

Christian buriall when they were dead, nor permitted to receive the rites of the church whilest they lived.

The word *estuis* or *stewes* is French, we having no English word for it.

Before the reigne of H. 7. there were eighteen of these infamous houfes, and H. 7. for a time forbad them: but afterwards twelve only were permitted, and had signes painted on their wals; as a Boares Head, the Crofs Keyes, the Gun, the Castle, the Crane, the Cardinals Hat, the Bell, the Swan, &c.

Many wicked and common women had seated themselves in a lane called Water-lane, next to the house of the friers Carmelites in Fleet-street: this being an open and known wickednesse, king E. 3. to the end these friars might performe their vowes, one of which was, to live in perpetuall chastity, took order for removing of these women. The record saith, *Rex præcipit majori civitatis London quod amoveri faciat omnes mulieres meretrices in venella prope fratres Carmelitarum in Fletestreet inhabitantes.*

Read 3 Regum cap. 14. verse 24. eodem lib. cap. 15. verse 12. & 4 Regum cap. 23. verse 7.

And by the common law it appertaineth to the marshall of the kings house to free, or protect the court from *femes puteins*, which is more particularly explained by Fleta, who saith, *Mareschalli interest virgatum à meretricibus omnib' protegere et deliberare, et habet mareschallus ex consuetudine pro qualibet meretrice coi. infra metas hospitii inventa, 4<sup>d</sup> primo die; quæ si iterum in baliva sua inveniat, capiatur et eam seneschallo inhibeat, et ei hospitium regis, reginæ, et liberorum suorum, ne iterum ingrediatur, et nomina eorum imbreventur: quæ si iterum inventæ fuerint hospic' sequutrices, tunc aut remaneant in prisona in vinculis, aut sponte prædic' hospicia abjurentur; quæ si autem tertio inventæ fuerint, considerabitur quod amputetur eis tresseria, et tondeantur; quæ quidem si quarto inveniantur, amputentur eis superlabia, ne de cætero concupiscantur ad libidinem.*

14 R. 2. It is enacted that no estews or brothel-houfes should be kept in Southwark, but in the common places therefore appointed.

So odious and so dangerous was this infamous vice (the fairest end whereof is beggery) that men in making of leases of their houfes, did adde an expresse condition, that the lessee, &c. should not suffer, harbour, or keep any *feme puteine* within the said houfes, &c.

See the case of 1 H. 7. the custome of London for entring into an house, and arresting of an advowtrer, and carrying her to prison. In ancient times adultery and fornication were punished by fine and imprisonment, and inquirable in turnes and leets by the name of Letherwite. We find in Domesday *De adulterio vero per totum Chent, habet rex hominem, (i. amerciamentum hominis) et archiepiscopus mulierem, (i. amerciamentum mulieris) &c.*

*Vidua, si alicui se non legitime commisceb. 20 s. emendabit, puella vero 10 s. pro consimili causa.*

*Adulterium faciens 8 s. & 4 d. emendabit homo, et fœmina tantundem. Rex habet hominem adulterum, archiepiscopus fœminam.*

But now these offences belong to the ecclesiasticall court.

*Legrewita, or logrewita, legergeld, or logergeld, of legre or logre for a bed,*

III. INST.

R

a bed,

Fabian Chron.  
Stowe.

In Dorf. Claus.  
21 E. 3. part 1.  
m. 6.

Fratres beatæ  
Maræ de Monte  
Carmeli, called  
White Fryers.

7 E. 3. fo. 23, 24.  
Fleta lib. 2.  
cap. 5. lib. 10.  
Le case de Mar-  
shallea, fo. 77.

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Rot. par. 14 R. 2.  
nu. 32

35 H. 6. Barre  
162.

1 H. 7. fo. 6;  
&c.

Domesday.  
Chent. Dover.  
Ibid. Cestrie ci-  
vitas.

Ibid. Sudsex  
Lewes.

Domesday.  
Hut. de iesc.  
Bracton.  
Fleta.

Rastall term.  
leg. Stat. de ex-  
posit. vocab.

a bed, and *wite amerciamient*, by common speech *letherwite*, or *lairewite*, *lierwite*, *lotherwite*.

*Childewite* is for the lord to take a fine for his bondwoman defiled and begotten with childe.

*Bawdry*, *lenocinium*, *unde ribawdry et ribaude*. i. *Impudicus rabela*. See *parliam.* 50 E. 3. nu. 61. of ribauds and robertsmen.

[ 207 ]

C A P. XCIX.

## De Assentatione, Fucologia, Pseudologia, Flattery.

Int. leges Canuti, fo. 106. c. 7. Lam. Fatalis magnarum potestatum peris, adulatio. Semper assentor id, quod is ad cujus voluntatem dicitur, esse magnum; ut in Terentio: magnas vero agere gratias mihi, &c. satis erat respondisse magnas, ingentes inquit.

WE find a law before the conquest against flatterers in these words, *Liccenar 7 Leogonar nepenar 7 neapanar 7 oðer 7 naman habban*, &c. which Dr. Lambard translateth thus, *Assentatores, mendaces, prædones, et rapaces offensionem Dei gravissimam incurrant*, &c.

The ancient manuscript translateth it thus, *Seductores, mendaces, rapaces et raptores Dei gravamen habeant*. And both translations do in effect agree, for a flatterer is a seducer for some private end, by fained praise and humouring of another, whereby he hath an *oultrecuidance* of himselfe, his state, and actions, *isti ducunt et seducunt*.

The occasion of making this law was, that king Canutus had been seduced by flatterers, who had shewed him his face and state in a false glasse, making too great a shew of his own parts, actions, and state, to the end to make him conceit himselfe to be better and greater then he was, and his adversaries lesse, then in truth they were. Nay, this king by wicked flatterers assumed to him divine power and honour: for coming from sea, he set his feet on the sea strand, as the sea was flowing, and commanded the sea not to rise to wet his lordly and majestick feet nor clothes: the sea keeping on his accustomed course, both wet his feet and thighs also: whereat being fore amazed repented his presumption (which he had undertaken by wicked flattery.)

And well is the flatterer marshalled in this law with lyers, thieves, and raveners; for the divine described flatterers to be those, *Qui colunt aliquem, et auferunt ab eo aliquid temporarii boni*. So as it is *peccatum viscatum*, it getteth away much and giveth smoke.

And the Holy Ghost hath styled flattery *oleum peccatoris*, that is, the oile of the sinner, *κατ' ἐξοχήν*, that is, of him that exceedeth others in sinne, and doth affect greatnesse, that is the head, making it greater and more prosperous then it is, as you may reade in the prophet David: *Corripiet me justus in misericordia, et increpabit me, oleum autem peccatoris non impinguet caput meum*. Whereby he being both a king and a prophet, preferreth the reproofe, nay the sharpe rebuke of the just and vertuous, before the smooth humouring of

Psal. 141. 5.

the flatterer (*per nomen*) of the sinner. This *oleum peccatoris* is *mel venenatum, et venenum mellitum*, and commonly affecteth greatnesse, and is called lordbane.

And againe, David speaking of the flatterer saith, his words are smoother then oile, and yet are they very swords. *Hæc dicit Dominus Deus, Væ qui consuunt pulvillos sub omni cubito manus, et faciunt cervicalia sub capite universæ ætatis ad capiend' animas, &c.* Thus saith the Lord God, Woe to them that sow pillowes under all arrow-holes, and put kerchifes upon the heads of every age to hunt soules. They make the king glad with their wickednesse, and the princes with their lyes. *In malitia sua lætificaverunt regem, et in mendaciis suis principes.*

The flattering mouth worketh ruine. And more kings and kingdomes have been overthrowen by the means of flattery, then by publick hostility. And this is the cause that we have mentioned the said ancient law for their punishment, they be lawfully banished from princes courts, and subjects houses.

*Ut videat, cæco fit simia præda leoni :  
Rex cæcus cernit, cum sycophanta perit.*

What fearfull ends flattering favourites, corruptors of their soveraigne liege lords, abusing their favours in subversion of their lawes, have had, appeareth in our parliament rolls, records, and histories.

<sup>a</sup> King H. 3. had Hubert de Burgo chiefe justice and earle of Kent, and many others: but this was his safety, that upon just occasion without any great grief he could forgoe a favourite. See in the preface to the second part of the Institutes, his countell to H. 3. to burne Magna Carta.

E. 2. had <sup>b</sup> Pierce de Gaveston, the <sup>c</sup> Spencers, &c. and the Spencers proceedings against *le grand charter* by name (amongst other things) tending to the subversion of law, &c.

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Psal. 55. 22.

Ezech. 13. 18.

Osee 7. 3.

Prov. 26. 28.

Qu. Curtius

[ 208 ]

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<sup>a</sup> Rot. pat. anno 17 H. 3. Nos integre et firmiter tenebimus judicium de Huberto de Burgo, per barones datum. Speed 18 H. 3. 520.

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<sup>c</sup> Vet. Mag. Cart. 2 part 44 ib 50. xi-lium Hugonis, & 54. Ne quis occasione pro felonis in prosecutione d' Spencer patris & filii. d Rot. par.

11 R. 2. nu. 8. &c.

<sup>e</sup> Rot. par. 28 H. 6. nu. 19. untill 47.

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<sup>f</sup> 11 mensh. 713. a. 30.

<sup>g</sup> 110. lenth. 722. 748. 767. a.

The like indictment

Richard Empson was indicted, *Quod ipse consiliarius excellentissimi principis Henrici nuper regis Angliæ septimi Deum præ oculis non habens, sed ut filius diabolicus subtiliter imaginans honorem, dignitatem, et prosperitatem d'Æi nuper regis ac posteritatem regni sui Angliæ minime valere, sed ut ipse magis si gulares favores d'Æi nuper regis adhibere, unde magnat' fieri potuisset, ac totum regnum Angliæ secundum ejus voluntatem gubernare, falso, deceptivo, et proditorie legem Angliæ subvertens, diversis ligeos i. s. nuper regis, ex sua falsa covina et subtili ingenio, contra communē legē regni Angliæ de diversis felonis, &c. indictari fecit, &c. per quod plures et diversi populi d'Æi nuper regis hinc gravaminibus, et indebitis exactiōib' multipliciter torquebantur, in tantum quod populi d'Æi nuper regis versus ipsum nuper regem multipliciter murmurabant, et mali nabant, in magnum periculum ipsius nuper regis regni sui Angliæ, ac subversionem legum et consuetudinum ejusdem regni, &c.* And the like indictment was against Dudley.

Tr. 23 H. 8.  
coram rege.  
Rot. 14.

H. 8. had Thomas Woolsey cardinall. *Ipsè intendens finaliter antiquissimas Angliæ leges penitus subvertere, et enervare, universumq; hoc regnum Angliæ et ejusdem regni populum legibus imperialibus, vulgo d'Æi, legibus civilibus, et earundem legum canonibus subjugare et subducere, &c.*

We will for some causes descend no lower. *Qui eorum vestigiis insistant, eorum exitus perhorrescant.*

But that right be done to him, who was a faithfull favorite and counseller to this king, we have seen a manuscript that relateth, that Charles Brandon duke of Suffolk a wise and warlike person, was for many years before his decease the greatest favourite the king had, upon whom he chiefly relied in all his weightiest affairs. This noble duke deceased in August in the 37 year of the reign of king H. 8. After whose death the next time the king sat with his counsell, and missing the good duke, grievously lamented for him, and said, that when I was offended with any (as often I was) and acquainted him therewith, that he ever endeavoured to mitigate my displeasure, and never spake to me evill of any of them. And the king looking upon the lords of his counsell one after another, said, and so (my lord) cannot you say, perusing them all throughout. A royall commendation of this great Duke, and a great argument of his piety and honour, that no subject had ever the indignation or displeasure of his soveraign, by any private whispering of his.

[ 209 ]

Anno 5 R. 2.  
Th. Walf.  
p. 281.

Read the story,  
and see the most  
lamentable  
estate of those  
times. Note  
these three PPP.

We will conclude this chapter with one of our own histories. *Generaliter cunctorum habitatorum terræ peccatis inclusivè ordinis sumendo mendicantium ad cumulandum causas malorum, &c. isti possessionatis invidentes, procerum crimina approbantes, commune vulgus in errore foventes, et utrorumque peccata comedentes, pro possessionibus acquirendis, qui possessiones renunciaverant pro pecuniis congregandis: qui in paupertate perseverare juraverant, dicunt bonum malum, et malum bonum, seducentes principes adulationibus, plebem mendaciis, et utrosque secum in devium pertrahentes, &c.* Note what is said, that the full heap of the causes of Gods vengeance in those days, was made up by those flattering preaching friers. But parliaments, palaces of princes and pulpits should be free from adulation and flattery.

C A P. C.

Of false Imprisonment.

SEE the second part of the Institutes, the statute *de 1 E. 2. de frangentibus prisonam*, and the exposition upon the same.

See the Petition of Right 3 Car. regis, and Mag. Cart. ca. 29. And it is to be observed that before the conquest it was thus provided. *Qui hominem paganum immerentem vinculis constrinxerit, 10 solidis noxiam sarcito; cum si verberibus offecerit, 20 solidorum cæna esto; si suspensum in sublimi rapuerit, 30 solidis culpa pensatur; si contumeliose capillum ejus morionis in morem totonderit, 10 solidi præstato; si caput in morem sacerdotis raserit, nec ipsum ligaverit, 30 solidos numerato; si barbam illi rescerit, 20 solidorum compensatio sequitur; si denique ei vinculis constricto capillos in morem sacerdotum abreserit, 60 solidos pendito.*

Int. leges Alveredi cap. 31.

By way of addition, here it is necessary to be known, how and by what means one that is in prison may be discharged. Every man that is in prison, either is imprisoned without lawfull *mittimus* (whereof we have spoken before *ubi supra*, and how he may be freed from imprisonment in that case) or with lawfull *mittimus*. He, that is lawfully imprisoned, is either imprisoned by lawfull commandment, and order or warrant, or by the kings writ: by commandment and order of any court of record; and this commandment, warrant or writ is either for causes not being treason or felony, misprision of the same, nor other publique offence or cause, or inferiour causes to these; as contempts, private actions or suits. If any court of record commit a man for a contempt done in court, they may discharge him by like order at their pleasure: but if they having authority, doe commit him for treason, felony, or other crime, or for suspicion of the same, they cannot discharge him, untill he be inquired of, and either indicted and acquitted, or an ignoramus found, and delivered by proclamation. <sup>a</sup> And so it is if any be taken and imprisoned by lawfull warrant, or the kings writ for treason, felony, or other crime, &c. he cannot be discharged by any without legall proceeding (but by the king only.)

<sup>b</sup> If a vagrant, refusing to serve, had been committed to prison upon the statute of 23 E. 3. of labourers by the lord of the town, or justice of peace, they might have discharged him, even as the chancellour, &c. may commit a man for a contempt before him in court, and discharge him again at his pleasure.

<sup>c</sup> If a man be taken by the kings writ in an action of debt or another private action, the plaintiff may discharge the gaoler of him, and set him at liberty, though he be in execution: but if he be taken in an appeal of death, robbery, rape, \* &c. the plaintiff cannot discharge him, because it is a publique offence, wherein the king hath an interest, and he may after nonsuit by the plaintiff be arraigned at the kings suit.

There are two great adversaries to the due execution of these laws (as

<sup>a</sup> For bailment See the statute of Mag. Cart. ca. 29. W. 2. ca. 15. and the exposition thereof.

<sup>b</sup> 1 & 2 Ph. and Mar. ca. 13. 2 & 3 Ph. and Ma. cap. 10. <sup>b</sup> 14 H. 6. 8. F. N. B. 167. b. See 12 H. 6. 3. <sup>c</sup> M ch. 13 Jac. in banke le Roy. Int. Withers & Herly, adjudge accord.

27 H. 8. 28. b. 1 R. 2. ca. 12. 10 H. 7. 3. a. per Vavasor. 13 E. 3. Bar. 253.

\*[ 210 ]

Fortescue ca. 53.  
10. 427. b.

(as before hath been touched) especially in criminall causes, viz. *præcipitatio, et morosa cunctatio*. Precipitation; as a man or woman to be committed to prison, and within so short a time to be indicted and arraigned, as it is not possible for them to send for, or procure their witnesses; this certainly is precipitation; for the law both in reall and personall actions doth give the party tenant or defendant a convenient time without respect of persons to answer, &c. much more it ought to be in case of life, *Nec unquam in judiciis tantum eminet periculum, quantum parit processus festinatus*: and again, *crebro in deliberationibus judic. a maturescunt, in accelerato processu nunquam*, and specially in case of life. As for *morosa cunctatio*, forward or weyward delay; see the second part of the Institutes, Glouc. ca. 2. 9. And we will conclude this chapter with the rule of law, *Quod in criminalibus, probationes debent esse luce clariores*.

## C A P. CI.

### Of Judgements and Execution.

**J**UDICIUM is derived à jure, et dicto, et est quasi juris dictum and therefore if the judgement be erroneous, both the judgement and execution thereupon, and all the former proceedings shall be reversed by writ of error: but if the former proceeding and judgement be good, if the execution be erroneous, the execution shall only be reversed: and because the judgement is the guide and direction of the execution, we shall treat principally of the judgement, and incidently of execution.

Of judgements, some be by the common law, and some by statute law, and some by custome.

Of judgements by the common law, some be in criminall causes, or pleas of the crown, concerning the life of man (whereof we are principally to intreat,) and of these some be expressed, and some implied. Other judgements at the common law be in actions reall and mixt, of which, some be *judicia interlocutoria*, and some *ultima seu principalia*: and again, *de principalibus, quædam sunt finalia, et quædam non sunt finalia*. Of judgements by statutes, some be in criminall causes, and some in common pleas: but judgements by custome are only in common pleas.

All pleas of the crown, concerning the life of man, are divided into treason and felony; and treason, into high treason, and petit treason; and felony into all the severall branches abovesaid. And as in the case of high treason, (as it hath before appeared) some be far more horrible and odious then other, yet (one case excepted, as before hath appeared) one and the same judgement is given for all. So in cases of petit treason, one judgement is given in all, nay in all the severall cases of felony, though some be far more hainous then other, yet all being but felony, one and the same judgement is given. See the judgement and forfeiture in cases of treason, felony, &c. in the severall titles thereof, these we will adde.

6 El. Dier 230.  
See before in the  
chapter of Treason,

*Judgements*



*Judgement in High Treason.*

*Et super hoc visis, et per curiam hic intellectis omnibus et singulis præmissis, \* consideratum est, quod prædictus R. usque furcas de T. 1 trahatur, et 2 ibidem suspendatur per collum, et vivus ad terram prosternatur, et 3 interiora sua extra ventrem † suum capiantur, 4 ipsoque vivente comburantur, et 5 caput suum amputetur, quodque 6 corpus suum in quatuor partes dividatur; ac 7 quod caput et quarteria illa ponantur, ubi dominus rex ea assignare vult.*

li. 3. fo. 118, b. *Crimen læsæ majest. ut si contra personam ipsius regis sit præsumptum, quod quidem crimen omnia alia crimina excedit quoad pœnam.* Idem. l. 3. f. 104. b. maketh mention of execution, *laqueo et securi, parliam. 21 R. 2. inter placita coron. nu. 50.*

Pl. Com. 287. b.  
See Stanford  
182. d. e. lib.  
Int. Co. 361.  
\* See the book  
of Judges cap. 19.  
ver. ult. Consider,  
consult, and  
give sentence.  
19 H. 6. 47.  
Trahe, pende, et  
disclose. Bract.  
† [ 211 ]  
35 H. 8. Br.  
Forfeiture. 99.

Implied in this judgement is, first, the forfeiture of all his manors, lands, tenements, and hereditaments in fee-simple, or fee-tail of whomsoever they be holden. Secondly, his wife to lose her dower. Thirdly, he shall lose his children (for they become base and ignoble.) Fourthly, he shall lose his posterity, for his blood is stained and corrupted, and they cannot inherit to him or any other auncestor. Fifthly, all his goods and chattels, &c. And reason is, that his body, lands, goods, posterity, &c. shall be torn, pulled asunder, and destroyed, that intended to tear, and destroy the majesty of government. And all these severall punishments are found for treason in holy scripture.

- 1 Reg. 2. 28. &c. *Joab tractus, &c.*
- Esther, 2. 22, 23. *Bithan suspensus, &c.*
- Acts, 1. 18. *Judas suspensus crepuit medius, et diffusa sunt viscera ejus.*
- 2 Sam. 13. 14, 15. *Infixit tres lanceas in corde Absolon cum adhuc palpitaret, &c.*
- 2 Sam. 20. 22. *Alscissum caput Sheba filii Bichri.*
- 2 Sam. 4. 11, 12. *Interfecerunt Baanan et Rechab, et suspende- runt manus et pedes eorum super piscinam in Hebron.*

Drawing.  
Hanging.  
Bowelling.  
The heart, &c.  
while he lived.  
Bcheaded.  
Quarters hanged  
up.  
Damnatae me-  
morizæ.  
a 25 E. 3. 42. b.  
Coron. 130.  
Brit. ca. 8. f.  
16. b. accord.  
b Degradation.  
Hil. 18 E. 2.  
Coram rege rot.  
34, 35. Wal-  
sing. p. 118.

Corruption of blood, and that the children of a traitor should not inherite, appeareth also by holy scripture.

Psal. 109. 9, 10, 11, 12, 13. *Mutantes transferantur filii ejus, et mendicent, et ejiciantur de habitationibus suis, et diripient alieni labores ejus, et dispereat de terra memoria ejus.*

<sup>a</sup> The judgement of a woman for high treason is to be drawn and burnt.

<sup>b</sup> Sir Andrew Harkley earl of Carlisle, convicted, degraded and attainted of treason.

*Judgement in Petit Treason, where he is convicted thereof by Verdict or Confession.*

*Super hoc visis, &c. ut supra, consideratum est, quod prædictus R. usque furcas de T. trahatur, et ibidem suspendatur per collum, quousque mortuus fuerit.*

But a woman is to have judgement to be drawn and burnt, as well in case of petit treason as high treason, and ought not to be

R 4

beheaded,

19 H. 6. 47.  
Com. Cæsar.  
ante Christum  
natum 1600 an-  
nis, what the  
judgement was  
for petit treason  
1 R. 3. f. 4.  
25 E. 3. 42.  
12 Ass. 30.

beheaded, or hanged. *De morte mariti si compertum est uxorem, &c. igne Britanni interficiunt.*

Braeton, li. 3. fo. 105. 2. *Ignē concremantur qui salutē dominorum suorum insidaverint, idem fo. 104. b.*

*Judgement in Felony, where he is convicted thereof by Verdict or Confession.*

6 E. 4. 4. a. & b.  
See the Preface  
to the sixth part  
of Reports, what  
the law was be-  
fore the conquest  
anno domini  
995. in case of  
felony.  
\* Paich. 20 R. 2.  
coram reg<sup>o</sup>,  
rot. 1. Lincoln.

See before cap.  
Murder.

*Et super hoc visis, &c. ut supra, consideratum est quod predictus R. suspendatur per collum, quousque mortuus fuerit.* Braeton, lib. 3 fo. 104. b. speaketh, *de laqueo.*

And it is a maxime in law, that execution must be according to the judgement, *Ea quæ in curia nostra rite acta sunt, debent executioni demandari debent*: \* and for expresse authority, *non licet jolorem pro feloniam deollare*; and yet some examples are to the contrary.

True it is that the lord of Hungerford of Heytesbury was in 32 H. 8. attainted of buggery, and had judgement to be hanged by the neck, untill he was dead; and yet on the twenty eight day of July in the same year was beheaded at the Tower Hill. But as true it is, that Thomas Fines lord Dacres of the South, in anno 33 H. 8. was attainted of murder, and had judgement to be hanged by the neck, untill he was dead, and according to the judgement was hanged at Tiborn the twenty eight of June in the same year. And true it is, that Edward duke of Somerset was attainted of felony in anno 5 E. 6. and had judgement to be hanged by the neck untill he was dead, and on the twenty second of February in the same year was beheaded at the Tower Hill. And as true it is, that 3 & 4 Ph. and Mar. the lord Stourton was attainted of murder, and had judgement to be hanged by the neck untill he were dead, and according to the judgement, the sixth of March in the same year was hanged.

In case of high treason, beheading is part of the judgement, and therefore the king may pardon all the rest saving beheading, as is usually done in case of nobility. But if a man being attainted of felony, be beheaded, it is no execution of the judgement, because the judgement is, that he be hanged, untill he be dead. In this case the judgement doth belong to the judge, and he cannot alter it, the execution belongs to the sheriff, &c. and he cannot alter it. And if the execution might be altered in this case, from hanging to beheading, by the same reason it might be altered to burning, stoning to death, &c. To conclude this point, *Judicandum est legibus, non exemplis*, and *judicium est juris dictum, et executio est executio juris secundum judicium.*

The forfeiture in case of petit treason and felony (which is implied in the judgement) is all one, which you may read in the first part of the Institutes. sect. 747.

*Quando peccaverit homo, quod morte plectendus est, et adjudicatus morti appensus fuerit in patibulo, non permanebit ejus cadaver in ligno, sed in eadem die sepelietur.* And the reason that divines yeeld hereof is, for that by the execution of the judgement by death, the law is satisfied, and abhorreth cruelty, and in that case, *mors dicitur ultimum supplicium.*

And herein this is observable, that in treason and felony, the judgement

Deut. 2. 13.  
Vide Hil.  
1 H. 5. Rog.  
Actons case.

ment is only of the fatall and corporall punishment, and nothing of the forfeiture, which is implied, but in common pleas the judgements are more particular.

*Judgement in Appeal, when the Defendant joyning Battail is vanquished in the Field, &c.*

If the defendant in appeal be vanquished in the field, the record reciteth the vanquishing in the field. *Ideo consideratum est, quod* *sup. per col.* and so it is when the defendant is vanquished and slain in the field, yet the judgement is *ut supra*. Otherwise there should be no escheat: see the second part of the Institutes, W. 1. ca. 14.

8 E. 3. Judgement, 225.

*Judgement in Treason or Felony, wherein neither any corporall Punishment or Forfeiture is expressed.*

In case of treason or felony, if any person be outlawed, the judgement upon the exigent at the first county court upon default of the party is, *Ideo, &c. per iudicium coronatoris domini regis comitatus predicti, utlagatus est.* Which writ being duly returned of record by the sheriff, the party shall have the like corporall punishment, and shall lose and forfeit as much as if he had appeared, &c. and judgement had been given against him in case of treason or felony respectively. And note that in these words (*ideo utlagatur*) both the corporall punishments and forfeiture also are implied: and if the proceeding therein, or the judgement be erroneous, and upon his appearance upon the *capias utlagatum*, if it appear to the court (whereof any man, as *amicus curie*, may inform the court) that the party may either avoid the outlawry against him by writ of error, or by plea, the court ought not to award execution against the party, but assign him or her counsell learned, and require him or her by their advice, either to bring a writ of error or plead: but if the party refuse to bring his writ of error or plead after convenient time be given, if the outlawry be erroneous and not void, the court may award execution. And so it was resolved, *termino Hil. anno 3 Jacobi regis*, by the whole court in the kings bench, and divers presidents thereof shewed in the reigns of H. 6. E. 4. and one in the reign of queen Eliz. which we saw; for as long as the attainder by outlawry standeth in force, the party outlawed cannot be drawn in question by any new indictment or appeal for the treason, or felony, for the which he was outlawed: for *auterfoitz attaint* for the same offence is a good plea to free him from answer in that cause, albeit the record be erroneous. But if the attainder or outlawry be void against him, then may he be either arraigned upon the former indictment, or appeal, or newly indicted, &c. if there be cause. And therefore the judges are to take due consideration of the whole record of the attainder or outlawry, that they may be truly informed of the true state of the cause, before they award execution of death against him upon the outlawry. Read Bracton, lib. 3. tract. 2. cap. 14. and Britton, cap. 13. 19. 20, 21. excellently treating hereof, and Fleta, lib. 1. cap. 27.

Regist. 164. b. Fecit feloniam pro qua utlagatus fuit.

19 H. 6. 2. a. Error Fi. 26. 28 E. 3. 91. a. 6 H. 4. 6. 9 H. 7. 19. b.

Hil. 3. Ja. coram rege per curiam.

*Auterfoitz attaint de meisme le offence.*

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Vide 6 E. 3. 55. in Aiel. 12 E. 2. Esch. 14. 19 E. 2. Cor. 337.

Bract. li. 3. f. 131. Britton. fo. 20, 21. Fleta li. 1. ca. 27.

And by the common law *auterfoitz attaint, &c.* of the same felony was a good plea as well in an indictment as in appeal by the common

mon law. See the statute of 3 H. 7. cap. 1. concerning appeal of death: so as in an appeal of death, at the suit of the party, *auterfoitz attain de mesme le mort*, is no plea at this day, but in case of an indictment of death at the suit of the king, *auterfoitz attain de mesme le mort* in appeal is a good plea. *Auterfoitz attain de murder* is a good plea to an indictment, &c. of petit treason of the same death, for in effect it hath the same judgement, and the self same forfeiture. So likewise if a man be attainted of manslaughter, it is a good bar to an indictment of murder of the same death, *et è converse*.

*Auterfoitz attain dun auter offence.*  
28 E. 3. 90. b.  
Dier 4 Eliz.  
Stones case.  
6 H. 4. 6.  
10 H. 4. coron.  
237. 6 E. 3.  
cor. 394. 22 E. 3.  
cor. 471. Stanf.  
f. 107, 108.  
See 44 E. 3. 44.  
7 H. 4. 31.  
4 E. 4. 11.  
\* 1 H. 6. fo. 5.  
Rot. Par. 3 R. 2.  
nu. 18. Jo. Imperials case.

By the common law if a man were attainted of a felony done by him, and admitting he were after pardoned, he cannot at the suit of the king be impeached for any felony whatsoever before his said attainder by him committed, for by the attainder he was *mort in ley*; and in that case he had the judgement due for felony, viz. *sus. per col.* But the party may have his appeal of robbery, for a robbery done before the felony, whereof he was attainted, because in the appeal he is to have restitution of his goods, besides judgement of death. \* And if the party attainted of felony had committed high treason before his attainder, he shall answer to the treason notwithstanding his attainder of felony, because the king by the treason was intitled to have the forfeiture of all his lands, of whomsoever they were holden. Also for high treason there is another judgement being an offence of an higher nature: but being attainted of felony, if he commit treason afterwards, he shall answer thereunto, because it is of higher nature then the felony, but it shall not devest the right of escheat, which lawfully was by the felony vested in the lords, contrary to the opinion of justice Stanford in that case, for the act and offence of the party shall not devest the lawfull escheat of the lords: but if a man be attainted of treason, he cannot be after attainted of a former treason, *casu qua supra*.

Dier 14 El. 308.  
Cobhams case.

Where a little before it is said, that a felon by his attainder is *mort in ley*, it is to be understood of such former offences as require *pœnam mortis*: for notwithstanding the attainder, his body remains subject to arrests and execution for debts, &c. *Vide hic paulo post*, Trussels and Prestals case *in margine*. Albeit for felony a man be adjudged to his penance, *pain fort et jure*, yet he may be impeached for any former felony, because, the judgement is not given for the felony, but for his contumacy.

If a man be attainted of petit larceny, he may be after attainted of a felony, for the which he shall have judgement of death, because it is an higher offence, and is to have an other judgement.

#### *Auterfoitz acquite, and the Judgement thereupon.*

See Stanf. 105. a.  
& b. &c.

But *auterfoitz acquite*, must be of the same felony, and albeit he be acquit of the latter felony, yet may he be arraigned of any former felony: and so it is in case of treason, *auterfoitz acquite* of treason must be of the same treason, for it acquiteth no other, because he ever remained a person able.

3 H. 7. ca. 1.  
15 E. 3. tit.  
Coron. 116.  
15 Aff. p. 7.

And albeit at this day in an appeal of death, *auterfoitz acquite*, upon an indictment of the same death is no bar, yet in an indictment

ment of death, *auterfoitz attainé de mesme le mort* in an appeal is a good bar.

In an indictment or appeal of death, if it be found that he killed him in his \* own defence, he is acquitted of the felony forever.

It appeareth in Vauxes case, that if a man be erroneously acquitted of felony by verdict and judgement thereupon given, yet if the indictment, &c. be insufficient, he may be indicted againe for the reasons and causes in that case reported, which you may reade there at large, and need not here be repeated: and thereunto this we wil adde, that the reason, wherefore upon an erroneous judgement of condemnation, the party as hath been said) is driven to his writ of error; and in the case of an erroneous judgement of acquittal, that no writ of error needeth to be brought by the king, but the offender may be newly indicted, &c. is this, that in the case of condemnation the judgement is, *Quod suspendatur, &c.* which is the judgement of law due for the offence, and ought to be given therefore, and can have no other intendment: but in the case of acquittal the judgement is, *Quod eat sine die, &c.* which may be given as well for the insufficiency of the indictment, as for the parties innocency, or not guiltinesse of the offence. And the judges of the cause ought before judgement to look into the whole record, and upon due consideration thereof to cause it to be entred, *Ideo consideratum est quod eat sine die*; which upon that report, and this addition implied therein, we hold may satisfie the studious reader.

Lib. 4. fo. 44-45.

And so it was adjudged Mich. 33 & 34 Eliz. coram rege, in an appeale of death between Katherine Wrote and Tho. Wigges. Vid. 19 E. 3. Barre 444.

Vi. 3 H. 4. fo. 3. 11.

*Auter foitz conviét de mesme le Felony devant Judgement.*

For this division see Holcrofts case before in the chapter of Murder, and Lib. 4. fo. 45, 46. where the statute of 3 H. 7. cap. 1. is well expounded: and the second part of the Institutes artic. super Cart. cap. 3 & Lib. Intr. Co. fo. 53, 54, &c. and Lib. 4. fo. 40. Wetherels case. And Stanford, Lib. 2. cap. 37. in pl. coron.

Lib. 4. fo. 45, 46. Holcrofts case. Second part of the Institutes, art. super cart. cap. 3. Lib. Intr. Co. 53, 54, &c.

\* Before the statutes of 8 Eliz. cap. 4. and 18 Eliz. ca. 6. If a man had committed divers felonies, if he had been indicted of the last, and had benefit of his clergy, he could not have been impeached for any of the former felonies, albeit for the same he could not have had his clergy: by that act it is provided, that notwithstanding the allowance of such clergy, he may be impeached for any former offence, for which he could not have had his clergy.

Lib. fo. 40. Wetherels case. Stanf lib. 2. ca. 37.

\* *Auter foits conviét. dun auter felony.* 25 E. 3. cap. 5. pro Clero.

*Judgement to reverse an Outlawry for Treason or Felony.*

The judgement to reverse an outlawry of A. B. in case of treason or felony in a writ of error is: *Ideo consideratum est quod utlagaria prædicta ob errorem prædicti et alios in recordo et processu prædicti. compert, revocetur, adnulletur, et penitus pro nullo habeatur, et quod prædicti. A. B. ad communem legem, et omnia quæ occasione utlagariæ prædicti. amisit, restituatur, &c. et quod ipse eat sine die.*

Vid. Pasc. 39 E. 3. rot. 95. Scire fac. Dominis mediatis & immediatis

If the outlawrie be avoided by plea, then the judgement is, *Ideo confi-*

*consideratum est quod prædictus A. B. de utlagaria prædicta exoneretur, et quod ipse ad communem legem, et omnia, quæ occasione utlagariæ prædictæ amisit, restituatur, et ea occasione non molestetur in aliquo, nec gravetur, sed sit, et eat inde quietus.*

If A. B. be indicted of treason or felony in the kings bench, or if he be indicted before commissioners of oier and terminer, or any other, and the indictment of treason or felony is removed into the kings bench: and by proces out of the kings bench he is erroneously outlawed and so returned, a writ of error may be brought in the kings bench for reverfall thereof.

Stanf. pl. cor. 18. k. 1.

33 H. 8. cap. 20.

† Nota, this act extends only to attainders of treasons before the act of 28 Eliz. where the party hath been executed, and not to attainders of treasons afterwards.

† [ 215 ]

\* What interest the king hath in the body of the attainted before execution.

<sup>a</sup> 35 H. 6. 63.

<sup>b</sup> See Britton, ca. 122. Fleta, lib. 6. cap. 6. 7. <sup>c</sup> Mich. 38 & 39 Eliz. in communi banco int. Banister and Trussel attaint de felony.

Vide Mich. 33 & 34 Eliz. coram Rege rot.

532. int. Ognel and Trussel.

Mich. 32 Eliz. inter Wade plaintife, and Prestal defend-

ant attaint de haut treason, coram rege. Vid. sup.

<sup>d</sup> See the first part of the Institutes, sect. 1. §. Car. si homo purchase.

<sup>e</sup> Ibid. sect. 199. 200. mort in ley

<sup>f</sup> First part Inst. sect. 405.

<sup>g</sup> 45 E. 3. 5. a. 18 E. 4. 25.

15 E. 4. 5. a. &c. Lit.

And where it is holden by some, that if any person be attainted of high treason by the common law, that no writ of error should be brought for the reverfall of that attainder by reason of these words of the statute of 33 H. 8. cap. 20. viz. And if any person or persons shall be attainted of high treason by the course of the common law, &c. that every such attainder by the common law shall be of as good strength, value, force, and effect, as if it had been done by authority of parliament. But the contrary heretofore was resolved at a parliament holden anno 28 Eliz. that a writ of error should be maintained for the reverfall of erroneous attainders of high treason by the common law: for that statute of 33 H. 8. is to be intended of lawfull attainders by the due course of the common law, and not of erroneous or void attainders. And thereupon at that parliament holden anno 28 Eliz. an act was made, That no record of attainder of any person or persons, of or for any high treason, where the party so attainted † is or hath been executed for the same treason, shall be, &c. in any wise hereafter reversed, undone, avoided, or impeached by any plea, or for any error whatsoever.

\* And albeit judgement be given against a man in case of treason or felony, yet his body is not forfeited to the king, but until execution remains his own. And therefore before execution, if he be slain without authority of law, his wife shall have an appeal; for notwithstanding the attainder he remained her husband. And after such attainder his body may at the suit of a subject be taken in execution upon a judgement or statute, &c. And he may be executed for treason or felony, notwithstanding such execution had against him. And in an action of debt, or other action brought against a person attainted, he cannot plead the attainder, and demand judgement, if during the attainder he shall be put to answer <sup>b</sup> for upon consideration had of the books in 11 Aff. 27. 2 E. 4. 1. 4 E. 4. 8. 6 E. 4. 4. 5 H. 4. 6. S. Eliz. Dier 245, &c. <sup>c</sup> It was adjudged that the person attainted should not plead the said plea, but should be put to answer. And there is a great diversity between an attainder of treason or felony, and an entry into religion; for he that is attainted of treason or felony hath capacity, and <sup>d</sup> may purchase lands to him and his heirs, <sup>e</sup> but so cannot he that is entred into religion. And it is against a rule in law, that any man of full age should be received in any plea by the law to disable his own person, & or take advantage of his own wrong. And if the person attainted be beaten or maimed, or a woman attainted be ravished, after pardon, they shall have an action of battery, appeale of mayme, or rape. See Lib. Intr. Co. 247. 248.

<sup>b</sup> In ancient time a man indicted or appealed of life or member, or imprisoned, &c. should not be compelled to answer at other mens suits, but (as before it appeareth) these opinions have been justly changed.

<sup>i</sup> There was a notable case adjudged in the kings bench Mic. 26 & 27 Eliz. wherewith I was well acquainted concerning the matters of outlawry and errors before spoken of, which was in effect as followeth.

*Ninianus Menvile nuper de Stedwich in com' Dunelm. ar' anno 1 & 2 Pa. and Mar.* was indicted in the kings bench of high treason, and upon proces he was outlawed, and so returned, and his daughter and heire brought a writ of error in the kings bench, wherein two errors were assigned. 1. That before the exigent the 2 capias with a proclamation was awarded to the sheriffe of the county palatine of Durham, where it ought to have been directed to the chancelour of that county. <sup>k</sup> For that point 30 H. 6. 6. 36 H. 6. 35. 1 E. 4. 10. the book of entries Raft. fo. 52. Stanf. pl. cor. 68, 69. & 70. Vid. 19 H. 6. 2. 31 H. 6. 11. but the court gave no opinion concerning this error. The other error that was assigned, was that the sheriffe returned upon the said capias, that at his court holden at the city of Durham the eight day of July in the second and third yeares of the reigne of king Philip and queen Mary he made the proclamation, &c. and there were no such years: for queen Mary began her reigne the 6 day of July, and the 25 day of July in the 2 year of her reign she married king Philip: so as between the 2 day of July, and the 25 day of July, the queen wrote two years before the king. And therefore there could be no such years as 8 July *anno 2 & 3*, but should have been 2 & 4. And so was the clear opinion of the whole court. But then it was objected, that by the said act of 35 H. 8. and Stanfords opinion thereupon, that the attainder by outlawry being an attainder by the common law, it could not be reversed by writ of error, for that the said act of 35 H. 8. was to be intended of lawfull attainders: and after great deliberation the outlawry of treason was reversed. And I take it, it shall not be altogether impertinent, sure I am it shall not be unprofitable, to report the consequent of this reversal. In the next terme, sc. term. Hil. *anno 27 Eliz.* for that queen Eliz. had the lands whereof the said Ninian was seised in fee: his wife by petition of right, which comprehended the title of the wife, and the title of the queen, claimed her dower, which in effect was this: that her husband was seised of certain lands in fee, and took her to wife; and before his treason committed *anno 1 Mariae* levied a fine with proclamation to another, whose estate the queen had by lawfull conveyance therein expressed; and that afterward her said husband was attainted of high treason by outlawry, *ut supra*, and died in *anno 4 Eliz.* which outlawry was the last terme reversed in a writ of error, as is above-said: which petition being indorsed by the queen, *Soit droit fait al partie*, and delivered into the chancery, Sir Thomas Bromley a man of great gravity and judgement in law, then being lord chancellor of England, by advice of all the judges resolved these four points following. First, that the petitioner need not to have any office to finde her title, because her title standeth with the title of the queen, and the queen is not intituled by office (which she might

<sup>b</sup> Brit. ca. 122.  
<sup>a</sup> § Encusement de crime.  
Fleta, lib. 6. c. 6, 7. &c.

<sup>i</sup> Mic. 26 & 27 El. Ninian Melvins case in the kings bench in bre. de errore.

<sup>k</sup> See the stat. of 8 H. 6. cap. 10.

Hil. 27 Eliz. in filicis cancellariae.

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traverie,

Vide Lib. 2. fo. 93. Bingham's case. See the first part of the Institutes. sect. 55.

4 H. 7. cap. 24. the first saving.

<sup>a</sup> 26 E. 3. 75.

4 H. 7. fo. 22. & 11, 12.

38 H. 6. 4 &

12. 21 E. 4.

23. Dier 29

H. 8. fo. 32. pl. 8. idem.

6 Eliz. 228. pl.

45. 3 Eliz. fo.

188. pl. 8. a.

Lib. 8. fo. 42.

43. b. Dr.

Druryes case.

<sup>b</sup> 34 H. 6. fo. 2.

\* Nota.

<sup>c</sup> 26 H. 8. cap.

13. 5 E. 6. cap.

11. These sta-

tutes not only

extend to all

treasons by the

statute of 25 E.

3. by the com-

mon law, but by

any other statute.

Vi. Dier 12

Eliz. fo. 287.

accord. First

part of Insti-

tutes, sect. 479.

traverse, or confesse and avoid) but by conveyance, which she affirms. Secondly, that a fine with proclamations, and five years past after the death of the husband doth bar the wife of her dower, and that the conusee shall take advantage thereof, and of the attainder also. Thirdly, that albeit five years and many more in this case were past since the death of her husband, yet the said fine with proclamations did not bar her; because as long as the said attainder of treason stood in force, she was barred of her dower, and could not have any remedy, or pursue her title, untill the outlawry were reversed, and then her title of dower did first grow due unto her, and therefore she might within five years after the reversal of the said outlawry, pursue her title by the expresse words of the saving of the act of 4 H. 7. Fourthly, albeit an attainder reversed by a writ of error, is as concerning restitution to the party by relation from the beginning become of no force, <sup>a</sup> and the record so annihilated thereby, as *nul tiel record* may be pleaded thereunto: yet this relation shall never work a bar, and consequently a wrong to a stranger, but that the truth of the matter may be shewed, viz. the record, and the reversal of the same: and the rather (as some said) because the wife could not have any writ of error to reverse the outlawry, <sup>b</sup> so as she had no mean to pursue her right so long as the outlawry remained in force, which it did, untill it was reversed by error. But admit the wife had been (in a remote degree of consanguinity) heir to her husband, so as she might within five years after the death of her husband have had her writ of error after the death of her husband to reverse the outlawry, and to enable herselfe to pursue for her dower, and reverse the outlawry within the five years: I hold in this case that she shall have five years after this reversal, and that within the said saving of the statute of 4 H. 7. for then did her title of dower (as hath been said) first grow unto her, \* and it was not in her power to reverse the outlawry when she would. And in this term of S. Hillary, Popham attorney generall, according to the said resolution of the lord chancellor and judges, confessed the petition to be true; and thereupon judgement was given, that she should be indowed, and was indowed accordingly.

<sup>c</sup> By the statute of 26 H. 8. and 5 E. 6. it is enacted, that all proces of outlawry against any offenders in treason, being out of the realm, or beyond the seas, at the time of the outlawry pronounced, shall be as good and effectually as if the offenders had been within the realme at the time of the outlawry pronounced. See the said statute of 5 E. 6. cap. 11. that, if the party outlawed shall within one year after the outlawry pronounced, yeild himselfe to the chief justice in England, and traverse the said indictment, &c. and thereupon be found not guilty by verdict, he shall be cleerly discharged of the said outlawry.

*Judgement in case of Abjuration for Felony, whiles it was of Force.*

After the flying of a felon for any kinde of felony whatsoever, sacriledge excepted, (but in case of high treason or petit treason a man could never abjure, because the coroner is not allowed by law



law to be a judge of those heynous crimes) into a church, &c. for safeguard of his life: and upon his prayer of a coroner <sup>a</sup>, \* and his voluntary and particular confession of the felony before the coroner, naming the certain time, the judgement was, *Idem A. petiit de prefato coronatore regnum dom. regis Angliæ abjurare: super quo tradito<sup>b</sup> ei libro p. prefat' coronatorē, idem A. regnum prædict. cora' præfato coronatore prædict' die, &c. in ecclesia prædicta abjuravit, in idem regnum nunquam rediturus absque speciali licentia, et reconciliatione regis Angliæ, et assignatus est eidem A. pro transitu suo extra regnum prædictum portus de Yarmouth<sup>c</sup> cruce in manu sua dextra posita, prout lex Angliæ est et consuetudo.* Nothing is expressed in this judgement but *abjuravit regnum*, but therein is implied, that all his lands, which he had at the time of the felony committed, <sup>d</sup> (and therefore the time of the felony was set down in his confession particularly) or at any time after, escheated to the lords of the fees, and forfeited to the king all his goods which he had at the time of his attainder, <sup>e</sup> the time whereof also was expressed certainly, and his blood corrupted, and other incidents, as in other attainders of felony, only by his voluntary and particular confession. In this case for the offence of felony, he saved his life so long as he kept himself *extra regnum*, but if he returned, then under this word [*abjuravit*] is implied *sus. percollum*. Mich 1 R. 2. rot. 1. Bedf. *redit et suspend.* See the first part of the Institutes, sect. 200. fo. 132, 133. and the second part of the Institutes, W. 1. ca. 20. verbo, <sup>f</sup> *Fore jure le realm.*] artic. Cler. cap. 10. and 15. And the law was so favourable for the preservation of sanctuary, that if the felon had been in prison for the felony, and before attainder or conviction, <sup>g</sup> had escaped and taken sanctuary in church or church-yard, &c. and the gaolers or others had pursued him, and brought him again to prison, upon his arraignment he might have pleaded the same, and should have been restored again to the sanctuary: see more concerning abjuration, Mic. 9 E. 3, coram rege rot 84. *extra legem positus, &c.* To conclude this judgment of abjuration, we take it, that for felony <sup>h</sup> abjuration is utterly taken away. For abjuration of recusants and of hunters in parks, &c. we have given but a light touch, because they belong not to our treatise of the pleas of the crown, nor have we spoken any thing of abjuration in case of heresy, *quia spectat ad aliud forum.*

Thus have we spoken of judgments, and attainders in cases of high treason, upon verdict, confession, or *nihil dicit*, and by outlawry: in case of petit treason, upon verdict, confession, or by outlawry: and in case of felony, upon verdict, or confession, or by outlawry, or by abjuration; for none can be attainted of petit treason or felony upon a *nihil dicit*, or refusal to answer, but in that case the delinquent is to have his punishment of *peine fort et dure*, which next falleth to be handled.

rot. 115. Buck. William Attewels case. <sup>h</sup> For all sanctuaries are taken away by 21 Jac. ca. 28. Note a sanctuary in the statute of 1 H. 7. cap. is called a hidel or hydle, because it hideth and protecteth the party, &c. Vide Deut. cap. 19. 3. 9, 10. Numb. 35. 13. Joshua 20. 8. See 2. part of the Institutes, Glouc. ca.

<sup>a</sup> 6 E. 3. 53. in Ajell Malloms case.

<sup>b</sup> 12 E. 2. esche. 14. Tr. 21 E. 1. coram rege 42. simile.

<sup>c</sup> Hereupon it was called abjuration, because he was sworn to depart the kingdom.

See the Oath Vet. Mag. Cart. 1. pte. f. 167. 168.

<sup>e</sup> That he might be known to be an abjured person, and not be let, or hindered in his journey. Et crux fuit signum servatæ vitæ per ecclesiam, and is sometimes called vexillum sanctæ ecclesiæ. Hil. 26. E. 3. coram rege rot. 20.

<sup>d</sup> Pl. com. f. 262. a. in Dam: Hales case. Register, fo. 164. b. Fecit feloniam pro qua regnum nostrum abjuravit.

<sup>e</sup> Stanf. pl. cor. 117. E.

<sup>f</sup> 6 E. 3. 55. in Ajell Malloms case. 12 E. 2. Esch. 14. 6 E. 2. Forf. Br. 121. 6 H. 4. 6.

<sup>g</sup> Forejure in French is take a for abjure, in Latin abjurare.

1 E. 3. 17. lib. intr. Rast. fo. 246. b. pl. 6. 8 Lib. int. Rast. 532. b. sanct. 2. Hil. 43 E. 3.

<sup>i</sup> First part of the Instit. sect. 545. verb. at-taint. 2 part of the Instit. W. 1. c. 12. Dier 3 El. 205. a. 13 El. 300. b. See before in the chap. of Treason. See after in the next chapter of Forfeiture &c. when the party arraigned chal-lengeth pre-emptorily above the number of 36. viz. three whole juries.  
<sup>k</sup> 35 H. 6. 57. 58. Vide l. 9. fo. 124. the lord Zanchers case.

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Bracton lib. 3. fo. 151. b.  
 Britton. fo. 24. a. Fleta, li. 1. ca. 36. Bracton, lib. 3. fo. 104. b. maketh mention of punishment, verberibus et virgis.  
 • 18 Ass. p. 13.  
 8 E. Cor. 130.  
 41 E. 3. Cor. 451.

*Peyne fort et dure.*

In case of petit treason or felony, <sup>i</sup> when the offender standeth mute, and refuseth to be tried by the common law of the land; See *Paine fort et dure* in the second part of the Institutes, W. 1. ca. 2. but this holdeth but in case of petit treason and felony. In case of high treason, upon standing mute, or a *nihil dicit*, the judgement aforesaid shall be given against him, as if he had been convicted.

And in doing of execution, both in treason and felony, two things are to be observed. First, that it be done by the right officer, as the sheriff, or marshall, for if any other execute the offender, it is felony. Secondly, execution must be made by him that is the right officer according to the judgement: for example, <sup>k</sup> where the judgement is, that the offender shall be hanged, he cannot behead him, &c. as before is said. Bracton, lib. 3. fo. 104. b. *Non alio modo puniatur quis, quam se habeat condemnatus.* P. 20 R. 2. coram rege rot. 58. Lincoln. *Non licet felonem pro feloniam decollari.*

*Judgement in case of Petit Larceny.*

The judgement herein was in ancient time referred to the discretion of the judge, as in Bractons time, *Per fustigationem, et sic castigatus dimittitur*. In Brittons time, sometime by the pillory, sometime by the losse of the ear: and Fleta saith, *Est enim furtum de re magna et parva, pro minimo tamen latrocinio 12 denariorum et infra, nullus morti condemnatur; pro hujusmodi modicis delictis inventa fuerunt judicialia pilloria, et deformitates corporum, ut scissio auricularum.*

\* But in and since the reign of E. 3. no person lost any member for petit larceny, but were sometime punished by imprisonment, and sometime by other penance, as whipping, &c. If the delinquent flyeth for petit larceny, and so be found by the jury, he forfeiteth his goods.

*Judgement in case of Misprision of High Treason.*

That the offender by the common law shall for this concealment forfeit all his goods; and the profits of his lands during his life, and suffer imprisonment during his life. Vide Stanford pl. coron. 10. 38. 1 et 2 Mar. cap. 10.

*Judgement for striking in Westminster Hall, &c. sitting the Courts.*

That the offender shall be imprisoned during his life, forfeit all his lands, tenements, goods and chattels, *et quod manus si a dextera amputaretur (apud talem locum)* and this judgement is given by the common law. Bracton, lib. 3. 104. b. *Panarum euzdam ad unum membrum, et corporis coercionem, sc. imprisonmentum, vel ad tempus, vel imperpetuum.*

Tr. 4 E. 4. coram rege rot. 3.  
 19 E. 3. Judgement. 174.  
 39 Ass. p. 1.  
 41 Ass. 25.  
 22 E. 3. 13. a.  
 41 E. 3. coron. 280. 42 Ass. 18.  
 Stanf. pl. cor. 38.  
 c. 3 Eliz. Dier 188.

Judgement

*Judgement for striking and drawing Blood in the Kings Court, &c.*

The offender shall have his right hand stricken off, be imprisoned during his life, and be fined and ransomed at the kings will: and this judgement is given by the statute of 33 H. 8. cap. 12. 33 H. 8. Paine Br. 16.

We cannot omit to touch by the way an act made in 1 & 2 Ph. and Mar. intituled, an act against seditious words and rumours, by a branch of which act, he that should send forth any booke, ryme, ballad, letter or writing containing any false, matter, clause or sentence of slander or reproach, and dishonour of the king and queens majesty, or either of them, &c. should have his or their right hand stricken off; which act being but a probationer, at the parliament in 4 & 5 Ph. and Mar. was continued untill the end of the next parliament. And by the act of 1 Eliz. (which was the next parliament) the said act of 1 & 2 Ph. and Mar. was enacted to extend to queen Elizabeth, and to the heirs of her body kings and queens of this realm, so as by the demise of queen Eliz. that act hath lost his force, as it was well worthy, being a dangerous act as some had felt in anno 23 Eliz.

1 & 2 Ph. and Mar. ca. 3. obtruncatio manus dexterae.

1 El. c. 6.

*Judgement in a Premunire at the Suit of the King.*

If the defendant be in prison, *Quod praedictus R. sit extra protectionem domini regis, et terras, et tenementa, bona et catalla domino regi forisfaciat, et quod corpus ejus remaneat in prisona ad voluntatem regis,* as in the book of entries, Raft. Judgement 465. And this judgement is given by the statutes of 25 E. 3. ca. 22. 25 E. 3. de Provisoribus. 27 E. 3. ca. 1. 16 R. 2. ca. 5. and if he be not in prison, *Quod praed. R. sit extra protectionem domini regis, et terras et tenementa, bona et catalla domino regi forisfaciat, et quod capiatur.*

See the 1. pt. of the Instit. §. 159.

44 E. 3. 36

*Judgement in case of Theftbote.*

That the offender be fined: and it is to be observed that whenever the delinquent, or defendant is to be fined, the judgement is *quod capiatur*, that is, to be imprisoned untill he doth pay his fine: but when the defendant is to be amerced, and not fined, then the defendant is *in misericordia*, whereof you may read at large. Lib. 8. fo. 38, 39. &c. et 59, 60. et 120. lb. 11. 43, 44.

5 E. 3 Cor 353.  
29 E. 3. 9.  
27 Aff. 69  
42 Aff. pl. 5.  
Stat. fo. 40. b.

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*Pillory.*

Pillory is a French word, and it is derived of the French word *piastre* a pillar, *columna*. *Et est lignea columna, in qua collum insertum premitur,* and thereupon in law it is called *collistrigium, quia in eo collum hominum constringitur*: this punishment is very ancient, for the Saxons called it *healsfang*, so called for straining the neck. Britton, fo. 24. saith, that those that have been adjudged to the pillory, or tumbrell, are so infamous, *Come ilz ne sont receiv-*

Saxonicè *healsfang*. Or *balsfang*, *bals collum, fang pressio*. It is also called an amercedment for commutation of such a punishment. 51 H. 3. *Judicium collistrigii. Et pillorii.*

III. Ins r.

S

receiv-

Vet. N. B. 1. *receivables al serement faire in juries, enquests ou en testimoignants;*  
 parte. 116, 117 and herewith agreeth Bracton. Vet. Mag. Cart. 2. parte, fo. 23,  
 Britton, fo. 24 24. 45.  
 Mirror, cap. 4.  
 §. De paines en divers manners. Kelway temps E. 3. 145. b. Fleta, li. 2. cap. 8. By the statute of 51 H. 3. k  
 31 E. 1. Vet. Mag. Cart. 2. parte, fo. 23, 24. 45.

Bracton, lib. 3. fo. 104. b. 129. b. 151. b. 138. Mirror ubi supra. Temps E. 3. Kelway 139, 140. b. 149. b. 152. Fleta li. 2. ca. 11. §. Item si d'nus li. Intr. Rast. 494. 2. in Quo warr. 7 E. 2. in eodem 260. b.

### Tumbrell.

Tumbrell is a word in use at this day for a dungcart. Bracton calleth it *tymboralem*.

*Infligitur pœna corporalis, sc. pilloralis vel tumberalis cum infamia. Secundum regni statuta,* it is called tumberellum, there being no proper Latin word for a dungcart.

*Furce pillor et tumbrel append al view de franckpledge* And every one that hath a leet or market ought to have a pillory and tumbrell, &c. to punish offenders, as brewers, bakers, fore-stallers, &c.

### Trebuchet.

Stat. de 51 H. 3. ubi supra. Vet. Mag. Cart. part 2. fol. 44, 45. Stat. de pace & cervisia.

Or castigatory, named in the statute of 51 H. 3. signifieth a cucking stool, and trebuchet properly is a pitfall or downfall, and in law signifieth a stool, that falleth down into a pit of water, for the punishment of the party in it. And *cuck*, or *guck* in the Saxon tongue, signifieth to scould or brawl, (taken from the cuckhaw, or guckhaw, a bird, *qui odiose jurgat et rixatur*) and *inge* in that language [water] because she was for her punishment fowled in the water, and others fetch it from cuckquean, i. *pellex*.

Now for that the judgement to the pillory or tumbrell (as it hath appeared before) doth make the delinquent infamous, and that the rule of law is, *Judicium de majore pœna quam quod legibus statutum est non infamum facit, sed per breve de errore adnullare potest*, and again, *pena gravior ultra legem posita estimationem conservat*, that the justices of assise, oier and terminer, gaol-delivery, and justices of peace, would be well advised before they give judgment of any person to the pillory or tumbrell, unless they have good warrant for their judgment therein. Fine and imprisonment for offences finable by the justices abovesaid, is a fair and sure way.

And it is to be observed that those kinds of punishments of pillory, &c. have been given by acts of parliament in cases of infamous and exorbitant offences, as by the statutes of 51 H. 3. 31 E. 1. De pistoribus, &c. 31 E. 1. De forestallariis. 11 H. 7. ca. 4. 33 H. 8. ca. 1. 1 & 2 Ph. and Mar. cap. 10. 2 E. 6. c. 15. 5 E. 6. ca. 6. & 14. 7 E. 6. ca. 7. 1 El. c. 7. 5 El. ca. 9. 16. 18 El. cap. And therefore the safest way for them is to follow those acts of parliament in cases provided by the same: but of the court of the kings bench, (the highest court of ordinary justice) in respect of the multitude of the judicial presidents (which we have seen) we say with the poet. *Huic nec metas rerum, nec tempora pœne*, (for judiciaill presidents of grave and reverend judges, are good

Judgements to be given by justices of assise, of oier and terminer, of gaol-delivery, of justices of peace.

\* Vet. Mag. Cart. parte 2. fo. 24, 25.

good guides to direct men in the right way) we will enumerate some of them.

21 E. 1. coram reg. rot. 2. Eustachius de Porles Castel, for slandering of justice Berisford, imprisonment in the tower, *ad voluntatem regis*.

Exemplary punishments adjudged in the kings bench.

Mich. 33 E. 1. coram rege. Rot. 75. William Brewces case, for slandering, &c. of Roger Hegham justice. Tr. 3 E. 2. int. mem. scaccarii for slandering of Foxley, a baron of the exchequer. Mich. 18 E. 3. coram rege, Rot. 151. for slandering of the justices of the kings bench, by a letter of Tho. Bilbroke a clerk of the same court. 30 Ass. p. 5. 19. 19 Ass. 1. Pasch. 10 E. 3. Rot. 87. *Thm. Twice Hazard: r cois' lud. us ad falsos talos adjudicatur quod per sex dies in diversis locis ponatur super collistrigium*. Mich. 10 E. 3. Rot. 92. coram rege, Adam de Ravensworth. Mich. 21 E. 3. coram rege, Warw. Verss. Attornat' apparent' sine warranto. Hil. 25 E. 3. coram rege, Rot. 13. *versus Robert. Hadham commissionarium pro venditione bladi in gerbis adjudicatur prisonæ, et quod ab omni officio domini regis amoveatur et finem faciat*. Tr. 2. H. 4. coram rege, Rot. 10. Suffex. Mich. 4 & 5 Eliz. coram rege, Hugh Bakers case, for a libell against certain of the inhabitants of Chersie, punished by imprisonment, pillory, and good behaviour, &c.

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See the fourth part of the Institutes, cap. Star-Chamber, for punishment by pillory, &c. for enormous and exorbitant offences, which require more exemplary punishment then an ordinary course of the laws of the realm do inflict. *Nobiles magis plectuntur pecunia, plebei vero in corpore*; which is observable in all the said statutes. And Bracton saith, *Quælibet pœna corporalis, quamvis minima, major est quælibet pœna pecuniaria. Carcer ad continendos, non ad puniendos haberi debet, &c. Pœnæ potius molliendæ, quam exasperandæ sunt. Respicendum est iudicanti, ne quid aut durius, aut remissius constituitur, quam causa deposcit; nec enim aut severitatis, aut clementiæ gloria affectanda est. Aliter puniuntur ex eisdem factionibus servi, quam liberi: et aliter qui quidem aliquid in dominum, parentemve commiserit, quam in extraneum; in magistratum, quam in privatum*.

Ancient rules of law in corporall punishments. Bracton, lib. 3. fo. 105. a. Ibid.

Ibid.

### Death of a man per infortunium.

Of this mischance there is no expresse judgement to be given, but the offender is to sue out his pardon of course, as it appeareth in the second part of the Institutes, Gloc. cap. 9. And hereof Bracton saith, *Casu, cum per infortunium, ut si aliquis venando per telum in suam missum, hominem interfecerit, et similia perpetraverit, &c.* But albeit there be no expresse judgement given upon such a verdict, yet the law giveth a judgement thereupon, viz. that he shall forfeit all his goods and chattels, debts and duties whatsoever, as in the second part of the Institutes, *ubi supra*, it appeareth.

Maibr. cap. 25.

Bracton ubi sup.

Judgement implied, or in law. 24 H. 3. cap. 5.

### Of Death of a Man, se defendendo.

Upon such a verdict given the court giveth no expresse judgement, for he is also to be pardoned of course: but the law hath given a judgement, that he shall forfeit all his goods and chattels, debts and duties, as in the second part of the Institutes, *ubi supra*, it appeareth.

Judgement implied, or in law. See c. 7 fo. 95. b. 43. Ass. p. 31. Rot. par. 3 R. 2. nu. 18. John Imperials case.

appeareth. But the jury cannot finde that the party killed him generally *se defendendo*: but they ought to finde the case specially, so as the court may judge whether in law it be *se defendendo*, or no. See Stanf. fol. 15.

*Of the Death of a Man that offereth to rob, &c.*

If it be found by verdict, that the party (indicted or appealed for the death of A) A attempted to have murdered or <sup>a</sup> robbed him in or nigh any common high way, cart-way, horse-way, or foot-way, or in his <sup>b</sup> mansion or dwelling house; or for the killing of him which attempteth burglary to break his dwelling house in the night; the judgement upon such a verdict shall be, that he shall be acquitted of the death of such a person paying his fees, and he shall forfeit nothing. And so it is <sup>c</sup> declared and enacted by the statute of 24 H. 8.

And if all the circumstances be proved to the jury in evidence required by this act in these cases, the jury may finde a general verdict of not guilty. And where it is rehearsed in the said act of 24 H. 8. that before that act it was a question and ambiguity whether evill disposed persons so attempting, *ut supra*, should forfeit their goods and chattels: the reason of that question and ambiguity was in none <sup>\*</sup> of those cases mentioned in that act, no robbery, murder, or burglary was done, but an attempt only to do it. But it was no question at the common law, that if a robbery, murder, burglary, or other felony was done, and pursuit made after the offender, who either by resistance or flight could not be apprehended without killing of him by inevitable necessity, the party so pursuing and killing should not forfeit his goods or chattel; for in those cases every man may arrest the felon by a warrant in law. But there is a diversity between a warrant in deed, and a warrant in law, in this, that if a man be indicted of murder, robbery, burglary, or other felony, and the sheriff by vertue of a *capias* offer to arrest him, and he resisteth and flyeth, *ut supra*, the sheriff may kill him, if otherwise he cannot arrest him, although in truth the party be not guilty, nor any felony done. But in the case of the above said warrant in law, there must be a felony done, and this diversity appeareth in our books. <sup>\*</sup> And so it is, if after arrest for felony the party arrested resisteth or flyeth, and in pursuit is slaine by inevitable necessity, they so killing him forfeit nothing.

An approver that kills the party accused in battell, or a champion that killeth the other champion in a writ of right, or a plaintife or defendand in an appeal that killeth the other party according to the common law, or in combat awarded by the sheriff, the stable and marshall in the court of chivalry, the party killing shall forfeit nothing; for these combats or duels are such trials as the law appoints in such cases. For saith Fleta, *Duellum est pro veritate pugna inter duos ad probandum veritatem litis; et qui vincit probare intelligitur: et q̄ amovis iudicium Dei expectatur ibid. quicunque tamen monomachiam, i. singularem pugnam sponte susceperit, aut obtulerit, homicida est, et mortale contrahit peccatum.* But before we leave these champions, it is to be observed that whosoever taketh upon him to be a champion for another (the forme and <sup>b</sup> oath whereof you may reade in the second part of the Institutes, W. 1. cap. 40. and

<sup>a</sup> 3 E. 3. cor. 305.

<sup>b</sup> 3 E. 3. cor. 330.  
26 Aff. 23.

Exod. 22. Si effringens vir domum sine suffodiens fuerit inventus. & accepto vulnere mortuus fuerit, percussor non erit reus sanguinis.

<sup>c</sup> Nota, declared, &c. and so was the common law, as by the books aforesaid it appeareth.

22 Aff. p. 55.

22 E. 3. cor. 261.

3 E. 3. cor. 328.

3 E. 3. ibid. 288.

289, 290

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\* See in the cha. of Hue and Cry.

<sup>a</sup> Rot. pat.

3 H. 4. part. 2.

Duellum percussum.

13 H. 4. 4.

37 H. 6. 20, 21.

See before in the

chapter of Approver. Fleta,

lib. 1. ca. 32.

<sup>b</sup> 4 E. 3. 41.

30 E. 3. 29.

29 E. 3. 12.

13 Eliz. Dicr,

301. Mirror, cap.

3. § Combat, &

§ Juramentum

duelli, & § Or-

dinatio pugnantium.

tium.

Civil.

Glanvil. lib. 2. cap. 3.) if he become recreant, that is, a crying coward or craven, he shall for his perjury lose *liberam legem*. Craven is derived from the Greek word *κράυω*, à *vociferatione*: others nearer home, of crying and craving, of mercy and forgiveness. And *recreantia* is derived of the French word *recreance*, of giving back or cowardize. And sometime it is called *creantia* per antiphrasim, because he that useth it is not faithfull, but breaketh his oath. And so if the appellat joyne battell, and cry craven, he shall also lose *liberam legem* for the cause aforesaid, but if the appellee cry craven he shall be hanged: \* but if they combat untill night come, and starres appear, the defendat in the appeal goeth quit, and the plaintife in that case loseth not *liberam legem*. Amittere *liberam legem* is to become infamous and of no credit, never to be witnesse, or juror: for when he is of fame and credit, he is called *liber et legalis homo*: and such men ought to be of juries and witnesses, because they do enjoy *liberam legem*. ‡ And a champion ought to be *liber homo*, and so is the entry, *per corpus liberi hominis. Et quam infamiam victus incurrit*, see Glanvile, lib. 2. cap. 3. & lib. 14. cap. 1. And he further saith, *Talis debet campio petentis esse, qui sit, et esse possit inde iuris idemus*. So as no man by the ancient common law could be a champion, but he that knew the right, and was a witnesse thereof: and therewith agreeth the statute of W. 1. cap. 40. wherein observe what the oath was by the common law. *Aliquando patria fiat pro campione et aliquando in bre. de reſto campio stat pro patria*. Campio is derived à *campo*, because it is publickly stroken in the field, and is called camp-fight: and is taken in the common law for one that striketh a legal camp-fight or combat in another mans quarrel: in Latin he is called \* *pugil à pugna*. But the defendat in an appeal that is to combat, is not called a champion, because he fighteth for himselfe. And these combats in cases whereof the countence belongs to the common law, are to be directed by the iudges of the common law *secundum legem et consuetudinem Angliæ*, and not by the constable and marshall by the civil law, as all our ancient authors and bookes aforesaid do agree, which also is apparent by the statute of 13 R. 2. ca. 2.

¶ Judgement in law against a recreant and craven champion is, *perdere liberam legem*. See a notable record here of R. pa. 55 H. 3. m. 3. Glanvil, li. 2. ca. 3. lib. 14. cap. 1. d Mirror cap. 3. § Ordination pugnantium, L'horrible mote de craven. e 41 E. 3. cor. 93. creat for recreant. Bract, lib. 2. f. 141. Brit. fo. 42. 81. Fleta lib. 1. ca. 32. 19 H. 6. fo. 35. 21 H. 6. 34. \* Mir. c. 3. §. ubi su. † Glanvil, lib. 2. cap. 19. Legem terræ amittentes perpetuam infamiz notam inde merito incurunt. See the first part of the Inst. Sect. 514. 27 Aff. 59. liberam legem, qui, &c. § 1 H. 6. 6. 3 H. 6. 55. See the oath in appeal, Bracton,

1. 3 fo. 141. b. Britton, fo. 42. Fleta, lib. 1. ca. 32. Glanvil, lib. 2. c. 3. lib. 9. cap. 1. Et 14. ca. 1. 9 H. 4. 3. 17 aff. 3. 17 E. 3. 2. 9 E. 4. 25. Fleta ubi sup. lib. lat. Co. fo. 182. 55 H. 3. ubi sup.

Judgement in an Indictment of Conspiracie, &c. where the Party indicted is legitimo modo acquietatus.

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Nota, the judgement in this case is, as in case of attaint against a jury, (whereof we shall speak hereafter), viz. *Quod committantur gaule domini regis, et quod omnia terræ et tenementa pred. R. & C. capantur in manum domini regis, et devastentur, et extirpentur, et uxores et liberi eorum amoveantur, et omnia bona et catalia eorundem R. & C. satisfaciant domino regi, et amodo amittant liberam legem in perpetuum*.

Nota in this judgement five severe punishments. 1. That their bodies shall be imprisoned in the common gaole. 2. Their wives and children amoved out of their house. 3. That all their houses and

4 H. 5. Indict. 220. Tr. 18 E. 3. coram rege Rot. 148. Walt iudicium reddit contr. Conspiratores. Pasch. 32 E. 3. Rot. 53 Somers. 27 Aff. 59. 24 E. 3. 34. 43 E. 3. 33. b. Vid. Artic. super cart. cap. 10.

and lands shall be seized into the kings hands, and the houses wasted and the trees extirpated. 4. All their goods and chattels forfeited to the king. 5. That they for ever shall lose the freedom and franchise of the law. That is, first, they shall never be of any jury or recognitors of assise. Secondly, nor ever be received for a witness in any case. Thirdly, that they shall never come into any of the kings courts, but make attornies, if they have any thing to do there. And this is called a \* villanous judgement, because of the villany and infamy which they deserve against whom it is given: And all is inflicted by the common law, for that the offenders by false conspiracy under the pretext of law, by indictment of treason or felony and legall proceeding thereupon, sought to do the greatest injustice by false conspiracy to shed his blood, who afterwards is thereof *legitimo modo acquittatus*.

\* 24 E. 3. fo. 33.  
27 Ass. 53.

4 H. 5. judg.  
220. 24 E. 3.  
34. 27 Ass. 59.

43 E. 3. 33 b.  
Tr. 32 E. 1. Rot.  
15 Eborum.

Parl. 17 E. 3.  
nu. 50.

But in a writ of conspiracy at the suit of the party grieved, the judgement is, damages to the party, fine to the king, and imprisonment. And the reason thereof is, first, for that when they are indicted at the suit of the king, the judgement is so severe, for that they falsely conspired in the kings name, and at the kings suit by indictment, &c. to do so horrible injustice: therefore at the kings suit they shall be heavily punished. Secondly, for that as it is said in 15 E. 2. *De exilio Hugonis, &c.* the law which was instituted for the maintenance of peace and of good men, and the punishment of the evill, is turned to the disheritance of the great men, and destruction of the people. Thirdly, for that the judgement at the kings suit is by the common law, and the action of the party is given by statute, which giveth no such punishment: but the party in his action, in respect of the danger of his life, is to recover answerable damages. Of conspiracy see the Register, fol. 134. a & b. & 188. F. N. B. 114, 115, &c. Stanf. pl. cor. fol. 172, 173, 174, 175, &c. and in the new Book of Entries, fol. 109. a president of a conspiracy upon an indictment of felony.

It is enacted, that such as be attainted of confederacy or conspiracy, shall have no office of the grant of the king, queen, or other noble, neither shall be sheriffe or escheator.

### *Judgement in an Attaint.*

Lib. Intr. Rastal.  
fo. 92. a.

9 E. 4. 51.

4 H. 5. ubi sup.

15 Ass. 2. Kelway 130. b.

Glanvil. lib. 2.

cap. 19.

Braeton, lib. 4.

fo. 129.

Brit. fo. 237,

238. Mirror,

ca. 7. § de attaint.

Flet. lib. 5.

ca. 21. Apud.

Northalverton

in com. Eborum

first part of the

en attaint. Kanc.

1. That the plaintife shall be restored, &c. and the defendant party to the record shall be fined in respect the false verdict was given for him (*cui bono*) by the common law.

The judgement against the petit jury is, as it is in case of conspiracy at the suit of the king, as is abovesaid, and in no other, but in those two cases, that villanous judgement is given. See 8 E. 2. Ass. 396. and 42 E. 3. 26. b. judgements given in attaint, & *nota bene*. 16 E. 3. tit. Judgement, 109. 21 H. 7. 83. Kelway. a good president of a judgement given in an attaint. Fortescue, cap. 26. Concerning Attaints, see the second part of the Institutes, Marlbr. cap. 14. W. 1. cap. 37, &c.

coram Hen. de Guildeford & aliis just. assignatis an. 35 E. 1. attainta. See the Institutes, sect. 514. verb. [en attaint.] Vide Mich. 3 H. 4. Rot. 109. Judgement



But now by the statute of 23 H. 8. cap. 3. the severity of the punishment is moderated, \* if the writ of attainr be grounded upon that statute: but the party grieved may at his election either bring his writ of attainr at the common law, or upon that statute: but all attainrs, either at the common law or upon the statute are to be taken before the king in his bench, or before the justices of the common pleas, and in no other courts.

This act of 23 H. 8. provideth for divers mischiefs which were at the common law, and giveth to thoe of the petty jury divers pleas, which they could not have at the common law, and hath been well expounded. 7 E. 6. Dier, 81. b. Sir John Aillis case. 3 & 4 Ph. and Mar. 129. b. Heydons case. 3 Eliz. 201. Clovils case. 3 Eliz. 202. Austens case. 7 Eliz. 23. b. Stephens case. See the record thereof u, on the statute of 23 H. 8. for it is an excellent president.

And generally of attainrs, see Lib. fo. 111. 112. Lib. 3. fo. 4. Lib. 6. fo. 4. 14. 25. 26. 44. 80. Lib. 8. fo. 60. Lib. 9. fo. 12. Lib. 10. fo. 119. Lib. 11. fo. 6. 43. 62. See also the new book of Entries, 63. 66. 68. 70. 73. 76. 77. 81. 83. 85. 86, &c.

*Judicium de corrupto Judice.*

We could not passe over a strange judgement of *suspendatur, &c.* as in case of felony (which we have touched before in the chapter of Bribery given against Sir William Thorpe, lately before chief justice of England, which we finde of record in these words. *Processus factus an. 24 E. 3. contra Willielmum Thorp chivalier nuper capitalem justiciarium coram Ricco. comite Arundel. T. de Beibocampo comite Warce. Willielmo de Clinton comite de Hunt. Joh. de Gray d. Rotherfield seneschallo hospitii regis, et Barthol. de Burgerf. camerario regis: pro eo quod idem Willielmus Thorp nuper capitalis justiciarius domini regis ad placita coram ipso rege tenenda, dum stetit in officio, cepit monea contra juramentum suum, viz. de Ricard Saltley 10 li. de Hildebrand Boreward 20 li. de Guillerro Hollyland 40 li. de Tho. Darby Sancti Botolphii, et de Roberto Daldery 10 li. qui pro diversis felonis, falsitatibus, et transgressionibus coram ipso Willielmo in sessione sua apud Lincolne anno 23 fuerint indictati, et per ipsum Willielmum bre. de exigenda vers. eos respect' fuit: quæ omnia et singula deducere non potuit: ideo adjudicatum fuit prout sequitur, viz. Consideratum est per dictos justiciarios assignatos ad judicandum<sup>a</sup> secundum voluntatem domini regis, et secundum regale posse suum, quod quia prædictus Willielmus de Thorpe cum sacramentum domini regis quod erga populum habuit custodiendum pregit<sup>b</sup> maliciose, false, et rebelliter in quantum in ipso fuit, et ex causis supradictis per ipsum Willielmum, ut prædictum est, expresse cognitis, suspendatur. Et quod omnia<sup>c</sup> terræ et tenementa, bona et catalla sua domino regi remaneant forisfacta. Et postea dominus rex mandavit bre. suum sub privato sigillo, all in French, and there entred *de verbo in verbum.* Ideo consideratum est quod executio judicii prædicti de suspensione ejusdem Willielmi omnino cesset et ei pardonetur. Et quod idem Willielmus remittatur prisonæ turris prædictæ. ad gratiam domini regis expectandam, &c. Et non est intentio domini regis quod hujusmodi iudicium in consimili casu versus quemcunque alium ex quacunque causa se*

Rot. pat. anno 24 E. 3. part 3. m. 2. in doll. & Rot. pat. anno 25 E. 3. part 1. m. 17.

In toto So li.

<sup>a</sup> The effect of the words of the oath hereafter mentioned.

<sup>b</sup> Nota, here is neither felonice, nor proditorie in this indictment, but rebelliter.

<sup>c</sup> According to the said oath, for otherwise the king had no colour to have the forfeiture of all his lands for felony, but every lord of whom they were respectively holden, &c.

<sup>d</sup> Nota prædic-  
tum sacramen-  
tum.

<sup>e</sup> Rot. Parl. in  
Ost. Pur. an.  
25 E. 3. nu. 10.

*teneat vel extendat, sed solummodo versus eos qui prædictum<sup>d</sup> sacramen-  
tum fecerunt, et fecerunt, et fregerunt et habent leges regales Angliæ ad  
custodiend'.*

° We have also found, that at a parliament holden at Westmin-  
ster in *octabis purificationis beate Marice*, anno 25 E. 3. holden be-  
fore Lionel duke of Clarence by force of the kings commission,  
&c. commandement was given, that the record of the said judge-  
ment against the said Sir William Thorp should be brought into  
the parliament, and there to be openly read before the nobles of  
the parliament to hear every of their advices, which was done ac-  
cordingly, and there the nobles affirmed the judgement.

And these words in the said judgement, *Ad iudicandum secun-  
dum voluntatem domini regis, et secundum regale posse suum*, and that  
his lands should be forfeit to the king, *et prædict. sacramentum*, were  
grounded upon the oath of the kings justices in anno 18 E. 3. the  
conclusion of which oath is, [upon pain to be at the kings will, body,  
lands, and goods, thereof to be done as pleaseth him.] We de-  
sireous to satisfie our self herein, searched for the record of this  
oath, and albeit there is a parliament roll of this parliament, and  
other acts, then passed by authority of parliament, be entred into  
the said roll, yet this is not; for that it had not the warrant of an  
act of parliament. It ought to have been printed amongst the  
statutes of the realm, and the title of them is, Here followeth the  
oath of the justices made in the same eighteenth year, but saith not  
at the parliament, &c. but after it became to be printed: and that  
which is printed in anno 20 E. 3. ca. 1. is but a recitall made by the  
king alone, and no act of parliament: for it appeareth by that  
which precedeth, and by the oath it self, that it was the action and  
commandement of the king, for it beginneth: first, we have com-  
manded all our justices, &c. which former part was but a recitall of  
some precedent act: and then followeth, we have ordained and  
caused our said justices to be sworn, &c. so as the oath was de-  
vised by the king, and the justices sworn before this parliament.  
Lastly, it is there said and concludeth: and for this cause we have  
increased the fees of our said justices, &c. which the king of him-  
self did before this act also.

And we have an ancient manuscript of the acts of parliament in  
anno 18 E. 3. and the oath is not within it.

And it appeareth by Fleta, that the punishment of a corrupt  
judge, that receiveth gift or reward was, *Si inde convictus fuerit,  
quid imperpetuum à concilio regis excludatur; terrasque, res, redditus,  
et proventus beneficiorum suorum amittat per unum annum: qui, si poenitent  
non habuerit, puniatur per discretionem regni et consiliariorum regis.*  
And that which Fleta calleth *sacramentum iustic'*, in Vet. Magna  
Carta, is named, *juramentum consiliariorum regis*: for the judges of  
England are of the kings counsell (as elsewhere hath appeared)  
for, in, and concerning the laws of the realm, in which oath also  
the said fatall clause is omitted.

See the Mirror cap. 4. §. *de faux judges*, and ca. 5. §. 1. of the  
law in the time of king Alfred, how many justices were in one  
year hanged, as homicides, for their false judgements: but that law  
hath been long since delect and antiquated, and yet may serve for a  
memoriall of the time past.

The offence of bribery was punished by fine, and ransome, and  
loffe

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Fleta, li. 1. ca.  
17. § Cum igi-  
tur non sit, &c.

Vet. Mag. Cart.  
1. parte fo. 165.  
Vide Braët. li. 3.  
fo. 109. Sacra-  
ment' Justic' iti-  
ner' and that  
then was the ef-  
fect, de sacra-  
ment' Justic'  
residentium.  
Vid. Flet. 1. 2.  
c. 7. § Item  
atrox est inju-  
tia, &c.

losse in the reign of E. 1. as in the chapter of Extortion and Bribery before appears: only Sir Thomas Weyland chief justice of the common pleas, took sanctuary, and before a coroner confessed himself guilty of murder, and according to the course of the common law abjured the realm, so as indeed he was attainted of felony, (which case had been vehemently urged) but it was not for bribery, but for murder, as any other man might have been.

But to winde up the thred of this discourse with three acts of parliament. First, with the statute of 8 R. 2. wherein it is recited, that whereas in the time of king E. 3. it was ordained, that justices as long as they should be in office, should not take gift or reward, and so forth, as in Veteri Magna Carta (without the said full clause) that act provideth, that the oath without that fatall clause should extend as well to the barons of the exchequer, as to the justices, and expressed the penalty of all to be (according to the common law) viz. losse of office, fine and ransome. But at the next parliament, viz. 9 R. 2. the said act of 8 R. 2. for that it was<sup>a</sup> very hard, and needed declaration, was made of no force till it be declared in parliament. <sup>b</sup> Afterwards at the parliament holden 11 H. 4. it was debated what punishment great officers there named counsellors of the king, and judges, &c. should have, which should take any gift, reward, or brocage for doing of their offices or services: in the end it was declared and enacted by authority of parliament, in these words following. *Item que nul chancelier, tresorer, garden del privy seal, counsellier du roy servantes a conseil du roy, ne nul autre officer, \* juge ne minister du roy pernent fait ou gages de roy pur leur dites offices ou service, preigne en nul manner, en temps avenir ascun manner de<sup>c</sup> done ou brocage de nulluy pur leur dites offices et services affaire, sur peine de 1 responder a roy de la treble de son que † isti peignent, 2 et de satisfaire la party, 3 et punis al volent le roy, et 4 soit d'charges de son office, service, et conseil pur tous jours, et que chescun que verra poursuivre en la dit matiere ait la sute s'voien pur le roy come pur luy mesme, et ait la tierce part del somme de que la partie soit dument convict. Respon. Le roy le voet.*

<sup>a</sup> This act being by authority of parliament, hath limited the punishment (amongst others) of corrupt judges, of whom now we entreat, so as the former example of Sir William Thorp is not now to be followed, which we affirm not in favour of ferdid bribery, (which we hate, as in the proper chapter thereof before appeareth) but in advancement of justice and right, which is the end of our labour in this and other of our works; <sup>b</sup> and therefore have caused that good act that hath lived so long in obscurity, for the better notice and observation thereof, to be put to the presse, which never was yet printed; and the cause thereof was, for that in the margin of the parliament roll of this act, it is written, *respectuatur per dominum principem et concilium*: a strange presumption without warrant of the king his father, and of the parliament, to cause such a *respectuatur* to be made to an act of parliament.

The like he did to another act in the same parliament, nu. 63. concerning attorneys, the like whereof was never done in any former or latter parliaments. \* This was that prince Henry, who keeping ill company, and led by ill counsell, about this time assaulted (some say) and stroke Gascoign chief justice sitting in the kings bench, for that the prince endeavouring with strong hand to rescue

8 R. 2. ca. 3.  
Vide Vet. Mag.  
Cart. fo. 165. a.  
ubi supra.

9 R. 2. cap. 1.  
<sup>a</sup> In respect of  
the recital.

<sup>b</sup> Ro. Par.

11 H. 4. nu. 28.  
not heretofore  
printed. Vid.

1 H. 4. nu. 99.

\* Nota.

<sup>c</sup> This is agreeable to the law of God, Deut. 16. 19. Non accipies personam, nec munera, quia munera excæcant oculos sapientum, et mutant verba justorum.

Exodus 23. 8.

† [ 225 ]

Nota four punishments.

1. By the court of justice where the matter shall depend (as hath been often observed) by fine and imprisonment.

<sup>a</sup> In the oath of the justices in Wales, that fearful clause is omitted, neither is it in the oath of the barons of the exchequer of England.

<sup>b</sup> Veritas nihil veretur nisi abscondi.

\* See Sir Tho. Eliot in his Governour, &c. Holl. Chron. 543. a.

rescue a prisoner, one of his unthrifty minions indicted and arraigned at the kings bench bar for felony, was prevented of his purpose by the perswasion and comandement of the chief justice, for which the chief justice committed the prince to the kings bench, whereof some of his followers instantly complained to the king his father: who informing himself of the true state of the case, gave God infinite thanks, that he had given him such a judge, as feared not to minister justice, and such a son, as could suffer seemblably and obey justice. And this is that prince, who abandoning his former company and counsell, and following the advice of grave, wise, and expert men, whom he made choice of to be of his counsell, became a victorious and vertuous king, and prosperous in all that he took in hand, at home and abroad.

For the duty of judges, it is truly said (as before hath been said) that *judex debet habere duos sales, viz. salem scientiæ, ne sit insipidus, et salem conscientiæ, ne sit diabolus.* And what persons should be judges, see Bracton, lib. 1. cap. 2. & lib. 3. fo. 106. & Fleta, lib. 1. cap. 17. § Caveat, and the Mirror, ca. 2. §. 2. de judges, and Rot. Parl. 17 E. 3. nu. 3. 10.

Anno 1 Mar. stat. 2. ca. 2. in print. See the Articles of Concord, 21 Maii anno Dom. 1420. et anno 8 H. 5. between king H. 5. and Charles the French king, whereby the crown of France after the death of the said Charles, was established to H. 5. and his heirs. Artic. 7, 8, &c.

To these we will add, that upon the conclusion of a marriage then to be had between Philip the son of the emperor, and prince of Spain, it was nobly and wisely provided by the queen, the lords spirituall and temporall, and the commons by authority of parliament (amongst many other excellent provisions worthy of observation) that the said prince should not promote, admit, or receive to any office, administration or benefice in the realm of England, and the dominions thereunto belonging, any stranger, or persons not born under the dominion and subiection of the most noble queen of England: and that the said most noble prince should doe nothing whereby any thing might be innovated in the state or right, either publique or private, or in the lawes and customes of England, or the dominions thereunto belonging, but shall contrariwise confirm and keep, to all estates and orders, their rights and priviledges.

And it is there further provided for the future, &c. that if the said prince should have issue male or female, the order of succession is there declared, but with this proviso. Provided nevertheless, and expresly reserved in all and singular the above declared cases of succession, that whatsoever he or she be, that shall succeed in them, they shall leave to every of the said realms, lands and dominions whole and entire their priviledges, rights, and customes, and the same realms and dominions shall administer, and cause to be administered by the naturall born of the said realms, dominions, and lands.

By this, Philip (after king of Spain) could not prefer any stranger born to any office of judicature, &c. within the realm of England, or dominions of the same, nor all the time he was within this realm, ever attempted the same.

And in the articles, *De matrimonio prælocuto inter reginam Elizabetham et ducem de Alonson*, amongst others it was expressly provided, *Quod dux nullum extraneum ad aliquod officium in Anglia promovabit, et nihil in jure mutabit, &c.*

Vide Camden. El. 322. Artic. inter reginam Eliz. et Franciscum ducem Alonson anno 23 El. populo super importune ut nuberet suadente in comitiis.

Also

\* Also king James wisely provided by authority of parliament, by the advice of the lords spirituall and temporall, and commons in that parliament assembled, that whereas in regard of some difference and inequality of the laws, trials, and proceedings \* in case of life, between the justice of the realm of England, and that of the realm of Scotland, it appeareth to be most convenient for the contentment and satisfaction of all his majesties subjects to proceed (with all possible severity) against such offenders in their own country according to the laws of the same, whereunto they are born and inheritable, and by and before the naturall born subjects of the same realm, if they be there apprehended. And by the next clause it is provided, that felonies committed by Englishmen in Scotland, shall be enquired of, heard, and determined before justices of assise, or commissioners of oier and terminer, and gaol-delivery, being naturall born subjects within the realm of England, and none other. And the like in another clause with an addition of justices of peace to be naturall born subjects within England; and God blessed and prospered this act with happy and desired successe.

<sup>a</sup> 4 Ja. regis, ca. 1. about the midst.

\* That case being then in question.

But contrariwise, *Petrus de Rupibus*, or of the Rocks, being a Gascoign born, preferred to be bishop of Winchester by king John, and being a principall counsellor about king H. 2. both in his young years, did after in his riper age prefer to offices about the king, such Gascoigns as were of his blood or alliance, (whereof one of his kindred, some say his son, Peter de Orival treasurer of England) to the great grief and discontentment of the nobility of England to have a Gascoign born in place above them. And what heavy event ensued thereupon, let historians inform you, for it is grievous to me to remember it.

Math. Par. pag. 363. 380. 383, &c. Hol. Chron. pag. 231. & 1071. a. b.

If you desire to see somewhat concerning ecclesiasticall offices, promotions, and benefices, first what petitions have been made in parliament against aliens or strangers; look in the parliament rolis of 50 E. 3. nu. 96, 97. 120. 13 E. 3. nu. 23. 17 E. 3. nu. 59, 60. 18 E. 3. nu. 38. 2 R. 2. nu. 6 H. 4. nu. 48. 4 H. 6. nu. 29, &c. And what laws have been made that aliens or strangers should not be advanced to the same; *Vide* 35 E. 1. Statut. de Carlisle. 3 R. 2. ca. 3. 7 R. 2. ca. 12. Rot. Parl. 13 R. 2. not in print. 1 H. 5. ca. 7. 4 & 5 Ph. and Mar. ca. 6.

Vide 50 E. 3. nu. 165. for the keeping of the castle of Nottingham. Vide 18 E. 1. Rot. Parl. nu. Solomon de Rolles case.

C A P. CII.

[ 227 ]

Forfeiture, Confiscation, &c.

**N**O T A *confiscare et forisfacere* are *synonyma*, and *bona confiscata* are *bona forisfacta*: *Fiscus* properly signifieth a panier or hamper of osiers, wherein the Romanes kept their treasure, and by the figure of *metonymia continens pro contento*, it is taken for the treasure it self, *unde confiscare*, and *bona confiscata*, and thereupon it is said, *Quod non capit Christus, capit fiscus*.

Of forfeiture of lands and tenements, and other hereditaments for

For the derivation of *forisfacere*, see the first part of the Institutes, sect. 74. fo. 59. a. 3 E. 3. forfeit 24.

\* See before cap. High treason, verbo [De t'res et tenements, &c.] fol. 18. & 19.

Et cap. de Petit treason. Verb. [Et de tiel maner de treason,] &c. fo. 21.

See the 1 part of the Institutes, of both these branches.

See the 1 part of the Institutes, ubi supra, both the former and the latter fort.

3 E. 3. Cor. 290. 312.

29 E. 3. 29. 45 E. 3. Cor. 100.

3 E. 2. Cor. 367, 368.

3 H. 7. 12.

22 H. 8. c. 14. 32 H. 8. ca. 3. See before *Paine fort et dure* in the next preceding chapter.

See before in the chapter of Petit treason, fo. 26.

[ 228 ]

for high treason, petit treason, felony, misprision of treason, pre-munire, and in some cases of misprision, \* and what hereditaments which be not holden shall be forfeited for high treason, and shall not escheat for petit treason or felony, we have spoken before in their severall chapters, &c. now let us speak of forfeiture of goods and chattels in these and some other cases.

<sup>a</sup> Of these the forfeiture of some of them must appear, or be found of record, and therefore these cannot be claimed by prescription; of other some the forfeiture need not appear, or be found of record, and therefore these may be gained by prescription.

<sup>b</sup> Of the former sort be *bona et catalla proditorum, felonum, uilagat', in exigend' positorum, fugitivorum, deodand' annus, dies, et vestim, &c.* and all other forfeitures which must appear or be found of record.

Of the latter sort be treasure trove, *bona et catalla waviat', extrahur' wreccum maris, &c'*

\* If a traitor or felon either rescue himself, or will not submit him to be arrested, but resisteth, and in resistance is slain; upon presentment hereof he forfeiteth all his goods and chattels.

<sup>d</sup> If a felon in pursuit wave his own goods, they are forfeited, yet are they not *bona waviata*.

If in appeal of robbery the plaintiff omit any of the goods stolen, they are forfeit to the king for the favour, which the law pre-muneth, the plaintiff beareth to the felon: and for that he cannot have restitution for more then is in his appeal.

In appeal of robbery of goods, if the jury find that the defendant found them in the high way, in this case the plaintiff for his false appeal, in seeking the blood of the innocent, shall forfeit his goods to the king.

If one arraigned for treason or petit treason, challengeth peremptorily above thirty five, he forfeiteth his goods, and judgement of *paine fort et jure* shall be given against him, as one that refuseth the triall of law, by challenging three full juries, and like unto one that stands mute and will not put himself upon the triall of the law.

By the statute of 22 H. 8. it was provided that no person arraigned for any petit treason, murder or felony, shall be admitted to any peremptory challenge above the number of twenty: but at this day in case of high treason, notwithstanding the statute of 33 H. 8. cap. 22, 23. and petit treason notwithstanding the act of 22 H. 8. he may challenge thirty five according to the common law, for it is enacted by the statute of 1 & 2 Ph. and Mar. cap. 10. that all trialls hereafter to be awarded, or made for any treason, shall be had and used only according to the due order and course of the common law, so as to petit treason the act of 22 H. 8. is abrogated, but in cases of murder and felony he cannot challenge peremptorily above the number of twenty, and if he challenge above twenty, and under thirty six, he forfeiteth not his goods and chattels, for no law giveth forfeiture for challenging above twenty; but the court ought to over-rule the challenge: neither is he convicted by the challenging above twenty, as he was by the common law by challenge of three juries, for the act of 22 H. 8. extendeth not to any conviction, but to the challenge only.

If the party defendant be attached or distreyned by proces out of any court of record, county, by force of a justices, &c. hundred court, or other court baron, and make default, the goods or issues are forfeited, and upon the attachment the sherif or other officer may take the goods with them: and this is the reason that upon the attachment the sherif or other officer ought to return the certainty of the goods and the value, and it is not sufficient to return that he hath attached or distrained the defendant by goods to such a value, and so upon the distresse the issues must be returned in certain, because they are upon default to be forfeited.

What a person convict of felony before attainder shall forfeit: see the first part of the Institutes, sect. 745. verb. Attaint, fo. 391.

See *supra* in the chapter of Deodands, and in the chapter of Wreck, *vid.* Stanford Pl. Cor. fo. 183, 184. &c.

8 E. 2. Forfeit.  
17. 23 E. con-  
tumac. 17.  
7 H. 6. 9.  
26 H. 6. Attach-  
ment 4.  
28 H. 6. 9.  
34 H. 6. 29. 49.  
32 H. 6. *ibidem*  
9 H. 7. 6. Broke  
tit. Forfeit. 4.  
3 El. Dier, 199.  
pag. 54.  
1. part of the  
Institutes. § 745.

### C A P. CIII.

#### Of the Seifure of Goods, &c. for Offences, &c. before Conviction.

**R**EGULARLY the goods, &c. of any delinquent cannot be taken and seifed to the kings use, before the same be forfeited.

The same cannot be inventoried, and the town charged therewith, before the owner be indicted of record.

It is to be observed, that there is two manner of seifures, one verball without taking, removing, or carrying away, only to make an inventory, and to charge the town: and the other an actuall seifure, and taking away the same.

As to the first, the same is manifest by Braeton, and all our ancient authors: and let Braeton speak for them all.

*Prisones imprisonati, antequam convicti fuerint, de terris suis disseisiri non debent, a nec de rebus suis quibuscunque spoliari; sed dum fuerint in persona debent de proprio in omnibus sustentari, donec per iudicium delibati fuerint vel condemnati, &c.* And fo. 136. b. he saith thus, *Qui pro b crimine vel feloniam magna, sicut pro c morte hominis, captus fuerit et imprisonatus, vel sub custodia detentus, non debet spoliari bonis suis, nec de terris suis disseisiri, sed debet inde sustentari donec de crimine sibi imposito se defenderit, vel convictus fuerit, d quia ante convictionem nihil foris facit; et si quis contra hoc fecerit, fiat vicecom' tale b. rex vic' salutem. Scias quod e provisum est in curia nostra etiam nri, quod nullus homo captus pro morte hominis, vel pro alia feloniam pro qua debeat imprisonari, disseisietur de terris, tenementis vel catallis suis, quisque convictus fuerit de feloniam de qua e relictus est, sed quam cito*

1.  
Vide 25 E 3  
ca. 14.

2.

3.

26 Aff. p. 32.  
43 E. 3. fo. 24.  
44 Aff. p. 12.  
7 H. 4. fo. ul-  
timo.  
Lib. 8. fo. 171.  
See the 1 part of  
the Institutes,  
sect. 745. l. 391.  
a. Bract. l. 3.  
f. 123. Bar.  
fo. 4 b. Fleta,  
li. 1. c. 25, 26.  
a Nota the ge-  
nerality of these  
words. Hil.  
29 E. 1. Coram  
rege in Aff.  
Cantons case.  
b In this word  
treason is com-  
prehended.

<sup>c</sup> Nota, Mort del home est feloniam magna. <sup>d</sup> Note this reason extends as well to treason, as to felony. <sup>e</sup> This writ is in the Regist. <sup>f</sup> That is, by Magna Cart. cap. 29. and that act extends to treason as well as to felony, 5 E. 3. cap. 9. Fleta, li. 2. c. 26. accord. <sup>g</sup> Id est, indictatus, for before indictment no verball seifure can be made, or inventory taken. Stat. de 4 E. 1. de offic. coronatoris, et aliquis culpabilis inveniatur, &c. Britton, f. 4. b. accord.

*captus*

<sup>b</sup> So it was in Braetons time, but afterwards the township was charged and answerable for the same. Britton, fo. 18. Mirror, c. 2. § 13. Fleta, li. 1. c. 25, 26. 43 E. 3. 18. a.

<sup>2</sup> Note the generality of these words.

<sup>b</sup> Mic. 18 E. 1. Coram rege Ro. 34. Norff. Nisi quis appellatus indictatus vel cum manu opere captus fuerit, non competit regi secta contra ipsum.

Begging of lands and goods before conviction, &c. unlawfull.

Cap. Itineris.

*captus fuerit per visum custodum placitorum coronæ nostræ, et per visum tuum et legalium hominum apprcientur catalla ipsius capti, et imbrevientur, et salvo custodiantur per <sup>b</sup> balivos ipsius qui capitur, et qui bonam inveniant securitatem \* de respondendo coram iusticiariis nostris cum ab eis exigantur: salvo tamen eidem capto et familiæ suæ necessariæ, quandiu fuerit in prisona, rationabili estoverio suo, &c. i. rationabili victu et vestitu. 3 E. 3. Coron. 366. 13 H. 4. 13.*

By the statute of 1 R. 3. cap. 3. it is enacted and declared, That neither sherif, escheator, bailife of franchise, <sup>a</sup> nor other person take or seise the goods of any person arrested, or imprisoned, before he be convicted or attaint of the felony, <sup>b</sup> according to the law of England, or before the goods be otherwise lawfully forfeited, upon pain to forfeit double the value of the goods so taken to the party grieved.

So as (*super toto materia*) these two conclusions are manifestly proved. First, that before indictment, the goods or other things of any offender cannot be searched, inventoried, or in any sort seised; nor after indictment seised, and removed, or taken away before conviction or attainder. Secondly, that the begging of the goods or state of any delinquent accused or indicted of any treason, felony, or other offence before he be convicted and attainted, is utterly unlawfull, because before conviction and attainder, as hath been said, nothing is forfeited to the king, nor grantable by him. And besides it either maketh the prosecution against the delinquent more precipitate, violent, and undue, then the quiet and equall proceeding of law and justice would permit, or else by some underhand composition and agreement stop or hinder the due course of justice for exemplary punishment of the offender. And lastly, when the delinquent is begged, it discourageth both judge, juror, and witness to doe their duty.

It was an article of inquiry, *de hiis qui aliquid agunt per quod veritas et justitia suffocantur.*

See Lib. 7. f. 36, & 37. the case of penall statutes, *et nota bene*: see also the statute of 21 Jac. ca. 3. *à fortiori* in case of life. *Placitum coronæ* ought not to become in effect *placitum privatum*. And if it fall out that the party accused be *legitimo modo acquietatus*, let such as begge him and prosecute against him be terrified by the villanous judgment against conspiratours, which you may read before cap. Judgements and Execution.

## C A P. CIV.

### Of Falsifying of Attainders.

[ 230 ]

Syers case, anno 32 Eliz.

**A**T twelve sessions of the peace holden at Norwich for the county of Norfolk, anno 32 Eliz. one Syer was indicted of burglary, supposed to be committed 1 Augusti anno 31 Eliz. whereunto Syer pleaded not guilty. And upon the evidence it appeared that the burglary was committed 1 Septemb. anno 31 Eliz. so as at the time alledged in the indictment there was no burglary done:



done: and it was conceived that the very true day in the indictment was necessary to be set down in the indictment, for that the judgement doth relate to the day in the indictment, and so avoid feoffments, leases, &c. for that as it was also conceived) the feoffee, lessee, &c. when the attainder is upon a verdict, should not falsifie in the time of the felony: and thereupon the jury found Syer not guilty. And at the same sessions Syer was again indicted for the same burglary done 1 *Septembris anno* 31 Eliz. when in truth it was done. And he that gave the charge at that sessions doubted, whether upon this matter Syer might plead *auter foitz acquite* for the same burglary, (for seeing the offender is allowed no counsell, the court ought to do him justice and assigne him counsell *in favorem vitæ*, though he demand it not, to plead any matter in law appearing to the court for his discharge;) and thereupon he stayed the proceeding against him, and the assises being at hand he acquainted the justices of assize, Wray chief justice, and justice Peryam with this case, and with the doubts conceived thereupon; who answered him, that the like case had then been lately propounded by justice Peryam to all the justices of England; and by them three points were resolved. 1. That the crown was not bound to set down the very day when the treason, felony, &c. was done, but the day set down in the indictment being before or after the offence done, the jury ought to finde him guilty, if the truth of the case be so; and if it be alledged before the offence done, to finde the day when it was done in *rei veritate*, for they are sworn *ad veritatem dicendam*, and then the forfeiture shall relate but to the day in the verdict, which was the day of the offence done, and not to the day in the indictment. 2. That if the triers finde the offender guilty generally, yet the feoffee or lessee, &c. if the offence be alledged in the indictment before it was done to their prejudice, may falsifie in the time, but not for the offence. For seeing the crown is not bound to set down the very just day when the treason or felony, &c. is done, and that the triers have chief regard and respect of the offence it selfe, God forbid, but that the subject might falsifie as concerning the time of the offence. 3. If the offender be found not guilty, he in that case might plead upon a new indictment, *auter foitz acquite*: and so Syer in the case aforesaid did, and was thereupon discharged according to the said resolutions. Nota three notable points resolved, that never were resolved in any book that we have read, and remember.

At the assises in Lent, 32 Eliz. in com. North.

Nota, The resolution of all the judges.

If a man infeoffeth another of his land, and after is indicted of felony supposed to be committed before the feoffment, and thereupon he is outlawed; the party himself is bound hereby, and cannot traverse the felony, but the feoffee, &c. may; because he is an estranger thereunto: for a false indictment without any tryall or verdict shall not binde the feoffee, &c. but that he may falsifie, either by traverse of the felony it selfe, or of the time of the feoffment.

49 E. 3. 11.  
7 E. 4. 1, 2

And so it is if a man maketh a feoffment of his land, and after taketh sanctuary, and confesse the felony before the coroner by him to be done before the feoffment, and abjureth the realm; the feoffee shall falsifie the attainder by traversing of the felony. And so it is if a man be indicted of felony, and is attainted by his own confession, the feoffee shall falsifie the attainder by denying the felony.

[ 231 ]  
11 H. 4. 94.  
2 H. 5. k. stop. 91.  
7 E. 4. 1. 2.  
Vid. Rot. Parl.  
23 H. 6. nu. 32.

felony. But otherwise it is if he be attainted upon a verdict given by twelve men, for then the feoffee shall not falsifie by traversing of the offence, but of the time only.

Where the case in effect is, that 15 *Januarii anno 1 Mariae*, a commission of oier and terminer in London was directed to Sir Thomas White the lord maior of London, and to divers others, reciting, that where Sir Robert Dudley knight, 9 *Januarii anno 1 Mariae* was indicted of high treason before Thomas duke of Norff. and 14 others commissioners of oier and terminer in the county of Norff. (where in truth that commission was directed to so many, but the indictment was taken but before 8 of them only) granting to them or any four of them, authority to receive the indictment taken before 15 commissioners, and to proceed thereupon as speciall justices of oier and terminer, &c. By pretext whereof they proceeded: and upon the confession of the said Sir Robert Dudley, gave judgement against him in case of high treason. <sup>a</sup> In this case it was adjudged, that Sir Robert Dudley, then earl of Leic. might falsifie the said attainer by plea, because it was void, and *coram non iudice*: for that the said latter commissioners <sup>b</sup> had no power to proceed upon an indictment taken before 8, but before 15, and so the judgement was void, and *coram non iudice*: for wheresoever the judgement is void or *coram non iudice*, the party is not driven to his writ of error, but may falsifie the attainer by plea, shewing the speciall matter which proveth it void, or *coram non iudice*. In which case the party forfeiteth neither lands nor goods. By which case it appeareth how necessary it is for judges, especially in cases of treason and felony, to look into the whole record, and the proceedings thereupon, before they give judgement, lest they give an unlawfull and unjust judgment, by means whereof the party may lose his life, &c.

<sup>c</sup> A and B were indicted, A as principall of felony, and B a accessory for receiving him. A fled and was attainted of the felony by outlawry. B the accessory (being seised of lands in fee holden of C) was arraigned upon the indictment and found guilty by verdict, and had judgement, and was hanged: C the lord entreteth as lord by escheat: A the principall reverteth the outlawry, and to the felony pleaded not guilty, and by verdict was found not guilty, and thereupon was by judgement acquitted. The heir of B, brought an assise of mordancestor against C the lord by escheat, who pleaded the outlawry of the principall, and the attainer of the accessory, his seison in fee, and the execution, and his entry as lord by escheat. <sup>d</sup> The plaintife shewed the reversal of the outlawry by the principall, and his acquittall by verdict and judgement, whereupon the lord demurred in judgement. And it was adjudged that the plaintife in the writ of mordancestor should recover against the lord by escheat. Upon which judgement we observe these five conclusions. 1. <sup>e</sup> That the attainer of the accessory hath a kinde of dependancy upon the attainer of the principall. For it is a maxime in law, that the accessory ought not to be put to answer before the principall be attainted; and by the reversal and acquittall of the principall, the dependant judgement against the accessory cannot stand. 2. <sup>f</sup> That this attainer of the accessory may be falsified and avoided by the heir by plea, and is not driven to his writ of error; for that the attainer of the accessory is by matter in law avoided by record of as high nature as the

Pl. com. f. 390.  
Le Countee de  
Leic. case.

<sup>a</sup> Tri. 3 El.  
<sup>b</sup> V. for this  
point 22 Aff.  
p. 64. 39 E. 3.  
33, 34. 41 Aff.  
p. ult. 27 Aff.  
p. 55. 39 Aff.  
p. 6. 7 H. 4.  
3. 9 H. 4. 1.  
10 H. 6. 13.  
36 H. 6. 32.  
31 H. 6. 10.  
4 H. 6. 24.  
22 E. 4. 31. Co-  
lyns case.  
2 H. 3. 10.  
4 H. 7. 18.  
2 H. 7. fo.  
Vide Rot. Parl.  
18 E. 1. Rot. 11.  
Mountgom. Bo-  
go de Knovil,  
&c.  
<sup>c</sup> See this case  
temps E. 1. tit.  
Mordanc. 46.  
but not so ly  
thine reported.  
Vid. lib. 9.  
fo. 119. Lord  
Zanchers case.  
<sup>d</sup> Where the an-  
cestor of the ac-  
cessory was law-  
fully and in due  
form attainted  
of felony and  
yet the heire  
shall inherit by  
matter *ex post  
facto*.  
<sup>e</sup> Vi. li. 5. fo.  
119. b.  
Lo. Zanchers  
case. Debili fun-  
damento fallit  
opus. 2 R. 3.  
fo. 12.  
<sup>f</sup> 26 E. 3. 57.  
7 H. 6. 44.  
43 E. 3. 3.  
4 E. 3. 36.  
11 H. 4. 4. 6.  
9 H. 6. 38. b.  
8 H. 4. 4.  
10 H. 6. 6.  
6 E. 4. 8.  
8 H. 7. 10.  
13 E. 4. 4.

the attainder of the principall was. For in this case it is impossible that there should be an accessory where there was no principall, of the same felony. 3. That the escheat of the land lawfully once vested shall by this matter *ex post facto*, be devested. 4. Though there were no immediate discent to the heir, yet upon the judgement of the acquittal of the principall the writ of mordancestor was maintainable. Lastly, that albeit the attainder of the accessory is avoided by judgement of law, yet the lord by escheat remain tenant of the land, until it be evicted from him by action or entry. And so it is if the principall be attainted of felony, and after the accessory is also attainted, if the principall reverseth his attainder by writ of error, the attainder of the accessory dependant thereupon is reversed.

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18 E. 4. 9. b.

A man commits treason or felony, and is thereof attainted in due form of law, and after this treason or felony is pardoned by a generall pardon; hereby the foundation it self, viz. the treason or felony being by authority of parliament discharged and pardoned, the attainder (being builded thereupon) cannot stand, but may be falsified and avoided by plea, for he hath no other remedy by writ of error or otherwise.

Dier 20 Eliz.  
135. lib. 6. fo.  
13, 14. in Arundels case.

In the county of Warwick there were two brethren, the one having issue a daughter, and being seised of lands in fee devised the government of his daughter and his lands, untill she came to her age of sixteen years, to his brother, and died. The uncle brought up his niece very well both at her book and needle, &c. and she was about eight or nine years of age: her uncle for some offence correcting her, she was heard to say, Oh good uncle kill me not. After which time the childe after much inquiry, could not be heard of: whereupon the uncle being suspected of the murder of her, the rather for that he was her next heir, was upon examination *anno 8 Jac. regis* committed to the gaol for suspicion of murder, and was admonished by the justices of assise to find out the childe, and thereupon bailed him untill the next assises. Against which time, for that he could not finde her, and fearing what would fall out against him, took another childe as like unto her both in person and years as he could find, and apparelled her like unto the true child, and brought her to the next assises, but upon view and examination, she was found not to be the true child; and upon these presumptions he was indicted and found guilty, had judgement, and was hanged. But the truth of the case was, that the child being beaten over night, the next morning when she should go to schoole, ran away into the next county: and being well educated was received and entertained of a stranger: and when she was sixteen years old, at what time she should come to her land, she came to demand it, and was directly proved to be the true child. Which case we have reported for a double caveat: first to judges, that they in case of life judge not too hastily upon bare presumption: and secondly, to the innocent and true man, that he never seek to excuse himself by false or undue means, lest thereby he offending God (the author of truth) overthrow himself, as the uncle did.

*Falsifying concerning Goods.*

Brañt. lib. 3. f.  
128, 129. a.  
Brit. ca. 12.  
fol. 20.  
3 E. 3. Forfeit  
25. 22 Aff. 96.  
13 H. 4. 13.  
<sup>a</sup> 4 H. 7. 18.

<sup>b</sup> 3 E. 3. cor.  
296. & 344.

<sup>c</sup> 47 E. 3. 26.  
13 E. 4. fo. 8. a.  
Travers de chat-  
tell al common  
ley.

<sup>d</sup> 27 Aff. p. 50.  
41 Aff. p. 13.  
44 Aff. p. 16.  
Lib. 5. fo. 111.  
Foxleyes case.

<sup>e</sup> Bra. li. 3. f.  
129. a. 43 E. 3.  
18. 7 E. 4. 17.  
a. per Cheke. 45  
Aff. p. 9. Stanf.  
pl. cor. 284. d.  
30 H. 6. tit. for-  
feit. 31. 19 E. 3.  
ibid. 19. 223.  
45 E. 3. Aff. 9.

\*[ 233 ]

8 E. 2. cor. 406.

If A be indicted before the coroner for the death of another, and that A fled for the same; hereby are all the goods and chattels of A forfeited which he had at the time of the verdict given; and this cannot be falsified by traverse. For if the party be arraigned upon the same indictment before justices of gaole delivery, and is by verdict acquitted of the felony, and that he did not flee for the same; yet he shall forfeit his goods and chattels, but yet, <sup>a</sup> such a *fugam fecit* may be falsified by matter in law; for if the indictment be void or insufficient, there is no forfeiture. <sup>b</sup> But if a man be indicted before justices of oier and terminer, and is acquitted by verdict, and they finde further that he fled for the same, his goods are forfeited which he had at the time of the verdict given; <sup>c</sup> and it being also found in particular what goods he then had, that may be traversed by any that had property in those goods.

There is also a *fugam fecit* in law. <sup>d</sup> As if a man be indicted or appealed of felony and proces continued against him, upon his default of appearance, and an exigent awarded against him, whereupon he appeareth, albeit he be after acquitted of the felony, yet all his goods and chattels are forfeited by the awarding of the exigent upon this *fugam fecit* in law. <sup>e</sup> But this may be falsified by matter in law: for if the indictment or writ of appeal be insufficient, or error be in the proces or exigent the same may be avoided by exception, and no forfeiture of goods. And there is no book to warrant the opinion of justice Stanford \* in this case: for in 25 E. 3. the originall writ was good, *quod adnoto, non ut arguam, sed ne ipse arguar.* And also by matter in deed or record he may excuse his absence, as if he were in prison or beyond the sea, at the time of the exigent awarded, or if the king before the exigent doth pardon him.

A is indicted of petit larceny, and upon his triall is found not guilty, and that he did flye for the same, he shall forfeit his goods. And so it is if an exigent be upon such an indictment awarded against him: but he may falsifie the same to free him of the forfeiture of his goods by such means as is aforesaid. See the first part of the Institutes, sect. 745. fol. 391. a.

*Hæ leges vitam vestram (generosa juvenus)  
Instituunt, quæ sunt fugienda, sequendaq; monstrant.*

C A P. CV.

O F . P A R D O N S .

WE have spoken of the royall and establishing vertue of justice: royall and establishing I say, because *justitia firmatur solium*, by justice the royall throne is established.

Prov. 16. 12.

We are now to speak of his mercy: for the same Holy Spirit saith, *Misericordia et veritas custodiunt regem, et roboratur clementia thronus ejus*. Mercy and truth preserve the king, and by clemency is his throne strengthened. And hereupon is the law of England grounded. *Non solum sapiens debet esse rex, sed et misericors, ut cum sapientia misericorditer sit justus, &c. Quibus tamen et qualiter est miserendum, doceant eum merita vel immerita personarum, &c.* Of this royall vertue we shall speak the more willingly, for that (as it hath appeared before in the chapter of Sanctuary) all sanctuaries and places of refuge for safegard of life are taken away. And where Bracton in the same place speaking of the kings mercy saith, *Nihil tam proprium est imperii quam legibus vivere*, it is to be observed, that the lawes of this realm have in some sort limited and bounded the kings mercy, as shall appear hereafter. And for as much as his mercy is conveyed unto his subjects by his pardons, we shall now speak thereof, being led thereunto by the book in 9 E. 4. where it is holden *a chescun roy appent per reason de son office a faire justice et grace; justice in execution des leyes, &c. et grace de granter pardons, &c.*

Prov. 20. 28.

Bract. lib. 2. fo.

<sup>a</sup> A pardon is a work of mercy, whereby the king either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporall or ecclesiasticall: <sup>b</sup> all that is forfeited to the king by any attainder, &c. he may restore by his charter: but if by the attainder the blood be corrupted, that must be restored by authority of parliament.

9 E. 4. 2. a.

<sup>a</sup> Seneca, lib. de Clementia, ca. 24. Remissius imperanti melius paretur.

<sup>b</sup> See the first part of the Inst. sect. 1. fo. 8. and sect. 646, 647. See after cap. Restitution.

\* Rot. par. 17 R. 2. nu. 11. &c.

<sup>c</sup> 27 H. 8. cap. 4. Hil. 29 E. 1. coram rege Eder. Jo. fil. Philippi Perpoint. 1 H. 4. fo. 37. 17 H. 6. protect. 57.

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We call it in Latin *perdonatio*, and derive it à *per et dono*: *per* is a preposition, and in the Saxon tongue is *for*, or *vor*: as to forgive is throughly to remit, and \* forethink is to repent, and forbear is to bear with patience, as it is said, *leve est ferre, perferre grave*.

<sup>c</sup> All pardons of treason or felony are to be made by the king, and in his name only, and are either generall or speciall. All pardons either generall or speciall, are either by act of parliament (whereof the court in some cases shall take notice) or by the charter of the king, (which must always be pleaded.) And these againe are either absolute, or under condition, exception, or qualification: for some of those pardons last mentioned the party may have a writ of allowance, or take an averment in certain cases, in others the party may be aided by averment only, where no writ of allowance doth lie.

And first of generall pardons. Generall pardons are by act of parliament, if any of these pardons be generall and absolute, the

11 H. 4. fo. 41.  
28 H. 8. Dier  
28. 3 Mar. ibid.  
200. 26 H. 8.

fo. 7. There is a very generall and absolute pardon. Ro. par. 15 H. 6. nu. 31. 33 H. 6. nu. 29. &c.

\* This is put but for an example, but care must be taken, that what generall pardon soever be pleaded the first clause of the pardon of discharge, &c. be truly alledged. For the exposition of generall words, see L. 5. fo. 47. Littletons case. Ibid. fo. 46. Franklyns case. Ibid. fo. 48. Drywoods case. Ibidem 49. b. Wirrals case. Li. 6. fo. 79, 80. Sir Edw. Fittons case. Li. 6. f. 13. b. Li. Keylw. 8 H. 8. 187. ibid. 10 H. 8. fo. 198. a. ter.

\* These averments (as you perceive) may be taken without any writ of allowance. 8 E. 4. 3. 4 H. 7. 8. Li. 8. fo. 68. Trollops case. Vid. l. 6. fo. 13, 14. in Arundels case. A case of Burton.

Hil. 29 El. the resolution of all the justices.

court must take notice of them, though the party plead it not, but would wave the same. But in these dayes the generall pardons have so man' qualifications and exceptions of offences and things, and of persons also, that the court cannot take notice of them, neither can the party take benefit or advantage thereof, unlesse he plead it: and for that it may concern the safety and quiet of manv a subject, we have expressed the form of the pleading of a generall pardon, and have it set down here in Latin: but if the offence be objected in the star-chamber, or any other English court, then it must be pleaded in English.

*Et p. ed. A. per B. attornatum suum venit, &c. (or in propria persona) et dicit quod dominus Jacobus rex nunc ipsum A. occasione præmissa impetere seu occasionare non debet: quia dicit, quod per quendam actum in parlamento dicti domini regis nunc tent' apud Westm' in com' Midd' nono die Februarii anno regni sui septimo, inter alia, inactitat' et stabilitum existit autoritate ejusdem parlamenti, \* quod omnes et singuli subditi dicti domini regis tam spirituales, quam temporales hujus regni Angliæ, Walliæ, insularum Fernsey, et Garusey, et villæ Barwic, hæredes, successores, executores, et administratores sui, et eorum quilibet, ac omnia et singula corpora aliquo modo corporata, civitat', burgi, comitat', riding, hundred, lath, rape, wapentag', vil', villat', hamlet' et tithing, et eorum quilibet, ac successor, et successores eorum, et cujuslibet eorum autoritate ejusdem parlamenti acquietarentur, perdonarentur, relaxarentur, et exonerarentur versus dictum dominum regem, hæredes et successores suos et quemlibet eorum de omnibus proditionibus, felonis, offensis, contempt', transgress', intrationibus, injuriis, deceptionibus, malegesturis, forisfacturis, penalitatibus, et summis pecuniæ, pœnis mortis, pœnis corporalibus, et pecuniariis, et generaliter de omnibus aliis rebus, causis, querelis, scelis, judiciis et executionibus in prædicto actu non exceptis, neque forpris, que per ipsum dominum regem aliquo modo, seu per aliquem modum perdonari potuerunt ante et usque nonum diem Novembris tunc ultim' prædict' editionem actus prædicti, cuilibet, aut alicui suorum sub litorum, corporum, corporat', civitat', burgorum, comitat', riding, hundred, lath, raparum, wapentag', villæ, villat', et tithing, vel aliquorum aliorum prout in actu prædicto plenius continetur. Et id m A. dicit quod \* offensa prædicta versus ipsum in forma prædicta objecta non est in actu prædicto accepta, neque forprisata. Et quod ipse est et tempore editionis actus prædicti fuit subditus et ligeus dicti domini regis nunc natus sub obedientia sua, videlicet apud Westm' prædict', quodque ipse non est aliqui persona in actu prædicti' except' neque forprisat'. Et hoc paratus est sciificare, unde non intendit quod dictus dominus rex nunc ipsum A. occasione præmissa impetere seu occasionare velit, unde petit judicium. Et quod ipse de præmissis prædicti' exoneraretur, et quod generalis pardonatio prædicta ei allocatur, &c. See before cap. of Falsifying of Attainders.*

By the generall pardon of 28 El. all felonies are pardoned, burglary excepted. Hil. 29 El. it was resolved by all the justices, that a man being attainted of burglary was excepted, for the burglary remains, and is made more apparant by the attainder, and the offence of burglary is the foundation.

The most beneficiall generall pardons for the subject were those of the fift, and thirteenth years of the reign of queen Elizabeth, as by comparison of those with others, will to the judicious reader easily appear. The best generall pardon in all king James time, was that of the 21 year of his reign, as by comparison of that with

with any of his former, will evidently appear, and were too long here to be rehearsed.

And now of particular pardons. No particular pardon, be it at the coronation, or any other, of any offence or offences whatsoever, that is absolute without any \* condition, &c. need any writ of allowance, but when the pardon is conditional by force of the act of 10 E. 3. cap. 2. there a writ of allowance out of the chancery testifying that the condition is performed, viz. surety found according to that act may be had, or the party may plead the finding of surety, &c. and vouch the record.

The most large and beneficial pardons by letters patents, that we have read, and doe remember, were that to William Wickham bishop of Winchester (for good men will never refuse God and the kings pardon, because every man doth often offend both of them) and that other to Thomas Woolsey cardinall, which are learnedly and largely penned.

But let us turn our eye to ancient charters of pardon, and consider well of them.

*Edwardus Dei gratia rex Angliæ, dominus Hiberniæ, et dux Aquit', omnibus balivis et fidelibus suis, ad quos presentes literæ pervenerint, salutem. Sciatis quod pro bono servitio quod Johannes Chaumprona de Thornton in Pickeringis, in partibus Scotiæ nobis impendit, perdonavimus ei sectam pacis nostræ, quæ ad nos pertinet \* pro morte Isabellæ, quondam uxoris suæ, unde indictatus est, et firmam pacem nostram ei inde concedimus. Ita tamen quod stet recto, si quis versus eum inde loqui voluerit. In cuius rei testimonium has literas nostras fieri fecimus patentes. Teste me ipso apud Roukesburge, nono die Febr. anno regni nostri tricesimo.*

*Edwardus Dei gratia rex Angliæ, dominus Hiberniæ, et dux Aquitan', omnibus balivis et fidelibus suis, ad quos presentes literæ pervenerint, salutem. Sciatis quod pro bono servitio quod Galf. filius Warrum in partibus Scotiæ impendit, perdonavimus eidem Galfro. sectam pacis nostræ quæ ad nos pertinet, de homicidiis, roberis, latrocinis, fractionibus domorum, felonis et aliis transgressionibus contra pacem nostram. in regno nostro factis, unde indictatus est, et similiter transgressionem quam fecit ab ecclesia de Watford, in quia aliquamdiu pro timore inimicorum suorum tenuit fugiendo, et se secundum legem et consuetudinem regni nostri iusticiar' non permittendo, et etiam utlagariam, si qua in ipsum ea occasione fuerit promulgata, et firmam pacem nostram ei inde concedimus. Ita tamen quod stet recto in curia nostra, si quis versus eum loqui voluerit de homicidiis, roberis, latrocinis, fractionibus, felonis et transgressionibus predictis. In cuius rei testimonium has literas nostras fieri fecimus patentes. Teste me ipso apud Linūsen vicesimo secundo die Januarii anno regni nostri tricesimo, per breve de privato sigillo.*

It appeareth by this record, that the said Jeffry was indicted for the death of a man, and of divers burglaries and felonies, and being thereupon arraigned prayed his clergy, sed salvo sibi privilegio clericali posuit se super patriam, and was found not guilty, &c. in the proceeding whereof there was manifest error, and obtained the said pardon. Herein divers things are observable: first, that the pardon is de \* homicidiis, and not de murdris, neither have we seen any pardon of murder by any king of England by expresse name. Secondly, by these ancient words the king doth pardon sectam pacis nostræ, quæ ad nos pertinet de homicidiis, &c. et firmam pacem nostram

Hil. 26 E. 3.  
Coram rege rot.  
21. Willes.  
3 H. 7. 7. 2.  
this statute expounded, and this act extend to felony, and not to treason.  
Rot. pat. 21 Julii anno 1 R. 2.  
Rot. pat. 12 Feb. 21 H. 8. great offences need great pardons, little offences are soon forgiven.  
Hil. 29 E. 3.  
Coram rege Hereford.  
Johannes fil. Ph. Perpoint, &c.

\* It appeareth by the record that he killed her per infortunium.

Delib. gaolæ de Windessore, coram Hugone de Braund, et Johanne Neprunt die Jovis proximo post clavis. Pasce. anno 25 E. 1.

\* For this word homicide, see in the chapter of Murder. See Hil. 31 E. 3. Coram rege rot. 7. Northumb. 9 E. 4. 28.

8 H. 4. fo. 22.  
Li. 6. fo. 13. b.

34 H. 6. 3. a.  
35 H. 6. 1. a.  
11 H. 7. 10.  
Li. 6. f. 79. l.  
8. 68. Lib.  
Keylw. 8 H. 8.  
fo. 137. 2 R. 2.  
4. b. simile.

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\* Pl. com. f.  
401. Coles case.  
37 H. 6. fo. 21.  
Quatermains  
case. Li. 5. fo.  
49. Vaughans  
case. Li. 6. fo.  
13. Cases de  
pardon.  
20 El. Dier 135.  
Exod. 21. 12,  
13, 14. Deut. 19.  
13. Non misere-  
beris ejus, &c.  
a 2 E. 3. c. 2.  
14 E. 3. ca. 14.  
10 E. 3. ca. 2.  
b 2 E. 3. c. 2.  
4 E. 3. ca. 13.  
Rot. Par. 13 E. 3.  
nu. 10.  
c 27 E. 3. c. 2.  
Trin. 30 E. 1.  
Rot. 2. coram  
rege London,  
anno 29 E. 1. A  
pardon of death,  
ad instantiam  
Johan. Bate-  
court. Mich.  
33 F. 1. coram  
rege Ro. 65. a  
pardon ad requi-  
sitionem H. de  
Bohun, count.  
Heref. & Essex.  
d 13 R. 2. sta. 2.  
c. 1. 16 R. 2.  
ca. 6. 9 E. 4.  
fo. 26. b.  
e 1 E. 3. f. 24.  
f 8 H. 6. 20.  
4 E. 4. fo. 10.  
g Li. 6. fo. 15.  
9 E. 4. 26. b.  
per Billing chief  
justice.

*et inde concedimus.* This *secta pacis* is by indictment, which is the kings suit, and, as it were, his declaration. Thirdly, that the king of ancient time did not pardon *homicidium, &c.* but *sectam pacis nostræ quæ ad nos pertinet de homicidiis, &c.* yet when he pardoned, and released the suit or mean, viz. *sectam pacis, &c.* the offender was discharged of the homicide it self, *in diebus illis*, but at this day the offence it self is pardoned, which is the surest way.

The king brought an action of debt upon an obligation, the defendant pleaded *non est factum*, and at a *nisi prius* it was found the deed of the defendant; and before the day in bank, the king pardoned the defendant all debts, querels, &c. and after the king had judgement, and sued out execution, and the defendant came and pleaded the pardon, and it was adjudged that in the kings case, he might plead the same, though he had no day in court, because he could not have an *audita querela*, or a *scire fac'* against the king, and therefore if he could not plead it, he should be without remedy, but against a common person he could not plead it, because he ought to have an *audita querela*, or a *scire fac'*. And in this case it is observable, that albeit by the judgement a new title to the said debt is accrewed to the king of record after the pardon, the obligation at the time of the pardon being but a matter in fact, yet for that the obligation was the \* foundation of the debt, and the matter whereupon judgement was given, and by the pardon the debt due by the obligation was extinct, the judgement thereupon cannot bind, but is to be avoided by pleading the pardon.

What things the king may pardon, and in what manner, and what he cannot pardon, shall now to be treated of.

<sup>a</sup> In case of death of man, robberies, and felonies against the peace, divers acts of parliament have restrained the power of granting charters of pardons. First, that no such charters shall be granted but in case where the king may doe it by his oath. <sup>b</sup> Secondly, that no man shall obtain charters out of parliament, and accordingly in a parliament roll it is said; [for the peace of the land it would much help, if good justices were appointed in every county, if such be let to mainprise doe put in good sureties, as esquires or gent. and that no pardon were granted but by parliament.] Thirdly, for that the king hath granted pardons of felonies upon false suggestions, <sup>c</sup> it is provided, that every charter of felony which shall be granted at the suggestion of any, the name of him that maketh the suggestion shall be comprised in the charter, and if the suggestion be found untrue, the charter shall be disallowed. And the like provision is made by the statute of 5 H. 4 cap. 2. for the pardon of an approver.

<sup>d</sup> Fourthly, it is provided that no charter of pardon for murder, treason, or rape, shall be allowed, &c. if they be not specified in the same charter.

Before this statute of 13 R. 2. by the pardon <sup>e</sup> of all felonies, treason was pardoned, and so was murder, &c. <sup>f</sup> At this day by the pardon of all felonies, the death of man is not pardoned. These be excellent laws for direction, and for the peace of the realm. <sup>g</sup> But it hath been conceived, (which we will not question) that the king may dispense with these laws by a *non obstante*, be it generall or speciall, (albeit we find not any such clauses of *non obstante*, to dispense with any of these statutes, but of late times) these



these statutes are excellent instructions for a religious and prudent king to follow, for in these cases, *ut summæ potestatis regis est posse quantum velit, sic magnitudinis est velle quantum possit.* Hereof you may read more in justice Stanford, lib. 2. cap. 35. in divers places of that chapter, of his grave advice in that behalf. Most certain it is, that the word of God hath set down this undisputable generall rule, <sup>h</sup> *Quia non profertur cito contra malos sententia, filii hominum sine timore ullo perpetrant mala.* And thereupon the rule of law is grounded. <sup>k</sup> *Spes impunitatis continuum affectum tribuit delinquendi. Et veniæ facilitas incentivum est delinquendi.* This is to be added, that the intention of the said act of 13 R. 2. was not that the king should grant a pardon of murder by expresse name in the charter, but because the whole parliament conceived, that he would never pardon murder by speciall name for the causes aforesaid, therefore was that provision made, which was (as in other cases I have observed) grounded upon the law of God, *Quicumque effuderit humanum sanguinem, fundetur sanguis illius; ad imaginem quippe Dei creatus est homo. Nec aliter expiari potest, nisi per ejus sanguinem, qui alterius sanguinem effuderit.* And the words of every pardon is after the recitall of the offence, *Nos pietate moti, &c.* See before in the chapter of Murder, and in the second part of the Institutes, stat. de Glouc. ca. 9. and the Register, fo. 309. pardon of the king, *de morte per infortunium, se defendendo, vel per lunaticum, vel per fugivum.*

By the ancient and constant rule of law, *Non poterit rex gratiam facere cum injuria et damno aliorum; quod autem alienum est, dare non potest per suam gratiam.*

In an appeal of death, robbery, rape, &c. the king cannot pardon the defendant, for the appeal is the suit of the party, to have revenge by death: and whether the defendant be attainted by judgment, &c. or by outlawry, the pardon of the king shall not discharge the defendant. \* In an appeal, the defendant wages battail, the plaintiff counterpleads, for that the defendant brake prison, if the king pardon the breaking of prison, the counterplea fails: note the breaking prison is a collateral act: and yet in divers cases at the only suit of the party, when the defendant either by the common law, or by any statute (besides the restitution, or damage of the plaintiff) is thereby also to have an exemplary punishment, the king may pardon the same. For example, in an attainder by A. against the party, and the petit jury; against the party to have restitution, this the king cannot pardon: against the petit jury, by the common law that they should lose *liberam legem*, their wives and children cast out of their houses, their houses wasted, their trees prostrated, their meadows ploughed up, their goods and chattels seized, and their bodies taken, this the king may pardon, because it is a punishment exemplary to deter others, and tendeth not to the restitution or satisfaction of the plaintiff.

Now to take an example upon a statute: *De pueris masculis sive famulis (quorum maritadium ad aliquem pertinet) raptis et abductis, si ille qui rapuit non habens jus in maritagio, licet postmodum restituat puerum non maritatum, vel de maritagio, satisfecerit, puniatur tamen pro transgressione per prisonam duorum annorum.* In this case the party being satisfied, the king may pardon the imprisonment by two years,

<sup>h</sup> Eccles. 8. 11.

<sup>i</sup> Regulæ.  
Maledictus est qui peccat sub spe.

Genes. 9. 6.  
Num. 35. 33.

Braet. l. 3. f. 132.

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11 R. 2. Chre.  
17. 2 R. 3. fo. 8.  
See 4 Martiæ  
Dier 133.  
\* 2 E. 3. Cor.  
134.

13 E. 4, 5. a.

W. 2. ca. 35.  
anno 13 E. 1.

Pasch. 34 E. 1.  
Coram rege Rot.  
20 Kanc. in  
Ravishment de  
gard.

See the first part  
of the Institutes.  
W. 2. ca. 35.

\* Nota de eo  
quod ad regem  
pertinet.

Anno 1 E. 2.

Trin. 40 El.  
Coram rege in  
appeal de mur-  
dro. Inter  
Shugborough &  
Buggins.  
Li. 5. fo. 50. &  
110. b. 15 H. 7.  
9. 4 H. 7. ca. 13.

3 E. 3. Aff. 445.  
16 E. 3. Grant.  
53. 35 H. 6. 29.  
per Fortescue.  
37 H. 6. 4. b.  
Pl. com. 487. in  
Nichols case.

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4 E. 4. fo. 4. 12.

11 H. 4. 43.  
37 H. 6. 4. b.  
1 H. 7. 10. b.

1 H. 7. 3.  
37 H. 6. 4.  
See before ca. 88.  
Against vexa-  
tious relators,  
&c. in fine.  
\* 3 H. 8. c. 12.  
&c.

years, for that was added as a punishment exemplary, *puniatur, &c.* And this doth notably appear by a charter of pardon which king E. 2. made after this statute. *Rex de gratia sua speciali perdonavit Godithæ, quæ fuit uxor Roberti de Waldisch, id quod ad ipsum pertinet, de transgressione quam ipsa Goditha fecit Agathæ, quæ fuit uxor Johannis de Waldisch de Ellam, rapiendo et abducendo Johannem fil' et heredem Johannis de Waldisch infra ætatem existentem, cujus maritag' ad ipsam Agatham pertin', unde ipsa Goditha coram domino E. quondam rege Angliæ patre ipsius regis convicta fuit, et per considerationem cur' dicti patris prisonæ adjudicata per biennium ibidem moratura, et etiam tempus imprisonmenti quod adhuc restat de biennio prædicto. Ideo vult idem rex quod præfata Goditha \* de eo quod ad ipsum pertinet pro transgressione prædicta sit quietæ, et quod à prisona prædicta, si pro eo quod ad ipsum regem inde pertinet, et non alia de causa detineatur in eadem, deliberetur. Teste rege apud Westm' 8. die Maii anno regni sui primo. Ideo ipsa Goditha inde quietæ quoad hoc, quod ad dominum regem inde pertinet, &c.*

See more of this matter, 3 El. Dier 201, 202. 9 El. Dier 261, Musgraves case. 16 El. Dier 323, Taverners case.

The defendant in an appeal of murder upon not guilty pleaded, was found guilty of manslaughter: and it was resolved by the justices upon conference between them, that the queen might pardon the burning of the hand, for that is no part of the judgement at the suit of the party plaintiff in the appeal, but it is a collateral, and exemplary punishment inflicted by the statute of 4 H. 7. cap. 13.

In some actions wherein the subject is sole party (as appeareth by that which hath been said) some things the king may pardon: so on the other side, where the king is sole party, yet some things there be, that he cannot pardon. As for example; for all common nufances, as for not repairing of bridges, high-ways, &c. the suit (for avoiding of multiplicity of suits, which the laws abhorre, and that *nulli magis tueri rempublicam creditum est quam regi*) is given to the king only, for redresse, and reformation thereof, but the king cannot pardon, or discharge either the nufance, or the suit for the same; for, as Bracton saith, *Non poterit rex gratiam facere cum injuria et damno aliorum.* See Glanvill li. 7. cap. 17. vers. finem.

The customer albeit the bond and surety be made to him for the importing of bullion according to the statute of 14 E. 3. cap. 1. yet cannot he release it, *quia pro bono publico.* If one be bound in a recognisance, &c. to the king to keep the peace against another by name, and generally all other lieges of the king; in this case, before the peace be broken, the king cannot pardon or release the recognisance, although it be made onely to him, because it is for the benefit and safety of his subjects.

After an action popular be brought, *tam pro domino rege, quam pro seipso*, according to any statute, the king cannot discharge but his own part, and cannot discharge the informers part, because by the bringing of the action he hath an interest therein: but before action brought, the king may discharge the whole, (\* unless it be provided to the contrary by the act) because the informer cannot bring an action or information originally for his part only, but must pur-  
sue

due the statute: and if the action be given to the party grieved, the king cannot discharge the same.

All suits in the star-chamber, though exhibited by the party, are informations for the king, and the king may pardon them, but after judgement (and dammages, if any be given) and costs taxed, the king cannot pardon them.

<sup>a</sup> And that party which informeth not the king truly, is not worthy of his grace and forgivenesse, and therefore either *suppressio veri*, or *expressio falsi* doth avoid the pardon.

<sup>b</sup> A man comits felony, and is attainted thereof, or is abjured for the same, the king pardoneth him the felony without any mention of the attainder, or abjuration, the pardon is void. <sup>c</sup> But if a man be attainted of burglary, and by the generall pardon all felonies, &c. are pardoned (except all burglaries) the attainder and burglary be excepted, as before is said.

The king pardoneth to A. a felony whereof he standeth indicted, or indicted and attainted, &c. and in truth he is not indicted, nor attainted, &c. this is *expressio falsi*, and maketh the pardon void. A is outlawed, and the king pardons him the outlawry, and all his goods; it is void for the goods, for he must have a grant of them.

If a man be indicted of felony, and the king reciteth the same, and pardoneth the felony contained in the indictment, and all outlawries thereupon, if any be, this is a good pardon of the outlawry, though it be doubtfully alledged, and the king not certainly informed.

The king may pardon one convict of heresie, or of any other offence punishable by the ecclesiasticall law. In all proceedings in the ecclesiastical court *ex officio*, the king may pardon the offence. The king may also pardon piracy upon the sea; but by what word, and in what manner, see before in the chapter of piracy.

All the justices of England being assembled at Serjeants Inne in Fleetstreet, when I served queen Eliz. as her attorney generall, I moved this case unto them. A man seised in fee of two manors, the one holden of the queen by knight service *in capite*, and the other holden of a common person, alieneth both, and the alienee sueth out a pardon for both, in which pardon the words are, *quæ de nobis tenentur in capite per servic' militare, ut dicitur*, and after this pardon being transcribed into the exchequer, processe goeth out against the alienee, who pleadeth the pardon, beginning his plea thus, *Quibus lectis et auditis idem A. queritur se colore præmissorum graviter vexatum et iniquitat' fore, et hoc minus juste: quia dicit quoad eadem domina regina per literas suas patentis, &c.* and plead the letters patents of pardon, as they be with the said clause of *ut dicitur*, and after he alieneth the manor which *in rei veritate*, was not holden: the question was, whether the second alienee may plead the truth of the matter or ought to be concluded by the pardon and plea of the first alienee. And first the justices had consideration of the books in 29 Ass. pl. 38. 46 E. 3. 33. Pl. com. 398. 7 E. 6. tit. Estoppel. Br. 222. And in the end it was resolved by all the justices, that the pleading of the pardon or of a license, as it is, is no conclusion for no more then the pardon or license being not positive or affirmative, but (*ut dicitur*) is a conclusion; no more is the

Lib. 5. fo. 50.  
Buggins case.  
Eodem li. fo. 51.  
Hals case.

<sup>a</sup> Prov. 20. 28.  
Misericordia et  
veritas custodi-  
unt regem.

<sup>b</sup> 9 E. 4. 28.  
19 E. 3. Cor.  
124. 6 E. 4. 4.  
per Cheke.

11 H. 4. 16.  
<sup>c</sup> Lib. 6. fo. 13.  
F. N. B. 225. c.

9 H. 5. 14, 15.

F. N. B. 269.  
20 El. Dicr, 135.  
Li. 6. 10. 13, 14.  
Li. 5. fo. 51.  
Hals case.  
Regitt 67.  
Mic. 37 & 40  
El. Resolution  
of the justices  
concerning par-  
dons and licences  
of alienation  
and the pleading  
of them, &c.

29 Ass. pl. 38.  
46 E. 3. 33.  
Pl. com. 398.  
7 E. 6. tit. Estop.  
Br. 222.

the pleading of them with the clause of (*ut dicitur*) any conclusion. And conclusions shall not be wrought by inference or implication of a thing that is not directly alledged. But if the pardon or license had been affirmative and direct without the clause, *ut dicitur*, it had been a conclusion, and so had the pleading thereof been also. Lastly, it was resolved, that in case of the pardon or license with the clause, *ut dicitur*; if the party confesse the tenure that plead the same; as to say, *bene et verum est*, that the land is holden by knights service *in capite*, and plead the pardon or license, this shall conclude: and some of the barons said, that according to these resolutions it hath been used in the exchequer, and many presidents be there accordingly: and by these resolutions the books abovesaid shall the better be understood.

34 H. 6. 3.  
21 E. 4. 46.  
2 R. 3. 4. lib. 5.  
fo. 56.

If the king release to A all debts, and in truth A and B be indebted, this shall not discharge B: but otherwise it is in the case of a subject, for in that case the release to one discharge both.

If one be indebted to the king, if the king pardon or release the debt, the action and suit for the debt is discharged, and if he pardon or release the action and suit, the debt is discharged: and so it is in both these cases in the case of a subject.

22 Ass. pl. 37.

A man is indicted of trespassse and outlawed at the suit of the king. *Rex pardonavit utlegariam in eum promulgat*, et *quicquid ad eum pertinet*, and notwithstanding the defendant shall make fine, for it seemeth that these words, *quicquid ad eum pertinet*, without any reference, are too generall to dispense with the fine.

Pasch. 4 E. 3.  
Coram rege.  
rot. 38.

We finde also a discharge of further proceeding directed to the judges of the court, &c. (not by any pardon of the offence) but by the kings acknowledgement under the great seale of the parties innocency, with commandement to the judges, that in the former proceedings and proces, &c. they shall altogether surcease: whereupon the court will award that the party shall go *sine die*, and that there shall be no further proceeding against him: as taking one example for many. William de Melton archbishop of York was accused in the kings bench *coram rege et concilio suo*, in anno 3 E. 3. for adherency to Edmond earle of Kent in his treasons, whereunto the archbishop pleaded not guilty; and after two writs of *certiorari* awarded, the king directed his writ under the great seale to the judges of the kings bench, to this effect. *Licet sciamus quod Willielmus archiepiscopus Eborum, et Stephanus London episcopus, et diversa br'ia nostra coram nobis ad scietem nostram implacite de eo quod ipsi Edmundo nuper comiti Kantie adhesisse debuerant: quod nos predicti archiepiscopus et episcopus de adhesionem predictam omnino non reputamus: vobis mandamus, quod placitis predictis coram nobis rarius tenen' omnino supersedeatis. Teste me ipso apud Westm. 12 die Decembr. anno regni nostri 4.* The award of the court that is given thereupon, is very observable, *viz. Cujus brevis preceptrum coram nobis est, quod predicti archiepiscopus eat inde sine die, &c. Et ultra non procedatur versus eum.*

Pasch. 4 E. 3.  
Coram rege.  
rot. 53.

Stephen Gravesend bishop of London was charged with the same offence in parliament, anno 3 E. 3. whence by order of parliament the matter was referred to the kings bench to be tried, where he pleaded not guilty, and after was discharged *ut supra*, by the same writ. These men (it may be) thought that the taking of the pardon should

should be an implied confession of the fault, and therefore went a new way: but no man that is wise and well advised will refuse God and the kings pardon how often so ever he may have it; for there is no man but offendeth God and the king almost every day, and the pardon is the safest and surest way.

If a man be indicted of felony, and found guilty, and being in prison the king may under the great seale reciting the offence, &c. retain him to serve in his wars on this side or beyond the seas: this charter he may plead, and the court ought to allow it. As for example: *Quidam indictatus de feloniam, et inde culp. dicit quod rex eum conduxit, et inde producit cartam, quod rex eum conduxit in vasco. in exercitu, et dicta carta allocata fuit per curiam.* But a protection lyeth not in that case: because a protection is a formed writ, and cannot have such a recitall of the truth of the case: and <sup>a</sup> writs of protection lye not in case of felony, nor is it to be allowed to any that is prisoner to the court.

<sup>b</sup> One indicted of felony, without any learned councell, shewed forth a charter of pardon which was discordant to the indictment, and also to his name; and because the court perceived that it was the kings meaning he should be pardoned, he was remanded to get a better pardon.

<sup>c</sup> What things be requisite to a pardon of outlawry, see the statute of 5 E. 3. cap. 12.

<sup>d</sup> When the parties defendants appeared to the court to be poore, and were to be amerced or fined, the entry of ancient time was, *pendantur per justic' quia pauperes.*

<sup>e</sup> It is observed that repeals by parliament of pardons lawfully and duly obtained, have been seeds of great discontentment, and of evill event.

<sup>f</sup> Generall pardons have been often granted at the petition of the commons, for they know best, where the shooe wringeth them, and wherein, and how they are to be eased.

So odious was perjury, that by the law of God it was not to be pardoned: *Non miseraberis ejus, &c.*

Pasch. 22 E. 3.  
tit. cor. 239. Co-  
ram rege.

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<sup>a</sup> 7 E. 4. 29. a  
acc' 30 H. 6. 3.  
See the first part  
of the Institutes.  
sect. 199.

<sup>b</sup> 26 Aff. p. 46.

<sup>c</sup> 5 E. 3. cap. 12.

<sup>d</sup> Pasch. 8 E. 1.

in banco Rot. 79.

Abbas de Bur-

ton, &c.

<sup>e</sup> Vid. Rot. Parl.

21 R. 2. nu. 12,

13, &c.

<sup>f</sup> 36 E. 3. ca. ult.

4 R. 2. nu. 30,

31, 32.

1 H. 4. ca. 20.

2 H. 4. ca. 13.

5 H. 4. ca. 15.

4 H. 5. cap. 8.

a short and effec-

tuall pardon,

and many others.

Deut. 9. 21.

## C A P. CVI.

### OF RESTITUTIONS.

**T**HERE is another work of grace and mercy, that is, when any man or woman being attainted of high treason, petit treason, or felony, (whereby the blood is corrupted, &c.) or his or her heir is restored.

And seeing we have formerly spoken how far, and to what intent in those cases, the king of his grace may by his charter of pardon restore the party: we shall now treat of the restitution of the delinquent, or of his or her heirs by parliament. Attainders ought to be had upon plain and direct evidence, (as before is said) for if the party be executed, restitution may be had of his lands, &c.

See the first part  
of the Institutes,  
sect. 1. fo. 8. a.  
& 646, 647. 745.  
Vid. cap. Par-  
don. fol. 233.

• Gen. 40. 13.  
Job 12. 23. 42.  
10. Restitutio  
secundum quid,  
feu in part m.  
Restitutio in in-  
tegrum.

Brit. ca. 13.  
fo. 23. 10 Eliz.  
Dier 274.

\* [ 241 ]  
3 E. 6. tit. Resti-  
tution. Br. 37.  
See the first part  
of the Institutes.  
sect. 646, 647.  
745. fo. 392.  
verb. *Le sank est*  
*corrupt, &c.*  
• See 10 El.  
Dier ubi sup.  
41 E. 3. 5. b.  
27 Aff. p. 48.  
17 E. 3. 40.  
5 E. 3. 66.  
29 E. 3. 7.  
20 Eliz. Dier  
360. Pl. Com.  
252. a. 16 E. 3.  
Livery 30.  
44 E. 3. 45.  
18 E. 3. 21, 22.  
24 E. 3. 29.  
40 E. 3. grant 50.  
• Mich. 8 E. 1.  
in Banco. Rot.  
62. Norff.  
Rot. Par. anno  
4 E. 3. nu. 18.  
on the backside  
of the roll.

\* An example  
of restitution in  
blood only.  
11 H. 4. nu. 42.  
13 H. 4. nu. 19,  
20.

&c. but not of his life. Generally, *Restituere nihil aliud est, quam*  
\* *in pristinum statum reducere.*

Of restitutions by parliament some be in blood only, (that is to  
make his resort as heir in blood to the party attainted and other his  
ancestors, and not to any dignity, inheritance of lands, &c.) and  
this is a restitution *secundum quid*, or in part. And some be gene-  
rall restitutions, to blood, honours, dignities, inheritance, and all  
that was lost by the attainder: and that is *restitutio in integrum*, with  
an addition sometimes, that it shall be lawfull for the party restored  
and his heirs, to enter, &c. Of the first you may reade in Dier  
10 Eliz. fo. 274. in Petition: and Rot. Par. 23 Eliz. of the earl of  
Arundel, &c. Of the second you may reade 15 E. 3. tit. Peti-  
tion 2. 3 H. 7. fo. 15. a. 10 H. 7. 22, 23. pl. com. fo. 175.  
Rot. Par. 13 H. 4. nu. 20, &c. Of both of them you may  
reade plentifully in our books, and parliament rolls, and in di-  
vers of them with addition of entry. See 1 H. 8. Kelw. 154.  
Sir William Oldehalls case, 4 H. 7. 7. Lo. Ormonds case. Rot.  
Parl. 11 H. 4. nu. 42. Rich. de Hastings case, and Rot. Parl.  
14 E. 4. nu. 4. Sir Joh. Fortescues case, attainted of treason in  
1 E. 4. &c.

And the reason wherefore the king may by his charter pardon  
the execution, and restore the party or his heirs to the lands for-  
feited by the attainder, and remaining in the crown is, for that  
no person hath thereby any prejudice; but to make \* restitution of  
his blood he cannot do it, but by act of parliament, because it  
should be to the prejudice of others.

*In cartis benigna facienda est interpretatio, in fundationibus domorum  
religiosarum, hospitalium, et aliorum operum charitatis benignior, in  
testamentis magis benigna, in restitutionibus benignissima.* • For it is  
holden in our books, that in restitutions the king himself hath no  
favour, nor his prerogative any exemption, but the party restored is  
favoured.

• king H. 3. was intituled, &c. to the lands of William de Albo  
Monasterio by his attainder, and granted the same to Robert de  
Mares and his heirs, *donec eas reddiderit restis herede suo per violentiam  
suam, vel per pacem.* And albeit at the making of this grant  
William de Albo Monasterio (being dead) could have in re-  
spect of the attainder and corruption of blood no right here; yet  
because it was to make restitution, it had a most benigne interpre-  
tation.

• William Lo. Zouche of Mortimer and Elianor his wife prayed  
to be restored to their land of Glannor and Morgannon in Wilt.  
the mannor of Haveley in the county of Worcester, the mannor of  
Teukesbury in the county of Gloucester, being the inheritance of  
the said Elianor: who by the extort means of Roger late earle of  
March, were inforced to passe the same to the king by fine, in con-  
sideration of ten thousand pounds the king restored them thereto  
in their former estate.

\* Henry Courtney marquisse of Exeter and earl of Devon. lay-  
ing issue Edward Courtney, his only sonne, was attainted of high  
treason by the course of the common law in anno 31 H. 8. and in  
the same year was also attainted by act of parliament. Queen Mary  
by her letters patents bearing date 18th Sept. anno 1. regni sui grant-  
ed the mannors of P and O, &c. in the county of Devon, &c. to  
the

the said Edward Courtney and his heirs: and afterwards 5 *Octobris* in the same year, at a parliament then holden, the said Edward and his heires were from thenceforth by authority of that act restored and inabled only in blood, as well as sonne and heir of the said lord marquisse his father, as to all and every other collaterall and lineall ancestor and ancestors of the said Edward. And that the severall attainders against the said lord marquisse for the attainder of the said lord marquisse be not in any wise prejudiciall or hurtfull to the said Edward or his heirs for the corruption of the blood only of the said Edward, but that the severall attainders and either of them be against him and his heirs for the corruption of blood only, utterly void. Provided always that the said act, ne any thing therein contained, should not in any wise extend to give any benefit or advantage to the said Edward, ne to his heirs, to demand, claime, or challenge any honors, castles, &c. ne any other hereditaments whatsoever whereunto H. 8. and E. 6. or either of them was entitled, or ought to have and enjoy by reason of the said several attainders of the said late lord marquisse, or of either of them. Edward Courtney died seised of the said mannors without issue, 18 Septemb. annis 3 and 4 Ph. & Mar. and Reinold Mohun, Alexander Arundell, John Vinnian the younger, John Trelawny Esq. and Margaret Buller widow, were his collateral cousins and heirs: and whether the said restitution extended to the heirs collaterall of the said Edward, was by the queens commandment referred to the consideration of the two chief justices Popham and Anderson, Peryam chief baron, and to Egerton attorney, and to the solicitor generall. And it was resolved, that by reason of the attainder of the lord marquisse, if there had been no act of restitution, the heirs collaterall of the said Edward could not have inherited to the said Edward, in respect of the corruption of the blood wrought by the said attainder only: hereupon it was objected, that when it was enacted by the said act of restitution, that the said Edward and his heirs should be restored and inabled in blood only as sonne and heir to his said father, as all his ancestors lineall and collaterall, that the said restitution extended only to his heirs lineall, for other heirs he could not have as long as the said attainders of the marquisse stood in force, and the words of the act of restitution to Edward and his heirs, might be satisfied with the heirs lineall. And upon due consideration had of the case, it was (*una voce*) resolved by them all, that corruption of blood is a distinct penalty inflicted by law; and that the said act of restitution did extend to the heirs collaterall of the said Edward, (having no heirs lineall) as to the clearing and restoring of the blood, and avoiding of the corruption thereof: and that it had been sufficient if the act had restored and enabled him in blood only as heir to his father, thereby he and his heirs, as well collaterall as lineall, might make their descent or resort from the marquisse (for there was the stop and corruption) and from all other the ancestors of the said Edward, lineall or collaterall, and *ex abundantia* the other clause also is added, for the more manifestation hercof.

Margaret Plantagenet was daughter to George duke of Clarence attainted of high treason by act of parliament 17 E. 4. and sister of Edward earl of Warwick, only sonne of the said George, and Isabel eldest daughter of Richard Nevil earle of Warwick and Salisbury: which

Mic. 35 &amp; 36 E.

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Statute de 5 H. 8.  
not in print.

14 R. 2. nu. 36.

<sup>a</sup> Rot. par.  
18 E. 1. nu. 11.  
of Liberties.  
Stanf. pl. cor.  
fo. 165, 166,  
167. 186. 66.  
105. 107.

F. N. B. 66. a.  
<sup>b</sup> 21 H. 8. cap.  
11. 22 E. 3.  
cor. 460.

Stanf. 167. a. b.  
Lib. 5. fo. 110.  
Lib. 6. fo. 80.

F. N. B. 66. a.  
8 E. 2. tit. For-  
feiture 34.  
3 E. 3. cor. 365.  
Vid. 40 E. 3.  
42. lib. 5. fo. 110.  
Hofsons case.

<sup>c</sup> 8 H. 6. cap. 9.  
See the second  
part of the Instit.  
cap. 8. H. 6.  
cap. 9.

<sup>d</sup> 31 Eliz. cap. 11.  
Vide 4 Marizæ,

<sup>e</sup> Dier 141.

21 Jac. cap. 15.  
By the statute of  
8 H. 6. cap. 9.

which Edward was attainted of high treason in *anno* 15 H. 7. before John Earle of Oxford then being high steward of England. The said Margaret was by act of parliament *anno* 5 H. 8. restored to the style, state, name, title, honour, and dignity of the countesse of Salisbury, (she was the last of the surname of Plantagenet) which act is very well penned, and worthy the reading for many respects, and the preamble thereof, *inter alia*.

Bills of restitution may begin in the parliament, either in the house of commons, or in the lords house.

<sup>a</sup> There be also other kinds of restitutions to be treated of amongst the pleas of the crown, as restitution of goods upon an appeal whereof you shall reade in Stanford with this addition. Vide lib. 5. fo. 110. a. 21 E. 4. 10.

<sup>b</sup> And by the statute of 21 H. 8. cap. 11. restitution is to be granted upon an indictment, &c. For by the common law the party should not be restored to his goods upon an indictment (because it is the suit of the king) albeit the enquest found that the party had made fresh suit. But restitution was to be made upon an appeal which is the suit of the party.

See Stanford also fo. 167. a. b. whereunto you may adde Lib. 5. fo. 110. a. & Lib. 6. fo. 80. where you shall finde, that though this statute of 21 H. 8. speak only of the party robbed, yet his executors are within the statute, and so are his administrators. For it is a beneficiall law, and giveth a more speedy remedy to the party robbed, &c. then the common law gave by way of appeal, and therefore ought to be construed beneficially.

Vide the Register, 68. b. that in some cases when the king ought *ex merito justitiæ* to make restitution to the party: yet for the honour of the king the writ saith, *Sine dilatione, restituas de gratia nostra speciali*, which derogate nothing from the right of the subject, when right is accompanied with grace.

Lastly, there are other lawes concerning restitutions of another kind. <sup>c</sup> As by the statute of 8 H. 6. restitution is to be made, when he that hath any estate of inheritance or freehold is disseised by forcible entry or forcible deteyner. <sup>d</sup> By the statute of 31 Eliz. there shall be no restitution by the statute of 8 H. 6. upon an indictment of forcible entry or forcible deteyner, where the defendant hath been three whole years together before the day of such indictment <sup>e</sup> in quiet possession, and his estate not ended, according to the true meaning of a proviso in the said statute of 8 H. 6. as it is declared by the said act of 31 Elizabeth.

By the statute of 21 Jac. regis, such judges, justices, or justice, as are enabled to give restitution of possession unto tenants of any estate \* of freehold, &c. shall by reason of this act of 21 Jac. have the like and the same authority upon indictment of such forcible entries or forcible with-holdings before them duly found, to give like possession unto tenant for years, tenant by copie of court roll, guardens by knights service, tenants by elegit, statute merchant, or by statute staple.

And for as much (as it hath been said) no restitution ought to be made where the defendant or party indicted in case of freehold hath been in possession by the space of three whole years, &c. they having the like and same authority in case of tenant for years, tenant by copie of court roll, and other the tenants above named, cannot



cannot give restitution or possession, where the party indicted hath been in quiet possession by the space of three whole years. *Nota*, this act of 21 Jac. extends not to a garden in foccage, nor to a garden or keeper of a park: neither (as some hold) doth it extend to him, that by a last will hath an interest in lands or tenements untill debts and legacies be paid, because certain tenants be particularly nominated, and this is *casus omiffus*. But this being a beneficial law to restore him, that right hath, to his possession of lands, &c. whereof he was wrongfully by force dispossessed, or by force withholden, &c. and being in like case in equall mischief, others do hold, that this act extendeth to this case of such a devisee, &c. and so it is for a tenant for a year, or for an halfe, or three quarters of a year.

See the statute of 32 H. 8. cap. 3. where the particular tenant charged with more then the land is worth, may after his term expired hold over untill he be satisfied, &c. in equall case with such a devisee.

\* *Nota*, there be divers presidents in the chancery for restitution by writ to be made after execution upon a statute staple.

*Anno* 25 H. 6. Execution was sued upon a statute staple, and for that no certificat of the statute, &c. appeared of record, the conuictor had a writ of *superfedeas* out of the chancery with restitution to be made; and the forme of this writ appeareth in a Register M. S. in the chancery.

In the case of Sir Robert Gardner in the time of Sir Thomas Bromley lord chancellor, after a *superfedeas* granted, execution was done upon a statute staple, whereupon a *superfedeas* was granted with restitution reciting the speciall matter.

There is another president in 33 Eliz. in the case of one Carrant, (but there the writ recited no speciall cause, but *pro diversis causis et considerationibus*;) a *superfedeas* with restitution was awarded.

\* Restitution of another kinde, whereof we remember no book case.

## THE EPILOGUE.

**T**HUS have we by the great goodnesse of Almighty God, *per varios casus, per tot discrimina rerum*, brought this work concerning high treason, and other pleas of the crowne, or criminall causes, and of pardons, and restitutions, to a conclusion: wherein (as we are verily perswaded) we have made it apparent from the lively voice of the lawes themselves, that no country in the Christian world have in criminall cases, of highest nature, laws of such expresse and defined certainty, and so equall between the king and all his subjects, as this famous kingdome of England hath, being rightly understood, and duly executed, to the great honour of the king, and of the laws, and the happy safety of all his loving and loyall subjects.

Now seeing *justitia est duplex, viz. severè puniens; et verè præveniens*; that is, justice severely punishing, whereof we have spoken, and truly

Justice divided.

## The Epilogue.

truly preventing, or preventing justice, (*quæ adhuc desideratur*) for we have spoken onely of the former; wee will therefore at this place (for a conclusion) point at the other with a direction how it may be effected.

True it is, that we have found by wofull experience, that it is not frequent and often punishment that doth prevent like offences, *Melior est enim justitia verè præveniens, quam severè puniens*, agreeing with the rule of the physitian for the safety of the body, *Præstat cautela, quam medela*: and it is a certain rule, that *Videbis ea sæpe committi quæ sæpe vindicantur*; those offences are often committed, that are often punished: for the frequency of the punishment makes it so familiar as it is not feared. For example, what a lamentable case it is to see so many Christian men and women strangled on that cursed tree of the gallows, insomuch as if in a large field a man might see together all the Christians, that but in one year, throughout England, come to that untimely and ignominious death, if there were any spark of grace, or charity in him, it would make his heart to bleed for pity and compassion. (But here I leave to divines to inform the inward man, who being well informed, *verbo informante*, the outward man will be the easilier reformed, *virga reformante*.)

This preventing justice consisteth in three things. First, in the good education of youth, and that both by good instruction of them in the grounds of the true religion of Almighty God, and by learning some knowledge or trade in their tender years, so as there should not be an idle person, or a \* begger, but that every childe, male or female, whose parents are poor, might at the age of seaven years earn their own living: for *ars fit quod à teneris primùm conjungitur annis*: and this, for the time to come, would undoubtedly by preventing justice avoid idlenesse in all, (one of the foul and fatall channels that lead into *mare mortuum*) and by honest trade cause them to become good members in the common-wealth.

Secondly, in the execution of good laws: True it is that there be good laws already to punish idlenesse, but none of sufficient force or effect to set youth, or the idle on work.

Thirdly, that forasmuch as many doe offend in hope of pardon, that pardons be very rarely granted, for the reasons in the chapter of pardons expressed.

But the consideration of this preventing justice were worthy of the wisdom of a parliament, and in the mean time expert and wise men to make preparation for the same, as the text saith, *ut benedicat eis dominus*. Blessed shall he be that layeth the first stone of this building, more blessed that proceeds in it, most of all that finisheth it, to the glory of God, and the honour of our king and nation.

*3 & 4 E. 6. ca. 5. in the preamble. Imprimis interest reipublicæ, ut pax in regno conservetur, & quæcunque paci adversentur, provide declinentur.* 1 Mar. cap. 12. 32 H. 8. ca. 9. See the fourth part of the Institutes, fo. 312. b.

*Et pergrata Deus nobis hæc otia fecit,  
Optimus est patriæ jura referre labor.*

*Deo gloria, et gratia.*

F I N I S.

*Regula.*

*Sta, perlege,  
plora.*

*Senecali. 1. De  
Clem. cap. 24.  
Non minus prin-  
cipi turpia sunt  
multa supplicia,  
quam medico mul-  
ta funera.*

*Regula.*

*Non morbus ple-  
risque, sed morbi  
neglecti curatio  
corpus interficit.*

\* *Deut. 15. 4.  
Non erit omnino  
indigens & men-  
dicus inter vos,  
ut benedicat tibi  
Dominus.*

*Otiosus nihil cogi-  
tat nisi de ventre,  
et ventre.*

See before ca. of  
Pardons fo. 236.

*Psal. 58. 11.  
Misericordia do-  
mini præveniet  
me. 1 Maccab.  
6. 27. Nisi præ-  
veneris illis, ma-  
jora quam hæc  
facient et non po-  
teris eos obtinere.*