. The election of their magiſtrates by the people; originally even that of their kings, till dearbought experience evinced the convenience and neceſſity of eſtabliſhing an hereditary ſucceſſion to the crown. But that of all ſubordinate magiſtrates, their military officers or heretochs, their ſheriffs, their conſervators of the peace, their coroners, their port-reeves, (ſince changed into mayors and bailiffs) and even their tythingmen and borſholders at the leet, continued, ſome till the Norman conqueſt, others for two centuries after, and ſome remain to this day. 3. The deſcent of the crown, when once a royal family was eſtabliſhed, upon nearly the ſame hereditary principles upon which it has ever ſince continued: only that perhaps, in caſe of minority, the next of kin of full age would aſcend the throne, as king, and not as protector; though, after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital puniſhments for the firſt offence: even the moſt notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage; to which our benefit of clergy has now in ſome meaſure ſucceeded. 5. The prevalence of certain cuſtoms, as heriots and military ſervices in proportion to every man's land, which much reſembled the feodal conſtitution; but yet were exempt from all it's rigorous hardſhips: and which may be well enough accounted for, by ſuppoſing them to be brought from the continent by the firſt Saxon invaders, in the primitive moderation and ſimplicity of the feodal law; before it got into the hands of the Norman juriſts, who extracted the moſt ſlaviſh doctrines, and oppreſſive conſequences, out of what was originally intended as a law of liberty. 6. That their eſtates were liable to forfeiture for treaſon, but that the doctrine of eſcheats and corruption of blood for felony, or any other cauſe, was utterly unknown amongſt them. 7. The deſcent of their lands was to all the males equally, without any right of primogeniture; a cuſtom, which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till

till the Norman conqueſt: though really inconvenient, and more eſpecially deſtructive to antient families; which are in monarchies neceſſary to be ſupported, in order to form and keep up a nobility, or intermediate ſtate between the prince and the common people. 8. The courts of juſtice conſiſted principally of the county courts, and in caſes of weight or nicety the king's court held before himſelf in perſon, at the time of his parliaments; which were uſually holden in different places, according as he kept the three great feſtivals of chriſtmas, eaſter, and whitſuntide. An inſtitution which was adopted by king Alonſo VII of Caſtile about a century after the conqueſt: who at the ſame three great feaſts was wont to aſſemble his nobility and prelates in his court; who there heard and decided all controverſies, and then, having received his inſtructions, departed home[d]. Theſe county courts however differed from the modern ones, in that the eccleſiaſtical and civil juriſdiction were blended together, the biſhop and the ealdorman or ſheriff ſitting in the ſame county court; and alſo that the deciſions and proceedings therein were much more ſimple and unembarraſſed: an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials, among a people who had a very ſtrong tincture of ſuperſtition, were permitted to be by *ordeal*, by the *corſned* or morſel of execration, or by *wager of law* with compurgators, if the party choſe it; but frequently they were alſo by *jury*: for, whether or no their juries conſiſted preciſely of twelve men, or were bound to a ſtrict unanimity; yet the general conſtitution of this admirable criterion of truth, and moſt important guardian both of public and private liberty, we owe to our Saxon anceſtors. Thus ſtood the general frame of our polity at the time of the Norman invaſion; when the ſecond period of our legal hiſtory commences.

II. THIS remarkable event wrought as great an alteration in our laws, as it did in our antient line of kings: and, though the alteration of the former was effected rather by the conſent of the people,

[d] Mod. Un. Hiſt. xx. 114.

than

than any right of conqueſt, yet that conſent ſeems to have been partly extorted by fear, and partly given without any apprehenſion of the conſequences which afterwards enſued.

1. AMONG the firſt of theſe alterations we may reckon the ſeparation of the eccleſiaſtical courts from the civil: effected in order to ingratiate the new king with the popiſh clergy, who for ſome time before had been endeavouring all over Europe to exempt themſelves from the ſecular power; and whoſe demands the conqueror, like a politic prince, thought it prudent to comply with, by reaſon that their reputed ſanctity had a great influence over the minds of the people; and becauſe all the little learning of the times was engroſſed into their hands, which made them neceſſary men, and by all means to be gained over to his intereſts. And this was the more eaſily effected, becauſe, the diſpoſal of all the epiſcopal ſees being then in the breaſt of the king, he had taken care to fill them with Italian and Norman prelates.

2. ANOTHER violent alteration of the Engliſh conſtitution conſiſted in the depopulation of whole countries, for the purpoſes of the king's royal diverſion; and ſubjecting both them, and all the antient foreſts of the kingdom, to the unreaſonable ſeverities of foreſt laws imported from the continent, whereby the ſlaughter of a beaſt was made almoſt as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chaſe the king's deer, yet he might ſtart any game, purſue, and kill it, upon his own eſtate. But the rigour of theſe new conſtitutions veſted the ſole property of all the game in England in the king alone; and no man was entitled to diſturb any fowl of the air, or any beaſt of the field, of ſuch kinds as were ſpecially reſerved for the royal amuſement of the ſovereign, without expreſs licence from the king, by a grant of a chaſe or free warren: and thoſe franchiſes were granted as much with a view to preſerve the breed of animals, as to indulge the ſubject. From a ſimilar principle to which, though the foreſt laws

laws are now mitigated, and by degrees grown intirely obſolete, yet from this root has ſprung a baſtard ſlip, known by the name of the game law, now arrived to and wantoning in it's higheſt vigour: both founded upon the ſame unreaſonable notions of permanent property in wild creatures; and both productive of the ſame tyranny to the commons: but with this difference; that the foreſt laws eſtabliſhed only one mighty hunter throughout the land, the game laws have raiſed a little Nimrod in every manor. And in one reſpect the antient law was much leſs unreaſonable than the modern: for the king's grantee of a chaſe or free-warren might kill game in every part of his franchiſe; but now, though a freeholder of leſs than 100 *l.* a year is forbidden to kill a partridge upon his own eſtate, yet nobody elſe (not even the lord of the manor, unleſs he hath a grant of free-warren) can do it without committing a treſpaſs, and ſubjecting himſelf to an action.

3. A THIRD alteration in the Engliſh laws was by narrowing the remedial influence of the county courts, the great ſeats of Saxon juſtice, and extending the *original* juriſdiction of the king's juſticiars to all kinds of cauſes, ariſing in all parts of the kingdom. To this end the *aula regis*, with all it's multifarious authority, was erected; and a capital juſticiary appointed, with powers ſo large and boundleſs, that he became at length a tyrant to the people, and formidable to the crown itſelf. The conſtitution of this court, and the judges themſelves who preſided there, were fetched from the duchy of Normandy: and the conſequence naturally was, the ordaining that all proceedings in the king's courts ſhould be carried on in the Norman, inſtead of the Engliſh, language. A proviſion the more neceſſary, becauſe none of his Norman juſticiars underſtood Engliſh; but as evident a badge of ſlavery, as ever was impoſed upon a conquered people. This laſted till king Edward the third obtained a double victory, over the armies of France in their own country, and their language in our courts here at home. But there was one miſchief too deeply rooted thereby, and which this caution of

king Edward came too late to eradicate. Inſtead of the plain and eaſy method of determining ſuits in the county courts, the chicanes and ſubtilties of Norman juriſprudence had taken poſſeſſion of the king's courts, to which every cauſe of conſequence was drawn. Indeed that age, and thoſe immediately ſucceeding it, were the aera of refinement and ſubtilty. There is an active principle in the human ſoul, that will ever be exerting it's faculties to the utmoſt ſtretch, in whatever employment, by the accidents of time and place, the general plan of education, or the cuſtoms and manners of the age and country, it may happen to find itſelf engaged. The northern conquerors of Europe were then emerging from the groſſeſt ignorance in point of literature; and thoſe, who had leiſure to cultivate it's progreſs, were ſuch only as were cloiſtered in monaſteries, the reſt being all ſoldiers or peaſants. And, unfortunately, the firſt rudiments of ſcience which they imbibed were thoſe of Ariſtotle's philoſophy, conveyed through the medium of his Arabian commentators; which were brought from the eaſt by the Saracens into Paleſtine and Spain, and tranſlated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a riſing ſtate, were thoſe of the nobleſt kind; the eſtabliſhment of religion, and the regulations of civil polity; yet, having only ſuch tools to work with, their execution was trifling and flimſey. Both the divinity and the law of thoſe times were therefore frittered into logical diſtinctions, and drawn out into metaphyſical ſubtilties, with a ſkill moſt amazingly artificial; but which ſerves no other purpoſe, than to ſhew the vaſt powers of the human intellect, however vainly or prepoſterouſly employed. Hence law in particular, which (being intended for univerſal reception) ought to be a plain rule of action, became a ſcience of the greateſt intricacy; eſpecially when blended with the new refinements engrafted upon feodal property: which refinements were from time to time gradually introduced by the Norman practitioners, with a view to ſuperſede (as they did in great meaſure) the more homely, but more intelligible, maxims of diſtributive juſtice among the Saxons. And, to ſay the truth, theſe

ſcholaſtic

ſcholaſtic reformers have tranſmitted their dialect and fineſſes to poſterity, ſo interwoven in the body of our legal polity, that they cannot now be taken out without a manifeſt injury to the ſubſtance. Statute after ſtatute has in later times been made, to pare off theſe troubleſome excreſcences, and reſtore the common law to it's priſtine ſimplicity and vigour; and the endeavour has greatly ſucceeded: but ſtill the ſcars are deep and viſible; and the liberality of our modern courts of juſtice is frequently obliged to have recourſe to unaccountable fictions and circuities, in order to recover that equitable and ſubſtantial juſtice, which for a long time was totally buried under the narrow rules and fanciful niceties of metaphyſical and Norman juriſprudence.

4. A FOURTH innovation was the introduction of the trial by combat, for the deciſion of all civil and criminal queſtions of fact in the laſt reſort. This was the immemorial practice of all the northern nations; but firſt reduced to regular and ſtated forms among the Burgundi, about the cloſe of the fifth century: and from them it paſſed to other nations, particularly the Franks and the Normans; which laſt had the honour to eſtabliſh it here, though clearly an unchriſtian, as well as moſt uncertain, method of trial. But it was a ſufficient recommendation of it to the conqueror and his warlike countrymen, that it was the uſage of their native duchy of Normandy.

5. BUT the laſt and moſt important alteration, both in our civil and military polity, was the engrafting on all landed eſtates, a few only excepted, the fiction of feodal tenure; which drew after it a numerous and oppreſſive train of ſervile fruits and appendages; aids, reliefs, primer ſeiſins, wardſhips, marriages, eſcheats, and fines for alienation; the genuine conſequences of the maxim then adopted, that all the lands in England were derived from, and holden, mediately or immediately, of the crown.

THE nation at this period ſeems to have groaned under as abſolute a ſlavery, as was in the power of a warlike, an ambitious,

and a politic prince to create. The conſciences of men were enſlaved by four eccleſiaſtics, devoted to a foreign power, and unconnected with the civil ſtate under which they lived: who now imported from Rome for the firſt time the whole *farrago* of ſuperſtitious novelties, which had been engendered by the blindneſs and corruption of the times, between the firſt miſſion of Auguſtin the monk, and the Norman conqueſt; ſuch as tranſubſtantiation, purgatory, communion in one kind, and the worſhip of ſaints and images; not forgetting the univerſal ſupremacy and dogmatical infallibility of the holy ſee. The laws too, as well as the prayers, were adminiſtered in an unknown tongue. The antient trial by jury gave way to the impious deciſion by battel. The foreſt laws totally reſtrained all rural pleaſures and manly recreations. And in cities and towns the caſe was no better; all company being obliged to diſperſe, and fire and candle to be extinguiſhed, by eight at night, at the ſound of the melancholy *curfeu*. The ultimate property of all lands, and a conſiderable ſhare of the preſent profits, were veſted in the king, or by him granted out to his Norman favourites; who, by a gradual progreſſion of ſlavery, were abſolute vaſals to the crown, and as abſolute tyrants to the commons. Unheard of forfeitures, talliages, aids, and fines, were arbitrarily extracted from the pillaged landholders, in purſuance of the new ſyſtem of tenure. And, to crown all, as a conſequence of the tenure by knight-ſervice, the king had always ready at his command an army of ſixty thouſand knights or *milites*: who were bound, upon pain of confiſcating their eſtates, to attend him in time of invaſion, or to quell any domeſtic inſurrection. Trade, or foreign merchandize, ſuch as it then was, was carried on by the Jews and Lombards; and the very name of an Engliſh fleet, which king Edgar had rendered ſo formidable, was utterly unknown to Europe: the nation conſiſting wholly of the clergy, who were alſo the lawyers; the barons, or great lords of the land; the knights or ſoldiery, who were the ſubordinate landholders; and the burghers, or inferior tradeſmen, who from their inſignificancy happily retained, in their ſocage and burgage tenure, ſome

points

points of their antient freedom. All the reſt were villeins or bondmen.

FROM ſo complete and well concerted a ſcheme of ſervility, it has been the work of generations for our anceſtors, to redeem themſelves and their poſterity into that ſtate of liberty, which we now enjoy: and which therefore is not to be looked upon as conſiſting of mere incroachments on the crown, and infringements of the prerogative, as ſome ſlaviſh and narrow-minded writers in the laſt century endeavoured to maintain; but as, in general, a gradual reſtoration of that antient conſtitution, whereof our Saxon forefathers had been unjuſtly deprived, partly by the policy, and partly by the force, of the Norman. How that reſtoration has, in a long ſeries of years, been ſtep by ſtep effected, I now proceed to enquire.

WILLIAM Rufus proceeded on his father's plan, and in ſome points extended it; particularly with regard to the foreſt laws. But his brother and ſucceſſor, Henry the firſt, found it expedient, when firſt he came to the crown, to ingratiate himſelf with the people; by reſtoring (as our monkiſh hiſtorians tell us) the laws of king Edward the confeſſor. The ground whereof is this: that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary *fruits* of his feodal tenures; but reſerved the tenures themſelves, for the ſame military purpoſes that his father introduced them. He alſo aboliſhed the *curfeu*[e]; for, though it is mentioned in our laws a full century afterwards[f], yet it is rather ſpoken of as a known *time* of night (ſo denominated from that abrogated uſage) than as a ſtill ſubſiſting cuſtom. There is extant a code of laws in his name, conſiſting partly of thoſe of the confeſſor, but with great additions and alterations of his own; and chiefly calculated for the regulation of the county courts. It contains ſome directions as to crimes and their puniſhments, (that of theft being made capital in his reign) and a few things relating to eſtates, parti-

[e] Spelm. *Cod. LL. W. I.* 288, *Hen. I.* 299. [f] *Stat. Civ. Lond.* 13 Edw. I.

cularly

cularly as to the deſcent of lands: which being by the Saxon laws equally to all the ſons, by the feodal or Norman to the eldeſt only, king Henry here moderated the difference; directing the eldeſt ſon to have only the principal eſtate, "*primum* "*patris feudum*," the reſt of his eſtates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of biſhops and mitred abbots; reſerving however theſe enſigns of patronage, *conge d' eſlire*, cuſtody of the temporalties when vacant, and homage upon their reſtitution. He laſtly united again for a time the civil and eccleſiaſtical courts, which union was ſoon diſſolved by his Norman clergy: and, upon that final diſſolution, the cognizance of teſtamentary cauſes ſeems to have been firſt given to the eccleſiaſtical court. The reſt remained as in his father's time: from whence we may eaſily perceive how far ſhort this was of a thorough reſtitution of king Edward's, or the Saxon, laws.

THE uſurper Stephen, as the manner of uſurpers is, promiſed much at his acceſſion, eſpecially with regard to redreſſing the grievances of the foreſt laws, but performed no great matter either in that or in any other point. It is from his reign however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the ſame time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

BY the time of king Henry the ſecond, if not earlier, the charter of Henry the firſt ſeems to have been forgotten: for we find the claim of marriage, ward, and relief, then flouriſhing in full vigour. The right of primogeniture ſeems alſo to have tacitly revived, being found more convenient for the public than the parcelling of eſtates into a multitude of minute ſubdiviſions. However in this prince's reign much was done to methodize the laws, and reduce them into a regular order; as appears from that excellent treatiſe of Glanvil: which, though ſome of it be now antiquated and altered, yet, when compared with the code of

of Henry the firſt, it carries a manifeſt ſuperiority [g]. Throughout his reign alſo was continued the important ſtruggle, which we have had occaſion ſo often to mention, between the laws of England and Rome; the former ſupported by the ſtrength of the temporal nobility, when endeavoured to be ſupplanted in favour of the latter by the popiſh clergy. Which diſpute was kept on foot till the reign of Edward the firſt; when the laws of England, under the new diſcipline introduced by that ſkilful commander, obtained a complete and permanent victory. In the preſent reign, of Henry the ſecond, there are four things which peculiarly merit the attention of a legal antiquarian: 1. The conſtitutions of the parliament at Clarendon, *A. D.* 1164. whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the ſecular juriſdiction: though his farther progreſs was unhappily ſtopped, by the fatal event of the diſputes between him and archbiſhop Becket. 2. The inſtitution of the office of juſtices in eyre, *in itinere*; the king having divided the kingdom into ſix circuits (a little different from the preſent) and commiſſioned theſe new created judges to adminiſter juſtice, and try writs of aſſiſe, in the ſeveral counties. Theſe remedies are ſaid to have been then firſt invented: before which all cauſes were uſually terminated in the county courts, according to the Saxon cuſtom; or before the king's juſticiaries in the *aula regis*, in purſuance of the Norman regulations. The latter of which tribunals, travelling about with the king's perſon, occaſioned intolerable expenſe and delay to the ſuitors; and the former, however proper for little debts and minute actions, where even injuſtice is better than procraſtination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of conſiderable moment. 3. The introduction and eſtabliſhment of the grand aſſiſe, or trial by a ſpecial kind of jury in a writ of right, at the option of the tenant or defendant, inſtead of the barbarous and Norman trial by battel. 4. To this time muſt alſo be referred the introduction of eſcuage, or pecuniary com-

[g] Hal. Hiſt. C. L. 138.

mutation

mutation for perſonal military ſervice; which in proceſs of time was the parent of the antient ſubſidies granted to the crown by parliament, and the land tax of later times.

RICHARD the firſt, a brave and magnanimous prince, was a ſportſman as well as a ſoldier; and therefore inforced the foreſt laws with ſome rigour; which occaſioned many diſcontents among his people: though (according to Matthew Paris) he repealed the penalties of caſtration, loſs of eyes, and cutting off the hands and feet, before inflicted on ſuch as tranſgreſſed in hunting; probably finding that their ſeverity prevented proſecutions. He alſo, when abroad, compoſed a body of naval laws at the iſle of Oleron; which are ſtill extant, and of high authority: for in his time we began again to diſcover, that (as an iſland) we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the juſtices in eyre: the king's thoughts being chiefly taken up by the knight errantry of a croiſade againſt the Saracens in the holy land.

IN king John's time, and that of his ſon Henry the third, the rigours of the feodal tenures and the foreſt laws were ſo warmly kept up, that they occaſioned many inſurrections of the barons or principal feudatories: which at laſt had this effect, that firſt king John, and afterwards his ſon, conſented to the two famous charters of Engliſh liberties, *magna carta*, and *carta de foreſta*. Of theſe the latter was well calculated to redreſs many grievances, and encroachments of the crown, in the exertion of foreſt law: and the former confirmed many liberties of the church, and redreſſed many grievances incident to feodal tenures, of no ſmall moment at the time; though now, unleſs conſidered attentively and with this retroſpect, they ſeem but of trifling concern. But, beſides theſe feodal proviſions, care was alſo taken therein to protect the ſubject againſt other oppreſſions, then frequently ariſing from unreaſonable amercements, from illegal diſtreſſes or other proceſs for debts or ſervices due to the crown

crown, and from the tyrannical abuſe of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the ſame manner as it ſtill remains; prohibited for the future the grants of excluſive fiſheries; and the erection of new bridges ſo as to oppreſs the neighbourhood. With reſpect to private rights: it eſtabliſhed the teſtamentary power of the ſubject over part of his perſonal eſtate, the reſt being diſtributed among his wife and children; it laid down the law of dower, as it hath continued ever ſince; and prohibited the appeals of women, unleſs for the death of their huſbands. In matters of public police and national concern: it injoined an uniformity of weights and meaſures; gave new encouragements to commerce, by the protection of merchant ſtrangers; and forbad the alienation of lands in mortmain. With regard to the adminiſtration of juſtice: beſides prohibiting all denials or delays of it, it fixed the court of commonpleas at Weſtminſter, that the ſuitors might no longer be harraſſed with following the king's perſon in all his progreſſes; and at the ſame time brought the trial of iſſues home to the very doors of the freeholders, by directing aſſiſes to be taken in the proper counties, and eſtabliſhing annual circuits: it alſo corrected ſome abuſes then incident to the trials by wager of law and of battel; directed the regular awarding of inqueſts for life or member; prohibited the king's inferior miniſters from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwiſe have unjuſtly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of juſtice, the county court, ſheriff's tourn, and court-leet. It confirmed and eſtabliſhed the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, laſtly, (which alone would have merited the title that it bears, of the *great* charter) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unleſs declared to be forfeited by the judgment of his peers or the law of the land.

HOWEVER, by means of theſe ſtruggles, the pope in the reign of king John gained a ſtill greater aſcendant here, than he ever had before enjoyed; which continued through the long reign of his ſon Henry the third: in the beginning of whoſe time the old Saxon trial by ordeal was alſo totally aboliſhed. And we may by this time perceive, in Bracton's treatiſe, a ſtill farther improvement in the method and regularity of the common law, eſpecially in the point of pleadings[h]. Nor muſt it be forgotten, that the firſt traces which remain, of the ſeparation of the greater barons from the leſs, in the conſtitution of parliaments, are found in the great charter of king John; though omitted in that of Henry III: and that, towards the end of the latter of theſe reigns, we find the firſt record of any writ for ſummoning knights, citizens, and burgeſſes to parliament. And here we conclude the ſecond period of our Engliſh legal hiſtory.

III. THE third commences with the reign of Edward the firſt; who may juſtly be ſtiled our Engliſh Juſtinian. For in his time the law did receive ſo ſudden a perfection, that ſir Matthew Hale does not ſcruple to affirm[i], that more was done in the firſt thirteen years of his reign to ſettle and eſtabliſh the diſtributive juſtice of the kingdom, than in all the ages ſince that time put together.

IT would be endleſs to enumerate all the particulars of theſe regulations; but the principal may be reduced under the following general heads. 1. He eſtabliſhed, confirmed, and ſettled, the great charter and charter of foreſts. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and eſtabliſhing the bounds of eccleſiaſtical juriſdiction: and by obliging the ordinary, to whom all the goods of inteſtates at that time belonged, to diſcharge the debts of the deceaſed. 3. He defined the limits of the ſeveral temporal courts of the higheſt juriſdiction, thoſe of the king's bench, common

[h] Hal. Hiſt. C. L. 156. [i] *Ibid.* 158.

pleas,

pleas, and exchequer; ſo as they might not interfere with each other's proper buſineſs: to do which, they muſt now have recourſe to a fiction, very neceſſary and beneficial in the preſent enlarged ſtate of property. 4. He ſettled the boundaries of the inferior courts in counties, hundreds, and manors: confining them to cauſes of no great amount, according to their primitive inſtitution; though of conſiderably greater, than by the alteration of the value of money they are now permitted to determine. 5. He ſecured the property of the ſubject, by aboliſhing all arbitrary taxes, and talliages, levied without conſent of the national council. 6. He guarded the common juſtice of the kingdom from abuſes, by giving up the royal prerogative of ſending mandates to interfere in private cauſes. 7. He ſettled the form, ſolemnities, and effects, of fines levied in the court of common pleas; though the thing itſelf was of Saxon original. 8. He firſt eſtabliſhed a repoſitory for the public records of the kingdom; few of which are antienter than the reign of his father, and thoſe were by him collected. 9. He improved upon the laws of king Alfred, by that great and orderly method of watch and ward, for preſerving the public peace and preventing robberies, eſtabliſhed by the ſtatute of Wincheſter. 10. He ſettled and reformed many abuſes incident to tenures, and removed ſome reſtraints on the alienation of landed property, by the ſtatute of *quia emptores*. 11. He inſtituted a ſpeedier way for the recovery of debts, by granting execution not only upon goods and chattels, but alſo upon lands, by writ of *elegit*; which was of ſignal benefit to a trading people: and, upon the ſame commercial ideas, he alſo allowed the charging of lands in a ſtatute merchant, to pay debts contracted in trade, contrary to all feodal principles. 12. He effectually provided for the recovery of advowſons, as temporal rights; in which, before, the law was extremely deficient. 13. He alſo effectually cloſed the great gulph, in which all the landed property of the kingdom was in danger of being ſwallowed, by his re-iterated ſtatutes of mortmain; moſt admirably adapted to meet the frauds that had then been deviſed, though afterwards contrived to be evaded by the

invention of uſes. 14. He eſtabliſhed a new limitation of property by the creation of eſtates tail; concerning the good policy of which, modern times have however entertained a very different opinion. 15. He reduced all Wales to the ſubjection, not only of the crown, but in great meaſure of the laws, of England; (which was thoroughly completed in the reign of Henry the eighth) and ſeems to have entertained a deſign of doing the like by Scotland, ſo as to have formed an intire and complete union of the iſland of Great Britain.

I MIGHT continue this catalogue much farther: --- but, upon the whole, we may obſerve, that the very ſcheme and model of the adminiſtration of common juſtice between party and party, was entirely ſettled by this king[k]; and has continued nearly the ſame, in all ſucceeding ages, to this day; abating ſome few alterations, which the humour or neceſſity of ſubſequent times hath occaſioned. The forms of writs, by which actions are commenced, were perfected in his reign, and eſtabliſhed as models for poſterity. The pleadings, conſequent upon the writs, were then ſhort, nervous, and perſpicuous; not intricate, verboſe, and formal. The legal treatiſes, written in his time, as Britton, Fleta, Hengham, and the reſt, are for the moſt part, law at this day; or at leaſt *were* ſo, till the alteration of tenures took place. And, to conclude, it is from this period, from the exact *obſervation* of *magna carta*, rather than from it's *making* or *renewal*, in the days of his grandfather and father, that the liberty of Engliſhmen began again to rear it's head; though the weight of the military tenures hung heavy upon it for many ages after.

I CANNOT give a better proof of the excellence of his conſtitutions, than that from his time to that of Henry the eighth there happened very few, and thoſe not very conſiderable, alterations in the legal *forms* of proceedings. As to matter of *ſubſtance*: the old Gothic powers of electing the principal ſubor-

[k] Hal. Hiſt. C. L. 162.

dinate

dinate magiſtrates, the ſheriffs, and conſervators of the peace, were taken from the people in the reigns of Edward II and Edward III; and juſtices of the peace were eſtabliſhed inſtead of the latter. In the reign alſo of Edward the third the parliament is ſuppoſed moſt probably to have aſſumed it's preſent form; by a ſeparation of the commons from the lords. The ſtatute for defining and aſcertaining treaſons was one of the firſt productions of this new-modelled aſſembly; and the tranſlation of the law proceedings from French into Latin another. Much alſo was done, under the auſpices of this magnanimous prince, for eſtabliſhing our domeſtic manufactures; by prohibiting the exportation of Engliſh wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to ſettle here. Nor was the legiſlature inattentive to many other branches of commerce, or indeed to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the ſtatute ſtaple; whereby he might the more readily pledge his lands for the ſecurity of his mercantile debts. And, as perſonal property now grew, by the extenſion of trade, to be much more conſiderable than formerly, care was taken, in caſe of inteſtacies, to appoint adminiſtrators particularly nominated by the law; to diſtribute that perſonal property among the creditors and kindred of the deceaſed, which before had been uſually applied, by the officers of the ordinary, to uſes then denominated pious. The ſtatutes alſo of *praemunire*, for effectually depreſſing the civil power of the pope, were the work of this and the ſubſequent reign. And the eſtabliſhment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown poſſeſſions of the monaſteries, added luſtre to the cloſe of the fourteenth century: though the ſeeds of the general reformation, which were thereby firſt ſown in the kingdom, were almoſt overwhelmed by the ſpirit of perſecution, introduced into the laws of the land by the influence of the regular clergy.

FROM this time to that of Henry the ſeventh, the civil wars and diſputed titles to the crown gave no leiſure for farther juridical

dical improvement: "*nam ſilent leges inter arma.*" --- And yet it is to theſe very diſputes that we owe the happy loſs of all the dominions of the crown on the continent of France; which turned the minds of our ſubſequent princes entirely to domeſtic concerns. To theſe likewiſe we owe the method of barring entails by the fiction of *common recoveries*; invented originally by the clergy, to evade the ſtatutes of mortmain, but introduced under Edward the fourth, for the purpoſe of unfettering eſtates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the univerſal eſtabliſhment of *uſes*, another of the clerical inventions.

IN the reign of king Henry the ſeventh, his miniſters (not to ſay the king himſelf) were more induſtrious in hunting out proſecutions upon old and forgotten penal laws, in order to extort money from the ſubject, than in framing any new beneficial regulations. For the diſtinguiſhing character of this reign was that of amaſſing treaſure into the king's coffers, by every means that could be deviſed: and almoſt every alteration in the laws, however ſalutary or otherwiſe in their future conſequences, had this and this only for their great and immediate object. To this end the court of ſtar-chamber was new-modelled, and armed with powers, the moſt dangerous and unconſtitutional, over the perſons and properties of the ſubject. Informations were allowed to be received, in lieu of indictments, at the aſſiſes and ſeſſions of the peace, in order to multiply fines and pecuniary penalties. The ſtatute of fines for landed property was craftily and covertly contrived, to facilitate the deſtruction of entails, and make the owners of real eſtates more capable to forfeit as well as to aliene. The benefit of clergy (which ſo often intervened to ſtop attainders and ſave the inheritance) was now allowed only once to lay offenders, who only could have inheritances to loſe. A writ of *capias* was permitted in all actions on the caſe, and the defendant might in conſequence be outlawed; becauſe upon ſuch outlawry his goods became the property of the crown. In ſhort, there is hardly a ſtatute in this reign, introductive of a new law or modifying

modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. THIS brings us to the fourth period of our legal hiſtory, *viz.* the reformation of religion, under Henry the eighth, and his children: which opens an intirely new ſcene in eccleſiaſtical matters; the uſurped power of the pope being now for ever routed and deſtroyed, all his connexions with this iſland cut off, the crown reſtored to it's ſupremacy over ſpiritual men and cauſes, and the patronage of biſhopricks being once more indiſputably veſted in the king. And, had the ſpiritual courts been at this time re-united to the civil, we ſhould have ſeen the old Saxon conſtitution with regard to *eccleſiaſtical* polity completely reſtored.

WITH regard alſo to our *civil* polity, the ſtatute of wills, and the ſtatute of uſes, (both paſſed in the reign of this prince) made a great alteration as to property: the former, by allowing the *deviſe* of real eſtates by will, which before was in general forbidden; the latter, by endeavouring to deſtroy the intricate nicety of *uſes*, though the narrowneſs and pedantry of the courts of common law prevented this ſtatute from having it's full beneficial effect. And thence the courts of equity aſſumed a juriſdiction, dictated by common juſtice and common ſenſe: which, however arbitrarily exerciſed or productive of jealouſies in it's infancy, has at length been matured into a moſt elegant ſyſtem of rational juriſprudence; the principles of which (notwithſtanding they may differ in forms) are now equally adopted by the courts of both law and equity. From the ſtatute of uſes, and another ſtatute of the ſame antiquity, (which protected eſtates for years from being deſtroyed by the reverſioner) a remarkable alteration took place in the mode of conveyancing: the antient aſſurance by feoffment and livery upon the land being now very ſeldom practiced, ſince the more eaſy and more private invention of transferring property, by ſecret conveyances to uſes; and long terms of years being now continually created in mortgages and family ſettlements,

ments, which may be moulded to a thouſand uſeful purpoſes by the ingenuity of an able artiſt.

THE farther attacks in this reign upon the immunity of eſtates-tail, which reduced them to little more than the conditional fees at the common law, before the paſſing of the ſtatute *de donis*; the eſtabliſhment of recognizances in the nature of a ſtatute-ſtaple, for facilitating the raiſing of money upon landed ſecurity; and the introduction of the bankrupt laws, as well for the puniſhment of the fraudulent, as the relief of the unfortunate, trader; all theſe were capital alterations of our legal polity, and highly convenient to that character, which the Engliſh began now to re-aſſume, of a great commercial people. The incorporation of Wales with England, and the more uniform adminiſtration of juſtice, by deſtroying ſome counties palatine, and abridging the unreaſonable privileges of ſuch as remained, added dignity and ſtrength to the monarchy: and, together with the numerous improvements before obſerved upon, and the redreſs of many grievances and oppreſſions which had been introduced by his father, will ever make the adminiſtration of Henry VIII a very diſtinguiſhed aera in the annals of juridical hiſtory.

IT muſt be however remarked, that (particularly in his later years) the royal prerogative was then ſtrained to a very tyrannical and oppreſſive height; and, what was the worſt circumſtance, it's encroachments were eſtabliſhed by law, under the ſanction of thoſe puſillanimous parliaments, one of which to it's eternal diſgrace paſſed a ſtatute, whereby it was enacted that the king's proclamations ſhould have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and new-fangled treaſons, which were ſlightly touched upon in a former chapter[e]. Happily for the nation, this arbitrary reign was ſucceeded by the minority of an amiable prince; during the ſhort ſunſhine of which, great part of theſe extravagant laws were repealed. And, to do juſtice to the ſhorter reign of queen Mary,

[e] See pag. 86.

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many ſalutary and popular laws, in civil matters, were made under her adminiſtration; perhaps the better to reconcile the people to the bloody meaſures which ſhe was induced to purſue, for the re-eſtabliſhment of religious ſlavery: the well concerted ſchemes for effecting which, were (through the providence of God) defeated by the ſeaſonable acceſſion of queen Elizabeth.

THE religious liberties of the nation being, by that happy event, eſtabliſhed (we truſt) on an eternal baſis; (though obliged in their infancy to be guarded, againſt papiſts and other nonconformiſts, by laws of too ſanguinary a nature) the foreſt laws having fallen into diſuſe; and the adminiſtration of civil right in the courts of juſtice being carried on in a regular courſe, according to the wiſe inſtitutions of king Edward the firſt, without any material innovations; all the principal grievances introduced by the Norman conqueſt ſeem to have been gradually ſhaken off, and our Saxon conſtitution reſtored, with conſiderable improvements: except only in the continuation of the military tenures, and a few other points, which ſtill armed the crown with a very oppreſſive and dangerous prerogative. It is alſo to be remarked, that the ſpirit of inriching the clergy and endowing religious houſes had (through the former abuſe of it) gone over to ſuch a contrary extreme, and the princes of the houſe of Tudor and their favourites had fallen with ſuch avidity upon the ſpoils of the church, that a decent and honourable maintenance was wanting to many of the biſhops and clergy. This produced the *reſtraining* ſtatutes, to prevent the alienations of lands and tithes belonging to the church and univerſities. The number of indigent perſons being alſo greatly increaſed, by withdrawing the alms of the monaſteries, a plan was formed in the reign of queen Elizabeth, more humane and beneficial than even feeding and cloathing of millions; by affording them the means (with proper induſtry) to feed and to cloath themſelves. And, the farther any ſubſequent plans for maintaining the poor have departed from this inſtitution, the more impracticable and even pernicious their viſionary attempts have proved.

HOWEVER, conſidering the reign of queen Elizabeth in a great and political view, we have no reaſon to regret many ſubſequent alterations in the Engliſh conſtitution. For, though in general ſhe was a wiſe and excellent princeſs, and loved her people; though in her time trade flouriſhed, riches increaſed, the laws were duly adminiſtred, the nation was reſpected abroad, and the people happy at home; yet, the encreaſe of the power of the ſtar-chamber, and the erection of the high commiſſion court in matters eccleſiaſtical, were the work of her reign. She alſo kept her parliaments at a very awful diſtance: and in many particulars ſhe, at times, would carry the prerogative as high as her moſt arbitrary predeceſſors. It is true, ſhe very ſeldom exerted this prerogative, ſo as to oppreſs individuals; but ſtill ſhe had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power, to play the tyrant. This is a high encomium on her merit; but at the ſame time it is ſufficient to ſhew, that theſe were not thoſe golden days of genuine liberty, that we formerly were taught to believe: for, ſurely, the true liberty of the ſubject conſiſts not ſo much in the gracious behaviour, as in the limited power, of the ſovereign.

THE great revolutions that had happened, in manners and in property, had paved the way, by imperceptible yet ſure degrees, for as great a revolution in government: yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progreſs of thoſe very means which afterwards reduced it's power. It is obvious to every obſerver, that, till the cloſe of the Lancaſtrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a ſtate of great ignorance; their perſonal wealth, before the extenſion of trade, was comparatively ſmall; and the nature of their landed property was ſuch, as kept them in continual dependence upon their feodal lord, being uſually ſome powerful baron, ſome opulent abbey,

or

or ſometimes the king himſelf. Though a notion of general liberty had ſtrongly pervaded and animated the whole conſtitution, yet the particular liberty, the natural equality, and perſonal independence of individuals, were little regarded or thought of; nay even to aſſert them was treated as the height of ſedition and rebellion. Our anceſtors heard, with deteſtation and horror, thoſe ſentiments rudely delivered, and puſhed to moſt abſurd extremes, by the violence of a Cade and a Tyler; which have ſince been applauded, with a zeal almoſt riſing to idolatry, when ſoftened and recommended by the eloquence, the moderation, and the arguments of a Sidney, a Locke, and a Milton.

BUT when learning, by the invention of printing and the progreſs of religious reformation, began to be univerſally diſſeminated; when trade and navigation were ſuddenly carried to an amazing extent, by the uſe of the compaſs and the conſequent diſcovery of the Indies; the minds of men, thus enlightened by ſcience and enlarged by obſervation and travel, began to entertain a more juſt opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants, and middling rank; while the two great eſtates of the kingdom, which formerly had ballanced the prerogative, the nobility and clergy, were greatly impoveriſhed and weakened. The popiſh clergy, detected in their frauds and abuſes, expoſed to the reſentment of the populace, and ſtripped of their lands and revenues, ſtood trembling for their very exiſtence. The nobles, enervated by the refinements of luxury, (which knowlege, foreign travel, and the progreſs of the politer arts, are too apt to introduce with themſelves) and fired with diſdain at being rivalled in magnificence by the opulent citizens, fell into enormous expenſes: to gratify which they were permitted, by the policy of the times, to diſſipate their overgrown eſtates, and alienate their antient patrimonies. This gradually reduced their power and their influence within a very moderate bound: while the king, by the ſpoil of the monaſteries and the great increaſe of the cuſtoms, grew rich, independent, and haughty: and the commons

were not yet ſenſible of the ſtrength they had acquired, nor urged to examine it's extent by new burthens or oppreſſive taxations, during the ſudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the inſolence and tyranny of the orders more immediately above them, they never dreamt of oppoſing the prerogative, to which they had been ſo little accuſtomed; much leſs of taking the lead in oppoſition, to which by their weight and their property they were now entitled. The latter years of Henry the eighth were therefore the times of the greateſt deſpotiſm, that have been known in this iſland ſince the death of William the Norman: the prerogative, as it then ſtood by common law, (and much more when extended by act of parliament) being too large to be endured in a land of liberty.

QUEEN Elizabeth, and the intermediate princes of the Tudor line, had almoſt the ſame legal powers, and ſometimes exerted them as roughly, as their father king Henry the eighth. But the critical ſituation of that princeſs with regard to her legitimacy, her religion, her enmity with Spain, and her jealouſy of the queen of Scots, occaſioned greater caution in her conduct. She probably, or her able adviſers, had penetration enough to diſcern how the power of the kingdom had gradually ſhifted it's chanel, and wiſdom enough not to provoke the commons to diſcover and feel their ſtrength. She therefore drew a veil over the odious part of prerogative; which was never wantonly thrown aſide, but only to anſwer ſome important purpoſe: and, though the royal treaſury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, ſhe aſked for ſupplies with ſuch moderation, and managed them with ſo much oeconomy, that the commons were happy in obliging her. Such, in ſhort, were her circumſtances, her neceſſities, her wiſdom, and her good diſpoſition, that never did a prince ſo long and ſo entirely, for the ſpace of half a century together, reign in the affections of the people.

ON the acceſſion of king James I, no new degree of royal power was added to, or exerciſed by, him; but ſuch a ſceptre was too weighty to be wielded by ſuch a hand. The unreaſonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occaſions, and the claim of a more abſolute power inherent in the kingly office than had ever been carried into practice, ſoon awakened the ſleeping lion. The people heard with aſtoniſhment doctrines preached from the throne and the pulpit, ſubverſive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciouſly ſupported: and common reaſon aſſured them, that, if it were of human origin, no conſtitution could eſtabliſh it without power of revocation, no precedent could ſanctify, no length of time could confirm it. The leaders felt the pulſe of the nation, and found they had ability as well as inclination to reſiſt it: and accordingly reſiſted and oppoſed it, whenever the puſillanimous temper of the reigning monarch had courage to put it to the trial; and they gained ſome little victories in the caſes of concealments, monopolies, and the diſpenſing power. In the mean time very little was done for the improvement of private juſtice, except the abolition of ſanctuaries, and the extenſion of the bankrupt laws, the limitation of ſuits and actions, and the regulating of informations upon penal ſtatutes. For I cannot claſs the laws againſt witchcraft and conjuration under the head of improvements; nor did the diſpute between lord Elleſmere and ſir Edward Coke, concerning the powers of the court of chancery, tend much to the advancement of juſtice.

INDEED when Charles the firſt ſucceeded to the crown of his father, and attempted to revive ſome enormities, which had been dormant in the reign of king James, the loans and benevolences extorted from the ſubject, the arbitrary impriſonments for refuſal, the exertion of martial law in time of peace, and other domeſtic grievances, clouded the morning of that miſ-

guided

guided prince's reign; which, though the noon of it began a little to brighten, at laſt went down in blood, and left the whole kingdom in darkneſs. It muſt be acknowleged that, by the petition of right, enacted to aboliſh theſe encroachments, the Engliſh conſtitution received great alteration and improvement. But there ſtill remained the latent power of the foreſt laws, which the crown moſt unſeaſonably revived. The legal juriſdiction of the ſtar-chamber and high-commiſſion courts was alſo extremely great; though their uſurped authority was ſtill greater. And, if we add to theſe the diſuſe of parliaments, the ill-timed zeal and deſpotic proceedings of the eccleſiaſtical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ſhip money, and other projects, we may ſee grounds moſt amply ſufficient for ſeeking redreſs in a legal conſtitutional way. This redreſs, when ſought, was alſo conſtitutionally given: for all theſe oppreſſions were actually aboliſhed by the king in parliament, before the rebellion broke out, by the ſeveral ſtatutes for triennial parliaments, for aboliſhing the ſtar-chamber and high commiſſion courts, for aſcertaining the extent of foreſts and foreſt-laws, for renouncing ſhip-money and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in conſequence of their feodal tenures: though it muſt be acknowleged that theſe conceſſions were not made with ſo good a grace, as to conciliate the confidence of the people. Unfortunately, either by his own miſmanagement, or by the arts of his enemies, the king had loſt the reputation of ſincerity; which is the greateſt unhappineſs that can befal a prince. Though he formerly had ſtrained his prerogative, not only beyond what the genius of the preſent times would bear, but alſo beyond the example of former ages, he had now conſented to reduce it to a lower ebb than was conſiſtent with monarchical government. A conduct ſo oppoſite to his temper and principles, joined with ſome raſh actions and unguarded expreſſions, made the people ſuſpect that this condeſcenſion was merely temporary. Fluſhed therefore with the ſucceſs they had gained, fired with reſentment for paſt oppreſſions, and dreading the

the conſequences if the king ſhould regain his power, the popular leaders (who in all ages have called themſelves *the people*) began to grow inſolent and ungovernable: their inſolence ſoon rendered them deſperate; and deſpair at length forced them to join with a ſet of military hypocrites and enthuſiaſts, who overturned the church and monarchy, and proceeded with deliberate ſolemnity to the trial and murder of their ſovereign.

I PASS by the crude and abortive ſchemes for amending the laws in the times of confuſion which followed; the moſt promiſing and ſenſible whereof (ſuch as the eſtabliſhment of new trials, the abolition of feodal tenures, the act of navigation, and ſome others) were adopted in the

V. FIFTH period, which I am next to mention, *viz.* after the reſtoration of king Charles II. Immediately upon which, the principal remaining grievance, the doctrine and conſequences of military tenures, were taken away and aboliſhed, except in the inſtance of corruption of inheritable blood, upon attainder of treaſon and felony. And though the monarch, in whoſe perſon the royal government was reſtored, and with it our antient conſtitution, deſerves no commendation from poſterity, yet in his reign, (wicked, ſanguinary, and turbulent as it was) the concurrence of happy circumſtances was ſuch, that from thence we may date not only the re-eſtabliſhment of our church and monarchy, but alſo the complete reſtitution of Engliſh liberty, for the firſt time, ſince it's total abolition at the conqueſt. For therein not only theſe ſaviſh tenures, the badge of foreign dominion, with all their oppreſſive appendages, were removed from incumbering the eſtates of the ſubject; but alſo an additional ſecurity of his perſon from impriſonment was obtained, by that great bulwark of our conſtitution, the *habeas corpus* act. Theſe two ſtatutes, with regard to our property and perſons, form a ſecond *magna carta*, as beneficial and effectual as that of Runing-Mead. That only pruned the luxuriances of the feodal ſyſtem; but the ſtatute of Charles the ſecond extirpated all it's ſlaveries: except

except perhaps in copyhold tenure; and there alſo they are now in great meaſure enervated by gradual cuſtom, and the interpoſition of our courts of juſtice. *Magna carta* only, in general terms, declared, that no man ſhall be impriſoned contrary to law: the *habeas corpus* act points him out effectual means, as well to releaſe himſelf, though committed even by the king in council, as to puniſh all thoſe who ſhall thus unconſtitutionally miſuſe him.

To theſe I may add the abolition of the prerogatives of purveyance and pre-emption; the ſtatute for holding triennial parliaments; the teſt and corporation acts, which ſecure both our civil and religious liberties; the abolition of the writ *de haeretico comburendo*; the ſtatute of frauds and perjuries, a great and neceſſary ſecurity to private property; the ſtatute for diſtribution of inteſtates' eſtates; and that of amendments and *jeofails*, which cut off thoſe ſuperfluous niceties which ſo long had diſgraced our courts; together with many other wholſome acts that were paſſed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewiſe conſider the freedom from taxes and armies which the ſubject then enjoyed, will be ſufficient to demonſtrate this truth, "that the "conſtitution of England had arrived to it's full vigour, and "the true balance between liberty and prerogative was happily "eſtabliſhed by *law*, in the reign of king Charles the ſecond."

IT is far from my intention to palliate or defend many very iniquitous proceedings, *contrary to all law*, in that reign, through the artifice of wicked politicians, both in and out of employment. What ſeems inconteſtable is this; that *by the law* [m], as it then ſtood, (notwithſtanding ſome invidious, nay dangerous, branches of the prerogative have ſince been lopped off, and the

[m] The point of time, at which I would chuſe to fix this *theoretical* perfection of our public law, is the year 1679; after the *habeas corpus* act was paſſed, and that for licenſing the preſs had expired: though the years which immediately followed it were times of great *practical* oppreſſion.

reſt

reſt more clearly defined) the people had as large a portion of real liberty, as is conſiſtent with a ſtate of ſociety; and ſufficient power, reſiding in their own hands, to aſſert and preſerve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable cataſtrophe of the next reign. For when king Charles's deluded brother attempted to enſlave the nation, he found it was beyond his power: the people both could, and did, reſiſt him; and, in conſequence of ſuch reſiſtance, obliged him to quit his enterprize and his throne together. Which introduces us to the laſt period of our legal hiſtory; *viz.*

VI. FROM the revolution in 1688 to the preſent time. In this period many laws have paſſed; as the bill of rights, the toleration-act, the act of ſettlement with it's conditions, the act for uniting England with Scotland, and ſome others: which have aſſerted our liberties in more clear and emphatical terms; have regulated the ſucceſſion of the crown by parliament, as the exigences of religious and civil freedom required; have confirmed, and exemplified, the doctrine of reſiſtance, when the executive magiſtrate endeavours to ſubvert the conſtitution; have maintained the ſuperiority of the laws above the king, by pronouncing his diſpenſing power to be illegal; have indulged tender conſciences with every religious liberty, conſiſtent with the ſafety of the ſtate; have eſtabliſhed triennial, ſince turned into ſeptennial, elections of members to ſerve in parliament; have excluded certain officers from the houſe of commons; have reſtrained the king's pardon from obſtructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow peers; have regulated trials for high treaſon; have afforded our poſterity a hope that corruption of blood may one day be aboliſhed and forgotten; have (by the deſire of his preſent majeſty) ſet bounds to the civil liſt, and placed the adminiſtration of that revenue in hands that are accountable to parliament; and have (by the like deſire) made the judges completely independent of the king, his miniſters, and his ſucceſſors. Yet, though theſe proviſions have, in appearance and nomi-

nally, reduced the ſtrength of the executive power to a much lower ebb than in the preceding period; if on the other hand we throw into the oppoſite ſcale (what perhaps the immoderate reduction of the antient prerogative may have rendered in ſome degree neceſſary) the vaſt acquiſition of force, ariſing from the riot-act, and the annual expedience of a ſtanding army; and the vaſt acquiſition of perſonal attachment, ariſing from the magnitude of the national debt, and the manner of levying thoſe yearly millions that are appropriated to pay the intereſt; we ſhall find that the crown has, gradually and imperceptibly, gained almoſt as much in influence, as it has apparently loſt in prerogative.

THE chief alterations of moment, (for the time would fail me to deſcend to *minutiae*) in the adminiſtration of private juſtice during this period, are the ſolemn recognition of the law of nations with reſpect to the rights of embaſſadors: the cutting off, by the ſtatute for the amendment of the law, a vaſt number of excreſcences, that in proceſs of time had ſprung out of the practical part of it: the protection of corporate rights by the improvements in writs of *mandamus*, and informations in nature of *quo warranto*: the regulations of trials by jury, and the admitting witneſſes for priſoners upon oath: the farther reſtraints upon alienation of lands in mortmain: the extenſion of the benefit of clergy, by aboliſhing the pedantic criterion of reading: the counterballance to this mercy, by the vaſt encreaſe of capital puniſhment: the new and effectual methods for the ſpeedy recovery of rents: the improvements which have been made in ejectments for the trying of titles: the introduction and eſtabliſhment of paper credit, by indorſments upon bills and notes, which have ſhewn the poſſibility (ſo long doubted) of aſſigning a *choſe in action*: the tranſlation of all legal proceedings into the Engliſh language: the erection of courts of conſcience for recovering ſmall debts, and (which is much the better plan) the reformation of county courts: the great ſyſtem of marine juriſprudence, of which the foundations have been laid, by clearly developing the principles on which policies of inſurance are founded, and by happily applying

plying thoſe principles to particular caſes: and, laſtly, the liberality of ſentiment, which (though late) has now taken poſſeſſion of our courts of common law, and induced them to adopt (where facts can be clearly aſcertained) the ſame principles of redreſs as have prevailed in our courts of equity, from the time that lord Nottingham preſided there; and this, not only where ſpecially impowered by particular ſtatutes, (as in the caſe of bonds, mortgages, and ſet-offs) but by extending the remedial influence of the equitable writ of treſpaſs on the caſe, according to it's primitive inſtitution by king Edward the firſt, to almoſt every inſtance of injuſtice not remedied by any other proceſs. And theſe, I think, are all the material alterations, that have happened with reſpect to private juſtice, in the courſe of the preſent century.

THUS therefore, for the amuſement and inſtruction of the ſtudent, I have endeavoured to delineate ſome rude outlines of a plan for the hiſtory of our laws and liberties; from their firſt riſe, and gradual progreſs, among our Britiſh and Saxon anceſtors, till their total eclipſe at the Norman conqueſt; from which they have gradually emerged, and riſen to the perfection they now enjoy, at different periods of time. We have ſeen, in the courſe of our enquiries, in this and the former volumes, that the fundamental maxims and rules of the law, which regard the rights of perſons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wiſdom of ages: that the forms of adminiſtring juſtice came to perfection under Edward the firſt; and have not been much varied, nor always for the better, ſince: that our religious liberties were fully eſtabliſhed at the reformation: but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained, till after the reſtoration of king Charles, nor fully and explicitly acknowleged and defined, till the aera of the happy revolution. Of a conſtitution, ſo wiſely contrived, ſo

ſtrongly raiſed, and ſo highly finiſhed, it is hard to ſpeak with that praiſe, which is juſtly and ſeverely it's due:--- the thorough and attentive contemplation of it will furniſh it's beſt panegyric. It hath been the endeavour of theſe commentaries, however the execution may have ſucceeded, to examine it's ſolid foundations, to mark out it's extenſive plan, to explain the uſe and diſtribution of it's parts, and from the harmonious concurrence of thoſe ſeveral parts to demonſtrate the elegant proportion of the whole. We have taken occaſion to admire at every turn the noble monuments of antient ſimplicity, and the more curious refinements of modern art. Nor have it's faults been concealed from view; for faults it has, leſt we ſhould be tempted to think it of more than human ſtructure: defects, chiefly ariſing from the decays of time, or the rage of unſkilful improvements in later ages. To ſuſtain, to repair, to beautify this noble pile, is a charge intruſted principally to the nobility, and ſuch gentlemen of the kingdom, as are delegated by their country to parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themſelves, who enjoy it; to their anceſtors, who tranſmitted it down; and to their poſterity, who will claim at their hands this, the beſt birthright, and nobleſt inheritance of mankind.

THE END.

APPENDIX.

§. 1. RECORD *of an Indictment and Conviction of* MURDER, *at the Aſſiſes.*

Warwickſhire, to wit. } BE it remembered, that at the general ſeſſion of the lord the king of *oyer* and *terminer* holden at Warwick, in and for the ſaid county of Warwick, on Friday the twelfth day of March in the ſecond year of the reign of the lord George the third, now king of Great Britain, before ſir Michael Foſter, knight, one of the juſtices of the ſaid lord the king aſſigned to hold pleas before the king himſelf, ſir Edward Clive, knight, one of the juſtices of the ſaid lord the king of his court of common bench, and others their fellows, juſtices of the ſaid lord the king, aſſigned by letters patent of the ſaid lord the king, under his great ſeal of Great Britain, made to them the aforeſaid juſtices and others, and any two or more of them, whereof one of them the ſaid ſir Michael Foſter and ſir Edward Clive, the ſaid lord the king would have to be one, to enquire (by the oath of good and lawful men of the county aforeſaid, by whom the truth of the matter might be the better known, and by other ways, methods, and means, whereby they could or might the better know, as well within liberties as without) more fully the truth of all treaſons, miſpriſions of treaſons, inſurrections, rebellions, counterfeitings, clippings, waſhings, falſe coinings, and other falſities of the monies of Great Britain, and of other kingdoms or dominions whatſoever; and of all murders, felonies, manſlaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, unlawful aſſemblies, miſpriſions, confederacies, falſe allegations, treſpaſſes, riots, routs, retentions, eſcapes, contempts, falſities, negligences, concealments, maintenances, oppreſſions, champarties, deceits,

Seſſion of *oyer* and *terminer*.

Commiſſion of

deceits, and all other miſdeeds, offences, and injuries whatſoever, and alſo the acceſſories of the ſame, within the county aforeſaid, as well within liberties as without, by whomſoever and howſoever done, had, perpetrated, and committed, and by whom, to whom, when, how, and in what manner; and of all other articles and circumſtances in the ſaid letters patent of the ſaid lord the king ſpecified, the premiſes and
oyer and *terminer*, every or any of them howſoever concerning; and for this time to hear and determine the ſaid treaſons and other the premiſes, according to
and of the peace. the law and cuſtom of the realm of England; and alſo keepers of the peace, and juſtices of the ſaid lord the king, aſſigned to hear and determine divers felonies, treſpaſſes, and other miſdemeſnors committed
Grand jury. within the county aforeſaid: by the oath of ſir James Thompſon, baronet, Charles Roper, Henry Dawes, Peter Wilſon, Samuel Rogers, John Dawſon, James Philips, John Mayo, Richard Savage, William Bell, James Morris, Laurence Hall, and Charles Carter, eſquires, good and lawful men of the county aforeſaid, then and there impanelled, ſworn, and charged to enquire for the ſaid lord the king and for the
Indictment. body of the ſaid county, it is preſented, **that** Peter Hunt, late of the pariſh of Lighthorne in the ſaid county, gentleman, not having the fear of God before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the fifth day of March in the ſaid ſecond year of the reign of the ſaid lord the king, at the pariſh of Lighthorne aforeſaid, with force and arms, in and upon one Samuel Collins, in the peace of God and of the ſaid lord the king then and there being, feloniouſly, wilfully, and of his malice aforethought, did make an aſſault; and that the ſaid Peter Hunt with a certain drawn ſword, made of iron and ſteel, of the value of five ſhillings, which he the ſaid Peter Hunt in his right hand then and there had and held, him the ſaid Samuel Collins in and upon the left ſide of the belly of him the ſaid Samuel Collins then and there feloniouſly, wilfully, and of his malice aforethought, did ſtrike, thruſt, ſtab, and penetrate; giving unto the ſaid Samuel Collins, then and there, with the ſword drawn as aforeſaid, in and upon the left ſide of the belly of him the ſaid Samuel Collins, one mortal wound of the breadth of one inch, and the depth of nine inches; of which ſaid mortal wound he the ſaid Samuel Collins, at the pariſh of Lighthorne aforeſaid in the ſaid county of Warwick, from the ſaid fifth day of March in the year aforeſaid until the ſeventh day of the ſame month in the ſame year, did languiſh, and languiſhing did live; on which ſaid ſeventh day of March, in the year aforeſaid, the ſaid Samuel Collins, at the pariſh of Lighthorne aforeſaid in the county aforeſaid, of the ſaid mortal wound did die: and ſo the jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid Peter Hunt him the ſaid Samuel Collins, in manner and form aforeſaid, feloniouſly, wilfully, and of his malice aforethought, did kill and murder, againſt the peace of the ſaid

lord

lord the now king, his crown, and dignity. **Whereupon** the ſheriff of the county aforeſaid is commanded, that he omit not for any liberty in his bailiwick, but that he take the ſaid Peter Hunt, if he may be found in his bailiwick, and him ſafely keep, to anſwer to the felony and murder whereof he ſtands indicted. **Which** ſaid indictment the ſaid juſtices of the lord the king abovenamed, afterwards, to wit, at the delivery of the gaol of the ſaid lord the king, holden at Warwick in and for the county aforeſaid, on Friday the ſixth day of Auguſt, in the ſaid ſecond year of the reign of the ſaid lord the king, before the right honourable William lord Mansfield, chief juſtice of the ſaid lord the king aſſigned to hold pleas before the king himſelf, ſir Sidney Stafford Smythe, knight, one of the barons of the exchequer of the ſaid lord the king, and others their fellows, juſtices of the ſaid lord the king, aſſigned to deliver his ſaid gaol of the county aforeſaid of the priſoners therein being, by their proper hands do deliver here in court of record in form of law to be determined. **And afterwards**, to wit, at the ſame delivery of the gaol of the ſaid lord the king of his county aforeſaid, on the ſaid Friday the ſixth day of Auguſt, in the ſaid ſecond year of the reign of the ſaid lord the king, before the ſaid juſtices of the lord the king laſt abovenamed and others their fellows aforeſaid, here cometh the ſaid Peter Hunt, under the cuſtody of William Browne, eſquire, ſheriff of the county aforeſaid, (in whoſe cuſtody in the gaol of the county aforeſaid, for the cauſe aforeſaid, he had been before committed) being brought to the bar here in his proper perſon by the ſaid ſheriff, to whom he is here alſo committed: **And** forthwith being demanded concerning the premiſes in the ſaid indictment above ſpecified and charged upon him, how he will acquit himſelf thereof, he ſaith, that he is not guilty thereof; and thereof for good and evil he puts himſelf upon the country: **And** John Blencowe, eſquire, clerk of the aſſiſes for the county aforeſaid, who proſecutes for the ſaid lord the king in this behalf, doth the like: **Therefore** let a jury thereupon here immediately come before the ſaid juſtices of the lord the king laſt abovementioned, and others their fellows aforeſaid, of free and lawful men of the neighbourhood of the ſaid pariſh of Lighthorne in the county of Warwick aforeſaid, by whom the truth of the matter may be the better known, and who are not of kin to the ſaid Peter Hunt, to recognize upon their oath, whether the ſaid Peter Hunt be guilty of the felony and murder in the indictment aforeſaid above ſpecified, or not guilty: becauſe as well the ſaid John Blencowe, who proſecutes for the ſaid lord the king in this behalf, as the ſaid Peter Hunt, have put themſelves upon the ſaid jury. And the jurors of the ſaid jury by the ſaid ſheriff for this purpoſe impanelled and returned, to wit, David Williams, John Smith, Thomas Horne, Charles Nokes, Richard May, Walter Duke, Matthew Lyon, James White, William Bates, Oliver Green, Bartholomew Naſh, and Henry

Capias.

Seſſion of gaol-delivery.

Arraignment.

Plea; not guilty.

Iſſue.

Venire.

Henry Long, being called, come; who being elected, tried, and ſworn, to ſpeak the truth of and concerning the premiſes, upon their
Verdict; guilty of *murder*. oath ſay, **that** the ſaid Peter Hunt is guilty of the felony and murder aforeſaid, on him above charged in the form aforeſaid, as by the indictment aforeſaid is above ſuppoſed againſt him; and that the ſaid Peter Hunt at the time of committing the ſaid felony and murder, or at any time ſince to this time, had not nor hath any goods or chattels, lands or tenements, in the ſaid county of Warwick, or elſewhere, to the knowlege of the ſaid jurors. And upon this it is forthwith demanded of the ſaid Peter Hunt, if he hath or knoweth any thing to ſay, wherefore the ſaid juſtices here ought not upon the premiſes and verdict aforeſaid to proceed to judgment and execution againſt him: who nothing farther ſaith, unleſs as he before had ſaid. **Whereupon**, all and ſingular the premiſes being ſeen, and by the ſaid juſtices here fully
judgment of death, underſtood, **it is conſidered** by the court here, that the ſaid Peter Hunt be taken to the gaol of the ſaid lord the king of the ſaid county of Warwick from whence he came, and from thence to the place of execution on Monday now next enſuing, being the ninth day of this in-
and diſſection. ſtant Auguſt, and there be hanged by the neck until he be dead; and that afterwards his body be diſſected and anatomized.

§. 2. *Conviction of* Manſlaughter.

Verdict; — not guilty of *murder*; guilty of *manſlaughter*. ——— upon their oath ſay, **that** the ſaid Peter Hunt is not guilty of the murder aforeſaid, above charged upon him; but that the ſaid Peter Hunt is guilty of the felonious ſlaying of the aforeſaid Samuel Collins; and that he had not nor hath any goods or chattels, lands or tenements, at the time of the felony and manſlaughter aforeſaid, or ever afterwards to this time, to the knowlege of the ſaid jurors. And immediately it is demanded of the ſaid Peter Hunt, if he hath or knoweth any thing to ſay, wherefore the ſaid juſtices here ought not upon the premiſes and verdict aforeſaid to proceed to judgment and execution
Clergy prayed. againſt him: **who ſaith** that he is a clerk, and prayeth the benefit of
Judgment to be burned in the hand, and delivered. clergy to be allowed him in this behalf. **Whereupon**, all and ſingular the premiſes being ſeen, and by the ſaid juſtices here fully underſtood, **it is conſidered** by the court here, that the ſaid Peter Hunt be burned in his left hand, and delivered. And immediately he is burned in his left hand, and is delivered, according to the form of the ſtatute.

§. 3. *Entry*

§. 3. *Entry of a Trial* inſtanter *in the Court of King's Bench, upon a collateral Iſſue; and Rule of Court for Execution thereon.*

Michaelmas term, in the ſixth year of the reign of king George the third.

Kent: The King againſt Thomas Rogers. } **The priſoner** at the bar being brought into this court in cuſtody of the ſheriff of the county of Suſſex, by virtue of his majeſty's writ of *habeas corpus*, **it is ordered** that the ſaid writ and the return thereto be filed. *Habeas corpus.*

And it appearing by a certain record of attainder, which hath been removed into this court by his majeſty's writ of *certiorari*, that the priſoner at the bar ſtands attainted, by the name of Thomas Rogers, of felony for a robbery on the highway, and the ſaid priſoner at the bar having heard the record of the ſaid attainder now read to him, is now aſked by the court here, what he hath to ſay for himſelf, why the court here ſhould not proceed to award execution againſt him upon the ſaid attainder. **He** for plea ſaith, that he is not the ſame Thomas Rogers in the ſaid record of attainder named, and againſt whom judgment was pronounced: and this he is ready to verify and prove, *&c.* **To** which ſaid plea the honourable Charles Yorke, eſquire, attorney general of our preſent ſovereign lord the king, who for our ſaid lord the king in this behalf proſecuteth, being now preſent here in court, and having heard what the ſaid priſoner at the bar hath now alleged, for our ſaid lord the king by way of reply ſaith, that the ſaid priſoner now here at the bar is the ſame Thomas Rogers in the ſaid record of attainder named, and againſt whom judgment was pronounced as aforeſaid; and this he prayeth may be enquired into by the country; and the ſaid priſoner at the bar doth the like: **Therefore** let a jury in this behalf immediately come here into court, by whom the truth of the matter will be the better known, and who have no affinity to the ſaid priſoner, to try upon their oath, whether the ſaid priſoner at the bar be the ſame Thomas Rogers in the ſaid record of attainder named, and againſt whom judgment was ſo pronounced as aforeſaid, or not: becauſe as well the ſaid Charles Yorke, eſquire, attorney general of our ſaid lord the king, who for our ſaid lord the king in this behalf proſecutes, as the ſaid priſoner at the bar, have put themſelves in this behalf upon the ſaid jury. **And** immediately thereupon the ſaid jury come here into court; and being elected, tried, and ſworn to ſpeak the truth touching and concerning the premiſes aforeſaid, and having heard the ſaid record read to them, do ſay upon their oath, that the ſaid priſoner at the bar is the ſame Thomas Rogers in the ſaid record of attainder named, and againſt whom

Record of attainder read; for felony and robbery.

Priſoner aſked what he can ſay in bar of execution.

Plea; not the ſame perſon.

Replication.

averring that he is.

Iſſue joined.

Venire awarded *inſtanter.*

Jury ſworn.

Verdict; that he is the ſame.

judgment was ſo pronounced as aforeſaid, in manner and form as the ſaid attorney general hath by his ſaid replication to the ſaid plea of the ſaid priſoner now here at the bar alleged. **And hereupon** the ſaid attorney general on behalf of our ſaid lord the king now prayeth, that the court here would proceed to award execution againſt him the ſaid Thomas Rogers upon the ſaid attainder. **Whereupon**, all and ſingular the premiſes being now ſeen and fully underſtood by the court here, **it is ordered** by the court here, that execution be done upon the ſaid priſoner at the bar for the ſaid felony in purſuance of the ſaid judgment, according to due form of law: **And** it is laſtly ordered, that he the ſaid Thomas Rogers, the priſoner at the bar, be now committed to the cuſtody of the ſheriff of the county of Kent (now alſo preſent here in court) for the purpoſe aforeſaid; and that the ſaid ſheriff of Kent do execution upon the ſaid defendant the priſoner at the bar for the ſaid felony, in purſuance of the ſaid judgment, according to due form of law.

Award of execution.

On the motion of Mr. Attorney General.

By the Court.

§. 4. *Warrant of Execution on Judgment of Death, at the general Gaol-delivery in* London *and* Middleſex.

London and Middleſex. } To the ſheriffs of the city of London; and to the ſheriff of the county of Middleſex: and to the keeper of his majeſty's gaol of Newgate.

Whereas at the ſeſſion of gaol delivery of Newgate, for the city of London and county of Middleſex, holden at Juſtice Hall in the Old Bailey, on the nineteenth day of October laſt, Patrick Mahony, Roger Jones, Charles King, and Mary Smith, received ſentence of death for the reſpective offences in their ſeveral indictments mentioned; **Now it is hereby ordered**, that execution of the ſaid ſentence be made and done upon them the ſaid Patrick Mahony and Roger Jones, on Wedneſday the ninth day of this inſtant month of November at the uſual place of execution. **And** it is his majeſty's command, that execution of the ſaid ſentence upon them the ſaid Charles King and Mary Smith be reſpited, until his majeſty's pleaſure touching them be farther known.

Given under my hand and ſeal this fourth day of November, one thouſand ſeven hundred and ſixty eight.

James Eyre, Recorder. L. S.

§. 5. *Writ*

§. 5. *Writ of Execution upon a judgment of* Murder, *before the* King *in* Parliament.

GEORGE the ſecond by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and ſo forth; to the ſheriffs of London and ſheriff of Middleſex, greeting. Whereas Lawrence earl Ferrers, viſcount Tamworth, hath been indicted of felony and murder by him done and committed, which ſaid indictment hath been certified before us in our preſent parliament; and the ſaid Lawrence earl Ferrers, viſcount Tamworth, hath been thereupon arraigned, and upon ſuch arraignment hath pleaded not guilty; and the ſaid Lawrence earl Ferrers, viſcount Tamworth, hath before us in our ſaid parliament been tried, and in due form of law convicted thereof; and whereas judgment hath been given in our ſaid parliament, that the ſaid Lawrence earl Ferrers, viſcount Tamworth, ſhall be hanged by the neck till he is dead, and that his body be diſſected and anatomized, the execution of which judgment yet remaineth to be done: We require, and by theſe preſents ſtrictly command you, that upon Monday the fifth day of May inſtant, between the hours of nine in the morning and one in the afternoon of the ſame day, him the ſaid Lawrence earl Ferrers, viſcount Tamworth, without the gate of our tower of London (to you then and there to be delivered, as by another writ to the lieutenant of our tower of London or to his deputy directed, we have commanded) into your cuſtody you then and there receive: and him, in your cuſtody ſo being, you forthwith convey to the accuſtomed place of execution at Tyburn: and that you do cauſe execution to be done upon the ſaid Lawrence earl Ferrers, viſcount Tamworth, in your cuſtody ſo being, in all things according to the ſaid judgment. And this you are by no means to omit, at your peril. Witneſs ourſelf at Weſtminſter the ſecond day of May, in the thirty third year of our reign.

Yorke and Yorke.

THE END.

I N D E X.

☞ *The large numerals denote the volumes; the ciphers the pages of the commentaries; and the ſmall numerals the pages of the appendix.*

A.

Abatement of freehold. III. 168.
- - - - - - indictment. IV. 328.
- - - - - - nuſance. III. 5.
- - - - - - - - - - writ, count, or ſuit. III. 302.
- - - - - - - -, plea in. III. 301. IV. 328.
Abbey-lands. II. 32. IV. 115.
- - - - - - -, moleſting their poſſeſſors. IV. 115.
Abbots. I. 155.
Abbreviations. III. 323.
Abdication. I. 212. IV. 78.
Abduction of child. III. 140.
- - - - - - - heireſs. IV. 208.
- - - - - - - ward. III. 141.
- - - - - - - wife. III. 139.
- - - - - - - women. I. 443.
- - - - - - or kidnapping. IV. 219.
Abearance, good, ſecurity for. IV. 248.253.
Abeyance. II. 107.
Abigei. IV. 239.
Abjuration, oath of. I. 368.
- - - - - - of the realm. IV. 56. 124. 326. 370.
Abſolute power of the crown. I. 250.
- - - - property. II. 389.
- - - - rights and duties. I. 123.
Abſtract of a fine. II. 351. xv.
Accedas ad curiam. III. 34.
Acceptance of bills. II. 468.
Acceſſion, property by. II. 404.
Acceſſories. IV. 35.
- - - - - - after the fact. IV. 37.
- - - - - - before the fact. IV. 36.
Acceſſories, when to be tried. IV. 318.
Accidents, where relieved againſt. III. 431.
Accomplices, diſcovery of. IV. 325.
Accord. III. 15.
Account books, when evidence. III. 368.
- - - - cognizable in equity. III. 437.
- - - -, writ of. III. 162.
Accroaching royal power. IV. 76.
Ac etiam. III. 288. xviii.
Act of bankruptcy. III. 477.
- - - grace, how paſſed. I. 184.
- - - - - - when pleaded. IV. 389.
- - - parliament. I. 85.
- - - - - - - - -, diſobedience to. IV. 122.
- - - - - - - - -, how made. I. 180.
- - - - - - - - -, it's antient form. I. 181.
- - - - - - - - - power. I. 185.
- - - - - - - - -, private. I. 86. II. 344.
- - - - - - - - -, public. I. 85.
- - - - - - - - -, when binding on the crown. I. 261.
Action at law. III. 116.
- - - -, *chaſe* in. II. 397.
- - - - *ex contractu.* III. 117.
- - - - - *delicto.* III. 117.
- - - - feodal. III. 117.
- - - - mixed. III. 118.
- - - - perſonal. III. 117.
- - - -, plea to. III. 303.
- - - -, property in. II. 396.
- - - - real. III. 117.
Actual right of poſſeſſion. II. 196.
Additions. I. 406. III. 302. IV. 301. 328.
Adherence to the king's enemies. IV. 82.
Adjoining county, trial in. III. 383.
Adjournment of parliament. I. 186.

Admeaſurement of dower. II. 136. III. 183.
- - - - - - - - - - paſture. III. 238.
Adminiſtration. II. 489.
- - - - - - - - *cum teſtamento annexo.* II. 504.
- - - - - - - - *de bonis non.* II. 506.
- - - - - - - - *durante abſentia.* II. 503.
- - - - - - - - - - *minore aetate.* II. 503.
- - - - - - - - limited or ſpecial. II. 506.
Adminiſtrator. II. 496. IV. 421.
Admiralty cauſes. III. 106.
- - - - -, court of. III. 69. IV. 265.
Admiſſion of a clerk. I. 390.
Admittance to copyholds. II. 370.
Admittendum clericum, writ *ad.* III. 250.
Ad quod damnum, writ of. II. 271.
Advertiſing for ſtolen goods. IV. 133.
Adultery. I. 441. III. 139. IV. 64, 65. 191.
Advocate. III. 26.
Advocatus fiſci. III. 27.
Advowſon. II. 21. IV. 419.
Aequitas ſequitur legem. II. 330. III. 441.
Affectum, challenge *propter.* III. 363. IV. 346.
Affeerors of amercements. IV. 373.
Affidavit. III. 304.
Affinity. I. 434.
Affirmance of judgments. III. 411.
Affray. IV. 145.
Age, action ſuſpended by. III. 300.
- - - of conſent to marriage. I. 436.
- - - - perſons, how reckoned. I. 463. IV. 22.
Aggregate corporation. I. 469.
- - - - - fund. I. 328.
Agiſtment. II. 452.
Agnati. II. 235.
Agnus Dei, &c. IV. 115.
Agriculture, it's original. II. 7.
Aid-prayer. III. 299.
Aids, feodal. II. 63. 87. IV. 411.
- - -, parliamentary. I. 307.
Air, right to. II. 14.
Albinatus, jus. I. 372. 374.
Alderman. I. 116.
Alderney, iſland of. I. 106.
Alehouſes. IV. 64. 167.
Alfred, his dome-book. I. 64. IV. 404.
Alias writ. III. 283. xv. IV. 314.
Alienation. II. 287.
- - - - -, fine for. II. 71. IV. 411.
- - - - -, forfeiture by. II. 268.
Alien-priories. I. 386. IV. 112.
Aliens. I. 366. 372. II. 249. 274. 293. IV. 111.
Aliens duty. I. 316. 372. 374.
Alimony. I. 441. III. 94.
Allegation. III. 100.
Allegiance. I. 366. IV. 74.
- - - - -, local. I. 370.
- - - - -, natural. I. 369.
- - - - -, oath of. I. 367. IV. 270.
- - - - - - - - -, refuſing it. IV. 116.
- - - - -, withdrawing from. IV. 87.
Allodial property. II. 47. 60.
Allodium. II. 105.
Allowance of franchiſe. III. 263.
- - - - - - - pardons. IV. 394.
- - - - - to bankrupts. II. 483.
Alluvion. II. 261.
Almanac, it's authority. III. 333.
Alteration of deeds. II. 308.
Amended bill in equity. III. 448.
Amendments at law. III. 406. IV. 432.
Amercement. II. xix. III. 376. III. v. vi. xxiv. xxvi. IV. 372. 416.
- - - - -, action for. III. 159.
American colonies. I. 106.
Anceſtor. II. 209.
Anceſtors, how numerous. II. 203.
Anceſtrel actions. III. 186.
Animals, larciny of. IV. 235.
- - - -, property in. II. 5.
Animus furandi. IV. 230. 232.
- - - *revertendi.* II. 392.
Annual parliaments. I. 153.
Annuities. II. 40.
Annulum et baculum, inveſtiture *per.* I. 378.
Annus luctus. I. 457.
Anſwer in chancery. III. 446.
- - - - upon oath. III. 100.
Antient demeſne. I. 286. II. 99.
Apoſtacy. IV. 43.
Apparel, exceſs in. IV. 171.
Apparent, heir. II. 208.
- - - - - right of poſſeſſion. II. 196.
Appeal by approvers. IV. 324.
- - - - how differing from writ of error. III. 55.
- - - - of arſon. IV. 310.
- - - - - death. IV. 310. 417.
- - - - - felony. IV. 310.
- - - - - larciny. IV. 310.
- - - - - mayhem. IV. 310.
- - - - - rape. IV. 310.
- - - - - treaſon. IV. 310.
- - - -, proſecution by. IV. 308. 417.
- - - - to parliament. III. 454.
- - - - - Rome. IV. 114. 414.
Appearance to actions. III. 290.

Appellee on approvement. IV. 324.
Appendant, advowſon. II. 22.
- - - - -, common. II. 33.
Appointment to charitable uſes. II. 376.
Appraiſement, commiſſion of. III. 262.
Apprentices. I. 426, 427. IV. 160.
Apprenticii ad legem. III. 27.
Appropriations. I. 384.
Approvement in felony and treaſon. IV. 324.
- - - - - - - of commons. II. 34. III. 240.
Approvers. IV. 324.
- - - - -, compelling priſoners to become. IV. 129.
Appurtenant, common. II. 33.
Arbitrary conſecrations of tithes. I. 112. II. 26.
Arbitration. III. 16.
Archbiſhop. I. 155. 377.
Archdeacon. I. 383.
- - - - - -, his court. III. 64.
Archdeaconry. I. 111.
Arches court. III. 64.
- - - - dean of. III. 65.
Areopagus, court of. III. 365. IV. 169. 342.
Ariſtocracy. I. 49.
Armed, being unuſually. IV. 148.
Armies. I. 262.
- - - -, ſtanding. I. 413. IV. 412. 432. 434.
Armorial enſigns. II. 428. III. 105.
Armour, *&c.* embezzling the king's. IV. 101.
- - - -, ſtatutes of. I. 410.
Arms and ammunition, exporting them. I. 265.
- - -, right of having. I. 143.
Arraignment. IV. 317. iii.
- - - - - - -, incidents to. IV. 319.
Array, challenge to. III. 359. IV. 346.
- - -, commiſſion of. I. 410.
Arreſt of judgment. III. 393. xi. IV. 368.
- - - - perſons. III. 288. IV. 286.
- - - - ſeamen and ſoldiers. I. 421.
Arſon. IV. 220. 366.
- - -, appeal of. IV. 310.
Articles of the navy. I. 420.
- - - - - war. I. 415.
Artificers. I. 406.
- - - - -, reſiding abroad. IV. 160.
- - - - -, tranſporting them. IV. 160.
As, Roman, diviſions of. II. 462.
Aſcendants excluded from inheriting. II. 210.
Aſportation. IV. 231.
Aſſault. III. 120. IV. 145. 216.
- - - -, coſts in actions for. III. 400.
Aſſembly of eſtates. I. 147.
- - - - -, riotous or unlawful. IV. 146.
Aſſenſu patris, dower *ex*. II. 132.
Aſſeſſments. I. 312.
Aſſets. II. 510.
- - - by deſcent, or real. II. 244. 302.
- - - perſonal. II. 510.
Aſſignees of bankrupt. II. 480.
Aſſignment of bankrupts effects. II. 485.
- - - - - - - dower. II. 135.
- - - - - - - errors. III. xxv.
- - - - - - - eſtate. II. 326.
Aſſigns. II. 289.
Aſſiſe, commiſſion of. III. 59. IV. 266. 417.
- - -, court of. III. 57.
- - -, general. I. 148.
- - -, grand. III. 341. 351. v. IV. 415.
- - -, juſtices of. III. 58.
- - - - - - - -, killing them. IV. 84.
- - - of arms. II. 66.
- - - - bread, breaking. IV. 157.
- - -, rent of. II. 42.
- - -, writ of. III. 184. IV. 415.
Aſſumpſit, expreſs. III. 157.
- - - -, implied. III. 161.
Aſſurances, common. II. 294.
- - - - -, covenant for farther. II. xi.
Attachment againſt witneſſes. III. 369.
- - - - - - for contempts. IV. 280.
- - - - - - in chancery. III. 443, 444.
- - - - - - - - - - -, with proclamations. III. 444.
- - - - - -, writ of. III. 280. xiii.
Attachments, court of. III. 71.
Attainder. II. 251. IV. 373.
- - - - -, act of. IV. 256.
Attaint, grand jury in. III. 351.
- - - -, writ of. III. 402. IV. 354.
Attainted perſons. II. 290. IV. 373.
Attempt to rob. IV. 242.
- - - - - - ſteal fiſh. IV. 235.
Atteſtation of deeds. II. 307. i. iii. xii. xiii.
- - - - - - deviſes. II. 376.
Attorney at law. III. 25.
- - - - - - -, action againſt. III. 164.
Attorney-general. III. 27.
- - - - - - - -, information by. III. 261. 427. IV. 304.
Attornment. II. 72. 288.
Aubaine, droit de. I. 372.
Audita querela, writ of. III. 404.
Auditors in account. III. 163.
Averium. II. 424.
Averment. III. 309. 313. IV. 334.
Augmentation of vicarages and curacies. I. 388.

Aula regia, or *regis*. III. 37. IV. 409. 415.
Aulnager. I. 275.
Avowry. III. 149.
Aurum reginae. I 221.
Auter droit. II. 177.
Auterfoits acquit. IV. 329.
- - - - - *attaint*. IV. 330.
- - - - - *convict*. IV. 330.
Auter vie, tenant, *pur*. II. 120.
Authorities in law. I. 72.
Award. III. 16.
Ayle, writ of. III. 186.

B.

Bachelor, knight. I. 404.
Backing warrants. IV. 288.
Bail above. III. 290.
- - below. III. 291.
- -, common. III. 287.
- - exceſſive. I. 135. IV. 294.
- - in criminal caſes. IV. 294.
- - - error. III. 410.
- -, refuſing. IV. 294.
- -, ſpecial. III. 287. xix.
- -, taking inſufficient. IV. 294.
- - to the action. III. 290.
- - - - - ſheriff. III. 290.
Bailable or not, who. IV. 294, 5, 6.
Bail-bond. III. 290. xix.
Bailiffs. I. 345. 427.
- - - - of hundreds. I. 115. 345.
Bailiwick. I. 344 II. 37.
Bailment. II. 395. 452.
Bail-piece. III. 291. xx.
Ballot for jurors. III. 358.
Balnearii. IV. 239.
Baniſhment. I. 137. IV. 370. 394.
Bank. I. 326.
Bankrupt. II. 471. IV. 424. 429.
Bankruptcy. II. 285. 471.
- - - - - -, cognizance of. III. 428.
- - - - - -, fraudulent. IV. 156.
Banneret, knight. I. 404.
Banns. I. 439.
Bar of dower. II. 136.
- -, plea in. III. 306. IV. 329. 389.
- -, trial at. III. 352.
Bargain and ſale of lands. II. 338. ii.
Baron. I. 399.
- - - and feme. I. 433.
Baronet. I. 404.
Baronies. II. 62. 91.
- - - - of biſhops. I. 156.
Barretry. IV. 133.
Barriſters. I. 23. III. 26.
Base tees. II. 109.
- - - ſervices. II. 61.
- - - tenants. II. 148.
Baſtard. I. 454.
- - - -, adminiſtration to. II. 505.
- - - -, concealment of it's death. IV. 198. 352.
- - - - *eigné*. II. 248.
- - - -, incapacity of. I. 459.
- - - -, maintenance of. I. 458.
- - - -, puniſhment for having. IV. 65.
Bath, knight of the. I. 404.
Battel, trial by. III. 337. iii. IV. 340. 411. 414. 417.
Battery. III. 120. IV. 216.
- - -, inſpection of. III. 333.
- - - - of a clergyman. IV. 217.
- - - - - - ſervant. III. 142.
Bawdy houſes. IV. 29. 64. 167.
Beaconage, ſuit for. III. 108.
Beacons. I. 264.
Behaviour, good, ſecurity for. IV. 248. 251. 395.
Beheading. IV. 92. 370.
Benefices. IV. 106.
Benefit of clergy. IV. 358. 406. 422. 434.
Benevolence, compulſive. I. 140. IV. 429.
Berwick. I. 98.
- - - -, part of England. I. 99.
Beſayle, writ of. III. 186.
Bigamy. IV. 163.
Bill for patents, *&c.* II. 346.
- - in equity. III. 442.
- - - parliament. I. 181.
- - - - - - - -, how paſſed. I. 181.
- - of exceptions. III. 372.
- - - exchange. II. 466.
- - - indictment. IV. 299.
- - - Middleſex. III. 285. xviii.
- - - privilege. III. 289.
- - - rights. I. 128. IV. 433.
- - or note, forging. IV. 246.
- - - - - -, ſtealing. IV. 234.
Billa vera. IV. 301.
Biſhop. I. 155. 377. 401.
- - -, certificate of. III. 335.
- - -, not electing or conſecrating. IV. 115.
- - -, right of, to try or be tried, as a peer. IV. 261, 262.
Biſhopricks, nomination to. I. 378. IV. 107. 408. 423.
Biſſextile year. II. 141.

Black act. IV. 144. 208. 232. 244.
- - - lead, ſtealing of. IV. 234.
- - - maile. II. 43. IV. 243.
Blanch rent. II. 42.
Blaſphemy. IV. 59.
Blench-holding. II. 42.
Blood corrupted. II. 251. IV. 381.
- - - inheritable. II. 246.
- - - of the firſt purchaſor. II. 220.
- - - royal. I. 225.
- - - whole and half. II. 227.
Body corporate. I. 467.
- - -, how protected. I. 134.
- - - politic. I. 467.
Boiling to death. IV. 196.
Bona notabilia. II. 509.
- - - *vacantia*. I. 298.
Bond. II. 340. xiii. III. xix. IV. 435.
- - - of arbitration. III. 16.
- - - tenants. II. 148.
Bono et malo, writ *de*. IV. 267.
Book of rates. I. 316.
Book-land. II. 90.
Books and papers, production of. III. 382.
- - -, popiſh, importing or ſelling them. IV. 115.
Borough. I. 114. II. 82.
- - - - - courts. III. 80.
- - - - - Engliſh. I. 75. II. 83.
Borrowing. II. 454.
Borſholder. I. 114. 356. IV. 406.
Botes. II. 35.
Bottomry. II. 458.
Bound bailiffs. I. 345.
Bounties on exportation. I. 315.
Bourdeaux, mayor of, his certificate. III. 334.
Bracton. I. 72. IV. 418.
Branding, in the hand or face. IV. 360. 370.
Breach of cloſe. III. 209
- - - - - covenant. III. 155.
- - - - - duty, action for. III. 163.
- - - - - peace. IV. 142.
- - - - - pound. III. 146.
- - - - - priſon. IV. 130.
Brehon law in Ireland. I. 100.
Brevia teſtata. II. 307.
Bribery in elections. I. 179.
- - - - - magiſtrates. IV. 139.
Bridges. I. 357. IV. 417.
- - - -, annoyances in. IV. 167.
Britiſh conſtitution. I. 50.
- - - - iſlands. I. 104.
Britons, antient, their laws. I. 63. IV. 401.
Britton. I. 72. III. 407. IV. 420.
Brothels, frequenting. IV. 64.
- - - -, keeping. IV. 29. 64. 168.
Bubbles. IV. 117.
Buggery. IV. 215.
Bulles, papal. IV. 109, 110.
Burgage, tenure in. II. 82. IV. 412.
Burgeſſes in parliament, their election. I. 174.
Burglary. IV. 223.
Burial charges. II. 508.
- - - of *felo de ſe*. IV. 190.
Burning in the hand. IV. 360. 370. iv.
- - - -, malicious. IV. 243, 4, 5.
- - - - - to death. IV. 93. 204. 216. 222. 370. 401.
Butlerage. I. 314.
By-laws. I. 475.
- - - -, action on. III. 159.

C.

Calais, captain of, his certificate. III. 334.
Calendar of priſoners. IV. 396.
Calling the plaintiff. III. 376.
Cancelling deeds. II. 309.
- - - - - wills. II. 502.
Canonical obedience. IV. 106. 112. 204.
- - - - - purgation. III. 342. IV. 361.
Canon law. I. 14. 19. 79. 82, 83. IV. 414, 415.
Canons of a church. I. 383.
- - - - - inheritance. II. 208.
- - - - - 1603. I. 83.
Capacity of guilt. IV. 20.
- - - - to purchaſe or convey. II. 290.
Capias ad audiendum judicium. IV. 368.
- - - - *reſpondendum*. III. 281. xiv. IV. 314. 422. iii.
- - - - *ſatisfaciendum*. III. 414. xxvi.
- - - *in withernam*. III. 129. 148. 413.
- - - *pro fine*. III. 398.
- - - *utlagatum*. III. 284. xvii. IV. 315.
Capiatur, judgment *quod*. III. 398. xii.
Capita, diſtribution *per*. II. 517.
- - -, ſucceſſion *per*. II. 218.
Capital puniſhment. IV. 9. 18. 237. 370. 406. 434.
Capite, tenants *in*. II. 60.
Captives. II. 402.
Captures at ſea. II. 401.
Caput lupinum. IV. 315.
Carnal knowlege of infants. IV. 212.
Carrier, action againſt. III. 164.

Cart-bote. II. 35.
Caſe, action on. III. 51. 122. IV. 435.
- - - reſerved at *niſi prius*. III. 378.
- - - ſtated out of chancery. III. 453.
Caſtigatory for ſcolds. IV. 169.
Caſtration. IV. 206.
Caſu conſimili, writ *in*. III. 51.
- - - *proviſo*, writ of entry in. III. 183.
Caſual ejector. III. 202. vii.
Cattle, malicious killing or maiming. IV. 243, 4.
- - - -, owner anſwerable for. III. 153. 211. IV. 197.
Caveat. III. 98. 246.
Cauſa matrimonii præclocuti, writ of entry. III. 183.
Cauſe, challenge for. IV. 346.
Cauſes of demurrer. III. 315. xxiv.
Centenarius. I. 115.
Centumviri. III. 315.
Cepi corpus. III. 288. xv. xviii, xix.
Certificate for coſts. III. 214.
- - - - - into chancery. III. 453.
- - - - - of bankrupt. II. 482.
- - - - - - poor. I. 365.
- - - - -, trial by. III. 333.
Certiorari facias. IV. 259. 262. 269. 315.
Ceſſavit, writ of. III. 232.
Ceſſio bonorum. II. 473. 483.
Ceſſion of a benefice. I. 392.
Ceſtuy que truſt. II. 328.
- - - - - *vie*. II. 123.
- - - - - *uſe*. II. 328.
Chains, hanging in. IV. 202.
Challenge of jury. III. 359. IV. 346.
- - - - - to fight. IV. 149.
Champerty. IV. 134.
Champions in trial by battel. III. 339. iv.
Chance. IV. 26.
Chancellor, his name and office. III. 47.
- - - - - -, killing him. IV. 84.
- - - - - -, lord. III. 46.
- - - - - - of a dioceſe. I 382.
- - - - - - - the duchy of Lancaſter. III. 78.
- - - - - - - - - exchequer. III. 44.
- - - - - - - - - univerſity, his court. III. 83.
Chance-medley. IV. 184.
Chancery, court of. III. 46. IV. 429.
Chapters. I. 382.
Charge to grand jury. IV. 300.
Charitable uſes. II. 273. 376.
- - - - - - -, commiſſion of. III. 428.
Charities, cognizance of. III. 427.
Charities, informations for. III. 427.
Charter. II. 195.
Charter of the king. II. 346.
Charter-governments in America. I. 108.
Charter-land. II. 90.
Chaſe. II. 38. 416. IV. 408.
- - -, beaſts of. II. 38. 415.
Chaſtity, homicide in defence of. IV. 181.
Chattels. II. 385.
- - - - - perſonal. II. 387.
- - - - - real. II. 386.
Chaud-medley. IV. 184.
Cheat, action againſt. III. 164.
Cheating. IV. 157.
- - - - - at play. IV. 173.
Cheſter, county palatine of. I. 116.
- - - -, courts of. III. 78.
Chevisance. II. 474.
Chichele, archbiſhop, vindicated. IV. 113.
Chief baron of the exchequer. III. 44.
- - - juſtices. III. 40, 41.
- - - juſticiary of England. III. 38. IV. 409.
- - - rents. II. 42.
- - -, tenants in. II. 60.
Children, their duties. I. 453.
Chirograph. II. 296.
- - - - - - of a fine. II. xv.
Chivalry, court of. III. 68. IV. 264.
- - - - - - - - -, it's juriſdiction. III. 103. IV. 264.
- - - -, guardian in. I. 462.
- - - -, tenure in. II. 62.
Choſe in action. II. 397.
- - - - - - -, how aſſigned. II. 442. IV. 434.
- - - - poſſeſſion. II. 389.
Chriſtian, courts. III. 64.
Chriſtianity, offences againſt. IV. 44.
- - - - - - part of the law of England. IV. 59.
Church, marriage in. I. 439.
- - - -, offences againſt. IV. 50.
- - - -, or churchyard, affrays in. IV. 145.
- - - - rate. I. 395. III. 92.
- - - -, repairs of. III. 92.
Churchwardens. I. 394.
Cinque ports, courts of. III. 79.
Circuits. III. 58. IV. 415. 417.
Circumſtantial evidence. III. 371.
Citation. III. 100.
Citizens in parliament, their electors. I. 174.
City. I. 114.
Civil corporations. I. 470.
- - - death. II. 121.

Civil injuries. III. 2.
- - - law. I. 14. 19. 79. 81. 83. IV. 414, 415.
- - - - -, it's ſtudy forbidden. I. 19.
- - - liberty. I. 6. 125. 251.
- - - liſt. I. 330. IV. 433.
- - - ſtate. I. 396.
- - - ſubjection. IV. 28.
Clarendon, conſtitutions of. IV. 415.
Clauſum fregit. III. 209.
Clearing contempts in chancery. III. 445.
Clementine conſtitutions. I. 82.
Clergy. I. 376.
- - - - averſe to the common law. I. 19, 20.
- - - -, benefit of. IV. 358. 406. 422. 434.
- - - -, plea of. IV. 327.
- - - -, prayer of. IV. iv.
Clergymen, beating them. IV. 217.
Clerical habit and tonſure. IV. 360.
Clerico admittendo, writ *de*. III. 413.
Clerk in office. I. 17.
- - - - orders. I. 388.
- - - of the market, his court. IV. 272.
Clients. III. 28.
Clipping the coin. IV. 90.
Cloaths, malicious deſtroying of. IV. 244.
Cloſe, breach of. III. 209.
- - - rolls. II. 346.
- - - writs. II. 346.
Coalmines, ſetting fire to. IV. 244.
Coat-armour. II. 306. III. 105.
Code of Juſtinian. I. 81.
- - - - Theodoſius. I. 81.
Codicil. II. 500.
Cognati. II. 235.
Cognizance, claim of. III. 300. IV. 275.
- - - - - - - *de droit, come ceo*, &c, fine *ſur*. II. 352.
- - - - - - - - - - -, *tantum*, fine *ſur*. II. 353.
- - - - - - in replevin. III. 149.
- - - - - - of pleas. II. 37.
- - - - - - wrongs. III. 86.
Cognizee of fine. II. 351.
- - - - - - recognizance. II, 341.
Cognizor of a fine. II. 350.
- - - - - - recognizance. II. 341.
Cognovit actionem. III, 304. 397.
Coin, falſifying, &c. IV. 84. 88. 90. 98. 120.
- - - felonies and miſdemeſnors relating to. IV. 98.
- - - treaſons relating to. IV. 84. 88. 90.
Coinage, inſtruments of, treaſon relative to. IV. 90.
- - - -, right of. I 277.
Coke, ſir Edward. I. 72, 73.
Collateral conſanguinity. II. 204.
Collateral deſcent. II. 220.
- - - - - iſſue. IV. 389. v.
- - - - - warranty. II. 301.
Collatio bonorum. II. 517.
Collation to a benefice. I. 391.
Collative advowſons. II. 22.
Collecting the goods of the deceaſed. II. 510.
Colleges. I. 471.
- - - -, their viſitor. I. 482.
Collegia in the civil law. I. 469.
Colligendum bona defuncti, letters *ad*. II. 505.
Colonies. I. 106. II. 7.
Colour in pleading. III. 309.
Combinations. IV. 159.
Combuſtio domorum. IV. 365.
Commenda. I. 393. IV. 107.
Commerce, king the arbiter of. I. 273.
Commiſſion of bankrupt. II. 480.
- - - - - - lunacy. I. 305.
- - - - - - the peace. I. 351.
- - - - - to examine witneſſes. III. 438. 449.
- - - - - - take anſwers in equity. III. 447.
Commitment of bankrupt. II. 481.
- - - - - - perſons accuſed. IV. 293.
Committee of council. I. 231.
- - - - - - parliament. I. 182.
- - - - - - lunatic. I. 305.
Common appendant. II. 33.
- - - - - appurtenant. II. 33.
- - - - - bail. III. 287.
- - - - - barretor. IV. 133.
- - - - - becauſe of vicinage. II. 33.
- - - - - bench, court of. III. 37.
- - - - - - -, juſtices of, killing them. IV. 84.
- - - -, diſturbance of. III. 237.
- - - -, eſtate in. II. 191. 399.
- - - - - farrier, &c, action againſt. III. 164.
- - - - - form, proof of will in. II. 508.
- - - - - in groſs. II. 34.
- - - - - informer. III. 160.
- - - - - jury. III. 358.
- - - - - law. I. 63. 67. IV. 404, 405.
- - - - - - -, corporation by. I. 472.
- - - - - - -, dower by. II. 132.
- - - - - - -, guardian by. I. 461.
- - - - - nuſance. IV. 166.
- - - - - of eſtovers. II. 35.
- - - - - - paſture. II. 32.
- - - - - - piſcary. II. 34.
- - - - - - turbary. II. 34.

Common pleas. III. 40.
- - - - - - - -, court of. III. 37.
- - - - - - -, court of, fixed at Weſtminſter. I. 22, 23. IV. 417.
- - - - - prayer book, reviling of. IV. 50.
- - - - - recovery. III. 182. 193. IV. 422.
- - - - - right of. II. 32.
- - - - - *ſans nombre*. III. 239.
- - - - - ſcold. IV. 169.
- - - - - ſeal. I. 475.
- - - - -, ſurcharge of. III. 237.
- - - - -, tenant in, of lands. II. 191. vi.
- - - - - - - - - - - - chattels perſonal, II. 399.
- - - - - vouchee. II. 359. xviii, xix.
- - - - - ways. II. 35.
- - - - - without ſtint. II. 34.
Commonalty. I. 403.
Commons, houſe of. I. 158.
Commonwealth, offences againſt. IV. 127.
Commorancy. IV. 270.
Communem legem, writ of entry *ad*. III. 183.
Communion of goods. II. 3.
Commutation of penance. IV. 105. 217. 273.
Compact. I. 45.
Compaſſing the death of the king, *&c*. IV. 76.
Compenſatio. III. 305.
Competent witneſſes. III. 370.
Compoſition real for tithes. II. 28.
- - - - - - with creditors. II. 484.
Compound larciny. IV. 240.
Compounding felony. IV. 133.
- - - - - - - other proſecutions. IV. 135.
Compulſion. IV. 27.
Compurgators. III. 342, 343. IV. 361. 407.
Concealment from the crown. IV. 429.
- - - - - - of baſtard's death. IV. 198. 352.
Conceſſit, fine *ſur*. II. 353.
Concluſion of deeds. II. 304. i. iii. xii.
- - - - - - pleas. III. 303.
Concord in a fine. II. 350. xiv.
Condition. II. 293. viii.
- - - - -, breach of. II. 281.
- - - - -, eſtate on. II. 152.
- - - - - in deed. II. 155.
- - - - - - - law. II. 154, 155.
- - - - - of a bond. II. 340. xiii. III. xx.
Conditional fees. II. 110.
- - - - - - pardon. IV. 394.
Confeſs and avoid. III. 310.
Confeſſion of action. III. 302 397.
Confeſſion of indictment. IV. 324.
Confeſſo, bill taken *pro*. III. 444, 445.
Confinement to the realm. I. 265.
Confirmation of biſhops. I. 378. 380. IV. 115.
- - - - - - - - lands. II. 325.
Confiſcation. I. 299. IV. 370.
Confuſion, property by. II. 405.
Conge d' eſlire. I. 379. 382. IV. 414.
Conjugal rights, reſtitution of. III. 94.
- - - - - - -, ſubtraction of. III. 94.
Conjuration. IV. 60. 429.
Conqueſt, Norman. I. 199. IV. 407, 408.
- - - - - or acquiſition. II. 48. 242.
- - - - - - victory. I. 103. 107.
Conſanguineus frater. II. 232.
Conſanguinity. I. 434. II. 202.
- - - - - - -, table of. II. 203.
Conſcience, courts of III. 81. IV. 434.
Conſecration of biſhops. I. 380. IV. 115.
Conſequential damages, action for. III. 153.
Conſervators of the peace. I. 350. IV. 406. 424.
- - - - - - - - truce and ſafe-conducts. IV. 69.
Conſideration of contracts. II. 443.
- - - - - - - - deeds. II. 296. ii. iv.
Conſideratum eſt per curiam. III. 396.
Conſilium, or imparlance. IV. 349.
Conſimili caſu, writ of entry *in*. III. 183.
Conſiſtory court. III. 64.
Conſort, queen. I. 219.
Conſpiracy. IV. 136.
- - - - -, action of. III. 126.
Conſtable. I. 355. IV. 289.
- - - - -, high. I. 115.
- - - - -, lord high. I. 355. IV. 265.
- - - - - - - - - - -, his court. III. 68. IV. 264.
Conſtruction of deeds and wills. II. 379.
- - - - - - - - ſtatutes. I. 87.
Conſtructive treaſon. IV. 75. 85.
Conſuetudinibus et ſervitiis, writ *de*. III. 232.
Conſultation, writ of. III. 114.
Conſummate, tenant by curteſy. II. 128.
Contempt againſt the king. IV. 121.
- - - - - in courts of equity. III. 443.
- - - - - - - - - law. IV. 280.
Contentious juriſdiction. III. 66.
Conteſtatio litis. III. 297.
Contingent legacy. II. 513.
- - - - - - remainder. II. 169.
- - - - - - - - - -, truſtees to ſupport. II. 171. v.
- - - - - - uſes. II. 334.

Continual claim. II. 316. III. 175.
Continuances. III. 316. iv. xi. xxii. xxiv. xxvi.
Continuando in treſpaſs. III. 212.
Contract. II. 442.
- - - -, action on. III. 117.
- - - -, expreſs. III. 153.
- - - -, implied. III. 158.
- - - - of marriage. I. 439.
- - - - - - - - - -, ſuit for. III. 93.
- - - -, original, between king and people. I. 233.
- - - - ſimple. II. 465.
- - - - ſpecial. II. 465.
Contractu, action *ex*. III. 117.
Convention of eſtates. I. 151, 152.
- - - - - - parliaments. I. 152.
Conventional eſtates for life. II. 120.
Converſion. III. 152.
Conveyances. II. 9 293. 309. IV. 423.
Conviction. IV. 355.
- - - - - -, ſummary. IV. 277.
Convocation. I. 279.
- - - - - -, court of biſhops in. III. 67.
Coparceners. II. 187.
Copper coin, counterfeiting. IV. 100.
Copy of indictment. IV. 345.
- - - - record of indictment. III. 126.
Copyhold. II. 95. 147. IV. 432.
- - - - - for life. II. 97.
- - - - - not liable to *elegit*. III. 419.
- - - - - of frank tenure. II. 100. 149.
- - - - - - inheritance. II. 97.
Copyrights. II. 407.
Corn rents. II. 322.
Cornage, tenure by. II. 74.
Corody. I. 283. II. 40.
Coronation oath, antient. I. 236.
- - - - - - - -, modern. I. 235.
Coronatore eligendo, writ *de*. I. 347.
- - - - *exonerando*, writ *de*. I. 348.
Coroner. I. 346. IV. 289. 406.
- - - -, his court. IV. 271.
Corporate counties. I. 119.
- - - - - name. I. 474.
Corporation. I. 467. II. 430.
- - - - - - act. IV. 57. 432.
- - - - - -, courts of. III. 80.
- - - - - -, it's diſſolution I. 485.
- - - - - - - - duties. I. 479.
- - - - - - - - incidents and powers. I. 477.
- - - - - - - - lands, if diſſolved. I. 484. II. 256.
- - - - - - - - privileges and diſabilities. I. 476.
Corporeal hereditaments. II. 17.
Corpſe, ſtealing of. II. 429. IV. 236.
Corpus juris canonici. I. 82.
Corpus juris civilis. I. 81.
Correction, houſe of. IV. 370.
- - - - - - - of apprentices. I. 428.
- - - - - - - - children I. 452, 453. IV. 182.
- - - - - - - - ſcholars. I. 453. IV. 182.
- - - - - - - - ſervants. I. 428. IV. 182.
- - - - - - - - wife. I. 444.
Corruption of blood. II. 251. IV. 381. 406. 431. 433.
Corſepreſent. II. 425.
Corſned, trial by. IV. 339. 407.
Coſinage, writ of. III. 186.
Coſts. II. 439. III. 399. xii. xxiv. xxvi.
- - - in equity. III. 451.
- - -, no more than damages. III. 400.
- - - on not going to trial. III. 357.
Cottages. IV. 168.
Covenant. III. 155.
- - - - - in a deed. II. 304. viii. x.
- - - - - real. III. 156.
- - - - - to ſtand ſeized to uſes. II. 338.
- - - - -, writ of. II. 350. xiv. III. 156.
Covert-baron. I. 442.
Coverture. I. 442.
Councils of the king. I. 227.
Counſel. III. 26.
- - - -, action againſt. III. 164.
- - - - for priſoners. IV. 349.
- - - -, king's. III. 27.
- - - -, when ſilenced. III. 29.
Count. I. 116 398.
- - - in declaration. III. 293. 295.
Counterfeiting the king's coin. IV. 84. 88.
- - - - - - - - - - - - - ſeals. IV. 83. 89.
Counterpart. II. 296.
Country, trial by the. III. 349. IV. 342.
County. I. 116. IV. 404.
- - - - court. I. 377. III. 35. IV. 404. 407. 409. 413. 415. 417. 434.
- - - - - - - of Middleſex. III. 82.
- - - - palatine. I. 116. IV. 424.
Court. I 267. III. 23. IV. 255. 407.
- - - baron. II. 91. III. 33. IV. 404.
- - - chriſtian. III. 64.
- - - hand. III. 323.
- - - leet. IV 270. 404. 417.
- - - martial. I. 414.
- - -, power to erect. I. 267. III. 24.
Courts, profits of. I. 289.
Craven. III. 340. IV. 342.
Credible witneſs. III. 370.
Crimes. IV. 1, 2. 5.

Criminal converſation. III. 139.
- - - - - law. IV. 2.
Croſs bill. III. 448.
- - - cauſes. III. 451.
- - - remainder. II. 381.
- - -, ſign of, in deeds. II. 305.
Crown, deſcent of the. I. 191. IV. 406.
- - - - office. IV. 262. 304.
- - - - pleas of the. IV. 2.
Cucking-ſtool. IV. 169.
Cui ante divortium, writ of. III. 183.
Cui in vita, writ of. III. 183.
Cul. prît. IV. 333.
Curate. I. 393.
- - - -, his ſalary. III. 90.
Curator of infants, *&c.* I. 460.
Curatores viarum. I. 358.
Curfeu. IV. 412, 413.
Curialitas. II. 126.
Curſing. IV. 59.
Curtefy, tenant by. II. 126.
Cuſtody of idiots and lunatics. I. 303. III. 427.
- - - - - temporalities. I. 282. IV. 414.
Cuſtom. II. 263. 422.
- - - -, aſſurances by. II. 365.
- - - -, dower by. II. 132.
- - - -, general. I. 68, 73.
- - - -, heriot. II. 422.
- - - - of London, how tried. III. 334.
- - - -, particular. I. 74.
- - - - - - - - -, how allowed. I. 78.
- - - - - - - - -, when legal. I. 76.
Cuſtomary freehold. II. 100. 149.
- - - - - tenant. II. 147.
Cuſtoms on merchandize. I. 313.
Cuſtos rotulorum. I. 349. IV. 269.
Cutpurſes. IV. 241.

D.

Damage to things perſonal. III. 152.
Damage-feaſant. III. 6.
Damages. II. 438.
Dane-lage. I. 65. IV. 405.
Darrein preſentment, aſſiſe of. III. 245.
Date of a deed. II. 304. i. iii. xii, xiii.
Day in bank. III. 277.
- - - - court. III. 316.
- - of grace. III. 278.
De bene eſſe. III. 383.
De la plus belle, dower. II. 132.
Deacon. I. 388.
Dead man's part. II. 518.
Deadly feud. IV. 243.
Deaf, dumb, and blind. I. 304. II. 497.
Dean and chapter. I. 382.
Dean, rural. I. 383.
Deanry, rural. I. 111.
Death, appeal of. IV. 310.
- - -, civil. I. 132.
- - -, judgment of. IV. iv.
Debet et detinet, action in. III. 155.
Debt. II. 464. III. 153.
- - -, action of. III. 154. xiii.
- - - - - - - - -, on amercement. III. 159.
- - - - - - - - - - by-law. III. 159.
- - - - - - - - - - judgment. III. 158, 159. 421.
- - - - - - - - - - penal ſtatutes. III. 159.
- - -, information of. III. 261.
- - -, public. I. 325. IV. 434.
Debtee executor. III. 18.
Debtor, refuſing to diſcover his effects. IV. 156.
Debts, priority of. II. 511.
Deceit, action of. III. 165.
- - - - - - - - on the caſe, in nature of. III. 166.
Decennary. I. 114. IV. 249.
Deception of the king in his grants. I. 246.
Deciſive oath. III. 342.
Declaration. III. 293. vii. x. xxi.
Declaratory part of a law. I. 54.
- - - - - - ſtatutes. I. 86.
Declinatory plea. IV. 327. 359.
Decree in equity. III. 451.
Decretals. I. 82.
Decretum Gratiani. I. 82.
Dedimus poteſtatem. I. 352. II. 351. III. 447.
Deed. II. 295.
Deed-poll. II. 296.
Deeds, ſtealing of. IV. 234.
Deerſtealing. IV. 235.
- - - - - - in diſguiſe. IV. 144.
Default, judgment by. III. 296. 395.
Defeazance, deed of. II. 327. 342.
Defectum, challenge *propter*. III. 362. IV. 346.
Defence. II. xviii. III. 296. iii. v. x. xxii.
Defendant. III. 25.
Defenſive allegation. III. 100.
Deforcement. III. 172.
Deforciant. II. 350. xv. xvi. III. 174.
Definitive ſentence. III. 101.
Degradation of peers. I. 403.
Degrees, conferred by the archbiſhop. I. 381.
- - - - in writs of entry. III. 181.
- - - - of conſanguinity. II. 206.

Degrees of conſanguinity, how reckoned. II. 206, 207. 224.
- - - - - guilt. IV. 34.
Dehors, matter. III. 387. IV. 383.
Delay of the law. III. 423.
Delegates, court of. III. 66, 69.
- - - - - - - - -, in academical cauſes. III. 85.
Delictum, challenge *propter*. III. 363. IV. 346.
Delivery of a deed. II. 306. iii. xii, xiii.
Demand of lands. II. xviii.
Demandant and tenant. II. xviii.
Demeſne lands. II. 90.
Demeſnes of the crown. I. 286.
Demi-mark, tender of. III. v.
Demiſe of the crown. I. 188. 249.
Demi-vills. I. 115.
Democracy. I. 49.
Demoliſhing churches, houſes, *&c.* IV. 244.
Demurrer. III. 314. xxiii.
- - - - - book. III. 317.
- - - - - in equity. III. 446.
- - - - - to evidence. III. 373.
- - - - - - indictment. IV. 327.
Denial of rent. III. 170.
Denizen. I. 374. II. 249.
Deodand. I. 300.
Departure in pleading. III. 310.
Depopulatio agrorum. IV. 365.
Depoſitions. III. 383.
- - - - - - in chancery. III. 449.
- - - - - - ecclesiaſtical courts. III. 100.
Deprivation. I. 393.
Derelict lands. II. 261.
Dereliction of property. II. 9.
Derivative conveyances. II. 324.
Deſcender, writ of *formedon in*. III. 192.
Deſcent of lands. II. 201. IV. 406. 414.
- - - - - - the crown. I. 193. IV. 406.
- - - - - - - - - - -, collateral. I. 194.
- - - - - - - - - - -, lineal. I. 193.
- - - -, rules of. II. 208.
- - - -, table of. II. 240.
Deſertion. IV. 101.
Detainer, forcible. III. 179. IV. 147.
- - - - -, unlawful. III. 150.
Determinable freehold. II. 121.
Determination of will. II. 146.
Detinue, action of. III. 151.
Devaſtation. II. 508.
Deviſe. II. 373. IV. 423.
Deviſee, liable to debts of deviſor. II. 378.
Die, en fine. III. 316. 399.
Diet, exceſs in. IV. 171.
Diets. I. 147.
Digeſts. I. 81.
Dignity of the king. I. 241.
Dignities. II. 37.
Dilapidations. III. 91.
Dilatory pleas. III. 301.
Diminiſhing the coin. IV. 90.
Diminution of record. IV. 383.
Dioceſe. I. 111.
Direct prerogatives. I. 239.
Directory part of a law. I. 55.
Diſabilities. IV. 370.
Diſability, plea to. III. 301.
Diſabling a man's limbs or members. IV. 205, 6, 7.
- - - - - ſtatutes of leaſes. II. 320. IV. 425.
Diſclaimer of tenure. II. 275.
Diſcontinuance of action. III. 296.
- - - - - - - - - - eſtate. III. 171.
Diſcovery by bankrupt. II. 483.
- - - - - of accomplices. IV. 325.
- - - - - on oath. III. 382. 437.
Diſfiguring. IV. 207.
Diſguiſe. IV. 144.
Diſmembring, puniſhment by. IV. 370.
Diſmiſſion of bill in equity. III. 451.
Diſorderly houſes. IV. 167.
- - - - - perſons. IV. 170.
Diſparagement. II. 70.
Diſpenſation from the king. II. 70.
- - - - - - - - - - - pope. IV. 114.
Diſpenſing power of the king. I. 142. 186. 342. IV. 429. 433.
Diſpoſſeſſion. III. 167. 198.
Diſſection of murderers. IV. 202. 370. iv.
Diſſeiſin. II. 195. III. 169.
- - - - at the party's election. III. 170, 171.
- - - -, warranty commencing by. II. 302.
- - - -, writ of entry *ſur*. III. 183.
Diſſenters, proteſtant. IV. 53.
Diſſolution of parliament. I. 187.
Diſtreſs. III. 6, 7.
- - - - exceſſive. III. 12.
- - - - illegal, for crown debts. IV. 416.
- - - - infinite. III. 231. 280. IV. 313.
- - - -, ſale of. III. 14.
- - - -, ſecond. III. 12.
Diſtribution of inteſtate's effects. II. 515. IV. 401. 417. 432.
Diſtringas in chancery. III. 445.
- - - - - - detinue. III. 413.
- - - - - *juratores*. III. 354.
- - - - to compel appearance. III. 280. xiv.

Diſturbance. III. 236.
- - - - - - of common. III. 237.
- - - - - - - - franchiſes. III. 236.
- - - - - - - - patronage. III. 242.
- - - - - - - - religious aſſemblies. IV. 53.
- - - - - - - - tenure. III. 242.
- - - - - - - - ways. III. 241.
Diſturber. II. 278.
Diverſity of perſon, plea of. IV. 389.
Dividend of bankrupt's effects. II. 487.
Divine law. I. 42.
- - - - right of kings. I. 191. IV. 429.
- - - - - - - - tithes. II. 25.
- - - ſervice, tenure by. II. 102.
Divorce. I. 440. III. 94.
Do, ut des. II. 444.
- - - *facias.* II. 445.
Docket of judgment. II. 511.
Doctrines illegal, aſſerting or publiſhing. I. 160. 208. 217. IV. 91. 116. 123.
Dog, carrying. IV. 123.
Dogs, *&c*, owner anſwerable for. III. 153.
Domebook of Alfred. I. 64. IV. 404.
Domeſday-book. II. 49. 99. III. 331.
Dominion. II. 1.
Domitae naturae, animals. II. 390.
Donatio mortis cauſa. II. 514.
Donative advowſons. II. 23.
Done, grant, et render, fine *ſur.* II. 353.
Donis, ſtatute *de.* II 112.
Double fine. II. 353.
- - - - plea. III. 308.
- - - - voucher. II. xvii.
Dowager, princeſs. IV. 81.
- - - - -, queen. I. 224. IV. 81.
Dower. II. 129. IV. 417.
- - - - *ad oſtium eccleſiae.* II. 132.
- - - - aſſignment of. II. 135.
- - - - bar of. II. 136.
- - - - by common law. II. 132.
- - - - - - cuſtom. II. 132.
- - - - *de la plus belle.* II. 132.
- - - - *ex aſſenſu patris.* II. 133.
- - - -, *unde nihil habet*, writ of. III. 183.
- - - -, writ of right of. III. 183. 194.
Draught for money. II. 467.
Drawbacks. I. 315.
Drawing to the gallows. IV. 92. 370.
Droit droit. II. 199.
Druids, their cuſtoms. I. 63. IV. 401.
Drunkenneſs. IV. 25. 64.
Duchy court of Lancaſter. III. 78.
Ducking-ſtool. IV. 169. 370.
Duel. IV. 145. 185. 199.
Dues, eccleſiaſtical, non-payment of. III. 89.
Dukes. I. 397. 408.
Dum fuit intra aetatem, writ of. III. 183.
- - - - - *non compos mentis*, writ of. III. 183.
Duodecima manus. III. 343.
Duplex querela. III. 247.
Duplicatio. III. 310.
Duplicity in pleading. III. 308. 311.
Durante abſentia, adminiſtration. II. 503.
- - - - *minore aetate*, adminiſtration. II. 503.
Dureſs. II. 292.
- - - - of impriſonment. I. 131. 136.
- - - - *per minas.* I. 131. IV. 30.
Durham, county palatine of. I. 116.
- - - -, courts of. III. 78.
Duties of perſons. I. 123.
- - - - - the king. I. 233.
Dwelling-houſe. IV. 224.

E.

Ealdormen. I. 398.
Ear, loſs of. IV. 146. 160. 206, 207. 246. 370.
Earl. I. 116. 398.
Earl marſhall, his court. III. 68. IV. 264.
Earneſt. II. 447.
Eat fine die. III. 316. 399.
Eaves-droppers. IV. 169.
Eccleſiaſtical corporations. I. 470.
- - - - - - courts. III. 61.
- - - - - - - - -, their cognizance. III. 87. IV. 418.
- - - - - - - - -, when ſeparated from the civil. III. 62. IV. 408. 414.
Education of children. I. 450.
Edgar, king, his laws. I. 66. IV. 405.
Edward the confeſſor, his laws. I. 66. IV. 405. 413.
Egyptians. IV. 165.
Ejectione firmae, writ of. III. 199.
Ejectment, action of. III. 199. vii. IV. 434.
Election of biſhops. I. 37. IV. 115. 414.
- - - - - - magiſtrates. I. 340. IV. 406. 420.
- - - - - - members of parliament. I. 170. 177.
- - - - - - Scots peers. I. 169. IV. 116.
Elective monarchy. I. 192. IV. 406.
Eleemoſynary corporations. I. 471.
Elegit, eſtate by. II. 161.
- - -, writ of. III. 418. IV. 419.
Eliſors. III. 355.
Eloignment. III. 129. 148.
Elopement. I. 442.
Ely, courts of. III. 78.

Ely, iſle of. I. 119.
Embargo. I. 270.
Embaſſadors. I. 253.
- - - - - -, killing them. IV. 85.
- - - - - -, violation of their privileges. IV. 70. 434.
Emblements. II. 122. 145. 403.
Embowelling alive. IV. 92. 370.
Embracery. IV. 140.
Emperor, his authority. I. 242.
Emphyteuſis. III. 232.
Enabling ſtatute of leaſes. II. 319.
Encloſure, diſſeiſin by. III. 170.
Endowment of vicarages. I. 387.
- - - - - - - widows. II. 135.
Enemies. I. 257. IV. 83.
- - - - goods. II. 401.
England. I. 110.
Engleſcherie. IV. 195.
Engliſh, law proceedings in. III. 322. IV. 434.
Engroſſing. IV. 158.
Enlarger l' eſtate. II. 324.
Enlarging ſtatute. I. 87.
Enquiry, writ of. III. 398.
Enſeint. II. 169.
Entails. II. 112. IV. 420. 424.
Entries, books of. III. 272.
Entry. III. 5. 174.
- - - forcible. III. 179. IV. 147.
- - - on lands. II. 312.
- - -, tolled by deſcent. III. 176, 177.
- - -, writ of. III. 180. II. xvii.
Equity. I. 61. 91. III. 49. 429.
- - - - and law, courts of, how diſtinguiſhed. III. 429. 436. IV. 435.
- - - - courts, hiſtory of. III. 49. IV. 423.
- - - - - - -, practice of. III. 442.
- - - - of redemption. II. 159.
- - - - - ſtatutes. III. 431.
- - - - reſerved. III. 453.
- - - - ſide of the chancery. III. 49.
- - - - - - - - exchequer. III. 44.
Eriach. IV. 309.
Error, coſts in. III. 399. 410. xxvi.
- - -, writ of. III. 405. xxi. IV. 384.
- - - - - - -, where proſecuted. III. 410, 411. IV. 384.
Eſcape. III. 290. 415. IV. 130.
- - - -, action for. III. 163.
- - - -, aſſiſting in. IV. 131.
Eſcheat. I. 302. II. 11. 72. 89. 244. IV. 406. 411.
- - - -, writ of. III. 194.
Eſcrow. II. 307.
Eſcuage. II. 74. IV. 415.
Eſplees. II. xviii. III. iii.
Eſquire. I. 405.
Eſſoign. III. 278.
- - - - day of the term. III. 278.
Eſtate in lands. II. 103.
Eſtates of the kingdom. I. 156.
Eſtoppel. II. 295. 308.
Eſtoveriis habendis, writ *de*. I. 441.
Eſtovers of a wife. I. 441.
- - - - common of. II. 35.
Eſtrays. I. 297. II. 14.
Eſtreat of recognizance, *&c*. IV. 250.
Eſtrepement, writ of. III. 225.
Evidence. III. 367. IV. 350.
Ex officio informations. IV. 304.
Ex poſt facto laws. I. 46.
Examination in chancery. III. 449.
- - - - - - - - of bankrupt. II. 481.
- - - - - - - - priſoners. IV. 293.
- - - - - - - - witneſſes. III. 372.
- - - - - - - -, trial by. III. 331.
Exceptio. III. 310.
Exceptions, bill of. III. 372.
- - - - - - to anſwer in chancery. III. 448.
Exchange, bill of. II. 466.
- - - - -, deed of. II. 323.
- - - - - of goods and chattels. II. 446.
- - - - - - - - lands. II. 322.
Exchequer chamber, court of. III. 55.
- - - - - -, court of. III. 43.
- - - - - -, receipt of. III. 44.
Exciſe. I. 318.
- - - -, hereditary. I. 288.
- - - -, offences againſt, how tried. IV. 278.
Excluſion bill. I. 211.
Excommunication. III. 101.
Excommunicato capiendo, writ *de*. III. 102.
- - - - - - - *deliberando*, writ *de*. III. 102.
Excuſable homicide. IV. 182.
Executed contract. II. 443.
- - - - - eſtate. II. 163.
- - - - - fine. II. 353.
- - - - - remainder. II. 168.
Execution, civil. III. 412. xxvi.
- - - - -, criminal. IV. 396.
- - - - - - - - - -, award of. IV. vi.
- - - - - - - - - -, plea in bar of. IV. 389.
- - - - - - - - - -, precept of. IV. 396.
- - - - - - - - - -, rule for. IV. 397.
- - - - - - - - - -, varying from judgment. IV. 179. 397.
- - - - - - - - - -, warrant of. IV. 397. vi.
- - - - - - - - - -, writ of. IV. 396. vii.
- - - - - of deviſes. II. 376.
- - - - - - uſes. II. 333.

Execution, proceſs of. III. 279. 412.
Executive power. I. 190.
Executor. II. 503.
- - - - - *de ſon tort*. II. 507.
- - - - - of executor. II. 506.
- - - - - - his own wrong. II. 507.
Executory contract. II. 443.
- - - - - deviſe. II. 173. 334.
- - - - - eſtate. II. 163.
- - - - - remainder. II. 169.
Exemplification. II. xvii.
Exemptions from tithes. II. 28.
Exigent, writ of. III. 283. IV. 314.
Exigi facias, writ of. III. 283. xvi. IV. 314.
Exile. I. 137. IV. 370.
Expectancy, eſtates in. II. 163.
Expenſes of proſecution. IV. 355.
- - - - - witneſſes. III. 369. IV. 355.
Exportation of wool, *&c.* IV. 154. 421.
Expreſs condition. II. 154.
- - - - contract. II. 443. III. 153.
- - - malice. IV. 199.
- - - warranty. II. 301.
Extendi facias. III. 420.
Extent, writ of. III. 420.
Extinguiſhment of eſtates. II. 325.
Extortion. IV. 141.
Extraparochial places. I. 113.
- - - - - - - tithes. I. 284.
Extravagants. I. 82.
Eye, putting out. IV. 206, 207.
Eyre, chief juſtice in. III. 72.
- - -, juſtices in. III. 57. IV. 415, 416.
- - - - - - - -, killing them. IV. 84.

F.

Facio, ut des. II. 445.
- - - - *facias*. II. 444.
Facto, king *de*. I. 204. 370. IV. 77.
Factor. I. 427.
Factorſhip, cognizable in equity. III. 437.
Fair. I. 274. III. 218.
Falſe impriſonment. III. 127. IV. 218.
- - - - - - - - - - -, action of. III. 138.
- - - judgment, writ of. III. 34. 405.
- - - news. IV. 149.
- - - return, action for. III. 111. 163.
- - - verdict. III. 402. IV. 140.
- - - weights and meaſures. IV. 157.
Falſi, crimen. IV. 88. 134. 156. 245.
Falſifying attainder. IV. 383.
- - - - - coin. IV. 84. 88. 90. 98.
- - - - - judgment. IV. 383.
Fame, good or ill. IV. 253.
Farm. II. 318.
Favour, challenge to. III. 363.
Fealty. I. 367.
- - - -, oath of. II. 45. 53. 86.
Fear, putting in. IV. 242.
Fee. II. 45. 104. 106.
- - - after a fee. II. 334.
- - -, eccleſiaſtical. III. 90.
- - - farm rent. II. 43.
- - - ſimple. II. 104. i. vi.
- - - tail. II. 112. vi.
Fees to counſel. III. 28.
Feigned iſſue. III. 452.
Felo de ſe. II. 499. IV. 189.
Felon. II. 499.
Felonious homicide. IV. 188.
Felony. II. 284. IV. 94.
- - - -, appeal of. IV. 310.
- - - -, compounding of. IV. 133.
- - - -, miſpriſion of. IV. 121.
- - - -, puniſhment of. IV. 98. 216. 222.
Feme covert. I. 442. II. 292. 497.
Feodal actions. III. 117.
- - - - tenures. II. 44. 425. 431.
- - - - - - - - among the Saxons. IV. 406.
- - - - - - - -, when received in England. II. 48. IV. 406. 411.
Feoffment. II. 310. i.
Feorm. II. 318.
Ferae naturae, animals. II. 390.
Fetters. IV. 297. 317.
Feud. II. 45.
Feudatory. II. 53.
Feudum antiquum. II. 212. 221.
- - - - *apertum*. II. 245.
- - - - *honorarium*. II. 56. 215.
- - - - *improprium*. II. 58.
- - - - *individuum*. II. 215.
- - - - *maternum*. II. 212. 243.
- - - - *novum*. II. 212. 221.
- - - - - - -, held *ut antiquum*. II. 212. 221.
- - - - *paternum*. II. 243.
- - - - *proprium*. II. 58.
Fiction in law. III. 43. 107.
Fictitious plaintiff. IV. 134.
Fidei-commiſſum. II. 327.
Fidejuſſors. III. 108. 291.
Fief. II. 45.
- - - *d' haulert*. II. 62.
Fieri facias, writ of. III. 417. xxvii.
- - - *feci*. III. xxvii.
Fifteenths. I. 308.
Filial portion. II. 519.
Final decree. III. 452.

Final judgment. III. 398.
Finding of indictments. IV. 301.
- - - - things perſonal. II. 9.
Fine for alienation. II. 71. 89.
- - - - endowment. II. 135.
- - - - miſdemeſnors IV. 370, 371.
- - - in copyhold. II. 98.
- - - of lands. II. 118. 348. III. 156. IV. 419. 422.
- - - - - - - - - executed. II. 353.
- - - *ſur done, grant, et render*. II. 353.
- - - - - *cognizance de droit, come ceo, &c.* II. 352. xiv.
- - - - - - - - - - - - - - - *tantum*. II. 353.
- - - - - *conceſſit*. II. 353.
Fines and forfeitures, when grantable. III. 259. IV. 372.
Finger, diſabling. IV. 206.
Fire, negligence of. I. 431. IV. 222.
Fire-bote. II. 35.
Fire-ordeal. IV. 336.
Fire-works. IV. 168.
Firſt-fruits. I. 284. II. 67. IV. 106.
Fiſh, royal. I. 290.
- - -, ſtealing, in diſguiſe. IV. 144. 235.
- - - - - - - -, or attempting to ſteal. IV. 235.
Fiſhery, common of. II. 34.
- - - -, free. II. 39. 417. IV. 417.
- - - -, ſeveral. II. 39.
Fiſhpond, deſtroying. IV. 244.
Fitzherbert. I. 72. III. 183.
Fleets. I. 262. IV. 412.
Fleta. I. 72. IV. 320.
Flight. IV. 380.
Flotſam. I. 292. III. 106.
Foenus nauticum. II. 459.
Folk land. II. 91, 92.
Foot of a fine. II. 351. xv.
Force, injuries with and without. III. 118.
- - -, when repellable by death. IV. 181.
Forcible abduction and marriage. IV. 208.
- - - - entry and detainer. III. 179. IV. 147.
Foreclosure. II. 159.
Foreign bill of exchange. II. 467.
- - - - coin, forging it. IV. 89. 99. 120.
- - - - dominions. I. 109.
- - - - prince, penſion from. IV. 122.
- - - - ſervice. IV. 100.
Foreſt. I. 289. II. 14. 38. 414.
- - - courts. III. 71.
- - - laws. II. 416. III. 73. IV. 408. 413, 414. 416. 425. 430.
Foreſta, carta de. IV. 416. 418.
Foreſtaller, diſſeiſin by. II. 170.
Foreſtalling. IV. 158.
Foretooth, ſtriking out. IV. 206.
Forfeiture. I. 299. II. 153. 267.
- - - - - - forcrimes. IV. 370. 374. 416, 417.
- - - - - - - of copyholds. II. 284.
- - - - - - - - goods and chattels, II. 420. IV. 379.
- - - - - - - - lands. II. 267. IV. 374.
Forgery. IV. 245.
Forgiveneſs by the proſecutor. IV. 357.
Forma pauperis. III. 400.
Formedon, writ of. III. 191.
Forms of law, unalterable. I. 142.
Fornication. IV. 64.
Forts and caſtles. I. 263.
Fortune-tellers. IV. 61.
Forty days court. III. 71.
Founder of a corporation. I. 480.
Foundling hoſpitals. I. 131.
Franchiſe. II. 37.
- - - - -, allowance of. III. 263.
- - - - -, diſturbance of. III. 236.
- - - - - royal. I. 302.
Frankalmoign. II. 101.
Franked letters. I. 322.
Frankmarriage. II. 115.
Frankpledge. I. 114. IV. 249.
- - - - - - -, view of. IV. 270.
Frank-tenement. II. 104.
- - - tenure. II. 61.
Frater conſanguineus. II. 232.
- - - *uterinus*. II. 232.
Fraud, civil, where cognizable. III. 431. 437. 439.
- - -, criminal. IV. 158.
Frauds and perjuries, ſtatute of. III. 157. IV. 432.
Fraudulent deviſes. II. 378.
Fraunk ferme. II. 80.
Free bench. II. 122.
- - - fiſhery. II. 39. 417.
- - - ſervices. II. 60.
- - - ſocage. II. 79.
- - - warren. II. 38. 417. IV. 408.
Freehold. II. 104.
- - - - - leaſes. II. 120. 318.
Freſh ſuit. I. 297.
Fruit, ſtealing of. IV. 233.
Full age. I. 463.
Fumage. I. 323.
Funds, public. I. 328.
Funeral expenſes. II. 508.
Furandi animus. IV. 230. 232.
Futuro, freehold *in*. II. 144. 165.

G.

Gage. III. 280. iv.
- - -, eſtates in. II. 157.
Game. II. 14. 395. 403. 410. IV. 408.
- - -, deſtroying of. IV. 174.
- - - laws. IV. 174. 409.
- - -, ſelling of. IV. 175.
Gaming. IV. 171.
Gaminghouſes. IV. 167. 171.
Gaol-delivery. IV. 267. iii.
Gaolers. I. 346. IV. 297.
- - - -, compelling priſoners to be approvers, &c. IV. 129.
Gardens, robbing of. IV. 233.
Garter, knight of. I. 404.
Gavelkind. I. 74. II. 84. IV. 401. 406.
General demurrer. III. 315.
- - - - fund. I. 328.
- - - - iſſue. III. 305. IV. 332.
- - - - legacy. II. 512.
- - - - occupancy. II. 258.
- - - - ſeſſions. IV. 269.
- - - - ſtatute. I. 85.
- - - - tail. II. 113. vi.
- - - - verdict. III. 378. IV. 354.
- - - - warrant. IV. 288.
Gentlemen. I. 405.
Gift of chattels perſonal. II. 441.
- - - - - - - - real. II. 440.
- - - - lands and tenements. II. 316.
Gilda mercatoria. I. 473.
Glanvil. I. 72. IV. 414.
Gleaning. III. 212.
God and religion, offences againſt. IV. 43.
Good behaviour, ſecurity for. IV. 248. 253.
- - - conſideration. II. 297.
Government, contempts againſt. IV. 123.
- - - - - - -, it's original. I. 48.
Grand aſſiſe. III. 341. 351. v. IV. 415.
- - - - *Couſtumier* of Normandy. I. 106.
- - - - juror, diſcloſing evidence. IV. 126.
- - - - jury. IV. 299. ii.
- - - - - - - in attaint. III. 351. 403.
- - - - lareiny. IV. 229.
- - - - ſerjeanty. II. 73.
Grants. II. 9.
- - - - of chattels perſonal. II. 441.
- - - - - - - - - - real. II. 440.
- - - - - lands and tenements. II. 317.
- - - - - the king. II. 346.
Great council. I. 147.
- - - ſeal of the king. II. 346. III. 47.
Great ſeal of the king, counterfeiting it. IV. 83.
- - - tithes. I. 388.
Gregorian code. I. 81.
Groſs, advowſon in. II. 22.
- - -, common in. II. 34.
- - -, villein in. II. 93.
Guardian *ad litem*. III. 427.
- - - - - and ward. I. 460.
- - - - - at common law. I. 461.
- - - - - by cuſtom. I. 462.
- - - - - - nature. I. 461.
- - - - - - ſtatute. I. 462.
- - - - - for nurture. I. 461.
- - - - - in chivalry. I. 462. II. 67.
- - - - - - ſocage. II. 88.
- - - - - - teſtamentary. I. 462.
Guernſey, iſland of. I. 106.
Gunpowder, hindering it's importation. IV. 116.
Gypſies. IV. 165.

H.

Habeas corpora juratorum. III. 354.
- - - - *corpus*. I. 135.
- - - - - - - - act. I. 128. III. 135. IV. 431.
- - - - - - - - *ad deliberandum*. III. 130.
- - - - - - - - - *faciendum et recipiendum*. III. 130.
- - - - - - - - - *proſequendum*. III. 130.
- - - - - - - - - *reſpondendum*. III. 129.
- - - - - - - - - *ſatisfaciendum*. III. 130.
- - - - - - - - - *ſubjiciendum*. III. 131.
- - - - - - - - - *teſtificandum*. III. 130.
- - - - - - - *cum cauſa*. III. 77.
Habendum of a deed. II. 298. i, ii. v.
Habere facias poſſeſſionem. III. 412.
- - - - - - - *ſeiſinam*. III. 412.
Habitation, offences againſt. IV. 220.
- - - - -, property in. II. 4.
Hackney coaches and chairs. I. 324.
Haereditas jacens. II. 259.
Haeretico comburendo, writ *de*. IV. 46. 432.
Half blood. I. 194. II. 227.
Hame-ſecken. IV. 223.
Hamlet. I. 115.
Hanaper office. III. 49.
Hand, diſabling. IV. 206.
- - -, holding up. IV. 318.
- - -, loſs of. IV. 125. 154. 273. 370.
- - - ſale. II. 448.
- - - writing, ſimilitude of. IV. 351.

Hanging. IV. 370.
Hanover. I. 109.
Havens. I. 264.
Hawks, ſtealing of. IV. 235.
Hay-bote. II. 35.
Head of the church. I. 278. IV. 423.
Headborough. I. 114.
Health. I. 124.
- - - -, injuries to. III. 122.
- - - -, offences againſt public. IV. 161.
Hearing in equity. III. 451.
Hearſay evidence. III. 368.
Hearth-money. I. 324.
Hedge-bote. II. 35.
Hedge-ſtealing. IV. 233.
Heir. II. 201.
- - - apparent and preſumptive. II. 208.
Heireſs, ſtealing of. IV. 208.
Heir-looms. II. 427.
Helping to ſtolen goods for reward. IV. 132,
Hengham. III. 408. IV. 420.
Henry I, his laws. IV. 413.
Heptarchy, Saxon. IV. 403.
Heraldry. III. 105.
Heralds. III. 105.
- - - - books. III. 105.
Hereditaments. II. 17.
Hereditary right. I. 191.
Hereſy. IV. 44.
Heretable juriſdictions. II. 77.
Heretochs. I. 397. 408. IV. 406.
Heriots. II. 97. 422.
- - - -, ſeiſing of. III. 15.
Hermogenian code. I. 81.
High commiſſion court. III. 67. IV. 42, 426. 430.
- - - conſtable. I. 355.
- - - - - - - - of England. I. 355. IV. 265.
- - - - - - - - - - - - - -, his court. III. 68. IV. 264.
- - - miſdemeſnors. IV. 121.
- - - ſteward of Great Britain, his court. IV. 258.
- - - - - - - - - - - - - -, in parliament. IV. 257. 260.
- - - - - - - - Oxford, his court. IV. 274.
- - - treaſon. IV. 75.
- - - - - - -, trials in. IV. 345. 433.
Highways. I. 357. II. 35.
- - - - -, annoyances in. IV. 167.
- - - - -, robbery in or near. IV. 243.
Hiring. II. 454.
Hiſtory of the law. IV. 400.
Hogs, keeping them in towns. IV. 167.
Holding over. II. 151. III. 210, 211.
Homage. II. 53.
- - - - aunceſtrel. II. 300.
- - - - by biſhops. I. 379. IV. 414.
- - - - liege. I. 367.
- - - - of a court baron. II. 91.
- - - - ſimple. I. 367.
Homicide. IV. 177.
Homine replegiando, writ *de*. III. 129.
Honorary feuds. II. 56. 215.
Honoris reſpectum, challenge *propter*. III. 261. IV. 346.
Honour, court of. III. 104.
- - - - of a peer. I. 402.
- - - -, or dignity. I. 271.
- - - - - - ſeignory. II. 91.
Hop-binds, deſtroying. IV. 245.
Horſe-races. IV. 173.
Horſes, ſale of. II. 450.
Hoſpitals. I. 471. 474.
- - - -, their viſitors. I. 482.
Hotchpot. II. 190. 517.
Houſe, immunities of. IV. 223.
- - -, larciny from. IV. 240.
Houſe-bote. II. 35.
Houſe-tax. I. 323.
Hue and cry. IV. 290.
Hundred. I. 115. IV. 404.
- - - -, action againſt, for robbery, &c. III. 160. IV. 244. 290.
Hundred-court. III. 34. IV. 404.
Hundredors, challenge for defect of. III. 359. IV. 346.
Hunger, IV. 31.
Hunting. III. 213.
- - - - - by inferior tradeſmen. III. 215. 401.
- - - - - - - night or in diſguiſe. IV. 144.
Hurdle. IV. 92. 370.
Huſband and wife. I. 433. IV. 28.
- - - -, injuries to. III. 139.
Huſtings, court of, in London. III. 80.
Hydage. I. 310.
Hypotheca. II. 159.

J. I.

Jactitation of marriage. III. 93.
Identity of perſon. IV. 389.
Idiot. I. 302. II. 291. IV. 24.
- - -, cognizance of. III. 427.
- - -, inſpection of. III. 332.
- - -, marriage of. I. 438.
Idicta inquirendo, writ *de*. I. 103.
Idleneſs. IV. 169.

Jrofails. III. 406. IV. 369. 432.
Jerſey, iſland of. I. 106.
Jetſam. I. 292. III. 106.
Jews. I. 375. IV. 365.
- - -, children of. I. 449.
Ignominious puniſhments. IV. 370.
Ignoramus. IV. 301.
Ignorance. IV. 27.
Illegal conditions. II. 156.
Imagining the king's death. IV. 76.
Imbezzling king's armour or ſtores. IV. 101.
- - - - - - public money. IV. 121.
- - - - - - records. IV. 128.
Immediate deſcent. II 226.
- - - - - - ſtates of the empire. II. 60.
Imparlance. II. xix. III. 298. xxii.
Impeachment in parliament. IV. 256.
- - - - - - - of waſte. II. 283. v.
Imperial chamber. III. 39.
- - - - conſtitutions. I. 80.
- - - - crown and dignity. I. 242.
Impediments of marriage. I. 434.
Implication. II. 381.
Implied condition. II. 152.
- - - - contract. II. 443. III. 158.
- - - - malice. IV. 200.
- - - - warranty. II. 300.
Importing *agnus dei*, croſſes, *&c.* IV. 115.
- - - - counterfeit money. IV. 84. 89.
Impoſſible condition. II. 156.
Impoſtures, religious. IV. 61.
Impotency. I. 434.
Impotentiae, property *ratione*. II. 394.
Impreſſing ſeamen. I. 418.
Impriſonment. I. 134. 136. IV. 370. 429.
- - - - - - - beyond ſea. I. 137. IV. 116.
- - - - - - -, falſe. III. 127. IV. 218.
Improper feuds. II. 58.
Impropriations. I. 386.
Incapacities. IV. 370.
Incendiaries. IV. 220.
Inceſt. IV. 64.
Inchantment. IV. 60.
Incidental prerogatives. I. 240.
Incloſures, deſtroying. IV. 245.
Incomplete judgments. III. 397.
Incorporation, power of. I. 472. 474.
Incorporeal hereditaments. II. 20.
Incorrigible roguery. IV. 170.
Incumbent. I. 392.
Incumbrances, covenant againſt. II. x.
Indebitatus aſſumpſit. III. 154.
Indefeaſible right to the throne. I. 195.
Indentures. II. 295.
- - - - - - of a fine. II. 351. xv.
Indicavit, writ of. III. 91.
Indictable, what. IV. 218.
Indictment. IV. 299. ii.
- - - - - -, copy of. III. 126. IV. 345.
Individuals, offences againſt. IV. 176.
Indorſement of bills and notes. II. 468. IV. 434.
Induction to a benefice. I. 391. II. 312. IV. 106.
Induſtriam, property *per*. II. 391.
Infamous witneſs. III. 370.
Infant. I. 463. II. 292. 497. IV. 22.
- - -, carnal knowledge of. IV. 212.
- - -, cognizance of. III. 427.
- - -, evidence by. IV. 214.
- - -, inſpection of. III. 332.
- - -, *in ventre ſa mere*. I. 129, 130.
- - -, privileges and diſabilities of. I. 464.
Infeodations of tithes. II. 27.
Influence on elections to parliament. I. 178.
Information, compounding of. IV. 135.
- - - - - - - - criminal. IV. 303. 422. 429.
- - - - - - - - *ex officio*. III. 427. IV. 304.
- - - - - - - - for charities. III. 427.
- - - - - - - - in crown office. IV. 304.
- - - - - - - - - ecclesiaſtical courts. III. 101.
- - - - - - - - - exchequer. III. 261.
- - - - - - - - - nature of *quo warranto*. IV. 304. 434.
- - - - - - - - - *rem*. III. 262.
- - - - - - - - of ſuperſtitious uſes. III. 428.
Informer, common. II. 437. III. 160. IV. 304.
Infortunium, homicide *per*. IV. 182.
Inheritable blood. II. 246.
Inheritance. II. 11. 201.
- - - - - - -, canons of. II. 208.
- - - - - - -, eſtates of. II. 104.
Initiate, tenant by courteſy. II. 127.
Injunction in equity. III. 443.
Injuries, civil. III. 2.
- - - - - with and without force. III. 118.
Inland bill of exchange. II. 467.
Inmates. IV. 168.
Inn of court and chancery. I. 23. 25.
Innkeeper, action againſt. III. 164.
Inns, diſorderly. IV. 167, 168.
Innuendo. III. 126.
Inofficious teſtament. I. 448. II. 502.
Inqueſt of office. III. 258. IV. 298. 417.
Inquiſitio poſt mortem. II. 68. III. 258.
Inſidiatio viarum. IV. 365.
Inſimul computaſſent. III. ~~86~~ 162
Inſolvency, act of. II. 484.

Inſolvent debtors. II. 484. III. 416.
Inſpection, trial by. III. 331.
Inſtallment. II. 312
Inſtanter, trial. IV. 389. v.
Inſtitutes of Juſtinian. I. 81.
Inſtitution to a benefice. I. 390. II. 23. IV. 106
Inſurance. II. 460. III. 74. IV. 434.
Interdictum. III. 442.
Intereſſe Termini. II. 134.
Intereſt of money. II. 455.
- - - - on bankrupt's debts. II. 488.
- - - - - - legacies. II. 514.
- - - - or no intereſt, inſurance. II. 461.
Intereſted witneſs. III. 370.
Interlineation in a deed. II. 308.
Interlocutory decree in eccleſiaſtical courts. III. 101.
- - - - - - - - - - - chancery. III. 452.
- - - - - - - - judgment. III. 448.
Interpleader, bill of. III. 448.
Interpretation of laws. I. 58.
Interregnum. I. 196. 249.
Interrogatories, examination on. III. 383. 438. IV. 283.
- - - - - - - - - in chancery. IV. 449.
Inteſtacy. II. 494.
Inteſtates, their debts and effects. IV. 418. 421.
Intruſion, information of. III. 261.
- - - - - - on freehold. III. 169.
- - - - - -, writ of. III. 183.
Inventory of deceaſed's effects. II. 510.
Inveſtiture. II. 209.
- - - - - - - of benefices. II. 23.
- - - - - - - - feuds. II. 53.
- - - - - - - - lands. II. 311.
Involuntary manſlaughter. IV. 192.
John, king, his reſignation of the crown to the pope. IV. 107. 111.
Joinder in demurrer. III. 315. xxiv.
- - - - of battel. III. iv.
- - - - - iſſue. III. 315. x. IV. 334. iii.
Joint-tenancy in lands. II. 180.
- - - - - - - - - things perſonal. II. 399.
Joint-tenant, king cannot be. II. 409.
Jointure. II. 137. 180. v.
Ireland. I. 99.
Iron, ſtealing. IV. 233.
Irons to ſecure priſoners. IV. 297. 317.
Iſlands. II. 261.
Iſſuable terms. III. 353.
Iſſue at law. III. 313, 314.
- - -, collateral. IV. 389. v.
Iſſue, feigned. III. 452.
- - - in criminal caſes. IV. 333. iii. v.
- - - - equity. III. 448.
- - -, joinder of. III. 315. x. IV. 334. iii.
- - -, tender of. III. 313.
Itinerant courts. IV. 404. 415.
- - - - juſtices. III. 57. IV. 415.
Judges. I. 267. III. 25. IV. 433.
- - - -, aſſaulting them. IV. 125.
- - - -, how counſel for priſoners. IV. 349.
- - - -, killing them. IV. 84.
- - - -, their commiſſions. I. 267.
- - - -, threatening or reproaching them. IV 126.
Judgment. II. xix. III. 395. v, vi. xii. xxiv. xxvi.
- - - -, action on. III. 158, 159. 421.
- - - - in criminal caſes. IV. 368. iv.
- - - -, property by. II. 436.
- - - , relieved againſt in equity. III. 437.
Judices ordinarii. III. 315.
Judicial power. I. 267. 269.
- - - - writs. III. 282.
Judicium Dei. IV. 336.
- - - - - *parium*. III. 350.
Jure divino right to the throne. I. 191.
- - - - - - - - - - - tithes. II. 25.
Jure, king *de*. I. 204. IV. 77.
Juris utrum, writ of. III. 252.
Juriſdiction, encroachment of. III. 111.
- - - - - - - of courts, ſettled by Edw. I. IV. 418, 419.
- - - - - - - -, plea to. III. 301. IV. 327.
Jurors, fining or impriſoning. IV. 354.
Jury, trial by. III. 349. IV. 342. 407. 434.
Jus accreſcendi. II. 184. v.
- - *ad rem*. II 312.
- - *duplicatum*. II. 199.
- - *fiduciarium*. II. 328.
- - *in re*. II. 312.
- - *legitimum*. II. 328.
- - *patronatus*. III. 246.
- - *precarium*. II. 328.
Juſtice, free courſe of. I. 141.
- - - -, homicide in advancement of. IV. 179.
- - - -, king the fountain of. I. 266.
- - - -, neglect or refuſal of. III. 109.
- - - -, offences againſt. IV. 128.
Juſtice-ſeat, court of. III. 72.
Juſticies, writ of. III. 36.
Juſtifiable homicide. IV. 178.
Juſtification, ſpecial. III. 306.
Juſtifying bail. III. 291.

K.

Keeper, lord. III. 47.
Kidnapping. IV. 219.
Kindred, how numerous. II. 205.
King. I. 190.
- - - can do no wrong. I. 246. III. 254. IV. 32.
- - -, compaſſing or imagining his death. IV. 76.
- - -, his councils. I. 227.
- - - - - counſel. III. 27.
- - - - - courts, contempts againſt. IV. 124.
- - - - - dignity. I. 241.
- - - - - duties. I. 226.
- - - - - enemies, adhering to. IV. 82.
- - - - - government, contempts againſt. IV. 123.
- - - - - grants. II. 346.
- - - - - money, counterfeiting. IV. 84.
- - - - - palaces, contemps againſt. IV. 124.
- - - - - perfection. I. 246.
- - - - - perpetuity. I. 249.
- - - - - perſon, contempts againſt. IV. 123.
- - - - - pleaſure, how underſtood. IV. 121.
- - - - - power. I. 250.
- - - - - prerogative. I. 237.
- - - - - - - - - -, contempts againſt. IV. 122.
- - - - - - - - - -, felonies againſt. IV. 98.
- - - - - - - - - - in debts, judgments, and executions. III. 420.
- - - - - revenue, extraordinary. I. 306.
- - - - - - - - -, ordinary. I. 281.
- - - - - royal family. I. 219.
- - - - - ſeals. II. 346, 347. III. 47.
- - - - - - - -, counterfeiting. IV. 83. 89.
- - - - - ſilver. II. 350.
- - - - - ſovereignty. I. 241.
- - - - - title. I. 190.
- - - - - - - -, contempts againſt. IV. 123.
- - - - - ubiquity. I. 270.
- - -, injuries to or by. III. 254.
- - -, levying war againſt. IV. 81.
- - -, refuſal to adviſe or aſſiſt him. IV. 122.
King's bench, court of. III. 41. IV. 262.
- - - - - -, juſtices of, killing them. IV. 84.
Knight bachelor. I. 404.
- - - - banneret. I. 401.
- - - - of the bath. I. 404.
- - - - - - - garter. I. 140.
- - - - - - - ſhire, his electors. I. 172.
- - - - to be returned on a lord's jury. III. 359.
Knight's-fee. I. 405. 409. II. 62.
Knighthood. II. 69. IV. 430.
Knight-ſervice. II. 62.

L.

Labour, foundation of property. II. 5.
- - - -, hard. IV. 370.
Labourers. I. 406. 426.
Laches. I. 247.
- - - - of infant. I. 465.
Laeſae majeſtatis, crimen. IV. 75. 89.
Laeſione fidei, ſuit *pro*. III. 52.
Laity. I. 396.
Lancaſter, county palatine of. I. 116.
- - - - - - - - - - - - - -, it's courts. III. 78.
- - - - -, duchy of, it's courts. III. 78.
Lands. II. 16, 17.
- - - -, property in. II. 7.
Land-tax. I. 308. IV. 416.
Lapſe. II. 276. IV. 106.
Lapſed legacy. II. 513.
Larciny. IV. 229.
- - - -, appeal of. IV. 310.
- - - -, compound. IV. 240.
- - - - from the houſe. IV. 240.
- - - - - - - - - perſon. IV. 241.
- - - -, grand. IV. 229.
- - - -, mixed. IV. 240.
- - - -, only of things perſonal. IV. 232.
- - - -, petit. IV. 229.
- - -, ſimple. IV. 230.
Lathes. I. 116.
Latitat, writ of. III. 286. xviii.
Law. I. 38.
- - -, amendment of, ſtatute for. IV. 434.
- - -, and equity, courts of, how diſtinguiſhed. III. 429.
- - -, canon. I. 14. 19. 79. 82, 83.
- - -, civil. I. 80.
- - - - - - and canon, authority of. I. 14. 79. 83. IV. 414, 415.
- - - - - - - - - - -, rejected by the Engliſh nobility. I. 19.
- - -, common. I. 63. 67.
- - -, divine or revealed. I. 42.

Law, divine or revealed, offences againſt. IV. 43.
- - -, feodal. II. 44. IV. 411.
- - - french. III. 317. IV. 409. 421.
- - - greek. III. 321.
- - -, hiſtory of. IV. 400.
- - - latin. III. 319. IV. 421.
- - -, martial. I. 412. IV. 429.
- - - merchant. I. 273. IV. 67.
- - -, municipal. I. 44.
- - - of nations. I. 43.
- - - - - - -, offences againſt. IV. 66.
- - - - nature. I. 39.
- - - - parliament. I. 163.
- - - ſide of the chancery. III. 47.
- - - - - - - - exchequer. III. 45.
- - -, ſtatute. I. 85.
- - -, unwritten. I. 63. IV. 401.
- - -, wager of. III. 341. IV. 407. 417.
- - -, written. I. 85.
Lawing of maſtiffs. III. 72.
Lay corporations. I. 470.
- - - inveſtiture of biſhops. I. 378.
Lazarets, eſcaping from. IV. 162.
Lead, ſtealing. IV. 233.
Leading interrogatories. III. 449.
Leap-year. II. 141.
Leaſe. II. 317. ii.
- - - - and releaſe. II. 339. ii.
- - - -, entry, and ouſter, rule to confeſs. III. 204. ix.
Leet. IV. 270. 404. 417.
Legacies. II. 512.
- - - - -, ſubtraction of. III. 98.
Legal eſtates for life. II. 124. 126. 129.
Legatine conſtitutions. I. 82.
Legiſlative power. I. 147.
Legiſlature, how far controllable. I. 161.
Legitimate child. I. 446.
Lending. II. 454.
Letter, demanding money, &c. IV. 144.
- - - - miſſive, for electing a biſhop. I. 379.
- - - - - - - -, in chancery. III. 445.
- - - -, threatening. IV. 144.
Letters patent. II. 346.
Levant and *couchant*. III. 9. 239.
Levari facias, writ of. III. 417.
Levitical degrees. I. 435.
Levying money without conſent of parliament. I. 140.
- - - - - war againſt the king. IV. 81.
Lewdneſs. IV. 64.
Lex manifeſta. III. 344.
- - *talionis*. IV. 12.
Libel, immoral or illegal. IV. 150.
Libel, in eccleſiaſtical courts. III. 100.
- - -, malicious. III. 125. IV. 150.
Liberam legem, loſing. III. 340. IV. 342.
Liberties or franchiſes. II. 37.
Liberty, civil. I. 6. 125.
- - - -, natural. I. 125.
- - - - of the preſs. IV. 151.
- - - -, perſonal. I. 134.
- - - - - - - - -, crimes againſt. IV. 218.
- - - -, perſonal, injuries to. III. 127.
- - - -, political. I. 125.
Licence for marriage. I. 439.
- - - - from the pope. IV. 114.
- - - - of alienation. II. 72.
- - - - - mortmain. II. 269.
- - - - to agree, in a fine. II. 350. xiv.
Licenſed curate. I. 394.
Licenſing of books. IV. 152. 432.
Licentia concordandi. II. 350. xiv.
- - - - *loquendi*. III. 298.
Liege. I. 367.
Lieutenant, lord. I. 410.
Life. I. 129.
- - -, crimes againſt. IV. 177.
- - -, eſtate for. II. 120. v.
Ligan. I. 292. III. 106.
Ligeance. I. 366.
Light. II. 14.
- - - houſes. I. 264.
- - - preſumption. III. 372.
Limbs. I. 130.
Limitation of entries and actions. III. 178. 188. 192. 196. 250. IV. 429.
- - - - - - - eſtate. II. 155.
- - - - -, ſtatutes of. III. 306.
Limited adminiſtration. II. 506.
- - - - fee. II. 109.
- - - - property. II. 391.
Lineal conſanguinity. II. 203.
- - - - deſcent. II. 210.
- - - - - - - - - of the crown. I. 194.
- - - - warranty. II. 301.
Lip, cutting of. IV. 207.
Literary property. II. 405.
Litigious church. III. 244. 246.
Littleton. I. 73.
Liturgy, reviling of. IV. 50.
Livery in chivalry. II. 68.
- - - - - deed. II. 315.
- - - - - law. II. 316.
- - - - of ſeiſin. II. 311. i.
Loans, compulſive. I. 140. IV. 429.
Local actions. III. 294.
Locality of trial. III. 384.
Locks on rivers, deſtroying. IV. 144.

Logic, it's effects upon law and theology. I. 33. II. 58. IV. 410.
Lollardy. IV. 47.
London, courts of. III. 80.
- - - -, cuſtoms of. I. 75, 76. II. 517.
- - - -, franchiſes of, not forfeitable. III. 264. IV. 417.
- - - -, mayor and aldermen of, their certificate. III. 334.
Lord and vaſal. II. 53.
- - -, feodal. II. 53.
Lords committees for courts of juſtice. III. 57.
- -, houſe of, it's attendants. I. 168.
- - - may kill the king's deer. I. 167.
- - - ſpiritual. I. 155.
- - - temporal. I. 157.
- - - triors. IV. 259, 260. 433.
Lotteries. IV. 168.
Lunatics. I. 304. II. 291. IV. 24. 388.
- - - - -, cognizance of. III. 427.
- - - - -, marriage of. I. 439.
Luxury. IV. 170.

M.

Madder roots, ſtealing them. IV. 233.
Magiſtrates. I. 146.
- - - - - -, oppreſſion of. IV. 140.
- - - - - -, ſubordinate. I. 338.
- - - - - -, ſupreme. I. 338.
Magna aſſiſa eligenda, writ *de*. III. 351.
- - - - *carta*. I. 127. IV. 416. 418.
- - - - - -, it's contents. IV. 416, 417.
Mainour. III. 71. IV. 303.
Mainpernors. III. 128.
Mainprize, writ of. III. 128.
Maintenance of baſtards. I. 458.
- - - - - - - children. I. 447.
- - - - - - - parents. I. 454.
- - - - - - - ſuits. I. 428. IV. 134.
- - - - - - - wife. I. 442.
Making law. III. 343.
Mala in ſe. I. 54.
- - - *prohibita*. I. 57.
Mal-adminiſtration of government. IV. 121.
Male preferred to female in deſcents. I. 194. II. 212.
- - - line preferred to female. I. 194.
- - - ſtock preferred to female. II. 234.
Malice expreſs. IV. 199.
- - - - implied. IV. 200.
- - - - prepenſe. IV. 198. 206.
Malicious miſchief. IV. 243.
Malicious proſecution. III. 126.
Malt-tax. I. 313.
Man, iſland of. I. 105.
Mandamus, writ of. III. 110. 264. IV. 434.
Mandates royal to the judges in private cauſes. I. 142. IV. 419.
Manhood. II. 54.
Manor. II. 90.
Manſion-houſe. IV. 224.
Manſlaughter. IV. 191.
- - - - - - -, conviction of. IV. iv.
Manſtealing. IV. 219.
Manufacturers, ſeducing them abroad. IV. 160.
Manufactures, encouragement of. IV. 421.
Manumiſſion of villeins. II. 94. 347.
Marchers, lords. I. 398.
Marches. I. 398.
Mariners, wandring. IV. 164.
Maritime cauſes. III. 106.
- - - - - courts. III. 69.
- - - - - ſtate. I. 417.
Mark, ſubſcribed to deeds. II. 305.
Market. I. 274. III. 218.
- - - -, clerk of, his court. IV. 272.
- - - - overt. II. 449.
- - - - towns. I. 114.
Marque and repriſal. I. 258.
Marqueſſes. I. 397.
Marriage. I. 433.
- - - - -, clandeſtine or irregular. I. 439. IV. 163.
- - - - - contract, ſuit for. III. 93.
- - - - -, forcible. IV. 208.
- - - - - in chivalry. II. 70. IV. 411. 413, 414.
- - - - - - ſocage. II. 89.
- - - - - licences and regiſters, forging or deſtroying. IV. 163. 246, 247.
- - - - -, property by. II. 433.
- - - - -, ſettlement. II. 364.
- - - - - - - - - -, it's antiquity. II. 138.
Marriages, when good. I. 440.
Marſhall of the king's bench. III. 42.
- - - - - - - - - - - - - -, cuſtody of. III. 283.
- - - - - - - - - - - hoſt, certificate of. III. 334.
Marſhalſea, court of. III. 76. IV. 273.
Martial, courts. I. 414.
- - - - law. I. 412. IV. 429.
Maſs books. IV. 115.
Maſter and ſervant. I. 423.
- - - - in chancery. III. 442.
- - - -, injuries to. III. 141.

Maſter of the rolls. III. 442.
- - - - - - - - - -, his judicial authority. III. 450.
Materia prima. III. 322.
Materna maternis. II. 236.
Matrimonial cauſes. III. 92.
Matrons, jury of. III. 362. IV. 388.
Maxims. I. 68.
Mayhem. I. 130. III. 121. IV. 205.
- - - - -, appeal of. IV. 310.
- - - - -, inſpection of. III. 332.
Mayors. IV. 406.
Meaſures. I. 274. IV. 272. 417.
- - - - -, falſe. IV. 157.
Mediate ſtates of the empire. II. 60.
Medietate linguae, jury *de*. III. 360. IV. 166. 346.
Mediterranean paſſes, counterfeiting of. IV. 246.
Members of parliament. I. 153.
Memory, time of. II. 31.
Menaces. III. 120.
Menial ſervants. I. 425.
Menſa et thoro, divorce *a*. I. 440. III. 94.
Mercen-lage. I. 65. IV. 405.
Merchants, cuſtom of. I. 75.
- - - - -, foreign. I. 260. IV. 417.
Mercheta. II. 83.
Mere right. II. 197.
- - - - - -, not aſſignable. II. 290.
Merger. II. 177.
Meſne lords. II. 59.
- - - - proceſs. III. 279. 415.
- - - -, writ of. III. 234.
Metaphyſics, their effects upon law and theology. II. 58. IV. 410.
Michel-gemote. I. 147.
Michel-ſynoth. I. 147.
Middleſex, bill of. III. 285. xviii.
Migration. II. 7.
Military cauſes. III. 103.
- - - - - courts. III. 68.
- - - - - feuds. II. 57.
- - - - - offences. I. 414. IV. 101.
- - - - - power of the crown. I. 262.
- - - - - ſtate. I. 407.
- - - - - tenures. I. 287.
- - - - - teſtament. I. 416.
Mines. I. 294.
- - - -, deſtroying their works. IV. 245.
- - - -, ſtealing oré out of. IV. 234.
Minority, none in the king. I. 248.
Minors not to ſit in parliament. I. 162.
Minſtrells. II. 96.
Miſ-adventure, homicide by. IV. 182.
Miſchief, malicious. IV. 243.
Miſdemeſnor. IV. 1. 5.
Miſe. III. 305. v.
Misfortune. IV. 26.
Miſnoſmer. III. 302. IV. 328.
Miſ-pleading, when cured by verdict. III. 394.
Miſpriſion. IV. 119.
- - - - - - of felony. IV. 121.
- - - - - - - treaſon. IV. 120.
Miſtake. IV. 27.
Miſ-uſer. II. 153.
Mitter le droit. II. 325.
- - - - *l' eſtate*. II. 324.
Mittimus. IV. 297.
Mixed actions. III. 118.
- - - - larciny. IV. 240.
- - - - tithes. II. 24.
Modus decimandi. II. 29.
Moërda. IV. 194.
Molliter manus impoſuit. III. 121.
Monarchy. I. 49.
Money. I. 276.
- - - - bills. I. 170. 184.
- - - - counterfeiting. IV. 84. 88.
- - - - received to another's uſe, action for. III. 162.
Monk. I. 132.
Monopolies. IV. 159. 429.
- - - - - - -, ſtay of ſuits therein. IV. 115.
Monſters. II. 246.
Monſtrans de droit. III. 256.
Month. II. 141.
Monuments. II. 428.
Mort d' anceſtor, aſſiſe of. III. 185.
Mortgage. II. 157. IV. 435.
- - - - - -, how conſidered in equity. III. 435.
Mortmain. I. 479. II. 268. IV. 108. 417. 419. 434.
Mortuaries. II. 425.
Mortuo vadio, eſtate *in*. II. 157.
Mother-church. I. 112.
Motion in court. III. 304.
Moveables. II. 384.
- - - - - -, property in. II. 5.
Mount, or bank. I. 326.
Mountebanks. IV. 167.
Mulier puiſné. II. 248.
Multiplicity of laws, it's original. III. 325.
Municipal law. I. 44.
Murder. IV. 194.
- - - - - by perjury. IV. 138. 196.
- - - - -, conviction of. IV. i.
- - - - -, indictment of. IV. ii.

Murder, when pardonable. IV. 194. 393.
Murdrum. III. 321. IV. 195.
Muta eanum. II. 427.
Mute, ſtanding. IV. 319.
- - - - - - - -, adviſing it. IV. 126.
Mutilation. I. 130. III. 121. IV. 207.
- - - - - -, puniſhment by. IV. 370.
Mutiny-act. I. 414.
Mutual debts. III. 305.

N.

National debt. I. 325. IV. 433.
Nations, law of. I. 43. IV. 66.
Nativi. II. 94.
Natural liberty. I. 125.
- - - - - life. I. 132. II. 121.
- - - - - perſons. I. 123.
Naturalborn ſubjects. I. 366. 371.
Naturalization. I. 374. II. 250.
Nature, crime againſt. IV. 215.
- - - -, guardian by. I. 461.
- - - -, law of. I. 39.
Navigation acts. I. 417. IV. 432.
Navy, articles of. I. 420.
Ne admittas, writ of. III. 248.
- - *exeat regnum.* I. 137. 266. IV. 122.
- - *injuſte vexes*, writ of. III. 234.
Neceſſity. IV. 27.
- - - - -, homicide by. IV. 178.
Negative in corporations. I. 478.
- - - - - of the king. I. 154.
Neglect of duty, action for. III. 163.
Negligence of officers. IV. 140.
Negligent eſcape. III. 415. IV. 130.
Negro. I. 127. 425. II. 402.
Neiſe. II. 94.
Nembda. III. 350.
New aſſignment. III. 311.
- - - trial. III. 387. IV. 355. 431.
News, falſe. IV. 149.
Next of kin. II. 224.
Night, in burglary, what. IV. 224.
Nightwalkers. IV. 289.
Nihil dicit, judgment by. III. 296. 397.
- - -, return of, to writs. III. 282. xiv.
Nil debet, plea of. III. 305.
Niſi prius, courts of. III. 57.
- - - - -, juſtices of. III. 59. IV. 266.
- - - - -, trial at. III. 353.
- - - - -, writ of. III. 354. x.
Nobility. I. 396.
- - - - -, it's uſes. I. 157.
Nocturnal crimes, how prevented or reſiſted. IV. 180.
Non aſſumpſit. III. 305.
- - - - - - - *infra ſex annos.* III. 308.
- - *compos mentis.* I. 304. II. 497. IV. 24. 388.
- - *cul.* IV. 333.
- - *culpabilis*, plea of. III. 305. IV. 333.
- - *decimando*, preſcription *de.* II. 31.
- - *eſt factum*, plea of. III. 305.
- - *eſt inventus*, return of. III. 283. xiv, xv. xviii.
- - *obſtante.* I. 342. II. 273. IV. 394.
- - *proſequitur.* III. 296.
- - *ſum informatus*, judgment by. III. 397.
Non-claim in fines. II. 354.
- - - - - - of infants. I. 465.
Nonconformity. IV. 51. 425.
Nonjuror. IV. 124.
Non-payment of eccleſiaſtical dues. III. 89.
Non-reſidence. II. 322.
Nonſuit. III. 296. 316. 376. v.
- - - -, judgment as in caſe of. III. 357.
Non-uſer. II. 153.
Northern borders, rapine on. IV. 243.
Norman conqueſt. I. 99. IV. 407, 408.
- - - - - iſles. I. 106.
Noſe, cutting off or ſlitting. IV. 207. 246. 370.
Not guilty, plea of. III. 305. x. IV. 322. iii.
Note of a fine. II. 351. xv.
- - - - - hand. II. 467.
Notice in ejectment. III. 203. viii.
- - - - of trial. III. 357.
Novel diſſeiſin, aſſiſe of. III. 187.
Novels, in the civil law. I. 81.
Nudum pactum. II. 445.
Nul diſſeiſin, plea of. III. 305. II. xviii.
- - *tiel record.* III. 331.
- - *tort*, plea of. III. 305.
Nuncupative wills. II. 500.
Nurture, guardian for. I. 461.
Nuſance, abatement of. III. 5.
- - - - -, aſſiſe of. III. 220.
- - - - -, common. IV. 166.
- - - - -, private. III. 216.

O.

Oath *ex officio.* III. 101. 447.
- - - of the party. III. 382. 437.
Oaths to the government, refuſal or neglect to take them. I. 368. IV. 115, 116. 123.
- - - -, voluntary and extrajudicial. IV. 137.
Obedience to parents. I. 452.

Objects of the laws of England. I. 121.
Obligation of human laws. I. 57.
- - - - -, or bond. II. 340. xiii. III. xix.
Obſtructing of proceſs. IV. 129.
Occupancy. II. 3. 8. 258. 400.
Odhal right. II. 45.
Odio et atia, writ *de*. III. 128.
Oeconomy, public, offences againſt. IV. 162.
Office found. III. 259.
- - -, inqueſt of. III. 258.
Officers, arreſt by. IV. 289.
- - - -, killing them in executing their office. IV. 200.
- - - - of courts, their certificates. III. 336.
- - - -, refuſal to admit. III. 264.
- - - -, removal of. III. 264.
Offices. I. 272. II. 36.
- - - - and penſions, duty on. I. 325.
Officio, oath *ex*. III. 101. 447.
Oleron, laws of. I. 417. IV. 416.
Opening counſel. III. 366.
Oppreſſion of crown, how remedied. I. 243.
- - - - - - - magiſtrates. IV. 140.
Option of the archbiſhop. I. 381.
Optional writs. III. 274.
Orchards, robbing of. IV. 233.
Ordeal, trial by. IV. 336. 407. 418.
Order of ſeſſions. IV. 269.
Orders, holy. I. 388.
Original contract of king and people. I. 233.
- - - - - - - - - - ſociety. I. 47.
- - - - - conveyances. II. 310.
- - - - - of a deed. II. 296.
- - - - - proceſs. III. 279.
- - - - - writ. III. 272. vii. xiii.
Orphanage. II. 519.
Oſtium eccleſiae, dower *ad*. II. 132.
Overſeers of the poor. I. 359.
Overt act of treaſon. IV. 79. 86. 350.
- - -, market. II. 449.
- - -, pound. III. 12.
Ouſter of chattels real. III. 198.
- - - - - freehold. III. 167.
Ouſterlemain. II. 68.
Outlawry. I. 142. III. 284. xvi. IV. 314.
Owling. IV. 154.
Oyer. III. 299. xxii.
- - - and *terminer*, commiſſion of. IV. 266. i.
- - - - - - - - -, juſtices of, killing them. IV. 84.
Oyez. IV. 334.

P.

Pains and penalties, act to inflict. IV. 256.
Pais, matter *in*. II. 294.
- - -, trial *per*. III. 349. IV. 342.
Palace court. III. 76.
Palatine counties. I. 116. IV. 424.
- - - - - - - -, their courts. III. 78.
Pandects. I. 81.
- - - - diſcovered. I. 17. 81.
Panel of jurors. III. 354. IV. 299. 344.
Papal encroachments. IV. 104.
- - - proceſs, obedience to. IV. 114.
Paper book. III. 317.
- - - credit. II. 466. IV. 434.
Papirian code. I. 81.
Papiſts, children of. I. 449. 451.
- - - -, incapacities of. II. 257. 293.
- - - -, laws againſt. II. 54. 87. 425.
Paramount, lord. II. 59. 91.
Paraphernalia. II. 435.
Paravail, tenant. II. 60.
Parcels in a conveyance. II. i, ii. iv.
Parceners. II. 187.
Parco facto, writ *de*. III. 146.
Pardon. IV. 331. 369. 389.
- - - - not pleadable to impeachment. I. 334. IV. 258. 392. 433.
Pardoning, prerogative of. I. 269. IV. 390.
Parent and child. I. 446.
- - - -, injuries to. III. 140.
Parental power. I. 452.
Parents, &c, their conſent to marriage. I. 437.
Pares curtis. II. 54.
- - -, trial *per*. III. 350.
Pariſh. I. 111.
Pariſh-clerk. I. 395.
Park. II. 38. 416.
Parliament. I. 141. 147. IV. 405. 418. 421.
- - - - - -, court of the king in. IV. 256. 260.
- - - - - -, diſuſe of. IV. 430.
- - - - - - of France. I. 147.
- - - - - -, power of. I. 160.
- - - - - - rolls. I. 181.
- - - - - -, ſummons of. I. 150.
Parliamentum indoctum. I. 177.
Parol conveyances. II. 297.
- - -, demur of. III. 300.
- - - evidence. III. 369.
- - - or pleadings. III. 293.
Parricide. IV. 202.
Parſon. I. 384.

Parſon imparſonee. I. 391.
Particular eſtate. II. 165.
- - - - - tenants, alienation by. II. 274.
Parties to a deed. II. 298. ii, iii.
- - - - - - fine. II. 355.
Partition. II. 189.
- - - - -, deed of. II. 323.
- - - - -, writ of. II. 189.
Partnerſhip, cognizable in equity. III. 437.
Paſs-ports. I. 260.
- - - - -, violation of. IV. 68.
Paſture, common of. II. 32.
Patents. II. 346.
- - - - for new inventions. IV. 159.
- - - - of peerage. I. 400.
- - - - - precedence. III. 28.
Patent-rolls. II. 346.
- - - writs. II. 346.
Paterna paternis. II. 236.
Patriam, trial *per*. III. 349. IV. 342.
Patronage. II. 21.
- - - - -, diſturbance of. III. 242.
Pauper-cauſes. III. 400.
Pawns. II. 452.
Payment of deceaſed's debts. II. 511.
- - - - - - money into court. III. 304.
Peace and war, right of making. I. 257.
- - -, breach of. IV. 142.
- - -, commiſſion of. I. 351. IV. 267.
- - -, conſervation of. I. 349.
- - -, juſtices of. I. 349. IV. 267. 279. 289. 421.
- - - - - - - -, conviction by. IV. 278.
- - -, offences againſt. IV. 142.
- - -, ſecurity for. IV. 248. 251.
- - -, the king's. I. 117. 268. 350.
Peculatus. IV. 122.
Peculiars, court of. III. 65.
Pecuniary cauſes, in eccleſiaſtical courts. III. 88.
- - - - - legacies. II. 512.
Peerage, benefit of, in offences. IV. 360.
Peereſſes. I. 402.
Peers, great council of. I. 227, 228.
- - -, hereditary counſellors of the crown. I. 227.
- - -, houſe of. III. 53.
- - -, pedigrees of. III. 106.
- - -, privileges of. I. 401. III. 359. IV. 250. 360.
- - -, proteſts of. I. 168.
- - -, proxies of. I. 168.
- - -, trial by. I. 401. IV. 257. 342.
Peine forte et dure. IV. 320.
Penal ſtatutes. I. 88. IV. 422.
Penalty of a bond. III. 435.
Penance, commutation of. IV. 105. 217. 273.
- - - - - for ſtanding mute. IV. 320.
- - - - - in eccleſiaſtical courts. IV. 105. 272. 361.
Pendente lite, adminiſtration. II. 503.
Penſion, eccleſiaſtical. I. 281. II. 40.
- - - - from the crown. I. 176.
- - - - from foreign princes. IV. 122.
Penſioners excluded from the houſe of commons. I. 175.
People. I. 366.
Per et cui, writ of entry in. III. 181.
- - *my et per tout*, ſeiſin. II. 182.
- - *quod*. III. 124.
- -, writ of entry in. III. 181.
Peremptory challenge. IV. 346. 389.
- - - - - - *mandamus*. III. 111. 265.
- - - - - - writ. III. 274.
Perfection of the king. I. 246.
Perjury. IV. 136.
- - - - in capital caſes. IV. 138. 196.
Permiſſive waſte. II. 281.
Pernancy of profits. II. 163.
Perpetual curate. I. 394.
Perpetuating the teſtimony of witneſſes. III. 450.
Perpetuity of the king. I. 249.
Perſecution, religious. IV. 46. 421. 425.
Perſon, injuries to. III. 119.
- - - -, larciny from. IV. 241.
- - - -, offences againſt. IV. 177.
Perſonal actions. III. 117.
- - - - - - - -, where they die with the perſon. III. 302.
- - - - aſſets. II. 510.
- - - - chattels. II. 387.
- - - - ſecurity. I. 129.
- - - - things. II. 384.
- - - - tithes. II. 24.
Perſonating others in courts, &c. IV. 128.
- - - - - proprietors of ſtock. IV. 246.
Perſons artificial. I. 123. 467.
- - - - natural. I. 123.
- - - -, rights of. I. 122.
Peter-pence. IV. 106.
Petit jury. III. 351.
- - - larciny. IV. 229.
- - - ſerjeanty. II. 81.
- - - ſeſſion. IV. 269.
- - - treaſon. IV. 75. 203.
Petition of appeal. III. 454.
- - - - - bankruptcy. II 480.
- - - - - right. I. 128. III. 256. IV. 430.

Petitioning, right of. I. 143. IV. 147.
- - - - - -, tumultuous. I. 143. IV. 147.
Petty bag office. III. 49.
- - - conſtables. I. 355.
Pews. II. 428.
Phyſicians, &c. III. 122. IV. 197.
Picpoudre, court of. III. 32.
Pignus. II. 159.
Pillory. IV. 370.
Piracy. IV. 71.
Piſcary, common of. II. 34. 39.
Placemen, excluded from the houſe of commons. I. 175. IV. 433.
Plagiarii. IV. 219.
Plague, irregularity during. IV. 161.
Plaint. III 273.
Plaintiff. III. 25.
Plantations. I. 106.
- - - - - -, deſtroying of. IV. 245.
Plants, ſtealing of. IV. 233.
Plea, at law. II. xviii. III. 301. x. xxii.
- - - in bar of execution. IV. 389. v.
- - - - equity. III. 446.
- - - to indictment. IV. 326. iii.
Pleadings. III. 293. IV. 420.
Pleas of the crown. III. 40. IV. 2. 417.
Pleaſure of the king, how underſtood. IV. 121.
Plebiſcita. I. 80.
Pledge. II. 452.
- - -, eſtates in. II. 157.
Pledges of appearance. III. 280. vii. xiii.
- - - - - - battel. III. iv.
- - - - - - proſecution. II. xiv. xvii. III. 275. III. i. iii. vii, viii. xiii.
Plegii de proſequendo in replevin. III. 147.
- - - - *retorno habendo*. III. 147.
Plena probatio. III. 371.
Plenarty. III. 243.
Plenum dominium. II. 312.
Plough-bote. II. 35.
Pluries habeas corpus. III. 135.
- - - writ. III. 283. xv. IV. 314.
Pocket-ſheriffs. I. 342.
Poiſoning. IV. 196.
Police, offences againſt. IV. 162.
Policies of inſurance. II. 460. IV. 434.
- - - - - - - - - -, court of. III. 74.
Political liberty. I. 125.
Poll, deed. II. 296.
Polls, challenge to. III. 361. IV. 346.
Polygamy. I. 436. IV. 163.
Pone, writ of. III. 34. 195. 280. ii. xiii.
Poor. I. 359.
Poor-laws. I. 131. 359. IV. 425.
Poors-ſettlements. I. 362.
Pope, his authority, how demoliſhed. IV. 104. 414. 421. 423.
- - - - - encroachments. IV. 104. 412. 417, 418.
- - - - - juriſdiction, defending it. IV. 87. 115.
- - -, reconciliation to. IV. 87.
Popery. IV. 54.
Popiſh books, importing or ſelling. IV. 115.
- - - prieſts. IV. 56. 87. 115.
- - - recuſants. IV. 55. 124.
- - - ſeminaries, education in. I. 451. IV. 55. 115.
- - - - - - - - -, maintaining. IV. 115.
Popular actions. II. 437. III. 160.
Portions, method of raiſing. II. vii.
Port-reeve. IV. 406.
Ports and havens. I. 264.
Poſitive proof. III. 371.
Poſſe comitatus. I. 343.
- - - - - - -, neglecting to join. IV. 122.
Poſſeſſion, actual right of. III. 180.
- - - - -, apparent right of. III. 177. 179.
- - - - -, eſtates in. II. 163.
- - - - -, naked. II. 195. III. 177.
- - - - -, property in. II. 389.
- - - - -, right of. II. 196.
- - - - -, writ of. III. 202. 412. xii.
Poſſeſſory action. II. 198. III. 180.
Poſſibilities not aſſignable. II. 290.
Poſt, writ of entry in. III. 182.
Poſt-diſſeiſin, writ of. III. 188.
Poſtea. III. 386. xi.
Poſt-fine. II. 350.
Poſthumous children. II. 169.
Poſt-man in the exchequer. III. 28.
Poſt-office. I. 321.
- - - - -, miſbehaviour of it's officers. IV. 234.
Pound. III. 12.
Poundage. I. 315. IV. 430.
Pound-breach. III. 146.
Pow-dike, cutting. IV. 243.
Power of the crown. I. 250.
- - - - - - - parent. I. 452.
Poyning's law. I. 102, 103.
Praecipe, writ of. III. 274.
- - - - *in capite*, writ of. III. 195.
- - - - - - common recoveries. II. 358. xvii.
- - - - - - fines. II. 350. xiv.
- - - -, tenant to. III. 182.
Praemunire. IV. 102. 421.
Praetor's edicts. I. 80.
Pre-audience. III. 28.

Prebendary. I. 383.
Precedence. II. 225. 272. III. 105.
- - - - - -, patent of. III. 28.
Precedent conditions. II. 154.
Precept of election to parliament. I. 177.
Pre-contract. I. 434.
Predial tithes. II. 24.
Pre-emption. I. 287. IV. 116. 417. 432.
Pregnancy, plea of. IV. 387.
- - - - -, trial of. I. 456. IV. 388.
Premier ferjeant. III. 28.
Premiſes of a deed. II 298. i. ii. iii.
Prerogative. I. 141. 237. 252. IV. 424. 425.
- - - - - -, cauſes of it's increaſe and decline. IV. 426.
- - - - - -, comparative review of. I. 333. IV. 433.
- - - - - -, contempts againſt. IV. 122.
- - - - - - copyrights. II. 410.
- - - - - - court. II. 509. III. 65.
- - - - - -, felonies againſt. IV. 98.
- - - - - -, property by. II. 408.
Preſcription. II. 263.
- - - - - -, corporations by. I. 473.
- - - - - -, time of. II. 31.
Preſentation to benefices. I. 389. II. 23.
Preſentative advowſons. II. 22.
Preſentment of copyhold ſurrenders. II. 369.
- - - - - - offences. IV. 298.
Preſident of the council. I. 230.
Preſs, liberty of. IV. 151.
Preſſing of ſeamen. I. 418.
- - - - to death. IV. 323.
Preſumptions. III. 371.
Preſumptive evidence of felony. IV. 352.
- - - - - - heir. II. 208.
Pretended titles, ſelling or buying. IV. 135.
Pretender and his ſons, treaſons relating to. IV. 91.
Prevention of crimes. IV. 248.
- - - - - - - - - -, homicide for. IV. 180.
Price. II. 446. 454.
Prieſt. I. 388.
Primae preces. I. 381.
Primary conveyances. II. 310.
Primer fine. II. 350.
- - - *ſeiſin*. II. 66. 88. IV. 411.
Primogeniture. I. 194. II. 214. IV. 414.
Prince of Wales. I. 225.
Princes of the blood royal. I. 225.
Princeſs of Wales, violating her. IV. 81.
- - - - royal. I. 225.
- - - - - - -, violating her. IV. 81.
Principal and acceſſory. IV. 34.
- - - - - challenge. III. 363.
Prior. I. 155.
Priority of debts. II. 511.
Priſage. I. 314.
Priſon, breach of. IV. 130.
Prit. IV. 333.
Private act of parliament. I. 86. II. 344.
- - - - nuſance. III. 216.
- - - - perſons, arreſt by. IV. 289.
- - - - wrongs. III. 2.
Privately ſtealing from the perſon. IV. 141.
Privies to a fine. II. 355.
Privilege. I. 272.
- - - - -, bill of. III. 289.
- - - - - from arreſts. III. 289.
- - - - - of parliament. I. 164.
- - - - -, writ of. I. 166.
Privileged places. IV. 129.
- - - - - - villenage. II. 98.
Privilegia. I. 46.
Privilegium clericale. IV. 358.
- - - - - -, property *propter*. II. 394.
Privy council. I. 229.
- - - counſellor, killing or attempt to kill. I. 232. IV. 100.
- - - ſeal. II. 347.
- - - ſignet. II. 347.
- - - - - -, forging them. IV. 89.
- - - tithes. I. 388.
- - - verdict. III. 377. IV. 354.
Prize cauſes. III. 108.
- - - - - -, commiſſion of. III. 69.
Probable preſumption. III. 372.
Probate of will. II. 508.
Procedendo, writ of. I. 353. III. 109.
Proceſs, civil. III. 279. xiii.
- - - -, criminal. IV. 313.
- - - -, obſtructing it's execution. IV. 129.
Prochein amy. I. 464.
Proclamations by the king. I. 270. IV. 424.
- - - - - - - of a fine. II. 352. xvi.
- - - - - - - on attachment in chancery, III. 444.
- - - - - - - - - exigent. III. 284. xvi. IV. 314.
- - - - - - - - - the riot-act. IV. 143.
- - - - - - -, writ of. III. 284. xvi.
Proctor. III. 25.
Procuration-money. IV. 157.
Prodigals. I. 305.
Profaneneſs. IV. 59.
Profert in curia. III. xxii.
Profeſſion religious. I. 133.
Profeſſor of the laws, his duty. I. 35.
Profits of courts. I. 289.
Progreſs, royal. IV. 404.

Prohibition, declaration in. III. 113.
- - - - -, writ of. III. 112.
Promiſes. III. 157.
Promiſſory note. II. 467.
Promulgation of laws. I. 45.
Proofs. III. 368.
- - - - in eccleſiaſtical courts. III. 100.
Proper feuds. II. 58.
Property. I. 138. II. 1, 2.
- - - - -, crimes againſt. IV. 229.
- - - - -, injuries to perſonal. III. 144.
- - - - - - - - - - real. III. 167.
- - - - -, right of. II. 197. III. 190.
Prophecies, pretended. IV. 149.
Proprietary governments in America. I. 108.
Proprietate probanda, writ *de*. III. 148.
Prorogation of parliament. I. 186.
Proſecution by the king. I. 268.
- - - - - -, expenſes of. IV. 355.
- - - - - -, malicious. III. 126.
- - - - - - of offenders. IV. 298.
Protection of children. I. 450.
- - - - - - embaſſadors. I. 254.
- - - - -, writ of. III. 289.
Protector. I. 248.
Proteſt of bills and notes. II. 468, 469.
- - - - - lords in parliament. I. 168.
Proteſtant diſſenters. IV. 53.
- - - - - ſucceſſion. I. 216.
- - - - - - - - - -, treaſon againſt. IV. 90.
Proteſtation. III. 311. xxiii.
Province. I. 111.
Provincial conſtitutions. I. 82.
- - - - - governments in America. I. 108.
Proving will in chancery. III. 450.
Proviſions, papal. I. 60. IV. 107.
- - - - -, ſelling unwholeſome. IV. 162.
Proviſo, trial by. III. 357.
Proviſors, ſtatutes againſt. IV. 110, *&c.*
Proxies in the houſe of lords. I. 168.
Puberty, age of. IV. 22.
Public act of parliament. I. 85.
- - - - verdict. III. 377. IV. 354.
- - - - wrongs. IV. 1.
Publication of depoſitions. III. 450.
Pueritia. IV. 22.
Puis darrein continuance, plea. III. 316.
Puiſné barons of the exchequer. III. 44.
- - - juſtices. III. 40, 41.
Pulling down churches, houſes, *&c.* IV. 143.
Pulſation. III. 120.
Puniſhment. IV. 7.
- - - - - -, capital. IV. 9. 18. 237. 434.
- - - - - -, certainty of. IV. 371.
- - - - - -, end of. IV. 11. 249.
- - - - - -, inflictions of. IV. 255.
- - - - - -, meaſure of. IV. 12.
- - - - - -, power of. IV. 7.
- - - - - -, ſeverity of. IV. 16.
Pur autre vie, tenant. II. 120.
Purchaſe. I. 215. II. 241.
- - - - - of writs. III. 273, 274.
Purchaſor, firſt. II. 220.
Pure villenage. II. 90.
Purgatio vulgaris. IV. 336.
Purgation, canonical. III. 342. IV. 361.
- - - - -, oath of. III. 100. 447.
Purpreſture. IV. 167.
Purſuit of remedies. III. 270.
Purveyance. I. 287. IV. 116. 417. 432.
Putting in fear. IV. 242.

Q.

Quadruplicatio. III. 310.
Qualification for killing game. II. 417. IV. 175.
- - - - - - of electors to parliament. I. 171.
- - - - - - - - jurors. III. 362.
- - - - - - - - juſtices of the peace. I. 352.
- - - - - - - - members of parliament. I. 175.
Qualified fees. II. 109.
- - - - - property. II. 391.
Quantum meruit. III. 161.
- - - - *valebat*. III. 161.
Quare clauſum fregit. III. 281.
- - - *ejecit infra terminum*, writ of. III. 206.
- - - *impedit*. III. 246.
- - - *incumbravit*. III. 248.
- - - *non admiſit*, writ of. III. 250.
Quarentine. II. 135.
- - - - -, irregularity in. IV. 161.
Quarrelling in church or church-yard. IV. 145.
Quartering of ſoldiers. I. 412. 414.
- - - - - - traitors. IV. 92. 370.
Quarter-ſeſſions, court of. IV. 268.
Quarto die poſt. III. 278.
Quaſhing. III. 303. IV. 315.
Quays. I. 264.
Que eſtate. II. 264.
Queen. I. 219.
- - - - Anne's bounty. I. 286.

Queen, compaſſing or imagining her death. IV. 76.
- - - - confort. I. 219.
- - - - dowager. I. 224.
- - - - gold. I. 221.
- - - -, her attorney and ſolicitor. I. 220. III. 28.
- - - - - - revenue. I. 220, 221.
- - - - regnant. I. 219.
- - - - - - - -, her huſband. I. 224.
- - - -, violating her. IV. 81.
Queſtion, or torture. IV. 320.
Qui tam actions. III. 160. IV. 303.
Quia dominus remiſit curiam, writ of right. III. 195.
Quia emptores, ſtatute of. II. 91. IV. 419.
Quick with child. IV. 388.
Quiet enjoyment, covenant for. II. x.
Quinto exactus. III. 283. xvi. IV. 314.
Quit-claim. II. xv.
Quit-rents. II. 42.
Quo minus, writ of. III. 45. 286. xix.
Quo warranto, information in nature of. I. 485. III. 263. IV. 307. 434.
- - - - - - -, writ of. III. 262.
Quod ei deforciat, writ of. III. 193.
- - - *permittat*, writ of. III. 240.
- - - - - - - *proſternere*, writ of. III. 221.
Quorum clauſe, in commiſſions. I. 351.

R.

Rack. IV. 320.
Rack-rent. II. 43.
Rank *modus*. II. 30.
Ranſom. IV. 372.
Rape, appeal of. IV. 310.
- - - in counties. I. 116.
- - - of women. IV. 210.
Rapina. IV. 241.
Raſure in a deed. II. 308.
Rationabili parte bonorum, writ *de*. II. 492.
- - - - - - - -, writ of right *de*. III. 194.
Rationabilis dos. II. 134.
Raviſhment of children. III. 141.
- - - - - - - ward. III. 141.
- - - - - - - wife. III. 139.
Reading of deeds. II. 304.
- - - -, on claim of clergy. IV. 360. 434.
Real actions. III. 117.
- - -, aſſets. II. 244. 302.
- - -, chattels. II. 386.
- - - compoſition for tithes. II. 28.
- - -, things. II. 16.
Reaſon of the law. I. 70.
Reaſonable part. II. 492. 516. IV. 401. 417.
Rebellion, commiſſion of. III. 444.
Rebutter. III. 310.
Recal of ſubjects from abroad. I. 266. IV. 122. 160.
Recaption. III. 4. IV. 356.
- - - - -, writ of. III. 150.
Receiving ſtolen goods. IV. 132.
Recitals in a deed. II. 298. iv.
Reclaimed animals. II. 391.
Recognizance. II. 341.
- - - - - - for the peace or good behaviour. IV. 249.
- - - - - - in nature of ſtatute ſtaple. II. 160. 342. IV. 424.
- - - - - - of bail. II. 391. xv.
- - - - - - - fine. II. xv, xvi.
Recompenſe in value. II. 358.
Reconciliation to the pope, *&c.* IV. 87.
Record. I. 69. III. 24. IV. 419.
- - - -, aſſurance by. II. 344.
- - - , court of. III. 24.
- - - -, debt of. II. 464.
- - - -, imbezzling of. IV. 128.
- - - - of actions. II. xviii. III. 317. iii. ix. xxi.
- - - - - - forcible entry or detainer. IV. 148.
- - - - - - riot. IV. 146.
- - - -, trial by. III. 330.
- - - -, vacating of. IV. 128.
Recordari facias loquelam. III. 34. 195.
Recovery, common. II. 116. 271. 357. xvii. IV. 422.
- - - - - in value. II. 358. xix.
- - - - - roll. II. 358. xvii.
Recreant. III. 340. IV. 342.
Rector of a church. I. 384.
Rectorial tithes. I. 388.
Recuſants, popiſh. IV. 55. 124.
Recuſatio judicis. III. 361.
Reddendum of a deed. II. 299. i. iii.
Re-diſſeiſin, writ of. III. 188.
Redreſs of injuries. III. 2.
Reference to maſters in chancery. III. 453.
Reformation of religion. IV. 423.
Refuſal of a clerk. I. 389.
Regalia, majora et minora. I. 241.
Regard, court of. III. 72.
Regardant, villeins. II. 93.
Regent. I. 240.
Regiſter of deeds. II. 343.
- - - - - marriages. IV. 163.

Regiſter of ſeamen. I. 420.
Regiſtrum omnium brevium. III. 183.
Regnant, queen. I. 219.
Regrating. IV. 158.
Rejoinder. III. 310.
- - - - - in error. III. xxv.
Rehearing. III. 453.
Relation back in bankruptcy. II. 486.
- - - - - - - - forfeiture. IV. 375. 379.
- - - - - - - - judgments. III. 420, 421.
Relations private. I. 422.
- - - - - public. I. 146.
Relative rights and duties. I. 123. 146.
Relator, in informations. III. 264. 427. IV. 304.
Releaſe of lands. II. 324. iii.
Relief. II. 56. 65. 87. IV. 411. 413, 414.
Religion, offences againſt. IV. 43.
Religious impoſtures. IV. 61.
Rem, information *in*. III. 262.
Remainder in chattels perſonal. II. 398.
- - - - - - of lands. II. 164.
- - - - - -, writ of formedon in. III. 192.
Remedial part of laws. I. 55.
- - - - - ſtatute. I. 86.
Remiſe. II. xv.
Remitter. III. 19. 189.
Removal of poor. I. 364.
Rent. II. 41. 57. 299.
- - - charge. II. 42.
- - -, remedy for. III. 6. 206. 231. IV. 434.
- - - ſeck. II. 42.
- - - ſervice. II. 41.
- - -, ſubſtraction of. III. 230.
Repleader. III. 395.
Replevin. III. 13. 170.
- - - - -, action of. III. 145.
Replicatio. III. 310.
Replication at law. III. 309. iv. xxiii.
- - - - - - in criminal caſes. IV. 333. v.
- - - - - - - equity. III. 448.
Reports by the maſter in chancery. III. 453.
- - - - of adjudged caſes. I. 71.
Repreſentation in deſcents. II. 217.
- - - - - - - - - - - - - of the crown. I. 194. 202.
- - - - - - - - - diſtribution. II. 517.
- - - - - - - - - parliament. I. 159.
Reprieve. IV. 387.
Repriſal of goods. III. 4.
Repriſals on foreigners. I. 258.
Republication of will. II. 379. 501.
Repugnant conditions. II. 156.
Reputation. I. 134.
- - - - -, injuries to. III. 123.
Requeſts, court of. I. 230. III. 50.
- - - - - - - - -, for ſmall debts. III. 81.
Rere-fiefs. II. 57.
Reſcripts of the emperor. I. 58.
Reſcous, writ of. III. 146.
Reſcue. III. 12. 170. IV. 125. 131.
Reſidence. I. 390. 392.
Reſiduum of inteſtates' effects. II. 514.
Reſignation. I. 382. 393.
Reſiſtance. I. 251. IV. 429. 433.
Reſpite of jury. III. 354. x.
Reſpondeat ouſter. III. 303. 396. IV. 332.
Reſpondentia. II. 459.
Reſponſa prudentum. I. 80.
Reſtitution in blood, *&c.* IV. 385.
- - - - - - of conjugal rights. III. 94.
- - - - - - - ſtolen goods. IV. 355.
- - - - - - - temporalties. I. 380. IV. 414.
- - - - - -, writ of. IV. 188. 356.
Reſtoration, *A. D.* 1660. I. 210. IV. 431.
Reſtraining ſtatute. I. 87.
- - - - - - - - - - of leaſes. II. 320. IV. 425.
Reſulting uſe. II. 335.
Retainer of debts. II. 511. III. 18.
- - - - - - ſervant by another. III. 142.
Retaliation. IV. 12.
Retorno habendo, plegii de. III. 147.
- - - - - - - -, writ *de*. III. 150. 413.
Retraxit. III. 296. 395.
Return, falſe or double. I. 180.
- - - - - -, action for. III. 111. 372.
- - - - of writs. III. 273.
- - - - - - - -, form of. II. xiv. xvii. xix. III. iii. v. vii. xii, xiii, xiv, xv, xvi, xvii. xix. xxi. xxv. xxvii.
Return-day of writs. III. 275.
Returns of the term. III. 277.
Revealed law. I. 42.
Revenue cauſes, cognizance of. III. 428.
- - - -, extraordinary. I. 306.
- - - -, ordinary. I. 281.
Reverſal of attainder. IV. 383.
- - - - - - judgment. III. 411. xxvi. IV. 383.
- - - - - - outlawry. III. 284. IV. 315. 384.
Reverſion. II. 175.
- - - - -, it's incidents. II. 176.
Revertendi animus. II. 392.
Reverter, writ of formedon in. III. 192.
Review, bill of. III. 454.
- - - - -, commiſſion of. III. 67.
Reviling church ordinances. IV. 50.
Revival of perſons hanged. IV. 399.
Revivor, bill of. III. 448.
Revocation of deviſes. II. 376.
- - - - - - - uſes. II. 335. 339. xi.

Revocation of will. II. 502.
Revolution, *A. D.* 1688. I. 211. IV. 433.
Rewards for apprehending offenders. IV. 291.
- - - - - - - discovering accomplices. IV. 325.
Ridings. I. 116.
Right close, writ of. II. 99. III. 195.
- - - - - -, *secundum consuetudinem manerii*, writ of. III. 195.
- - - *de rationabili parte*, writ of. III. 194.
- - -, mere writ of. III. 193.
- - - of advowson, writ of. III. 243. 250.
- - - dower, writ of. III. 183.
- - - - possession. II. 196.
- - - - property. II. 197.
- - - - ward, writ of. III. 141.
- - - patent, writ of. III. 141. i.
- - -, petition of. I. 128. III. 256. IV. 430.
- - -, *quia dominus remisit curiam*, writ of. III. 195. ii, iii.
- - - *sur disclaimer*, writ of. III. 233.
Rights. I. 122.
- - - -, bill of. I. 128. IV. 433.
- - - - of persons. I. 122.
- - - - - - things. II. 1.
Riot. IV. 125. 142. 146.
Riot-act. IV. 142, 143. 433.
Riotous assemblies, felonious. IV. 142.
Rivers, annoyances in. IV. 167.
- - - -, banks of, destroying. IV. 245.
- - - -, sluices on, destroying. IV. 144.
Robbery. IV. 241.
Roberds-men. IV. 244.
Roguery, incorrigible. IV. 170.
Rogues. IV. 170.
Romney-marsh, laws of. III. 74.
Roots, destroying of. IV. 245.
- - - -, stealing of. IV. 233.
Rope-dancers. IV. 167.
Routs. IV. 146.
Royal assent. I. 154. 184.
- - - - family. I. 219.
Rule of court. III. 304. ix.
Rural dean. I. 383.
- - - deanry. I. 111.
Ryder to a bill. I. 183.

S.

Sabbath-breaking. IV. 63.
Sacculatii. IV. 241.
Sacrament, reviling of. IV. 50.
Sacramentum decisionis. III. 342.
Safe-conducts. I. 259.
- - - - - - -, violation of. IV. 68.
Saint Martin *le grand*, court of. III. 80.
Sale. II. 9. 446.
- - - of distress. III. 14.
Salt-duty. I. 321.
Salvage. I. 293.
Sanction of laws. I. 56.
Sanctuary. IV. 326. 358. 429.
Sark, island of. I. 106.
Satisdatio. III. 291.
Satisfaction, entry of, on record. IV. 421.
Saxon laws. IV. 403. 405.
Scale of crimes and punishments. IV. 18.
Scandal or impertinence in bills in equity. III. 442.
Scandalum magnatum. I. 402. III. 123.
Schire-men. I. 398.
Schism. IV. 52.
Schoolmaster. I. 453.
Sciences auxiliary to the study of the law. I. 33.
Scire facias against bail. III. 416.
- - - - - - in detinue. III. 413.
- - - - - - to hear errors. III. xxv.
- - - - - - - remove an usurper's clerk. III. 248.
- - - - - - - repeal letters patent. III. 261.
- - - - - - - revive a judgment. III. 421.
- - - *feci*. III. xxv.
Scold, common. IV. 169.
Scotland. I. 95. IV. 420.
Scots, or assessments. III. 74.
- - - peers, their election. I. 169. IV. 116.
Scripture, scoffing at. IV. 59.
Scutage. I. 309. II. 74.
Se defendendo, homicide. I. 130. IV. 183.
Sea banks, destroying. IV. 245.
Seal, counterfeiting the king's. IV. 83. 89.
- - -, great. II. 346. III. 46.
- - - of a corporation. I. 475.
- - -, privy. II. 347.
Sealing of deeds. II. 305. iii. xii, xiii.
Seals, their antiquity. II. 305.
Sea-marks. I. 264.
- - - - -, destroying. I. 294.
Seamen. I. 418.
Seamens' wages. III. 107.
- - - - - wills or powers, counterfeiting. IV. 246.
Second surcharge, writ of. III. 239.
Secondary conveyances. II. 324.
- - - - - use. II. 335.
Secretaries of state. I. 338.
Secta. III. 295. 344.

Secta ad molendinum, &c, writ *de*. III. 235.
Secunda superoneratione, writ *de*. III. 239.
Securities for money, their true conſtruction. III. 439.
Security for good behaviour. IV. 248. 253.
- - - - - - peace. IV. 248. 251.
- - - - of perſon. I. 129.
Seduction of women-children. IV. 209.
Seiſin. II. 209.
- - - for an inſtant. II. 131.
- - -, livery of. II. 311. i.
- - -, writ of. III. 412. II. 359. xix.
Seiſing of heriots, *&c*. III. 15.
Selecti judices. III. 366.
Self-defence. III. 3.
- - - - - -, homicide in. I. 130. IV. 183.
Self-murder. IV. 189.
Semi-plena probatio. III. 371.
Senatus-conſulta. I. 80. 86.
Senatus-decreta. I. 86.
Septennial elections. I. 189. 433.
Sequeſtration in chancery. III. 444.
- - - - - - of a benefice. III. 418.
Serjeant, antient. III. 28.
- - - - at arms in chancery. III. 444.
- - - - - law. I. 24. III. 27.
- - - -, premier. III. 28.
Serjeanty, grand. II. 73.
- - - - - petit. II. 81.
Servants. I. 423.
- - - - -, battery of. III. 142.
- - - - - embezzling their maſter's goods. IV. 230, 231.
- - - - -, firing houſes by negligence. I. 431. IV. 222.
- - - - -, larciny by. IV. 230.
- - - - -, maſter when anſwerable for. III. 153.
- - - - -, retainer of. I. 425.
Service, feodal. II. 54.
- - - -, heriot. II. 422.
Seſſion, great, of Wales. III. 77.
- - - - of gaol-delivery. IV. iii.
- - - - - *oyer* and *terminer*. IV. i.
- - - - - parliament. I. 186, 187.
- - - -, quarter. IV. 268.
Set-off. III. 304. IV. 435.
Settlement, act of. I. 128. 217. IV. 433.
Settlements of the poor. I. 362.
Several fiſhery. II. 39.
Severalty, eſtates in. II. 179.
Severance of jointure. II. 185.
Severity of puniſhment. IV. 16.
Sewers, commiſſioners of. III. 73.
Sextons. I. 395.
Shepway, court of. III. 79.
Sheriff. I. 116. 339. IV. 289. 406. 421.
Sheriff's court, in London. III. 80.
- - - - - tourn. IV. 270. 404. 417.
Shifting uſe. II. 335.
Shipmoney. IV. 430.
Ships in diſtreſs, plundering them. I. 294. IV. 234.
- - -, maliciouſly deſtroying. I. 293. IV. 244.
Shire. I. 116.
Shooting at another. IV. 208.
Shop-books. III. 368, 369.
Shrubs, deſtroying of. IV. 245.
- - - -, ſtealing of. IV. 233.
Shrowd, ſtealing of. II. 429. IV. 236.
Si fecerit te ſecurum. III. 274. vii.
Signet, privy. II. 347.
Significavit, writ of. III. 102.
Signing of deeds. II. 305. iii. xii, xiii.
Sign-manual. II. 347.
- - - - - -, forging it. IV. 89.
Similitude of handwriting. IV. 351.
Simony. I. 389. 393. II. 278. IV. 62.
Simple contract, debt by. II. 465.
- - - - larciny. IV. 230.
Sine-cure. I. 386.
Single bond. II. 340.
- - - voucher. II. xvii.
Sinking-fund. I. 329.
Six clerks in chancery. III. 443.
Slander. III. 123.
Slavery. I. 423.
Slaves. I. 127.
Sledge. IV. 92. 370.
Sluices on rivers, deſtroying. IV. 144.
Small debts, courts for. III. 81. IV. 434.
- - - tithes. I. 388.
Smuggling. I. 317. IV. 155.
Socage. II. 79. IV. 412.
- - - -, free and common. II. 79.
- - - -, guardian in. I. 461.
- - - -, villein, II. 98.
Society, it's nature. I. 47.
Sodomy. IV. 215.
Sodor and Man, biſhopric of. I. 106. 111.
Sokemans. II. 100.
Soldiers. I. 407.
- - - - wandering. IV. 164.
Sole corporations. I. 469.
Solicitor. III. 26.
- - - - - general. III. 27.
Son aſſault demeſne. III. 120. 306.
Sophia, princeſs, heirs of her body. I. 217.
Sorcery. IV. 60.

Sovereignty. I. 49.
- - - - - - of the king. I. 241.
Soulfcot. II. 425.
South-ſea fund. I. 329.
Speaker of each houſe of parliament. I. 181.
Speaking with proſecutor. IV. 357.
Special adminiſtration. II. 506.
- - - - bail. III. 287. xix.
- - - - bailiff. I. 345.
- - - - baſtardy. I. 454.
- - - - caſe. III. 378.
- - - - demurrer. III. 315.
- - - - jury. III. 357.
- - - - matter in evidence. III. 306.
- - - - occupant. II. 259.
- - - - plea. III. 305.
- - - - property. II. 391.
- - - - ſeſſion. IV. 269.
- - - - ſtatute. I. 86.
- - - - tail. II. 113.
- - - - verdict. III. 377. IV. 354.
- - - - warrant. IV. 288.
Specialty, debt by. II. 465.
Specific legacies. II. 512.
- - - - relief in equity. III. 438.
Spiriting away men and children. IV. 219.
Spiritual corporations. I. 470.
- - - court. III. 61.
Spiritualties, guardian of. I. 380.
Spoliation. III. 90.
Sponſio judicialis. III. 452.
Springing uſes. II. 334.
Squibs. IV. 168.
Stabbing. IV. 193.
Stage-plays. IV. 167.
Stake driven through the body. IV. 190.
Stamp duties. I. 323.
Stamping of deeds. II. 297. iii. xii, xiii.
Stamps, forging of. IV. 246, 247.
Standard of weights and meaſures. I. 274, 275. IV 272.
Stannary courts. III. 80.
Staple commodities. I. 314.
Starchamber, court of. I. 230. IV. 263. 422. 426. 430.
Starrs. II. 342. IV. 263.
Stated damages. III. 435.
Statute. I. 85.
- - - -, guardian by. I. 462.
- - - -, merchant. II. 160. IV. 419.
- - - -, rolls. I. 182.
- - - -, ſtaple. II. 160. IV. 421.
- - - - - - - -, recognizance in nature of. II. 160. 342. IV. 424.
Statutes of a corporation. I. 475.
Stealing an heirefs. IV. 208.
Sterling. I. 278.
Steward. I. 427.
- - - -, high, his court. IV. 258.
- - - - - - - -, in parliament. IV. 257. 260.
- - - -, of the houſhold, his court. III. 76. IV. 273.
- - - - - - - - univerſity, his court. IV. 274.
Stint, common without. II. 34. III. 239.
Stipulatio. III. 291.
Stipulation in the admiralty court. III. 108.
Stirpes, diſtribution *per*. II. 517.
- - - -, ſucceſſion *in*. II. 217.
Stocks for puniſhment. IV. 370.
- - - -, of deſcent, male and female. II. 234.
Stolen goods, receiving, *&c*. IV. 132.
- - - marriages. IV. 209.
Stoppage. III. 305.
Stores, embezzling the king's. IV. 101.
Strangers to a fine. II. 356.
Striking in the king's palace, or courts of juſtice. IV. 125. 273.
Study of the law, it's diſcouragements. I. 31.
- - - - - - - - - - uſes. I. 6.
- - - - - - - -, reſtrained in London. I. 24.
- - - - - - - -, why neglected in the univerſities. I. 16.
Stultifying one's ſelf. II. 291.
Subjection, civil. IV. 28.
Subinfeudation. II. 91.
Subornation of perjury. IV. 137.
Subpœna ad teſtificandum. III. 369.
- - - - *duces tecum*. III. 382.
- - - - in equity. III. 445.
- - - - - - - - -, it's original. III. 51.
Subſcription of witneſſes. II. 378.
Subſcriptions, unlawful. IV. 117.
Subſequent conditions. II. 154.
- - - - - - evidence. III. 403. 454, 455.
Subſidies, eccleſiaſtical. I. 311.
- - - - -, lay. I. 307. 310. IV. 416.
- - - - -, on exports and imports. I. 315.
Subſtraction of conjugal rights. III. 94.
- - - - - - - - legacies. III. 98.
- - - - - - - - rents and ſervices. III. 230.
- - - - - - - - tithes. II. 88. 102.
Succeſſion *ab inteſtato*. II. 516.
- - - - - to goods and chattels. II. 430.
- - - - - - - the crown. I. 197. IV. 433.
Sufferance, eſtate at. II. 150.
Suffrage, who intitled to. II. 171.

Suggeſtion for prohibition. III. 113.
- - - - -, proſecution by. IV. 305.
Suicide. IV. 189.
Suit and ſervice. II. 54.
- - at law. III. 116.
- - in equity. III. 442.
- -, or witneſſes. III. 295. II. xviii.
Summary convictions. IV. 277.
Summoners. III. 279. II. xiv. xvii. III. iii. xiii.
Summons. III. 279. v.
- - - - - before conviction. IV. 279.
- - - - - to parliament. I. 149, 150.
Sumptuary laws. IV. 170.
Sunday, no juridical day. III. 278. 290.
Superſedeas, writ of. I. 353.
Superſeding commiſſions of bankrupt. II. 488.
Superſtitious uſes, information of. III. 428.
Supplemental bill in equity. III. 448.
Suppletory oath. III. 371.
Supplicavit. IV. 250.
Supplies. I. 307.
Supremacy. IV. 423.
- - - - - -, oath of. I. 368.
- - - - - - - - -, refuſing it. IV. 115.
Supreme magiſtrates. I. 146.
- - - - - power. I. 49. 146.
Surcharge of common. III. 237.
Surplus of inteſtates' effects. II. 514.
Sur-rebutter. III. 310.
Sur-rejoinder. III. 310.
Surrender, deed of. II. 326.
- - - - - - of bankrupt. II. 481.
- - - - - - - copyholds. II. 365. 368.
Surveyors of highways. I. 357.
Survivorſhip. II. 183. vii.
- - - - - - - of things perſonal. II. 399.
Suſpenſion of *habeas corpus* act. I. 136.
Sus. per coll. IV. 396.
Swans, ſtealing of. IV. 235.
Swearing, profane. IV. 59.
- - - - - the peace. IV. 252.
Sweinmote, court of. III. 72.
Sycophants. IV. 237.
Syngrapha. II. 296.
Synods. I. 279.

T.

Tail after poſſibility of iſſue extinct. II. 124.
- - - female. II. 114.
- - - general. II. 113. vi.
Tail male. II. 114.
- - - ſpecial. II. 113.
- - -, tenant in. II. 112.
Taking, felonious. IV. 230. 232.
- - - -, unlawful. III. 145.
Tale, or count. III. 293.
Tales de circumſtantibus. III. 365. xi. IV. 348.
- - - - - - - - - - -, writ of. III. 364.
Talionis lex. IV. 12.
Talliage. I. 310. IV. 412. 419.
Tariff. I. 313.
Taxation by the houſe of commons. I. 169.
Taxes. I. 139. 307. IV. 419. 432.
- - -, their annual amount. I. 331.
Technical words in indictments. IV. 302.
Temporalties of biſhops, their cuſtody. I. 282. IV. 414.
- - - - - - - - - - - - - - - reſtitution. I. 380. IV. 414.
Tenant. II. 59.
- - - - to the *praecipe*. II. 359. 461.
Tender of amends. III. 16.
- - - - - iſſue. III. 313.
- - - - - money. III. 303.
- - - - - oaths. I. 368. IV. 124.
- - - -, plea of. III. 303.
Tenement. II. 16. 59.
- - - - - - entailable. II. 113.
Tenemental lands. II. 90.
Tenendum of a deed. II. 298. i.
Tenths, eccleſiaſtical. I. 284. IV. 106.
- - - -, temporal. I. 308.
Tenure, diſturbance of. III. 242.
Tenures, antient. II. 59.
- - - -, modern. II. 78.
Term in law, eſſoign day of. III. 278.
- - - - - -, firſt day of. III. 278.
- - - - - - -, original of. III. 275.
- - - - - - - -, returns of. III. 277.
- - - of years. II. 143. iii. vi. IV. 423.
Terminum qui praeteriit, writ of entry *ad*. III. 183.
Termor. II. 142.
Terre-tenant. II. 91. 328.
Teſt-act. IV. 57. 432.
Teſtament. II. 10. 12. 373. 489. 499. IV. 417. 423.
Teſtamentary cauſes. III. 95.
- - - - - - - guardian. I. 462. II. 88.
- - - - - - - juriſdiction in equity. III. 437.
- - - - - - - - - - - - ſpiritual courts. III. 97. IV. 414.
Teſtamento annexo, adminiſtration *cum*. II. 504.

Teſtatum capias. III. 283. xiv.
Teſte of writs. I. 179. III. 274. append. *paſſim.*
Teſtes, proof of will *per.* II. 508.
- - -, trial *per.* III. 336.
Theft. IV. 229.
- - -, it's puniſhment. IV. 236. 413.
Theft-bote. IV. 133.
Theodoſian code. I. 81.
Things perſonal. II. 384.
- - - - real. II. 16.
- - - -, right of. II. 1.
Threatening letters. IV. 144.
Threats. III. 120.
- - - - of accuſation, to extort money. IV. 136.
Timber. II. 281.
- - - - trees, ſtealing. IV. 233.
Tippling. IV. 64.
Tithes. I. 388. II. 24.
- - - - cognizable in equity. III. 437.
- - - - of foreſt land. III. 48.
- - - -, original diſtribution of. I. 384.
- - - -, ſubtraction of. III. 88. 102.
Tithing. I. 113. IV. 404.
Tithingman. I. 114. 406.
Title of acts of parliament. I. 183.
- - - to lands. II. 195.
- - - - - - -, pretended, ſelling or buying. IV. 135.
- - - - the crown. I. 190.
- - - - things perſonal. II. 400.
Toleration. IV. 52, 53. 433.
Tolt, writ of. III. 34. 195. i.
Tongue, cutting out or diſabling. IV. 206, 7.
Tonnage. I. 315. IV. 430.
Tonſura clericalis. IV. 360.
Torts, actions on. III. 117.
Torture. I. 133. IV. 320.
Tourn of the ſheriff. IV. 270. 404. 417.
Tout temps priſt. III. 303.
Town. I. 114.
Trade, it's progreſs in England. IV. 412. 417. 421. 424. 427. 432.
- - -, offences againſt. IV. 154.
- - -, offenſive. IV. 167.
- - -, unlawful exerciſe of. I. 427. IV. 160.
Tradeſmen. I. 406.
- - - - -, actions againſt. III. 164.
Traitors. II. 499. IV. 75.
Tranſitory actions. III. 294.
Tranſportation. I. 137. IV. 363. 370. 394.
Tranſportation, returning from. IV. 131. 363.
Traverſe of indictment. IV. 345.
- - - - - - offices. III. 260.
- - - - - - plea. III. 312.
Treaſon, appeal of. IV. 310.
- - - -, high. IV. 75. 421.
- - - -, miſpriſion of. IV. 120.
- - - -, petit. IV. 75. 203.
- - - -, trials in. IV. 345. 433.
Treaſurer, lord high. III. 44. 56.
- - - - - - - - - -, killing him. IV. 84.
Treaſure-trove. I. 295.
- - - - - - -, concealment of. I. 296. IV. 121.
Treaties, leagues, and alliances. I. 257.
Trebucket. IV. 169.
Trees, deſtroying. IV. 244, 245.
- - -, ſtealing. IV. 233.
Treſayle. III. 186.
Treſpaſs, coſts in. III. 401.
- - - - - on lands. III. 208, 209.
- - - - - the caſe, action of. III. 122.
- - - - - *vi et armis*, action of. III. 120, 121. 123.
Treſpaſſers *ab initio.* III. 15.
Trial. III. 330. IV. 336. 407.
- - -, new. III. 387. IV. 355. 431.
Triennial elections. I. 189. 433.
- - - - parliaments. I. 153. 430. 432.
Trinity, denial of. IV. 50.
Trinoda neceſſitas. I. 263. 357. II. 102.
Triors, lords. IV. 259, 260.
- - - of jurors. III. 263.
Triplicatio. III. 310.
Trithing. I. 116.
Triverbial days. III. 424.
Trover and converſion, action of. III. 151. IV. 356.
Truce, breakers of. IV. 68.
- - -, conſervators of. IV. 69.
Truſts. II. 356. v, vi.
- - -, where cognizable. III. 431. 439.
Tub-man, in the exchequer. III. 28.
Tumultuous petitioning. I. 143. IV. 147.
Turbary, common of. II. 34.
Turnips, ſtealing. IV. 233.
Turnpikes, deſtroying of. IV. 144.
Tutor. I. 453. 460.
Twelve tables, laws of. I. 80.
Two witneſſes, when neceſſary. III. 370. IV. 350.
Tyranny. I. 126. 133.

V. U.

Vacancy of the throne. I. 211.
Vacarius, Roger. I. 18.
Vacating records. IV. 128.
Vacations. III. 276.
Vadium mortuum. II. 157.
- - - - *vivum.* II. 157.
Vagabonds. IV. 170.
Vagrants. IV. 170.
- - - - -, harbouring them. IV. 170.
Valor beneficiorum. I. 284.
- - - *maritagii.* II. 70.
Valuable conſideration. II. 297.
Valvaſors. I. 403.
Vaſal. II. 53.
Ubiquity of the king. I. 270.
Udal right. II. 45.
Venary, beaſts of. II. 415.
Venire facias, writ of. III. 352. vi. x. IV. 313. 344. iii.
Ventre inſpiciendo, writ *de*. I. 456.
Venue. III. 294.
- - -, when changed. III. 294. 384.
Verberation. III. 120.
Verderors. III. 71, 72.
Verdict. III. 377. vi. xi. IV. 354. iii. v.
- - - -, falſe. III. 402. IV. 140.
Verge of the court. III. 76.
Vert, veniſon, and covert, injuries to. III. 71.
Veſted legacy. II. 513.
- - - - remainder. II. 168.
Vetitum namium. III. 148.
Vicar. I. 387.
Vicarages, when eſtabliſhed. I. 387. IV. 421.
Vicarial tithes. I. 388.
Vice-admiralty courts. III. 69.
Vicinage, common becauſe of. II. 33.
Vicineto, jury *de*. III. 383.
Vicontiel writs. III. 238.
Vidames. I. 403.
View by jurors. III. 298. 358.
- - - of frankpledge. IV. 270.
Vill. I. 114.
Villein. II. 92. IV. 413.
- - - - in groſs. II. 93.
- - - - regardant. II. 93.
- - - - ſervices. II. 61.
- - - - ſocage. II. 98.
Villenage. II. 90. 92.
- - - - -, privileged. II. 98.
- - - - -, pure. II. 90.
Villenous judgment. IV. 136.
Vinculo matrimonii, divorce *a*. III. 94.
Viner, Mr, his inſtitution. I. 27.
Violating the queen, *&c.* IV. 81.
Violent preſumption. III. 371.
Virge, tenant by. II. 148.
Virgin Mary, a civilian and canoniſt. I. 21.
Viſcount. I. 399.
Viſitation books of heralds. III. 105.
Viſitor. I. 480.
- - - - of civil corporations. I. 481.
- - - - - colleges. I. 482.
- - - - - hoſpitals. I. 482.
Viſne. III. 294. IV. 344.
Vivo vadio, eſtate *in*. II. 157.
Umpire. III. 16.
Unanimity of juries. III. 376. IV. 407.
Uncertainty of the law. III. 325.
Uncore priſt. III. 303.
Underſheriff. I. 345.
Underwood, ſtealing. II. 233.
Union, articles of. I. 96.
- - - - of Great Britain. I. 93. IV. 420. 433.
Unities of joint eſtates. II. 180.
Univerſitates. I. 469.
Univerſity. I. 471.
- - - - -, burgeſſes of. I. 174.
- - - - -, chancellor of, his certificate. III. 335.
- - - - -, courts of. III. 83. IV. 274.
- - - - -, right of, to popiſh advowſons. III. 251.
- - - - -, ſtudy of the law in. I. 26.
Unknown perſons, larciny from. IV. 236.
Voir dire, oath of. III. 332.
Voluntary eſcape III. 415. IV. 130.
- - - - - juriſdiction. III. 66.
- - - - - manſlaughter. IV. 191.
- - - - - oaths. IV. 137.
- - - - - waſte. II. 281.
Vouchee, in recoveries. II. 358. xviii.
Voucher. III. 299.
- - - - - in recoveries. II. 358. xviii.
Uſes. II. 137. 271. 327. IV. 420. 422. 423.
- - -, covenant to ſtand feiſed to. II. 338.
- - -, deeds to lead or declare. II. 339. 363. ix. x.
- - -, ſtatute of. II. 332. IV. 423.
Uſurpation of advowſon. III. 242.
- - - - - - - franchiſes or offices. III. 262.
Uſura maritima. II. 459.
Uſury. II. 455. IV. 115. 156.
Uſus-fructus. II. 327.
Uterinus frater. II. 232.
Uttering falſe money. IV. 89. 99.
Vulgaris purgatio. IV. 336.

W.

Wager of battel. III. 337. 339. iii. IV. 340. 411. 414. 417.
- - - - - law. III. 341. IV. 407. 417.
Wagering policies. II. 461.
Wages of members of parliament. I. 174.
- - - - - ſervants. I. 428.
Waifs. I. 296.
Wales. I. 93. IV. 420. 424.
- - - -, courts of. III. 77.
- - - -, part of England. I. 99.
- - - -, prince of. I. 225.
- - - - - - - - -, compaſſing and imagining his death. IV. 76.
- - - -, princeſs of. I. 225.
- - - - - - - -, violating her. IV. 81.
Wandering ſoldiers and mariners. IV. 164.
Want. IV. 31.
Wapentakes. I. 115.
War and peace, right of making. I. 257.
- - -, articles of. I. 415.
- - -, levying, againſt the king. IV. 81.
Ward by conſtables, &c. I. 356. IV. 419.
Wards and liveries, court of. III. 258.
Wardſhip in chivalry. II. 67. IV. 411. 413, 414.
- - - - - - copyholds. II. 97.
- - - - - - ſocage. II. 88.
Warrant. I. 137. IV. 287.
Warrantia chartae. III. 229.
Warranty of chattels perſonal. II. 452.
- - - - - - goods ſold. III. 165.
- - - - - - lands. II. 300. i. xv. xviii.
Warren, beaſts and fowls of. II. 38.
- - - -, robbery of. IV. 235.
- - - - - - - - -, in diſguiſe. IV. 144.
Waſte. II. 281. III 223.
- - -, how prevented in equity. III. 438.
- - -, impeachment of. II. 283.
- - - lands. II. 14. 91.
- - -, writ of. III. 227.
Watch. I. 356. IV. 289. 419.
Water. II. 14. 18.
Water-ordeal. IV. 336.
Ways. II. 35.
- - - and means, committee of. I. 307.
- - -, diſturbance of. III. 241.
Weights and meaſures. I. 274. IV. 272. 417.
- - - - - - - - - - -, falſe. IV. 157.
Weregild. IV. 188. 308. 406.
Wells, property in. II. 5.
Weſt-Saxon-lage. I. 65. IV. 405.
Whales, property of. I. 223.
Wharfs. I. 264.
Whipping. IV. 370.
White rents. II. 42.
Whole blood. II. 227.
Widow's chamber. II. 518.
Wife. I. 433.
- - -, battery of. III. 140.
Will, defect of. IV. 20.
- - -, eſtates at. II. 145.
- - - of the lord. II. 95. 147.
- - -, vitious. IV. 21.
Wills and teſtaments. II. 10. 12. 373. 489. 499. IV. 417. 423.
Winchester meaſure. I. 274.
Window tax. I. 323.
Wine, adulteration of. IV. 162.
- - - licences. I. 288.
Witchcraft. IV. 60. 429.
Withdrawing from allegiance. IV. 87.
Withernam. III. 129. 148. 413.
Witneſſes. III. 369.
- - - - - for priſoners. IV. 352. 434.
- - - - -, tampering with. IV. 126.
- - - - -, their expenſes. III. 369. IV. 355.
- - - - - to deeds. II. 307.
- - - - - - wills. II. 501.
- - - - -, trial by. III. 336.
- - - - -, two, where neceſſary. III. 370. IV. 350.
Wittena-gemote. I. 148. IV. 405.
Women, appeals by. IV. 417.
- - - - children, ſtealing or ſeduction of. IV. 209.
- - - -, guilty of clergyable felonies. IV. 362.
- - - -, jury of. III. 362. IV. 388.
Woodmote, court of. III. 71.
Wood-ſtealing. IV. 233.
Wool, &c, tranſporting. IV. 154. 421.
Words, action for. III. 123.
- - - -, coſts in actions for. III. 400.
- - - -, treaſonable. IV. 79.
Worthieſt of blood. II. 213.
Wounding. III. 121. IV. 216.
Wreck. I. 290. II. 14. III. 106.
Writ. III. 273.
- - - cloſe. II. 346.
- - - of election to parliament. I. 177.
- - - - - peerage. I. 400.
- - - patent. II. 346.
Writs, forms of. III. 51. 183. 273. IV. 420.
Writing of a deed. II. 297.

Writing, treaſon by. IV. 80.
Writings, ſtealing of. IV. 234.
Written conveyances. II. 297.
- - - - evidence. III. 368.
Wrongs. I. 122.
- - - -, private. III. 2.
- - - -, public. IV. 1.

Y.

Year. II. 140.
- - - and day, in appeals of death. IV. 311. 329.
Year and day, in continual claim. III. 175.
- - - - - - - - - - copyhold forfeiture. II, 284.
- - - - - - - - - - eſtrays. I. 297.
- - - - - - - - - - fines. II. 354.
- - - - - - - - - - murder. IV. 197.
- - - - - - - - - - wrecks. I. 292.
- - -, day, and waſte. II. 252. IV. 378.
Yearbooks. I. 72.
Years, eſtate for. II. 140.
Yeomen. I. 406.
York, cuſtom of. II. 517.

THE END.