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

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

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

Hil. 11 H. 4. f. 41.

[34]

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

Vid. le statutes de 1 R. 3. ca. 4. 33 H. 6. c. 2. W. 2. ca. 13. 1 E. 3. stat. 2. ca. 17. All tending that indictments may be duly had.

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

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

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

5 El. cap. 1.

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

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

Bract. lib. 3. fo. 154. b. *Vincula qui sensit, didicit succurrere vinctis.* Bract. lib. 3. fo. 105. a. Stanford 78. Bract. li. 3. f. 137. Note Shackells about the feet ought not to be, but for fear of escape. Mirror, c. 2. §. 9. [a] Brit. c. 5. fo. 14. [b] Cap. 11. fo. 17. W. 2. c. 1. after judgement. Lib. 3. fo. 44. Lib. 8. fo. 100. 24 H. 8. Dier. 249. Pl. Com. 360. a. [c] Fleta li. 1. ca. 26. [d] Mirror c. 5. §. 1. [e] 8 E. 2. cor. 432. [f] Tr. 7 E. 3. coram rege Rot. 44.

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

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

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

† [35]

* 1 E. 3. c. 7.

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

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

Tortures, the rack, &c.

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

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

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

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

Hollenshed. pa. 670. &c. Innocentem cogit mentiri dolor.

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

Fortescue. ca. 22. fo. 24.

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

Castigatque, auditque dolos, subigitque fateri.

Virgil.

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

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

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

Proditor illudit verbis, dum verbera cudit.

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

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[f] 1 Reg 2. 26, 27.
[g] 2. Sam. 16. 5, 6. 1 Reg. 2. 8. &c. 46.
[h] 1 Regum 16. 9. &c. 18.
[i] Act. Apost. 5. 36, 37.
[k] Act. Apost. 1. 18. Math. 27. 5. laqueo se suspendit.

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

Qui molitur insidias in patriam, id facit quod insanus nauta perforans navem in qua ipse vehitur.

* *Felix quem faciunt aliena pericula cautum.*

Prov. 24. 21.

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

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

CAP. III.

OF MISPRISION OF TREASON.

Misprisio proditionis.

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

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

See hereafter ca. 65. of misprisions, &c. See hereafter in Theftbote, ca. 61. 1 & 2 Ph. & Mar. Ubi supra. See 1 E. 6. c. 12. and 1 El. ca. 6. 25 H. 8. ca. 12.

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

[a] 14 El. ca. 3.

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

[b] 13 El. ca. 2.

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

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

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

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

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

CAP.

CAP. IV.

Felony by compaffing or confpiring to kill the King, or any Lord, or other of the King's Counfell.

NEXT hereunto we have thought good to fpeak of the ftatute of 3 H. 7. the letter of which law enfueth.

3 H. 7. cap. 14.

Item, FORASMUCH as by quarrels made to fuch as have been in great authority, office, and of counfell with kings of this realme, hath enfued the deftruction of kings, and the undoing of this realme; fo as it hath appeared evidently, when compaffing of the death of fuch as were of the kings true fubjects was had, the deftruction of the prince was imagined thereby: and for the moft part it hath growne, and been occafioned by envie, and malice of the kings own houfhold-fervants, as now of late fuch a thing was likely to have enfued: * and for fo much as by the law of this land, if actuall deeds be not had, there is no remedy for fuch falfe compaffings, imaginations, and confederacies had againft any lord, or any of the kings counfell, or any of the kings great officers in his houfhold, as fteward, treafurer, and comptroller: and fo great inconveniencies might enfue, if fuch ungodly demeaning fhould not be ftraitly punifhed before that actuall deed were done. Therefore it is ordained by the king, the lords fpirituall and temporall, and the commons of the faid parliament affembled, and by authority of the fame, That from hence forward, the fteward, treafurer, and comptroller of the kings houfe for the time being, or one of them, have full authority and power to enquire by twelve fad men, and difcreet perfons of the chequer roll of the kings honourable houfhold, if any fervant admitted to be his fervant fworne, and his name put into the chequer roll of his houfhold, whatfoever he be, ferving in any manner, office, or roome, reputed, had and taken, under the ftate of a lord, make any confederacies, compaffings, confpiracies, or imaginations with any perfon or perfons, to deftroy or murder the king, or any lord of this realme, or any other perfon fworne to the kings counfell, fteward, treafurer, or comptroller of the kings houfe; that if it be found before the faid fteward for the time being, by the faid twelve fad men, that any fuch of the kings fervants as is abovefaid, hath confederated, compaffed, confpired, or imagined, as is abovefaid, that he fo found by that inquiry, be put thereupon to anfwer. And the fteward, treafurer, and comptroller, or two of them have power to determine

* Nota.

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

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

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

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

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

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

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

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

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

† conspiracy,

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

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

18 E. 3. 1.
23 Aſſ. 17.
27 H. 6. 8.
27 H. 8. 13.

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

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

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

Vide lib. Plac. Coke fo. 482.

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

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

3 & 4 E. 6. ca. 5.

CAP.

CAP. V.

OF HERESIE.

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

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

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

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

Fitz. N. B. 269. a. 1 El. ca. 1. [b] Vid. 23 H. 8. ca. 9. F. N. B. Ubi supra. 5 El. ca. 23. 10 H. 7. 17. b. Doct. & Stud. lib. 2. ca. 29. Br. 2. Mar. tit. Heresy 1.

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

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

[40]

Mic. Hammond Anno 21 El. Hol. 1579. Stowe. 1161. Hil. 9 Ja. Regis Legate's case.

Vide 1. E. 6. c. 21. 1 E. c. 1.

force: and at this day no perfon can be indicted, or impeached for herefy before any temporall judge. or other, that hath temporall jurifdiction, as upon perufall of the faid ftatutes appeareth.

Every archbifhop of this realme may cite any perfon dwelling in any bifhops dioces within his province for caufes of herefy, if the bifhop, or other ordinary immediate thereunto confent, or if that the fame bifhop, or other immediate ordinary, or judge doe not his duty in punifhment of the fame.

23 H. 8. ca. 9.

2. Touching the fecond point, if any perfon be charged with herefy before the high commiffioners, they have no authority to adjudge any matter or caufe to be herefy, but only fuch, as hath been fo adjudged by the authority of the canonicall fcripture, or by the firft four generall councells, or by any other generall councell, wherein the fame was declared herefie by the expreffe and plain words of the canonicall fcripture, or fuch as fhall hereafter be determined to be herefy by parliament, with the affent of the convocation: for fo it is expresly provided by the faid act of 1 El. And albeit this provifo extendeth only to the faid high commiffioners, yet feeing in the high commiffion, there be fo many bifhops, and other divines, and learned men, it may ferve for a good direction to others, efpecially to the diocefan, being a fole judge in fo weighty a caufe.

No manner of order, act, or determination for any matter of religion, or caufe ecclefiafticall, had or made by the authority of the parliament in *anno* 1 El. fhall be accepted, deemed, interpreted, or adjudged herefy, fchifm, or fchifmaticall opinion, any order, decree, fentence, conftitution, or law (whatfoever the fame be) notwithftanding.

1 El. ca. 1.

There was a ftatute fuppofed to be made in 5 R. 2. that commiffions fhould be by the lord chancellor made, and directed to fherifs, and others, to arreft fuch as fhould be certified into the chancery by the bifhops, and prelates, * mafters of divinity, to be preachers of herefies, and notorious errors, their fautors, maintainers, and abetters, and to hold them in ftrong prifon, until they will juftifie themfelves to the law of holy church. By colour of this fuppofed act, [a] certaine perfons, that held, that images were not to be worfhipped, &c. were holden in ftrong prifon, until they (to redeem their vexation) miferably yeelded before thefe mafters of divinity to take an oath, and did fwear to worfhip images, [b] which was againft the morall and eternall law of Almighty God. We have faid (by colour of the faid fuppofed ftatute, &c.) not only in refpect of the faid opinion, but in refpect alfo, that the faid fuppofed act, was in truth never any act of parliament, though it was entred in the rolls of the parliament, for that the commons never gave their confent thereunto. And therefore in the [c] next parliament, the commons preferred a bill reciting the faid fuppofed act, and conftantly affirmed, that they never affented thereunto, and therefore defired that the faid fuppofed ftatute might be anulled, and declared to be void: for they protefted, that it was never their intent to be juftified, and to bind themfelves and their fucceffors to the prelates, more then their anceftors had done in times paft: and hereunto the king gave his royall affent in thefe words, *Y pleift au roy.* And mark well the manner of the penning the act: for feeing the commons did not affent thereunto, the words of the act be,

5 R. 2. ftat. 2. cap. 5. repealed by 1 E. 6. c. 12. & 1 Eliz. ca. 1.
* *In diebus illis* Mafters of divinity (and batchelors of divinity) now doctors of divinity and batchelors.
[a] Rot. clauf. 19 R. 2. m. 17. in Dorf.
[b] Exod. 20. 4. Levit. 26. 1. Deut. 5. 8. & 16. 22. Pfal. 97. 7. 1 John 5. 21.
[c] Rot. Parl. 6 R. 2. nu. 62. *Vide* 7 H. 4. nu. 62. Rot. Parl.

[41]

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

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

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

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

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

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

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

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

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

[42]

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

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

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

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

beration it was by Brian chief juftice, and the whole court of common pleas adjudged, that the faid opinion was not within the faid ftatute of 2 H. 4. for that it was an error, but no herefy. Which I have the rather reported, for that the reporter of this cafe did not only mifreport the time of the bringing of the action, but the ftatute, which was the ground of the matter in law, and leaveth out the judgement. The record it felf is worthy the reading.

Hil. 10 H. 7. f. 17.

Upon that which hath been faid touching the faid ftatute of 2 H. 4. four conclufions doe neceffary follow. Firft, that feeing, that many opinions were by the bifhops taken to be herefy, which in troth had no fhadow of herefy, and fo miftaken, and unjuftly extended by the bifhops further than the purvieu, and true intention thereof, as by that which hath been, and might be faid, appeared, the makers of the faid act of parliament of 1 El. had great reafon to limit (as hath been faid) what opinions fhould be judged herefy by authority of that commiffion grounded upon that act. Secondly, that if any ecclefiafticall judge or commiffioner fhall by pretext of any ftatute, or other caufe, commit any man to prifon, upon motion in court on the behalf of the party imprifoned, the judges of the common law ought to grant an *Habeas corpus* for him: upon the retorn of which writ, if it fhall appear to the judges, that the imprifonment is well warranted by law, the party fhall be remanded: and if the imprifonment be without warrant of law, then the party ought to be delivered. Thirdly, if the imprifonment be not warranted by law, the party impriloned may have his action of falfe imprifonment, and recover his damages. Fourthly, that when an act of parliament is made concerning matter meerly fpirituall, as herefie, &c. yet that act being part of the lawes of the realm, the fame fhall be conftrued and interpreted by the judges of the common lawes, who ufually confer with thofe that are learned in that profeffion. But let us now defcend to the third point.

See in the fecond part of the Inftitutes, the expofition upon the ftatute of *Artic. Cleri*, the refolution of all the judges of England to the 21 and 22 articles, or objections.

[43]

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

4. To the fourth. [b] The ecclefiafticall judge at this day cannot commit the perfon that is convict of herefie to the fheriffe, albeit he be prefent, to be burnt; but muft have the king's writ *de hæretico comburendo*, according to the common law: for now all acts of parliament (as hath been faid before) againft hereticks are repealed. And the reafon wherefore herefie is fo extremely and fearfully punifhed, is, for that *gravius eft æternam, quam temporalem lædere majeftatem:* and *hærefis eft lepra animæ.* [c] The party duly convicted of herefie, may recall, and abjure his opinion, and thereby fave his life, but a relapfe is fatall: for as in cafe of a difeafe of the body, after recovery, recidivation is extremely dangerous: fo in cafe of herefie (a difeafe of the foule) a relapfe is irrecoverable. And as he that is a leper of his body, is to be removed from the fociety of men, left he fhould infect them, by the king's writ *de leprofo amovendo:* fo he that hath *lepram animæ*, that is, to be convicted of herefie, fhall be cut off, left he fhould poyfon others, by the king's writ *de hæretico comburendo.* But if the heretick will not after conviction abjure, he may by force of the faid writ [d] *de hæretico comburendo* be burnt without abjuration.

[a] Mir. cap. 4. de Majeftie. Bracton, ubi fupra. Britton, cap. 9. Fleta lib. 1. ca. 35. Regifter. F. N B. 269.

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

[c] 2 Mar. tit. herefie, Br. 7.

[d] 2 Mar. ubi fupra.

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

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

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

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

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

[f] Vid. hereafter in case of piracy.

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

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

CAP. VI.

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

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

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

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

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

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

And again. *Carmina de cœlo possunt deducere lunam.*

> By rhymes they can pul down full soon,
> From lofty sky the wandring moon.

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

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

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

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

A conjurer described.

A witch described.

An inchanter described.

* A sorcerer described.

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

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

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

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

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

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

[e] Int. leges Edw. ca. 11. fo. 55. & Ethelſtani ca. 6. fo. 60 & Canuti cap. 5. fo. 5.

45 E. 3. 17. b.

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

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

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

[45]

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

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

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

1 Jac. cap. 12.

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

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

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

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

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

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

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

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

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

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

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

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

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

[46]

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

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

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

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

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

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

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

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

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

As

As in the cafe of cattel or goods, the deftruction muft be (as is aforefaid) effected and done: fo in cafe of the perfon of man, woman, or childe, though the hurt be not effected, or done; yet is the taking upon him, &c. to hurt or deftroy any perfon, &c. within this branch.

Being therefore lawfully convicted.

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

Shall for the faid offence, &c.

Here are expreffed the punifhments inflicted upon thefe impoftors, mountebanks, and cheating quackfalvers, viz. 1. To fuffer imprifonment by the fpace of a whole year without bail or mainprize. 2. Once every quarter of the year thefe mountebanks are to mount the pillory, and to ftand thereupon in fome market towne fix houres, and there to confefs his or her error, and offence.

And if any perfon being once convicted of the fame offences, &c.

Here is alfo [convicted] taken for attainted, for he fhall not be drawn in queftion for the fecond offence, to make it felony, till judgement be given againft him for the firft; for the indictment of felony recites the former attainder, and the fecond offence muft be committed after the judgement. And fo it is in the cafe of forgery upon the ftatute of 5 Eliz. and in cafe of conveighing of fheep alive out of this realme, and fome others.

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

Saving to the wife of fuch perfon as fhall offend in any thing contrary to this act, her title of dower, and alfo to the heire and fucceffor of every perfon, his or their titles of inheritance, fucceffion, and other rights, as though no fuch attainder of the anceftor or predeceffor had been made.]

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The judgement againft a felon is, that he be hanged by the neck until he be dead: and albeit nothing elfe is expreffed in the judgement, yet by the common law many things are therein implied; as the loffe of his wives dower, the loffe of his inheritance, corruption of his blood, forfeiture of his goods, &c. Now a faving will ferve for any thing, that is implied in the judgement, as in this cafe for the wives dower, and alfo for the heirs inheritance, and for all the reft of the things implied in the judgement. But a faving will not ferve againft the expreffe judgement in cafe of felony, for that fhould be repugnant; as faving the life of the offender fhould be void, becaufe it is repugnant to the expreffe judgement, viz. that he be hanged by the neck until he be dead. Alfo where the faving is to the heir, it is well faved by the name of the heir, becaufe notwithftanding the forfeiture implied in the judgement, his inheritance is faved, and by confequent the blood not corrupted, for if

See the 1. part of the Inftitutes. fect. 747.

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

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

5 El. cap. 14.

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

8 El. ca. 3.

The words of the ſtatute of 8 Eliz. be, Provided always that this act ſhall not extend to corruption of blood, or be prejudiciall or hurtfull to any woman claiming dower by or from any ſuch offender, &c. Wherein it is to be obſerved, that by the avoidance of corruption of blood, the inheritance is impliedly ſaved. See the manner of the penning of the act of 31 Eliz. concerning this matter and divers others.

31 El. ca. 4.

See the ſtatute of 3. Ja. ca. 4.

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

CAP. VII.

OF MURDER.

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

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

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

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

[b] *The definition of murder.* Vid. devant. ca. Treaſon. verb. Quant home, &c. Bract. l. 3. fo. 120, 121, 134, 135. Brit. fo. 5. 18. Fleta, lib. 1. cap. 23. & 30. Miror, cap. 1. §. ca. 2. § 11. de Appeal de homicide. Tr. 32 E. 1. Coram Rege Rot. 15. 25 E. 3. 28. 26 Aſſ. p. 27. 3 E 3. cor. 383. 3 H. 7. ca. 1. 3 H. 7. 1. 12. 21 H. 7. 31. E. 2. Coron. 389. 1 Ma. Dier, 104. b. See the firſt part of the Inſtit. 104.

Tr. 31. E. 3. Coram rege. Rot. 54. per maſ. canis.

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

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

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

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

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

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

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

[b] Anno 33 H. 8.

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

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

Britton, fo. 14.

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

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

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

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

13 R. 2. ca. 2.

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

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

28 H 8. ca. 13.

2 E. 6. ca. 24.

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

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

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

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

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

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

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

fuch principall fhall hereafter be attainted or convict. And to prevent all doubts, a fpeciall writ was directed according to the words of the act, to the commiffioners of oier and terminer, to certifie whether the principall was attainted, convicted, or acquitted, and they made a particular certificate accordingly: fo as the record of the attainder remained ftill with the commiffioners of oier and terminer in London. 5. It was refolved upon confideration had of the whole act, that the words of the act being, the juftices of gaol delivery, or of oier and terminer, or other there authorized, fhall proceed, &c. the fame extend to the high fteward to write, &c.

The indictment of Richard Wefton was, that he 9 *die Maii anno* 11 *regis Jacobi, &c.* gave to Sir Thomas Overbury a poyfon called rofeacre in broth, which Sir Thomas Overbury not knowing it, received, *et ut idem Ri. Wefton præfatum Thomam Overbury magis celeriter interficeret, et murdraret,* 1 *Junii anno* 11 *Jac. regis,* gave unto him another poyfon called white arfenick. And that Richard Wefton, 10 *Julii, anno* 11. *Jac. regis,* gave unto him poyfon, called mercury fublimat, in tarts, &c. *ut præd. Thomam magis celeriter interficeret, & murdraret.* And that a perfon unknown, by the procurement, and in the prefence of Richard Wefton, 14 Septemb. 11. *fupradicto,* gave to the faid Thomas a glyfter with poyfon in it, called mercury fublimat, &c. *ut præd. Thomam magis celeriter interficeret et murdraret. Et prædict. Thomas Overbury de feparalibus venenis prædict. et operatione inde à prædict. feparalibus temporibus, &c. graviter languebat ufque* 15 *diem. Septemb. anno* 11. *fupradicto, quo quidem* 15 *die Septembris, &c. prædictus Thomas de feparalibus venenis prædictis obiit venenatus.* And this was refolved to be a good indictment by all the juftices of the king's bench, although it doth not appeare in particular, of which of the faid poyfons he died. For the fubftance of the indictment was, whether he was poyfoned or no, by the faid Richard Wefton. And upon this indictment he was arraigned, pleaded not guilty, and had judgement given againft him. And afterward Anne Turner, Sir Gervafe Helwys lieutenant of the Tower, and Richard Franklin the phyfitian, were indicted as acceffories before the fact, and arraigned, and pleaded not guilty: and it fell out in evidence, that Franklin had prepared divers other poyfons, then were contained in the indictment, as the powder of diamonds, the powder of fpiders, lapis cauftícus, and cantharides, over and befides the poyfons in the indictment. And it was refolved, that any of thefe was fufficient to prove the indictment; for the fubftance of the indictment was poyfoning, which (as hath been faid) is fecret: fee Machallis cafe *ubi fupra,* and after verdict, judgement was given againft all thefe acceffories. And after, the faid earle and the counteffe his wife were indicted as acceffories before the fact, and were arraigned before the lord chancellor of England, and *hac vice,* lord high fteward of England: and upon the arraignment of the counteffe, fhe confeffed the indictment: and when the clerk of the crown did afk her, What fhe could fay why judgement of death fhould not be given againft her? fhe faid, That fhe could fay much againft her felfe, but nothing for her felfe. And then the lord fteward gave judgement of death againft her, viz. That fhe fhould be hanged by the neck till fhe were dead: and adjourned his commiffion, (as it was refolved he might do by law) untill the next day: and then the

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

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

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

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

[a] Chro. de Dunſtable, Holl. 252. Coram Juſtic. Itiner. in Com. Kanc. 18 E. 1. See the ſecond part of the Inſt. cap. Stat. de Judaiſmo.

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

[c] 1 E. 3. 23, 24. 3 Aſſ. p. 2.

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

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Geneſis, c. 6. v. 6.

Dier. 3. Eliz. fol. 186.

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

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

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

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

* Bracton, lib. 3. fol. 155

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

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

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

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

Pl. Com. ubi sup.

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

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

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

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

Lib. 9. fo. 68.

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

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

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

Mackallies case. Ubi supra.

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

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

Bract. l. 3. fo. 104.

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

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

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

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

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

[53]

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

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

Lib. 4. fo. 41, 42. in Heydons caſe.

Stanf. Pl. Cor. 63. 26 Aſſ. p. 52.

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

3 H. 7. c. 1. ſtat. 1. 3 E. 3. cor. 299. 8 E. 2. cor. 393. Inter leges regis Edw. cap. 6.Ætheſtani cap. 1. Ed.' cap. 6. &c.

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

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

CAP. VIII.

OF HOMICIDE.

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

3 E. 3. cor. 290. 289. 312.
Britton cap. 7.

Felo de ſe.

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

Regula.

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

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

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

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

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

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

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

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

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

[d] Pl. Com. 260. b.

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

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

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

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

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

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

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

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

[f] Pl. com. 260. b.

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

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

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

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

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

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

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

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

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

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

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

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

[i] Lib. 4. fol. 44. Bibithes case

[k] 15 E. 3. cor. 110. 15 Ass. p. 7. 43 Ass. 31. See the stat. of Gloc. cap. 30. 3 E. 3. cor. 184. 286 & 297. 305. & 361. See hereafter, cap. 101. of Judgement and Execution. Verb. Of death of a man se defendendo.

* [56]

[a] 43 Ass. 31. Rot. Parl. 5 R. 2. nu. 18. John Imperials case.

[b] 21 E. 3. 17. Gloc. cap. 9. 4 H. 7. 2.

[c] Lib. 4. fo. 44. Bibiths case. Bracton.

[d] Lib. 5. fo. 91. Semayns case. 26 Ass. p. 23. 32. 29 Ass. p. 23. 3 E. 3. co. 305. & 332. 22 E. 3. cor. 261. 21 H. 7. 39.

[e] 24 H. 8. cap. 5.

[f] 22 Ass. p. 55.

[g] 3 E. 3. cor. 290. 22 E. 3. cor. 261. M. 22 E. 3. coram rege Rot. 181. Ebor. Rot. Libert. anno 1 & 2 E. 1. m. 2

[h] Pasch. 16 E. 3. Coram rege. Rot. 131. Norff.

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

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

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

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

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

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

Nec veniam effuso sanguine casus habet.

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

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

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

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

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

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

[57]

Marlbr. ca. 25.

D. Medletis.

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

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

CAP. IX.

OF DEODANDS.

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

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

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

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

[a] 8 E. 2. Cor. 403 8 E. 2 Ibid. 189. A mill wheel. Fleta lib. 1. ca. 25. quicquid mobile sit in molendino. Mirror c. 1. § 13. 12 R. 2. Cor. 20. a masse of earth in a mine.
[b] Bract. lib. 3. fo. 120. b. à bove, cane, &c.
[c] Bracton, lib. 3. fo. 122. a. Britton, fo. 6. 15 Mirror, cap. 1. § 3. Fleta, li. 1. ca. 25. 45 E. 3. 2. b. Vide 4 E. 1. stat. officium coron. 6 E. 6. Dier, 77. b. 61. a. Quæ movent ad mortem sunt Deo danda. 2 Mar. ibid. 107. b. Kelway, 21 H. 7. fo 8.
[d] Lib. 5. fo. 110. b. Foxleys case accord. And this is the reason they cannot be claimed by prescription. 45 E. 3. ubi supra. Fleta ubi sup.
[e] 8 E. 2. cor. 389.
[f] Exod. 2. 28.

*[58]

Doct. & Stud. lib. 2. 156. b. Br. Forfeit. 113. All our ancient authors ubi supra Rot. Parl. 51 E. 3. nu. 73.

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

* The arm of the ſea is included herein.

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

CAP. X.

Of BUGGERY, or SODOMY.

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

25 H. 8. ca. 6. 5 Eliz. ca. 17.

1 Mar. ubi ſup.

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

Horrendum illud peccatum. 5 El. ca. 17.

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

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

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

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

[59]

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

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

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

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

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

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

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

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

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

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

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

* This is grounded upon the word of God. viz. Gen. 19. 4, 5. Judges, 19. 22. Ut cognoſcamus eos.

[a] Coke, lib. Intr. 352. Mich. 5 J. Coram rege.

[b] Ezek. 16. 49. Gen. 18. 20. Deut. 29. 23. Eſay, 13. 19. Jer. 23. 14. 49. 18. 50. 4. Luke 17. 28, 29. 2 Pet. 2. 6. Jud. verſ. 7. Rom. 1. 26, 27. Sapient. 10. 6, 7.

[c] Levit. 20. 13. 1 Cor. c. 6. v. 10.

[d] 3 & 4 P. & Mar. juſtice Daliſons Reports. Stanf. Pl. cor. Pl. com. 97.

[e] 11 H. 4. 13. See the 2. part of the Inſtitutes in the expoſition upon the ſtatute of W. 1. ca. 13. and W. 2. ca. 34.

Cap.

CAP. XI.

OF RAPE.

RAPE is felony by the common law, declared by parliament for the unlawfull and carnall knowledge and abuse of any woman above the age of ten years against her will, or of a woman child under the age of ten years with her will, or against her will, and the offender shall not have the benefit of clergy.

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

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

[c] Although there be *emissio seminis*, yet if there be no penetration, that is, *res in re*, it is no rape, for the words of the indictment be, *carnaliter cognovit, &c.*

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

[e] The same Isabell by another petition shewed, how the said William by dures and menace of imprisonment inforced her to marry him, and by colour thereof ravished her, for the which she prayeth her appeal, which to her is granted.

[f] Margaret late the wife of sir Thomas Malefant knight, made the like complaint against one Lewis Leyson alias Gethey a Welchman. Against whom the like order is taken, as was for the said Isabell: onely where the rape was committed in Wales, it is enacted, that the same shall be tried in Somersetshire.

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

Deut. 22. 25.
Inter leges Alvredi, cap. 25.
Canuti 49, 50.
See W. 2. c. 34.
W. 1. ca. 13.
Rot. Parl. 8. E. 2. & Rot. Claus. 8 E. 2. m. 3.
Quia in casu quando aliquis, &c. 6 R. 2. ca. 6.
18 Eliz. cap. 6.
Lib. 11. fo. 29. Alexander Poulters case.
See the 1. part of the Institutes. sect. 190.
Mich. 19 E. 3. Coram rege. Rot. 159. London quod ipsam de puellagio suo felonice et totaliter defloravit.
7 H. 6. 2.
22 E. 4. 22.
6 H. 7. 4. b.
[a] Di. 14 El. f. 304.
[b] 18 El. ca. 6.
[c] See before in the next preceding chapter of buggery.
[d] Rot. Parl. 15 H. 6. nu. 14.
[e] In the same roll nu. 15.
[f] Rot. Parl. 18 H. 6. nu. 28.
[g] Rot. Parl. 31 H. 6. nu. 72.
[h] 31 H. 6. ca. 9.

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

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

Gen. 34.

2 Sam. 13. 14. 19.

In the holy hiſtory you ſhall read, *Dinam cum vidiſſet Sichem filius Hemor Hevæi princeps terræ illius, adamavit et rapuit, &c.* Obſerve well what followed thereupon. Likewiſe, *Ammon prevalens viribus ſuis oppreſſit Thamar ſororem ſuam, et cubavit cum ea, &c. quæ aſpergens cinerem capiti ſuo, ſciſſa talari tunica, impoſitis manibus ſuper caput ſuum, ibat ingrediens et clamans &c.* And obſerve alſo the end of the offender.

[61]

CAP. XII.

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

Exod. 21. 16.
Deut. 24. 7.
* 1 Tim. 1. 10.

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

3 H. 7. c. 2.
39 El. cap. 9.

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

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

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

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

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

Nota, quia raro.

[62]

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

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

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

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

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

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

Tower

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

CAP. XIII.

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

5 H. 4. ca 5.

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

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

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

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

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

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

Rot Clauſ. anno 13 H. 3. m. 9.

[63]

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

CAP.

CAP. XIV.

OF BURGLARIE.

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

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

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

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

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

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

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

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

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

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

[b] Lib. 4. fo. 39. Brooke's caſe.

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

[d] Horace lib. 1. epiſt

[e] Britton, fo. 17.

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

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

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

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

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

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

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

Break

1 Mar. Dier 99.

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

Stanf. pl. cor. 30. a. Dier 1 Mar. 99. a. 22 Ass. p. 39. 95. * 13 H. 4. 13.

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

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

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

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

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

b Lib. 4. fo. 40. in Brocks case. Hil. 38 Eliz. per les justices, [illegible].

b If a man hath a mansion house, and upon some accident he and all his family some part of the night are out of the house, and in the mean time a thief break and enter into the house, of intent to steale; this is burglary, although neither the owner nor any of his family is in the house: for the indictment of burglary is, *domum mansionalem, &c. fregit, &c.* and this is *domus mansionalis.* c See hereafter the statutes of 23 H. 8. and 5 E. 6.

c 23 H. 8. cap. 1. 5 [illegible] 9. See [illegible] Also [illegible]

If

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

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

[d] Britton. fo. 17. Dier, 1 Mar. 99. 22 E. 3. tit. cor. 264. 22 Aſſ. p. 95. 26 Aſſ. 19.
[e] 27 Aſſ. 42. 20 E. 2. Cor. 283. 12 E. 3. Cor. 120. Rot. Clauſ. 3 E. 3. m. 2 & 18. the ordinary may allow clergy for ſacrilege. Lib. 11. fo. 29.

[65]

[f] Matth. 21. 23.
[g] 5 E. 6. cap. 9.

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

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

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

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

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

Bracton, lib. 3. fo. 144. b. Britton, fo. 33. Statut. Walliæ, fo. 6. tit. de Sweden
Mirr. cap. 1. § 11. de Hamſockne.
Expoſit. vocab. inter ſtatuta.
Fleta, lib. 1. ca. 42

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

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

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

13 H. 4. ubi ſup.

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

22 E. 3. cor. 264. 22 Aſſ. 39. & 95.

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

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

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

Clergie. 18 Eliz. cap. 6.

39 Eliz. ca. 15.

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

[66]

CAP. XV.

Of BURNING of HOUSES.

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

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

[a] Cap. Itineris.

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

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

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

Brit. fo. 16.

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

Fleta li. 1. ca. 35. De combustionibus.

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

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

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

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

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

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

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

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

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

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

Maliciously and voluntarily. Proved also by the words of the indictment, which be, *voluntariè, ex malitia suâ præcogitata, et felonicè.* For if it be done by mischance, or negligence, it is no felony, as before it appeareth.

The law doth sometime imply, that the house was burnt maliciously and voluntarily. As if one intend to burn the house of A only, and not the house of B. and yet in burning the house of A. the house of B. is burnt; in this case the burning of the house of B. is felony, because it proceeded of the malicious and voluntary burning of the house of A. and the event shall be coupled to the cause, which was voluntary, and malicious: and therefore in the indictment for the burning of the house of B. it shall be said, *voluntariè ex malitia sua præcogitata, et felonicè, &c.*

The house of another.] This is not only intended of inset houses, parcell of the mansion-house, but to the outset also, as barn, stable,

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

Hil. 7 E. 2. Corā rege Rot. 24. Norff.

8 H. 6. ca. 6. See 15 H. 6. nu. 23.

All the ancient authors.

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

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8 H. 6. ca. 6.
3 H. 7. 10. per Brian.
High treason. Nota

Pl. Com. fo. 475.

cow-houſe, ſheephouſe, dairy houſe, millhouſe, and the like, parcell of the manſion houſe: but burning of a barn, being no parcell of a manſion houſe, is no felony: and yet if there be corn or hay within it, the burning thereof is felony, though the barn be not part of a manſion houſe. * But the offender is not ouſted of his clergy, but where he burns ſome part of a manſion houſe, or a barn with corn.

Tr. 44 Eliz. Coram reg. Ro. 20. 229. Lib Int. Coke, fo. 25. b. lib. 4. fo. 20. Barhams caſe.

* Pl. Com. 475.

Note the ancient authors extended this felony, further then houſes, viz. to ſtacks of corn, wayns or carts of cole, wood or other goods. And it is ſaid in 3 H. 7. *ubi ſupra, Certum eſt quòd crematio domorum felonicè fuit felonia per communem legem.*

3 & 4 E. 6. c. 5.

The attempt to burn a ſtack of corn, was made felony by the ſtatute of 3 and 4 E. 6. but this is repealed by 1 Mariæ.

37 H. 8. ca. 6.

Burning of the frame of a houſe, was made felony by the ſtatute of 37 H. 8. becauſe the frame of a houſe is no houſe: but that is repealed by 1 E. 6. ca. 12. and 1 Mariæ.

43 El. ca. 13.

43 El. ca. 13. It is felony if any within the counties of Cumberland, Northumberland, Weſtmerland, or the B. of Dureſme wilfully, and of malice burn or cauſe to be burnt any barn or ſtack of corn or grain, without benefit of clergy.

Bract. lib. 3. fo. 146. b.

Note a diverſity between the indictment of burglary and burning; for the indictment of burglary muſt ſay (as hath been ſaid) *domum manſionalem*, but ſo need not the indictment of burning, but *domum*, viz, a barn, &c. malt houſe, or the like.

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CAP. XVI.

OF ROBBERY.

See the 1. part of the Inſtitutes. Sect. 501. Cuſtum. de Norm. cap. 71.

[a] Int. leges Canu. cap. 61. fo. 118. Lamb.

[b] Bracton, li. 3. fo. 146.

ROBBERY is a felony by the common law, committed by a violent aſſault, upon the perſon of another, by putting him in fear, and taking from his perſon his money or other goods of any value whatſoever. [a] See *inter leges Canuti, apertæ compilatione numerantur inter ſcelera hominum inexpiabilia.*

Robbery] [b] It is derived *de la robe*, both becauſe in ancient times (as ſometime yet is done) they bereave the true man of ſome of his robes or garments, and alſo for that his money or other goods are taken from his perſon, that is, from or out of ſome part of his garment, or robe about his perſon. And is ranked in this place, for that it concerneth not only the goods, but the perſon of the owner. We call it, *roberia et rapina*, and the theef *raptor.* Whereof Bracton ſaith, *Eſt enim quaſi furtum rapinæ, quæ idem eſt, quantum ad nos, quod roberia, et eſt genus contrectationis contra voluntatem domini, et ſimilis pœna ſequitur utrunque delictum, unde prædo dicitur fur improbus: quis enim magis contrectat rem alienam invito domino, quam ille qui rapit?*

Bracton, lib. 3. fo. 150. b. Britton, fo. 22. Fleta, lib. 1. ca. 37. Mirror cap. 1. §. 10.

Britton & Fleta Ubi ſupra. 14 E. 3. cor. 115.

Felony by the common law.] This is agreed of, of all, both ancient and late, without any queſtion. And it is deemed in law to be amongſt the moſt hainous felonies, *crimen improbiſſimum.*

Violent

Violent assault.] This agreeth with the indictment, *violenter et felonicè cepit, &c.*

Bract. li. 3. fo. 150. b.

By putting him in fear.] This agreeth also with the indictment: and this circumstance maketh the difference between a robber and a cutpurse: both take it from the person, but this takes it *clam et secretè*, without assault or putting in fear, and the robber by violent assault, and putting in fear. If one cut a purse, with money in it above twelve pence, he shall be hanged, and the benefit of clergy is taken from him. But of ancient time the punishment was otherwise. *S. captus in London cum bursa quam scidit cum tribus solidis, et hoc non potuit dedicere, et ideo amittat dextrum pollicem.* Britton saith, *Des cursors des burses, voylons que celuy que la burse coupa, si auter mavièse ne eyt fait, eyt judgement de pillory; et silz eyent emble auter chose meinder de 12 deniers, perdent un oraile, et si le chose passe 12 deniers, eyent judgment de mort.*

10 H. 3. cor. 434.

Britton, fo. 24. b.

By taking.] The words of the indictment be, *violenter et felonicè cepit. Hic opus est interprete.* For it must be understood, that there is an actuall taking in deed, and a taking in law, and that may be, when a thief receiveth, &c. For example: if thieves rob a true man, and find but little about him, take it, this is an actuall taking; and by menace of death, compell him to swear upon a book to fetch them a greater sum, which he doth, and deliver it unto them, which they receive, this is a taking in law by them, and adjudged robbery: for fear made him to take the oath, and the oath, and fear continuing, made him bring the money, which amounteth to a taking in law, and in this case there need no speciall indictment, but the generall indictment (*quòd violenter et felonicè cepit,*) is sufficient. And so it is, if at the first, the true man for fear deliver his purse, &c. to the thief.

44 E. 3. 14.
4 H. 4. 2.

This word [*cepit*] necessarily implieth, that the thief must be in possession of the thing stoln: for example, if the bag or purse of the true man be fastned to his girdle, &c. and the thief the more easily to take the bag or purse, doe cut the girdle, whereby the bag or purse falleth to the ground, this is no taking, for the thief had never any possession thereof, *et sic de similibus:* but if the thief had taken up the bag, or purse, and in striving had let it fall, and never took it again, this had been a taking, because he had it in his possession; for the continuance of his possession is not required by law.

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From his person.] The words of the indictment be, *à persona, &c.* If the true man seeking to escape, for the safeguard of his mony, cast it into a bush, which the thief perceiving, takes it; this is a taking in law from the person, because it is done at one time. If the true man had cast off his surcote, or other uppermost garment, and the same lying in his presence, a thief assault him, &c. and take the surcote, this is robbery; for that which is taken in his presence, is in law taken from his person: and so it is of the horse of a true man, which stands by him, *et sic de similibus.*

14E. 3. cor. 115.

In ancient authors and records, in pleas of the crown, you shall read of *sakebere, &c.* whom we will derive and explain. *Sakebere, sacbere,* or *sacburgh, sac,* or *sak* is an ancient French word, and signifieth a bag, purse, or powch. So that *sackbere* is he that did bear the bag, &c. and in legall understanding, is he that was robbed of his mony in his bag. And this agreeth with the interpretation thereof

Bract. lib. 3. fo. 150. b.

of by Bracton, viz. *Furtū verò manifestū est, ubi latro deprehensus est seisitus de aliquo latrocinio, viz.* hondhabende, and bacberende, *et insecutus fuerit per aliquē cujus res illa fuerit, qui dicitur* sacaburth. And herewith agreeth Fleta, lib. 1. c. 42. § *Sunt autem,* &c. And Britton, fo. 22. b. & 72. b. agreeth herewith, and calleth him *sakebere;* and so doth justice Stanford, Pl. Cor. fo. 28. term him, which (as we take it) is his right name derived of these two words, *sac,* and *bere,* that is, he that did bear the bag, &c.

Fleta, l. 1. ca. 42. Britton fo. 22. b. & 72 b. Stanf. fo. 28.

14 E. 3. cor. 115. 22 Ass. p. 39. 27 Ass. 38. 24 E. 3. 42. 13 H. 4. 7. 9 E. 4. 28.

Of what value soever.] Though it be under the value of twelve pence, that is taken; (as to the value of a penny or two pence) it is robbery, but somewhat must be taken, for the assault only to rob without taking some money or goods is no felony, and such opinions, as seem to the contrary were maintained by that, which then was anciently holden, *Quòd voluntas reputabatur pro facto.* See before, cap. High Treason, fo. 5. *insidiator viarum.*

CAP. XVII.

In what Cases Breakers of Prisons are Felons.

In the second part of the Institutes upon the statute of 1 E. 2. De frangentibus prisonam.

WE have spoken sufficiently hereof in his proper place, in the exposition of the statute of 1 E. 2. *de frangentibus prisonam.* Only this is to be added, that in case of felony, the offender shall have the benefit of clergy, for the breach of prison.

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CAP. XVIII.

Where Escape Voluntary is Felony.

WE have also spoken somewhat hereof in the exposition of the said act of 1 E. 2. And the voluntary escape can be no felony in the gaoler, unlesse the prisoner be under custody by lawfull warrant expressing the offence, which you may see there at large.

2. There must be a felony done at the time of the escape: for a relation which is but a fiction in law, shall never make a man a felon, as likewise there it appeareth. See Stanford, lib. 1. cap. 26, &c.

CAP. XIX.

Of Felonie by ſtealing, carrying away, withdrawing or avoiding of Records, &c.

SI aſcun record (1) ou parcel dicel, breif, retorne, pannell, proces, ou garrant d'attorney (2) en les courts le roy (3) de chancery (4) eſchequer, lun banke, ou lauter, ou ſa treaſorie (5) ſoit voluntarement emblee, emport, retreit, ou avoide (6) per aſcun clerke ou auter perſon (7), a cauſe de quel aſcun iudgement (8) ſoit reverſe (9): que tiel embleor, emporter, retraher, et avoider, lour procurators, councellors, et abettors (10) ent endites (11) et ſur proces ſur ceo fait, ont duement convicts per lour proper confeſſion, ou per enqueſts prender des loiall homes, (dont la moitye ſoit des homes daſcun court (12) de meſme les courts, et lauter moitye des auters) ſoient adjudges pur felons, et encorgent la paine de felony, et que les iudges de les courts de lun banke, ou de lauter eyent power de oier et terminer, tielz defaults devant eux, et ent fait punition, come devant eſt dit (13).

8 H. 6. cap. 12

IF any record or parcell of the ſame, writ, retorne, panell, proceſſe or warrant of attorny in the kings courts of chancery, exchequer, the one bench or the other, or in his treaſury be willingly ſtolne, taken away, withdrawne, or avoided by any clerk, or by other perſon, becauſe whereof any judgement ſhall be reverſed: that ſuch ſtealer, taker away, withdrawer, or avoyder, their procurators, counſellors, and abettors, thereof indicted, and by proces thereupon made thereof duly convict, by their own confeſſion, or by inqueſt to be taken of lawfull men, (whereof the one halfe ſhall be of the men of any court of the ſame courts, and the other halfe of others) ſhall be judged for felons, and ſhall incurre the paine of felony. And that the judges of the ſaid courts, of the one bench or of the other, have power to hear and determine ſuch defaults before them, and thereof to make due puniſhment, as afore is ſaid.

[71]

The miſchiefe before this ſtatute was, That whereas records are of ſuch high nature and credit, as they import in themſelves abſolute verity without contradiction; to the end, that there might be an end of contention and controverſie, and men might reſt in ſafety and repoſe, certaine clerks and other perſons did oftentimes imbeſell records, or ſome parcell of them, and ſometime a writ,

writ, retorne, panell, proces, or warrant of attorney; or rase or vitiate the same; by reason whereof divers judgements were avoided, or reversed, whereby no man (as the statute saith) had any thing in surety. This was a great misprision, for the which the offenders therein might be punished, either at the suit of the king by indictment, or at the suit of the party by an action upon his case. See the record concerning this matter following. *Placita coram justiciariis de banco termino Trinitatis anno* 19 *E.* 1. *Rot.* 57. *indors.*

Radulphus de Greshope communis attornatus de com. Westmerland malitiose rotulum excurtavit et abscidit, et ideo per annum et diem committitur turri London, postea anno 20 *E.* 3. *per mandatum regis liberatur et per justic'arios ei est inhibitum ne de caetero in cadē curia de aliquibus negotiis se intromittat.*

Which remedie and punishment were thought too weak against clerks and other persons, which (committing such things) commonly were of small ability: therefore this act, considering the danger of the offence, maketh the same felony, as by the letter thereof appeareth.

* See the first part of the Institutes sect. 117. for this word.

a 9 E. 4. 3. b. 16 Eliz. Dier, 330. a. *Virgil.*

(1) *Si ascun * record.*] A record is regularly a monument or act judiciall before a judge, or judges, in a court of record, entred in [a] parchment in the right roll. It is called a record, for that it recordeth or beareth witnesse of the truth, and is derived of the verb *recordor*, whereof the poet speaketh,

Si rite audita recordor.

It hath this soveraigne priviledge, that it is proved by no other but by itselfe. *Monumenta (quae nos recorda vocamus) sunt vetustatis et veritatis vestigia.* And albeit the cause adjudged be particular, yet when it is entred of record, it is of great authority in law, and serves for perpetuall evidence, and therefore ought to be common to all, yea, though it be against the king: as it is declared by act of parliament in *anno* 46 E. 3. which you may reade in the preface to the third book of my reports.

Rot. Parl. 46 E. 3. 9 H. 7. 16. See the preface to the third book.

(2) *Breife, retorne, panel, proces, ou garr' d'attornie.*] All these are sufficiently known, and yet have we treated of the same in the first part of the Institutes.

(3) *En les courts le roy.*] Here are expresly named four of the kings courts, viz. the chancery, the exchequer, the kings bench, and the court of common pleas, and hereunto is added the kings treasury: so as this act extendeth not to any other court or place, then is here named.

(4) *Chancery.*] This must be understood of the court of chancery, which proceedeth according to the course of the common law, as in case of priviledge, of *scire facias* upon recognizances, traverses of offices, and the like: for as to these it is a court of record, but as to the proceeding by English bill in course of equity, it is no court of record, for thereupon no writ of error lieth, as in the other cases.

37 H. 6. 14.

(5) *Ou sa treasorie.*] The kings treasury is called *thesauraria regis*, the place where the kings treasure is kept. This treasure is twofold, viz. his money or coine: and another, that is far more precious and excellent, and those be the sacred judgements, records, and other judiciall proceedings under the safe custody of the treasurer,

treasurer, and chamberlains of the exchequer. And this treasury is partly in the exchequer, and partly in the towre of London: for there be ancient rolls of the treasury remaining in the towre. And therefore this act intending to include both the one, and the other, saith generally, *en sa treasorie*.

Register. F. N. B. 244. d.

(6) *Soit voluntarement emblee, emport, retreit, ou avoide.*] In the indictment upon this statute besides *felonicé*, this word [*voluntarié*] must of necessity be used, to agree with this act. Here be four words used, *emblee* stolne, *emport* carried away, *retreit* withdrawne, *ou avoide* or avoided. So as the sense is, if any record or part of it, writ, retorne, panell, proces, or warrant of attorney, &c. be stolne, carried away, withdrawn, or avoided, &c. And this word [avoided] is a large word, and doth include, rasing, or clipping, or cutting off of the side, or other part of the roll, or any other kind of avoiding the same.

2 R. 3. 10.

(7) *Per ascun clerk ou auter person.*] This act doth not extend to any judge of the court; both because it beginneth with a clerk, &c. and for that by the statute of 8 R. 2. a penalty is inflicted upon a judge, &c. for making any false entry, rasing any roll, or changing any verdict. See the statute; for it extendeth also to clerks. Only this is to be observed in that statute, that where it is said [the king and his councell,] it is intended of the court of justice where the matter dependeth: for the judges are the kings councell for judicature and proceedings according to law and justice.

2 R. 3. 10.
8 R. 2. cap. 4.
2 R. 3. 10.

Justice Ingham paid in the raigne of E. 1. eight hundred marks for a fine, for that a poore man being fined in an action of debt at thirteen shillings foure pence, the said justice moved with pity caused the roll to be rased, and made it six shillings eight pence.

2 R. 3. 10.

This case justice Southcot remembred, when Catlyn chiefe justice of the kings bench in the raigne of queen Elizabeth, would have ordered a rasure of a roll in the like case, which Southcot, one of the judges of that court, utterly denied to assent unto, and said openly, that he meant not to build a clock-house: for (said he) with the fine that Ingham paid for the like matter, the clock-house at Westminster was builded, and furnished with a clock, which continueth to this day.

(8) *A cause de quel ascun judgement soit revers.*] This act extendeth only to records, whereupon judgement is given. But whether judgement be given in causes criminall at the suit of the king upon an indictment, or at the suit of the party in an appeale, or in actions, reall, personall, or mixt, or of the like nature, this act extends thereunto, if judgement be afterwards given, and to outlawries, for there judgement is given *per judicium coronatorum*. For it is not materiall whether the act be done against this statute, either before or after judgement, so judgement be given.

2 R. 3. 10.

(9) *Revers*] is here taken, not only where the judgement is made erroneous, and to be reversed by writ of error, but where the judgement is so annihilated, and made voide, as it bindeth not, or may be reversed or avoided by plea. See the book in 2 R. 3. fol. 10. which expoundeth well this statute.

(10) *Que tiel embleor, emporter, &c. lour procurers, counsellors et abettors, &c.*] This act expresly extendeth to accessories before, and leaveth accessories after to the construction of law, yet may there

Vide 3 & 4 Ph. and Mar. Justice Dalisons Report, ubi sup.

there be accessories after the fact: for whensoever an offence is made a felony by act of parliament, there shall be accessories to it both before and after, as if it had been a felony by the common law, and therefore though this act expresseth accessories * before, yet it taketh not away accessories after, but leaveth them to the law, contrary to the opinion of justice Stanford. See before the exposition of 3 H. 7. for taking away of women against their will.

Stanf. pl. cor. 44. b.
3 H. 7. cap 2.

2 R. 3. fo. 10.

(11) *Ent endites.*] If the acts that make this felony, be committed in two counties, the indictment faileth, as hath bin said before upon the statute of 2 & 3 E. 6. cap. 24. And this case of felony rising in two counties, is not holden by any statute yet made.

(12) *Dont la moity soit des hommes dascun court.*] Here is a party jurie, the one halfe to be of the officers and clerks of the court, &c. for their knowledge, and for the better information of the others.

(13) *Et que les judges des dits courts de lun bank ou de lauter eyent power de oier et terminer tiels defaults devant eux, et ent faire punition, come est avant dit.*] This clause is in nature of a commission to the justices of either bench, if the offence be committed in the county where the benches do sit. And the justices of either bench have a concurrent authority, and which of them enquire first shall proceed: but if the felony be committed in another county, then where the benches sit (as for example in Surry, Hertfordshire, &c.) there the justices ought to have a commission. But if the bench sit in Middlesex, and the felony is done in London, in which case a commission is requisite, as is aforesaid. But then some have said, that by the charters of London confirmed by parliament, the major ought to be principall in the commission, and the major is none of the judges authorized by this act to heare and determine this felony, but the justices of the one bench or the other: and therefore the statute being penall, and to be taken strictly, no proceeding can be. *Sed salva res est:* for the charters of the city of London extend only to such offences committed in London, whereof the major with others by commission may enquire of, heare, and determine, and not to such offences so annexed by authority of parliament to other persons (as in this case to the justices of the one bench or the other) as the major is not warranted by the said act to enquire, &c. And therefore a commission in this case may be made to the justices of the one bench or the other, omitting the major, *ne curia regis deficeret in justitia exhibenda.*

2 R. 3. 10.
2 R. 3. 11.

4 H. 7. cap. 13.
22 H. 7. cap. ult.

And albeit this kinde of felony is an heinous offence, yet may the offenders therein have their clergy: for untill the raign of H. 7. (that we may note it once for all) the benefit of clergy was not taken away by any act of parliament in case of felony. As for the statute of *bigamis* made in 4 E. 1. it was but an exposition and allowance of the constitution made at the generall councell at Lyons concerning the same, as before hath been said. But (as we remember) the first statute making a new felony that took away the benefit of clergy was the statute of 7 H. 7, concerning souldiers. *Vide* lib. 8. fol. 160. & lib. 11. fol. 11.

7 H. 7. cap. 1.

CAP.

CAP. XX.

Of Felony in ſuch as uſe the Craft of Multiplication.

NONE from henceforth ſhall uſe to multiply gold or ſilver, or uſe the craft of multiplication (1): and if any the ſame doe, he ſhall incur the pain of felony.

5 H. 4. ca. 4.

This is the ſhorteſt act of parliament that we remember; before the making whereof, divers of the nobility, gentry, and others did waſt and conſume a great part of their inheritance, and wealth, about the art of multiplication, by the ſubtile and ſiniſter perſwaſion of certain impoſtors, and deceivers, which took upon them to be ſkilfull therein, and to be able to multiply gold and ſilver, being themſelves for the moſt part very poor and indigent perſons, of whom it was ſaid, *Quòd pollicentur aliis ingentes divitias, et ipſi petunt parvas drachmas.* See Chaucer our Engliſh poet, who wrote about the time of the making of this act, in the tale of the Chanons Yeoman, fo. 63. *(in libro meo,)* that the end of this ſliding and curſed craft (ſo full of impoſture and deceit) is extream beggery: he is worth the reading, for he diſcovereth the ſecrets of this craft, as our act tearms it.

Now ſeeing the end of this feigned art of multiplication is meer deceit, and tendeth to the undoing of many; at this parliament the uſe of this craft of multiplication is made felony. For the better underſtanding of that which ſhall be ſaid, it is to be known, that there are ſix kinds of metalls, viz. *aurum, argentū, æs, ſive cuprum (quia inventum fuit in Cypro) ſtannum, plumbum, et ferrum.* That is to ſay, gold, ſilver, copper, tynne, lead, and iron; for *chalybs* ſteel is but the harder part of iron, and *orichalcum, aurichalcum,* viz. lattyn or braſſe, is compounded of copper and other things.

(1) *The craft of multiplication.*] That is, to change other metals into very gold or ſilver. And this they pretend to doe by a *quint eſſence*, or a fifth eſſence. Four eſſences, or elements we know, fire, aire, water, and earth, but ſay they, this *quint eſſence* is a certain ſubtill, and ſpirituall ſubſtance extracted out of things by ſeparation from the four elements, differing really from their eſſence, as *aqua vitæ*, the ſpirit of wine, or the like, and this is called *elixar*, or the philoſophers ſtone, and it is part of alchemie, or chemie, in Latine *ars chemica.* The offenders therein are called multipliers, chemiſts, alchemiſts, &c. There * may be acceſſories to this new felony, both before and after. King Henry the ſixth, by his letters patents, *de concilii ſui deliberatione deputavit Willm. Cautelo et alios cives civitatis London ad inveſtigandam veritatem ſuper hiis quæ in ſcriptis erunt eis monſtrata, pro multiplicatione muniſmatis,*

* 7 E. 6. Dier, 88 Rot. Pat. 34 H. 6. m. 13.

nuniſmatis, tam de auro, quam argento, et quicquid in præmiſſis egerint, cum eorum opinione referrent in ſcriptis regi et concilio ſuo.

The like [a] letters patents *anno* 35 H. 6. *pro Thoma Harvie et aliis.*

Rex [b] *ex ſua regali prærogativa, &c. dedit licentiam Johanni Faceby et aliis ad inveſtigandum, proſequendum et perficiendum quandam precioſiſſimam medicinam, quintam eſſentiam, lapidem philoſophorum nuncupatum, nec non poteſtatem faciendi et exercendi tranſmutationes metallorum in verum aurum, et argentum,* with a *non obſtante* of this ſtatute of 5 H. 4. By theſe letters patents this act is more explained, then by any record we have ſeen.

How theſe ſeveral kinds of metalls, as is ſuppoſed, proceed originally from ſulphur * and quickſilver, as from their father and mother, and other things concerning the ſame, you may at your leiſure read in George Agricola, lib. 10. ca. 1. Encelms, li. 1. ca. 1. Pl Com. 359.

Almighty God in the fourth day created the earth, and no mention is made of metals, for that they were as parts of the earth.

The fatall end of theſe five are beggery; this kind of alchemiſt, the monopoliſt, the concealer, the informer, and poetaſters.

Sæpe pater dixit, ſtudium quid inutile tentas?
Mæonides nullas ipſe reliquit opes.

I could give examples (of mine own obſervation) of all theſe, if it were pertinent to our purpoſe.

[a] Ro. Pat. 35 H. 6.

[b] Ro. Pat. 34 H. 6. m. 7. Hanc artem ſophiſticam impoſturam nominat *Melancthon.* Mentiendi et fallendi artem. *Petrarch Eraſ.* in Colloquio Dæmonis præſtigias. *Peucerus Chaucer* ubi ſupra. The curſed and ſliding craft. *Vertitur in fumum quicquid ineptus agit.* See *Pancirolus.* Int. nova reperta tit. 7. fo. 357. Vide Stanf. pl. cor. 37. b. Gen. c. 1. v. 9. cap. 2. v. 11.

* [75]

CAP. XXI.

Of Felony in Hunters in the Night, or with painted Faces, in any Foreſt, Park, or Warren.

1 H. 7. ca. 1.

AT every ſuch time as information ſhall be made of any unlawfull huntings in any foreſt, park, or warren (3) by night, or with painted faces (1) to any of the kings councell (4) or any the juſtices of the kings peace (5) in the county where any ſuch hunting ſhall be had, of any perſon to be ſuſpected (2) thereof, it ſhall be lawfull to any of the ſame councell, or juſtices of peace, to whom any ſuch information ſhall be made, to make a warrant (6) to the ſherif of ſuch county, or to any conſtable, bailif, or other officer within the ſame county, to take and arreſt the ſame perſon and perſons of whom ſuch informations ſhall be made, and to have him, or them before the maker of the ſame warrant, or any other (7) of the kings ſaid councell, or his juſtices of peace of the ſame county. And that the ſaid counſellor or juſtice of peace, before whom ſuch perſon, or perſons ſhall be brought, by his diſcretion have power to examine him or them ſo brought, of the