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As to the fines for alienation, without licence, directed by the laſt act to be paid by thoſe who took any freehold under ſuch wills; it was declared, that they ſhould be remitted by ſuing forth the king's pardon, and paying the third of the yearly value of the lands ſo deviſed: and the chancellor was hereby empowered to iſſue ſuch pardons without applying to the king.

It was declared, that a will of lands, tenements, or hereditaments made by a feme covert, any perſon under twenty-one years, idiot, or of non-ſane memory, ſhould not be good or effectual.

In the ſpirit of a proviſion, in the ſtat. Marlb[e]. it was ordained, that if any perſon holding by knight-ſervice of the king, or another, or in chief, by will, or other act in his life, gave his manors, lands, tenements, or hereditaments, by fraud, or covin, to any one for term of years, life or lives, with one remainder over in fee, or with divers remainders over for term of years, life, or in tail, with remainder over in fee-ſimple, to any perſon, or to his right heirs, or ſhould make by fraud or covin, contrary to the intent of this act, any eſtates, conditions, menalties, tenures, or conveyances, to defraud the king of his prerogative, primer ſeiſin, livery, relief, wardſhip, marriages, or rights, or any other lord of his wardſhips, reliefs, heriots, or other profits which ſhould ariſe by the death of any tenant; then, upon office being found, the king ſhould have his right, as if no ſuch eſtate had been made, until ſuch office be legally done away by traverſe, or otherwiſe. And any other lord might bring his writ of ward, diſtrain or avow, as the caſe might be; ſaving, however, to the donees or deviſees their intereſt after the king and lord were ſatisfied. Laſtly, it was provided, that where the king or any lord took any lands to make up his full third; the perſon from whom they were taken, ſhould

[e] Vid. ant. vol. II. 62.

obtain

obtain a contribution againſt all perſons intitled to the other two parts by bill exhibited in chancery.

THIS is the ſubſtance of the two famous ſtatutes concerning wills of land. Except in the inſtance of land deviſable by cuſtom, deviſes before theſe ſtatutes were in conſequence of ſome feoffment to the uſe of a will, ſo that the deviſe made in purſuance thereof, gave only an equitable right to be eſtabliſhed by the authority of the court of chancery, being, in fact, no more than a declaration of a uſe; but now, being authoriſed by ſtatute, a will of land became a new mode of conveyance on the death of the teſtator, cognizable in the courts of common law. So much of uſes and wills; the ſtatutes concerning which are ſtrongly allied to each other in their reaſon and conſequences, and may be conſidered as a ſyſtem of conſtitutions, forming a remarkable period in the hiſtory of landed property.

THUS far of real property. We ſhall next conſider ſome few particular inſtances of parliamentary interpoſition, for altering the modes of ſecuring property, and redreſſing injuries to perſonal eſtates, before we come to the general alterations which were made in the adminiſtration of juſtice. Firſt, of the recognizance in nature of a ſtatute ſtaple; then of bankrupts, and uſury.

THIS new ſecurity was framed by ſtat. 23 Hen. VIII. c. 6. and was denominated, after the original from whence it was framed, *A Recognizance in the nature of a Statute Staple*. The ſtatute ſtaple, as we have ſeen[f], was a charge on land, which was contrived as a ſecurity to be uſed by thoſe only who had dealings in the ſtaple; it was therefore, like the ſtatute-merchant, confined to certain perſons and places. It had, however, by a fiction lately introduced of ſurmiſing the debt to have been contracted in the ſtaple, been extended beyond its primary deſign;

[f] Vid. ant. vol. II. 393.

land

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and it was now thought expedient, by a legiſlative ſanction, to communicate the benefit of ſuch a ſecurity to all perſons who choſe to avail themſelves of it; or rather, without the circuity of a fiction, to which they before reſorted, to frame a ſimilar ſecurity for debts, that might be open to perſons of all deſcriptions. This was done by the above-mentioned ſtatute, which gives the form of the recognizance, and directs all the method of proceeding therein. It is to be acknowledged before either of the chief juſtices; or, out of term, before the mayor of the ſtaple of Weſtminſter and the recorder of London, jointly.

Statute of bankrupts.

THE firſt ſtatute of bankrupts is ſtat. 34 and 35 Hen. VIII. c. 4. and is intitled, "An Act againſt ſuch Perſons *as do make Bankrupts.*" The perſons who are the objects of this new proviſion for the recovery of debts, are deſcribed as thoſe who "craftily obtaining into their hands "great ſubſtance of other men's goods, do ſuddenly flee to "parts unknown, or keep their houſes;" ſo that the ſtatute extends to all perſons whatſoever who act as above deſcribed. A new and peculiar method of dealing with theſe defaulters is directed: the chancellor, or keeper of the great ſeal, the lord treaſurer, lord preſident, privy-ſeal, and others of the privy-council, the chief juſtices of both benches, or three of them at leaſt, whereof the chancellor or keeper, the treaſurer, preſident, or privy-ſeal, were to be one, upon complaint in writing by a party grieved, were to take order concerning the lands and goods, and alſo with the body of ſuch *offender*, for ſo he is named; and they were either to ſell his effects, or make ſuch diſpoſition of them as they ſhould think meet, ſo as every creditor had a rateable portion according to his demand; and ſuch ſale and direction was to be as good in law, as though made by ſuch offender himſelf. They were authorized to call perſons before them, and examine them upon oath touching the offender's goods. Perſons concealing effects of the offender, were to forfeit double the value of them; to be

recovered

recovered by ſuch means as the lords ſhould think proper: and perſons making falſe claims of debts, were to forfeit double the ſum demanded.

If ſuch offender left the kingdom, the lords were to iſſue a proclamation commanding him to ſurrender; and if he did not comply within three months after he had notice thereof, he was to be adjudged out of the king's protection; and in ſuch caſe, ſhould any one help to convey to him his effects out of the realm, he was to ſuffer ſuch fine and impriſonment as the lords ſhould think proper to inflict [s]. The act further directs, that after a man was by theſe means ſtript of all his property, he was ſtill to be liable to all unſatisfied demands, as before that act was made.

This is the firſt draught of that ſpecies of ſummary execution againſt the perſon and effects of a debtor, which has ſince been modelled into a very different ſhape. At preſent, the bankrupt was conſidered as a criminal, whoſe delinquency could be expiated only by paying the laſt farthing. Later ſtatutes have, beſides the payment of his creditors, provided in ſome meaſure for his intereſt, rather viewing him in the light of an unfortunate man: upon that idea, his compliance with the direction of the ſeveral ſtatutes is rewarded by an immunity from his former incumbrances *, and an allowance to enable him to try his ſucceſs in the world once more. Theſe qualifications of the rigour of the firſt bankrupt-law have been added, ſince their operation has been confined totally to *traders*; tho', perhaps, a general policy, as well as a conſideration of the caſualties attending trade and commerce, would dictate ſuch a proviſion. However, as the firſt bankrupt-law completely ruined the man who was unhappily the object of it, the modern regulations are looked on by many as holding forth to a deſigning trader an unmerited indemnity, if not a proſpect of gain, at the expence of his creditors;

[s] Sect. 5. * 2 Blackſt. ch. 31.

and

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and this has tempted many to court a ſituation and character, from which, in the reign of Henry VIII. they would have ſhrunk with horror: ſo that, if the ſeverity of the firſt bankrupt-law was carried too far, the opportunity of impoſing on the eaſe of modern ones by fraud and colluſion, makes many doubt of their benefit to the community.

THE prejudices againſt uſury had worn off; and a rational commerce had taught the nation that an eſtate in money, as well as an eſtate in land, might be let out to hire, without the breach of one moral or religious duty. The parliament concurred with the opinion of the times, and by ſtat. 37 Hen. VIII. c. 9. all former acts [h] againſt uſury, as an offence, were repealed; and a certain ſum to be given for the loan of money was permitted, under the following terms and precautions: In the firſt place, it was by this ſtatute enacted, that no perſon ſhould ſell his wares or merchandize, and within three months buy them again at a lower price; nor ſhould any one by means of any corrupt bargain, loan, exchange, cheviſance, ſhift, intereſt of any wares, merchandizes, or other thing; or by any other corrupt or deceitful way or means, or by any covin or conveyance, receive or take for the forbearing or giving day of payment for a year for his money or other thing due for the ſaid wares or merchandizes, or other thing, above 10l.; nor ſhould ſell, bargain, or mortgage any lands upon any higher intereſt: and thoſe who tranſgreſſed in any of theſe points, were to forfeit treble the value of the thing bargained for, and ſuffer fine and impriſonment at the king's pleaſure. The proviſions of this act have undergone ſome qualifications by later ſtatutes [i].

IN ſpeaking of the adminiſtration of juſtice, we ſhall firſt mention certain new courts, which were erected by

[h] 3 Hen. III. c. 5. 3 Hen. III. c. 5, 6. 11 Hen. VII. c. 8.

[i] Stat. 2 and 3 Ed. VI. c. 20. 13 El. c. 8. 31 El. c. 5, &c.

parliament:

parliament: ſome of theſe concerned criminal matters, and, therefore, will be more properly noticed hereafter; others, which were of a civil nature, may very properly be placed here: they all related to the better collection and management of the king's revenue.

THE diſſolution of religious houſes opened a new ſource of revenue to the crown; for the governance of which was erected by ſtat. 27 Hen. VIII. c. 27. *The Court of Augmentation of the Revenues of the Crown of England.* This was a court of record, with a ſeal; a perſon was to be appointed and called chancellor of the court of augmentations. There was beſide to be a treaſurer, attorney, ſolicitor, ſeveral auditors and receivors, with clerks, and other neceſſary retainers to a court. Another was eſtabliſhed by ſtat. 33 Hen. VIII. c. 39. called *The Court of General Surveyors of the King's Lands.* This was to be a court of record, and to have a ſeal. Several perſons were to be appointed and called the general ſurveyors of the king's lands; which ſeveral perſons were to conſtitute only one officer. The treaſurer of the king's chamber was always to be treaſurer of the revenues of this court, and was to rank next to the ſurveyors; the next officer was to be the king's attorney of this court; the next was maſter of the woods: then followed the ſeveral auditors and receivors: clerks were to be appointed, with other neceſſary appendages to a court. All ſuch lands, and no other, as were mentioned in a ſchedule, ſigned with the king's ſign-manual, were to be within the order and governance of this court. Henry afterwards, in the 38th year of his reign, diſſolved both theſe courts by letters patent; and by letters patent erected a new court of augmentation: both which acts of authority have been held contrary to law, and to require the confirmation of parliament to give them force, as was afterwards done by ſtat. 7 Ed. VI. c. 2. But the date of this re-eſtabliſhment was ſhort; for queen Mary, according to a power given her by ſtat. 1 Mar.

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c. 10. did, by letters patent in that ſame year, diſſolve this court; and the next day, by other letters, *united the ſame* to the exchequer: which laſt ſtep was reſolved afterwards [k] by all the judges to be utterly void, as there remained after the diſſolution no court to be united [l]. Such was the fortune of theſe two courts.

By ſtat. 32 Hen. VIII. c. 45. a court of *the firſt-fruits and tenths* was eſtabliſhed. This was a court of record, with a ſeal; the principal officer of which was to be called chancellor of the firſt-fruits and tenths. There was to be a treaſurer of the firſt-fruits and tenths; the third perſon in the court was to be the king's attorney of the firſt-fruits and tenths: there were to be auditors and clerks meſſengers, and other retainers. This was diſſolved by ſtat. 1 Mar. ſeſſ. 2. c. 10. and the clergy exonerated from theſe payments by ſtat. 2 and 3 Ph. and Mar. c. 4.; and though the crown reſumed the firſt-fruits and tenths by ſtat. 1 El. c. 4. yet the court was not revived.

For the ſurvey and management of the valuable fruits of tenure, a court of record was erected by ſtat. 32 Hen. VIII. c. 46. called *The Court of the King's Wards*. To this was annexed, by ſtat 33 Hen. VIII. c. 22. *The Court of Liveries*; ſo that it then became *The Court of Wards and Liveries*. This, like other parts of the king's revenue, was before under the government of the exchequer.

This judicial eſtabliſhment had a longer continuance than the other novelties of this ſort projected by Henry and his parliament; it continued as long as the object of its judicial cogniſance had exiſtence, exerciſing this juriſdiction with great vigour till the abolition of tenures. An eſtabliſhment of ſuch importance deſerves, therefore, ſome more particular notice among the innovations in our juridical polity.

[k] Dyer, 4 El. 216. [l] 4 Inſt. 122.

This

Court of wards and liveries erected.

THIS court, as appears by the preamble of the act for eſtabliſhing it, was not only for the management of wards properly ſo called, but alſo of idiots and fools natural in the king's cuſtody, and alſo for licences to be granted to the king's widows to marry, and fines to be made for marrying without his licence. For managing ſuch perſons and their property, a court of record, with a ſeal, was thereby erected, to be called *The Court of the King's Wards*. A chief officer was to be appointed by the king, to be called *maſter of the wards*, who was to keep the ſeal; then another, called the king's attorney of the wards, the king's receiver-general of the lands of the wards, and two others to be called auditors of the lands of the wards. All lands, and other hereditaments whatſoever, belonging to ſuch wards, were to be in the order, ſurvey, and governance of this court. The maſter of the wards was authorized to iſſue ſuch proceſs as was then in uſe in the king's Duchy chamber of Lancaſter, held at Weſtminſter, for any matter or debt touching or ariſing from ſuch property. He was to hold a court at the times of the four terms, and all proceſs from the court of exchequer upon this head was in future to be void. The authorities through the act are moſtly given to the maſter, with the advice of the attorney, receivor, and auditors: they had power to take recogniſances, and to commit to priſon. By ſtat. 33 Hen. VIII. c. 22. all tranſactions relating to the king's liveries were brought within the ſurvey of this court, and the maſter of the king's wards was thenceforth to be *the maſter of the king's wards and of the liveries*: a perſon was alſo appointed, to be called ſurveyor of the king's liveries, who was to take precedence next before the king's attorney of the wards.

THE ſtat. 33 Hen. VIII. c. 39. for erecting the court of ſurveyors of the king's lands, contains numerous proviſions applicable to all the beforementioned courts, and alſo to that of the Duchy, and court of exchequer: we

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ſhall take notice only of the following very general deſcription of their juriſdiction. It was ordained, that all manner of debts, detinues, treſpaſſes, accounts, reckonings, waſtes, deceipts, negligences, defaults, contempts, complaints, riots, quarrels, ſuits, ſtrifes, controverſies, forfeitures, offences, or other things, ariſing in, for, or upon any matter, cauſe, or thing, committed to the order and governance of any of theſe courts, wherein the king was only party; and alſo all manner of eſtates for term of years, between party and party, concerning the premiſes, were to be cogniſable in theſe courts reſpectively, with power to correct and puniſh all perſons convicted of any of the above offences. There was an exception out of the above general words, of all treaſons, murders, and felonies, of eſtates, rights, titles, and intereſts, as well of inheritance as of freehold, other than jointures for term of life. All ſuits, bills, plaints, informations, declarations, complaints, anſwers, replications, allegations, cauſes, matters, and iſſues, were to be purſued, made, and tried in ſuch ſeveral courts, by due examination of witneſſes, writing, proof, or by ſuch other ways or means as by the ſeveral courts ſhould be thought expedient [m].

SUCH was the extenſive authority given to theſe new tribunals, among which the court of wards and liveries was moſt diſtinguiſhed, from the intereſting nature of the ſubjects of cogniſance there, which involved the concerns of ſo many of the king's ſubjects, in an article of ſuch ſerious conſequence to them and their families.

SOME attention was paid by the parliament to the adminiſtration of juſtice; and ſeveral acts were paſſed, in order to remove obſtacles, and expedite the proceedings and proceſs of courts. Proceſs of outlawry was allowed by ſtat. 23 Hen. VIII. c. 14. in actions on ſtat. 5 Rich. II. of forcible entries; and the proceſs of debt allowed in actions of

[m] Sect. 57. 59.

covenant

covenant and annuity. By ch. 15. of the ſame ſtatute, coſts were given to defendants, upon nonſuit or verdict, with the ſame proceſs and execution for recovery thereof as plaintiffs would have. This was in the following actions: on the ſtatute of forcible entries, 5 Rich. II. in debt or covenant upon any ſpecialty or contract, detinue of goods, in accompt, treſpaſs on the caſe, and action upon a ſtatute for a wrong to the plaintiff. There was a proviſo added, that plaintiffs ſuing *in formâ pauperis* ſhould not, hereby, be made liable to pay coſts, but ſhould, inſtead thereof, ſuffer ſome puniſhment at the diſcretion of the juſtices; and this puniſhment, we are informed, was uſually whipping[a]. Again, it was provided, by ſtat. 24 Hen. VIII. c. 8. that this act ſhould not give coſts againſt any plaintiff ſuing to the uſe of the king. By ſtat. 21 Hen. VIII. c. 19. coſts and damages are given to an avowant in replevin or ſecond deliverance, if the plaintiff was nonſuit, or otherwiſe barred, in the ſame manner as the plaintiff would have recovered them. Where lands delivered in execution were evicted, a remedy by *ſcire facias* againſt the party or his executor is given by ſtat. 32 Hen. VIII. c. 5. to have the part of the debt unſatisfied, out of other lands belonging to him.

Proclamations on exigents.

PROVISION was made by ſtat. 4 Hen. VIII. c. 4. for proclamations on exigents in foreign counties, which act was perpetuated by ſtat. 6 Hen. VIII. c. 4. It was thereby directed, that where in any action perſonal a defendant was deſcribed of one county, and an exigent was awarded into another, it ſhould be lawful for the juſtices to award a writ of proclamation to the ſheriff of the county of which the defendant was deſcribed; or if the king's writ runneth not there, then to the adjoining county. The proclamation was to contain the effect of the action, and to direct the ſheriff to make three proclamations within

[a] Salk. 506.

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his county at three different days, two in full county-court, the third at the general ſeſſions, requiring him to yield himſelf to the ſheriff of the foreign county into which the exigent was awarded. Such proclamation was to have the ſame return as the exigent, and to be made out by the ſame officer. Any outlawry promulged in a foreign county, without award of ſuch writ of proclamation, was declared void.

Jurors.

SEVERAL regulations were made reſpecting jurors, as well to ſecure a regular appearance of them at the trial, as to guard againſt or to puniſh perjury and miſbehaviour. Two of theſe parliamentary proviſions were confined to jurors in London. In the former reign[o], it had been endeavoured to enforce appearance by larger iſſues: there being ſome doubt, how theſe were to be levied, it was now directed[p], that the mayor might diſtrain for them. This was confined to actions in the city courts. By the laſt it was ordained, to prevent delays for want of jurors, that in all city actions depending in the courts at Weſtminſter, the ſheriffs might ſummon perſons having goods to the value of 100 marks, as well as thoſe having lands or tenements of forty ſhillings value annually. It further directs, what iſſues ſhould be returned on the firſt and ſecond diſtreſs, and all the ſubſequent ones[q].

A MORE general proviſion was made by ſtat. 35 Hen. VIII. c. 6. to effect a due appearance of jurors at *niſi prius*. It was ordained, that where the jurors, upon an iſſue joined, in a court at Weſtminſter, were to have forty ſhillings freehold, the *venire facias* ſhould ſpecify *quorum quilibet habeat quadraginta ſolidatas terræ, tenementi, vel redditus ad minus*; and the ſheriff was not to return perſons who were not ſo qualified. In caſes which did not require that clauſe, he was not to return any that

[o] Vid. ant. 143.
[p] Stat. 4 Hen. VIII. c. 3.
[q] Vid. alſo ſtat. 5 Hen. VIII. c. 5.

had

had not ſome freehold; and in both caſes, he was to return ſix ſufficient hundredors, at leaſt, if there were ſo many within the hundred. Upon every firſt *habeas corpora*, or *diſtringas*, with a *niſi prius*, the ſheriff was to return at leaſt five ſhillings; at the ſecond, ten ſhillings; at the third, thirteen ſhillings and fourpence; and upon every ſubſequent one he was to double the iſſues, till a full jury was ſworn, or the proceſs otherwiſe determined. If a full jury ſhould not appear, or after challenges there was likely to be a default of jurors, the juſtice, at requeſt of the plaintiff or defendant, might command the ſheriff to name and appoint as many perſons of the ſame county, then preſent at the aſſiſes or *niſi prius*, as would make up a full jury, who ſhould be added to the pannel, and their names annexed to it: theſe were to be liable to challenge, as if they had been impannelled on the *venire facias*; and if they made default, they might be fined as jurors at common law. The jurors firſt impannelled were nevertheleſs to loſe their iſſues, the ſame as if the jury had remained for default of jurors, unleſs they were excuſed upon any reaſonable cauſe by the juſtice; in like manner, if the jury was not taken by reaſon of the not coming of the juſtices. The ſubſidiary jurors added, according to the directions of this act, conſtituted what were called *tales de circumſtantibus*, and they were mentioned under that appellation, in ſtat. 37 Hen. VIII. c. 22. made for continuing this act, which was only temporary.

Attaint.

Now we are upon the ſubject of jurors, we may introduce a ſtatute made for altering the proceedings in attaint. We have obſerved, in the laſt reign, that the parliament had provided a new way of puniſhing jurors, and had foregone the antient villainous judgment in attaint[r],

[r] Vid. anf. 143.

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That ſtatute was only experimental; and therefore, after being continued by one at the beginning of this reign, was ſuffered to expire in the third year of this king[1]. Attaints, therefore, again returned to their antient courſe, till ſtat. 23 Hen. VIII. c. 3. which renewed the policy of the act of the laſt reign, in the following manner: In every caſe of an untrue verdict, between party and party, in any ſuit, plaint, or demand, before judges of record, where the thing in demand was worth forty pounds, and did not concern a man's life, the party grieved might have an attaint againſt the jurors and the party; with ſummons, reſummons, and diſtreſs infinite againſt them, and alſo the grand jury. Every one of the grand jury was to have freehold of the yearly value of forty ſhillings. The diſtreſs againſt the grand jurors was to be awarded, and open proclamation was to be made, and this was to be fifteen days before the return of the diſtreſs. If the party or any of the petit jurors made default, the grand jury was to be taken againſt every one ſo making default. Thoſe who appeared, were to have no anſwer to the plaintiff, except *that they made true ſerement* (provided they were the ſame perſons; and the writ, proceſs, return, and aſſignment, were good and lawful), and the party was to plead that *they gave a true verdict*; and if they pleaded in bar, the grand jury was ſtill to go on to enquire whether the firſt jury gave a true verdict. If the jury were convicted, each of them was to forfeit twenty pounds, half to the king, and half to the party grieved; they were alſo to be fined at the diſcretion of the juſtices, and their oath never more accepted in any court: the party's plea being alſo found againſt him, the plaintiff was to be reſtored to what he had loſt, with reaſonable coſts and damages. It was ordained, that outlawry or excommu-

[1] Stat. 1. Hen. VIII. c. 24.

nication

nication of the plaintiff ſhould be a void plea, not to be anſwered. In proceſs of attaint, day was to be given as in a writ of dower, and no eſſoin or protection to be allowed. An attaint was not to abate for the death of the party, or any of the jury.

If the verdict was for a perſonal thing, as debt, treſpaſs, or the like, under forty pounds, there was to be the ſame proceſs and pleas, and delays were in the ſame manner to be removed: only the qualifications of the grand jury need not exceed five marks yearly of freehold, or the property of one hundred marks of goods and chattels; and the petit jurors, if attainted, were to forfeit only five pounds, and alſo make fine and ranſom.

In either caſe, if there were not ſufficient qualified jurors, a *tales* might be awarded into the next county. The remedy of this ſtatute was alſo extended to perſons grieved by any untrue verdict of inheritance in deſcent, or of freehold or inheritance in reverſion or remainder. If the plaintiff was nonſuit, or diſcontinued, he was to make fine by the diſcretion of the juſtices. All attaints were thenceforward to be taken in the king's bench or common-pleas, and in no other court; and *niſi prius* might be granted by the juſtices upon the diſtreſs: every petit juror might appear by attorney.

There is a proviſo, declaring, that this ſtatute ſhall not prejudice the act of the laſt reign [t], reſpecting attaints in the city; but that attaints might be either brought there in the huſtings, or under this act. To obviate ſome infringement which it was apprehended the city-privileges might undergo by the general form of this act, it was in a ſubſequent ſtatute declared [u], that in attaints for verdicts given by citizens, the jurors need no qualification of freehold, but only to have 400 marks in value of goods

[t] Stat. 11 Hen. VII. c. 21. Vid. ant. 143. [u] Stat. 37 Hen. VIII. c. 5.

and

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and chattels; and, further, that the juſtices ſhould ſit at Guildhall, or elſewhere, in the city to try ſuch attaints [*].

SUCH was the new form into which this antient proceeding for puniſhing the perjury of jurors was now thrown: it has been treated very fully in the early parts of our Hiſtory; and when it underwent ſo important a revolution, it ſeemed proper that ſuch changes ſhould be recounted equally at large.

Statute of jeofail.

THE attaining of ſubſtantial juſtice was promoted by a new ſtatute of amendment and jeofail: this was ſtat. 32 Hen. VIII. c. 30. which took away ſome of the minute cauſes of exception to which records and proceedings were before liable. It ordains, that after verdict judgment ſhall be given, notwithſtanding any miſpleading, lack of colour, inſufficient pleading, or jeofail, any miſcontinuance, diſcontinuance, or miſconveying of proceſs, misjoining of the iſſue, lack of warrant of attorney of him againſt whom the verdict is, or any other default, or negligence of any of the parties, their counſellors, or attornies; nor ſhall any writ of error, or of falſe judgment, be maintainable on account of any of the defects abovementioned. By the ſame ſtatute, attornies are required to deliver their warrants of attorney to be entered of record, the ſame term the iſſue is entered, under penalty of 10l. and impriſonment at the diſcretion of the court. After this act, much room was ſtill left for the parliament to interpoſe on the ſame ſubject, as has been ſince done by many ſtatutes of greater extent than the preſent.

WHILE theſe proviſions were made to prevent the failure of actions on account of trifling defects in the proceedings, the antient ſtrictneſs was ſtill preſerved in criminal proſecutions: in theſe it was thought not inconvenient

[*] It appears from the preamble of this ſtatute, that the city privilege about trials run thus: That inquiſitions of the citizens of London ſhould be taken at St. Martin's le Grand, or at the Guildhall of the city of London, and not elſewhere, except inquiſitions before the juſtices in eyre, at the tower of London, and for the delivery of the gaol of Newgate.

to

to allow any exception which could, upon any fair pretence, be taken in favour of the life or liberty of a defendant, after conviction. But the ſtat. 37 Hen. VIII. c. 8. ordained, that, for the future, the words *vi et armis*, *videlicet*, *cum baculis*, *cultellis*, *arcubus*, *et ſagittis*, or any of the ſame or like words, if omitted in an indictment or inquiſition, ſhall not be a cauſe to avoid ſuch indictment or inquiſition, by writ of error, plea, or otherwiſe. A doubt has been raiſed on the conſtruction of this ſtatute; whether it was meant to extend to all the words there recited, or only to thoſe which come under the *videlicet*. This has prevented the full benefit that otherwiſe might have been derived from this only ſtatute of jeofail which relates to criminal proceedings.

As the end of all laws is the quiet and peace of ſociety, the limiting a period of time within which perſons muſt purſue their remedy by action, was a wiſe and politic conſtitution. Some ſtatutes were made for the limitation of actions[7]. The cruel proceedings upon penal ſtatutes in the laſt reign, made it neceſſary to fix ſome bounds to common informers. By ſtat. 1 Hen. VIII. c. 4. actions on penal ſtatutes were to be brought by the king within three years, and by any common perſon within one. This act being temporary, was continued by ſtat. 7 Hen. VIII. c. 3.

Statute of limitation.

A MORE general proviſion was made for limitations in ſeveral real writs, by ſtat. 32 Hen. VIII. c. 2. which ſtates in the preamble, two inconveniencies from the preſent length of limitation: one is, that it was above the remembrance of any man to try and know the certainty of the point in iſſue; and that perſons, though they and their anceſtors had been in long poſſeſſion, could not enjoy their eſtates in ſafety. To remedy this, the following alterations were made: That no perſon ſhould ſue a writ of right, or make preſcription, title, or claim, alledging the ſeiſin of his anceſtor, any otherwiſe than

[7] Vid. ant. vol. II. 124.

within

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within threeſcore years before the *teſte* of the writ, or before the preſcription, title, or claim made: That no perſon ſhould maintain an aſſiſe of mortaunceſtor, coſinage, aiel, writ of entry upon diſſeiſin done to an anceſtor, or any other action poſſeſſory of any further ſeiſin of himſelf or his anceſtor, but within fifty years before the *teſte* of the writ; nor of his own ſeiſin, above thirty years before the *teſte* of the writ; nor ſhould avow or make cogniſance for any writ, ſuit, or ſervice, alledging a ſeiſin thereof in himſelf, his anceſtor, or any one whoſe eſtate he had, above fifty years next before the making of the avowry or cogniſance. All formedons in reverter and remainder, and every *ſcire facias* on a fine, was to be ſued, uſed, and taken, within fifty years after the title and cauſe of action accrued; and if a writ was brought, preſcription, title, claim, avowry, or cogniſance, was made any otherwiſe, and was traverſed, and found againſt the perſon ſo doing, he was to be barred for ever.

Trinity term altered.

AMONG the proviſions relating to the adminiſtration of juſtice, we muſt not forget one for bringing Trinity term more forward in the year. This was ſtat. 32 Hen. VIII. c. 21. which ſtates two reaſons for ſuch a change: firſt, that in this ſeaſon there had often happened the plague and other ſickneſſes; ſecondly, that it was a great impediment to poor people who ought to be employed about their harveſt. It was therefore thought proper to take off the two laſt returns, and, inſtead, to add one to the beginning of the term[a]. For this purpoſe it was enacted, that this term ſhould have only four common returns; the firſt of which was to be *in craſtino Sanctæ Trinitatis*; the ſecond, *in octabis Sanctæ Trinitatis*; the third, *in quindenâ Sanctæ Trinitatis*, as before; but the fourth was to be *a die Sanctæ Trinitatis in tres ſeptimanas*, which was to take its commencement from Trinity Sunday into three weeks next

[a] See the Diagram exhibiting the returns as they were laſt adjuſted by the ſtat. *Dies communes in Banco*, 52 Hen. III. ant. vol. II. 58.

follow-

following, and was to have its return with the fourth day next following, as was uſual in the other returns; and the returns *in craſtino Sancti Johannis Baptiſtæ*, *in octabis Sancti Johannis Baptiſtæ*, and *in quindenâ Sancti Johannis Baptiſtæ*, were thenceforward to be aboliſhed. It was ordained, that this term ſhould begin the Monday next after Trinity Sunday[a], for the keeping of eſſoins, profers, returns, and the other uſual ceremonies; and that the full term ſhould commence on Friday next after *Corpus Chriſti* day. When this alteration was made, another was alſo neceſſary for adjuſting the relation the term, after this modification, was to bear with the others. In the old ſcale, ſettledby the ſtat. *Dies communes in Banco*, all writs iſſued in Hilary term, and thoſe of no other, were returnable on ſome of the returns in Trinity term; and all thoſe iſſued in Trinity, fell upon ſome return in Michaelmas: this relation was ſtill preſerved, but it was ordered in this way. If any writ, in a real action, was returnable *in octabis Hilarii*, then day was to be given *in craſtino Sanctæ Trinitatis*; if *in quindenâ Sancti Hilarii*, *in octabis Sanctæ Trinitatis*; if *in craſtino Purificationis Beatæ Mariæ*, *in quindenâ Sanctæ Trinitatis*; if *in octabis Purificationis Beatæ Mariæ*, then *a die Trinitatis in tres ſeptimanas*. Again, if *in craſtino Sanctæ Trinitatis*, *in craſtino Animarum*; if *in octabis Sanctæ Trinitatis*, *in craſtino Sancti Martini*; if *in quindenâ Sanctæ Trinitatis*, *in octabis Sancti Martini*; if *a die Trinitatis in tres ſeptimanas*, then *in quindenâ Sancti Martini*.

PROVISION was likewiſe made, as in the reign of Henry III. to adapt this alteration to the return of writs of dower. If a writ of dower was returnable *in quindenâ Paſchæ*, day was to be given *in craſtino Sanctæ Trinita-*

[a] The Monday after Trinity Sunday in this year 1786, is the 12th of June, and *Corpus Chriſti* being Thurſday 15th, the full term begins Friday 16th of June. The new return *in tres ſeptimanas a die Sanctæ Trinitatis* will fall on the third of July.

tis;

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tis; if *a die Paſchæ in tres ſeptimanas, in octabis Sanctæ Trinitatis*; if *a die Paſchæ in unum menſem, in quindenâ Sanctæ Trinitatis*; if *a die Paſchæ in quinq; ſeptimanas*, or *in craſtino Aſcenſionis*, then *a die ſanctæ Trinitatis in tres ſeptimanas*. Again, if *in craſtino Sanctæ Trinitatis*, then *in octabis Sancti Michaelis*; if *in octabis Sanctæ Trinitatis, in quindenâ Sancti Michaelis*; if *in quindenâ Sanctæ Trinitatis, a die Sancti Michaelis in tres ſeptimanas*; if *a die Sanctæ Trinitatis in tres ſeptimanas*, then *a die Sancti Michaelis in unum menſem*; or otherwiſe, ſays the act, as it is appointed by the ſtatute of Marlbridge. Thus far of real writs. It was ordained, further, that all common writs and proceſſes, as well perſonal as mixed, returnable in Trinity term, ſhould be returnable on ſome of the four returns directed by this act. The juſtices, however, in ſuch and the like caſes and proceſſes, where ſpecial days had been uſed to be appointed for the return of writs and proceſſes, were authorized to continue to appoint ſpecial days as it ſeemed convenient to them. The days appointed to be given in *quare impedit* by the ſtatute of Marlbridge, and in attaint by ſtat. 5 Ed. III. c. 7. as far as they were not contrary to this act, were ſtill to continue.

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Many new Treaſons created—Treaſon by writing or ſpeaking—to diſobey the King's Proclamations—Statute of the Six Articles—Puniſhment of Poiſoning—Of Larceny—Servants embezzling Goods—Larceny in a Houſe—Law againſt Gypſies—Cheating by falſe Tokens—Gaming—Trial of Treaſon committed in Wales—and committed out of the Realm—Trial of Piracy—Trial of Bloodſhed in the Palace—The Benefit of Clergy taken away—The Queſtion of Clergy debated before the Council—The King's Determination—Abjuration and Sanctuary—Clergy again taken from certain Offenders—Sanctuary taken from certain Offenders.

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THE law of crimes and puniſhments began to aſſume a very different appearance. An alteration in circumſtances, and an alteration in ſentiments, induced the parliament to give a keener edge to the law, in many caſes. To ſuffer ſuch offences as murder and robbery, larceny, burning, and other crimes, to enjoy impunity, through a peculiarity in legal notions, or defects in the courſe of juſtice, was thought too inconſiſtent with the good order and peace of ſociety to be any longer endured. Many ſtatutes were made for the due puniſhment of ſuch enormities. Beſides this modifying of common-law offences, the character of the times, and that of the prince upon the throne, contributed to the enacting of many new crimes, with new methods of trial and puniſhment; all which, together, exhibit a greater ſhew of novelty than had been introduced

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introduced in our criminal law in any of the preceding reigns.

THE penal ſtatutes of this reign may be naturally divided into ſuch as concern religion, and the king's perſon and government; thoſe which regard inferior offences; and ſuch as make any change in the mode of trial at common law, or in any other way affect the puniſhment of offenders; and, laſtly, thoſe that reſpect the benefit of clergy and ſanctuary.

THE penal acts relating to the king's perſon and government, and to the alteration made in religion, conſtitute the firſt head of enquiry: theſe were all repealed by ſtat. 1 Ed. VI. c. 12. and not one of them has any influence on the body of our law in force at this day. Notwithſtanding this, they are extremely worthy of obſervation, when conſidered in an hiſtorical light. Theſe laws were intirely of a new impreſſion, totally differing from any that had gone before, both in the deſcription of crimes, and the ſeverity with which they puniſhed them. In theſe ſtatutes treaſon and miſpriſion of treaſon were made the conſequence of every action and every word that tended to affect the regal dignity; the obedience of men was ſecured by oaths, and the diſcovery of guilt facilitated by methods unheard of in the common law. Though theſe ſtatutes were all abrogated, yet the offences therein created were revived in the ſubſequent reigns, with inferior penalties; and many of their regulations were followed in ſimilar circumſtances: ſo that theſe laws gave riſe to a new ſpecies of criminal juriſprudence, which has been adopted occaſionally ever ſince; tempered, however, with greater ſhew of moderation. For theſe reaſons, as well as to diſplay their peculiar ſtile and extravagance, we ſhall treat them fully, and that nearly in the order in which they were made.

Many new treaſons created.

IT was not till the 25th year of his reign, that Henry had involved himſelf in meaſures which forced him to ſuch acts of violence, as marked his government for ſanguinary

ſanguinary and tyrannical. Having parted with his queen *Catharine*, embroiled himſelf with the Emperor and the Pope, and taken the reſolution of throwing off the papal yoke, he found himſelf under a neceſſity of ſecuring what he had done by an act of parliament, which was to confirm the divorce, and the marriage with *Anne Boleyne*, and to ſettle *the ſucceſſion* of the crown upon the iſſue of that marriage. Stat. 25 Hen. VIII. c. 22. was paſſed for this purpoſe. After giving the ſanction of parliament to the ſteps which had been lately taken by the king reſpecting his two queens, it enacted, that if any perſon by writing, or imprinting, or by any exterior act or deed, maliciouſly procured, or did any thing to the peril of the king's perſon; or gave occaſion, by writing, print, deed, or act, whereby the king might be diſturbed of the crown; or by writing, print, deed, or act, procured, or did any thing to the prejudice, ſlander, or derogation of queen Anne or her iſſue by the king, ſo as to interrupt their title to the crown, as limited by that act, ſuch offence ſhould be high-treaſon. And if any perſons, *by words only*, ſhould publiſh or utter any thing to the peril of the king, or ſlander of the marriage with queen Anne, or to the ſlander or diſheriſon of the iſſue of that marriage, it was made miſpriſion of treaſon. All perſons of full age were to take an oath to fulfil and maintain the objects of that act; and thoſe who refuſed to take ſuch oath, when required, were to be held guilty of miſpriſion of treaſon; the preciſe form of which oath was afterwards preſcribed by ſtat. 26 Hen. VIII. c. 2.

Treaſon by writing or ſpeaking.

WHEN the way was once pointed out of ſurrounding the king's perſon and dignity with new-made treaſons, and of binding people to their duty and allegiance by expreſs and formal oaths, we ſhall preſently ſee how ready the parliament was, on every occaſion, to fabricate and alter, as circumſtances changed, theſe freſh devices for the ſecurity of government and religion.

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In the very next year an act was paſſed, in order to reſtrain "all manner of ſhameful ſlanders and dangers "which might happen to the king's perſon, or that of the "queen." It was by ſtat. 26 Hen. VIII. c. 13. made *high-treaſon*, if any one did maliciouſly *wiſh*, *will*, or *deſire by words*, or writing, or by craft imagine, invent, practiſe, or attempt any bodily harm to the perſon of the king, queen, or of their heir apparent, to deprive them of their dignity, title, or name; or if any did ſlanderouſly and maliciouſly publiſh and pronounce, by expreſs writing or words, that the king was heretic, ſchiſmatic, tyrant, infidel, or uſurper (which latter words were intended to bridle the inſolence of ſome friars); or if any with-held from the king his caſtles, fortreſſes, or holds, or rebelliouſly detained any of his ſhips, ordnance, artillery, or munition, and did not deliver them up within ſix days after proclamation. This act, beſides taking away ſanctuary in caſes of high-treaſon, increaſed the forfeiture upon attainder, by declaring, that all lands, tenements, and hereditaments, *of any eſtate of inheritance*, in uſe or poſſeſſion, ſhould be forfeited; which words included eſtates tail.

By the laſt act, we find that not only *exterior acts and deeds* (as the preceding ſtatute expreſſed it), and writing, but *words* expreſſive of a *wiſh* were made treaſon. We ſhall ſoon ſee that the legiſlature laid the ſame penalty upon the *thoughts* or *belief* of men[a], if expreſſed by words. After ſtat. 27 Hen. VIII. c. 2. which made it treaſon to counterfeit the king's ſign-manual, privy-ſignet, or privy-ſeal, there follows ſtat. 28 Hen. VIII. c. 7. made for *the ſucceſſion of the crown*, after the death of *Anne Boleyne*, and the king's marriage to his queen *Jane*. The former act of ſucceſſion was thereby repealed; and now, ſimilar proviſions were made in favour of the iſſue and ſucceſſion by this new marriage. The king being empowered, in de-

[a] Stat. 28 Hen. VIII. c. 7. 21.

fault

fault of iſſue, to appoint a ſucceſſor, by letters patent or by will, it was made high-treaſon to interrupt the ſucceſſion of the iſſue, or of the perſons ſo appointed by the king[t]. It was made high-treaſon to procure or do any thing, by words, writing, print, or deed, *for the repeal* or avoidance of that act; and the ſlander of the queen and her iſſue, or the doing any thing to the peril of the king's perſon, was made high-treaſon, in the very terms of the former act of ſucceſſion. It was moreover made high-treaſon, if any one by words, writing, imprinting, or any other exterior act, directly or indirectly, accepted, took, *judged*, or *believed*, the marriages with queen *Catharine* and *Anne* to have been good and lawful; or ſlandered the ſentences of the archbiſhop therein; or took, accepted, named, or called any of their children legitimate; or craftily imagined, invented, or attempted, by colour of any pretence, to deprive the king, queen, or their heirs, or thoſe the king ſhould appoint, of any of their titles, ſtyles, or regal power.

BUT the moſt ſingular part of this act was the following clauſe, which enacted, that if any, being required, by commiſſioners properly authorized, to make oath to anſwer ſuch queſtions as ſhould be objected to him upon any clauſe, article, ſentence, or word in that act, *did* contemptuouſly *refuſe to make ſuch oath*, *or*, after making it, *refuſed to anſwer*, he ſhould be guilty of high-treaſon: a ſpecies of examination unknown to the antient common law of the country. The act even goes further, and ſays, that "if any proteſted, that they were not "bound to declare their thought and conſcience, and ſtiffly "thereon abided," it ſhould be high-treaſon; ſo little aſhamed were the makers of this act to be confronted with the miſchiefs that would naturally enſue from it; and ſo ready were they to undertake the cruel taſk of obviating

[t] Sect. 18, 19, 20.

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the conſequences of former ſeverities by impoſing new ones. This act contained one more treaſon; which was, in caſe any one refuſed to take the oath preſcribed for the obſervance of it; the former oath of a ſimilar import being repealed and diſpenſed with [c]. The matter of this act was ſo various, and of ſuch a peculiar kind, and the manner in which it might be enforced ſo inſidious, that it became an engine in the hands of government, by which they might catch any man whom they wiſhed to deſtroy. This act is a ſtrong inſtance how abſolute Henry had become, when the parliament conferred on him the power to diſpoſe of the ſucceſſion to the crown.

THIS was followed by an act [d] to extinguiſh the authority of the biſhop of Rome. There is a long preamble, ſtating the uſurpations of the Pope in ſpirituals and temporals; and that, notwithſtanding the laws which had lately been made, "divers ſeditious and contentious perſons, "being imps of the ſaid biſhop of Rome, do, in corners "and elſewhere, whiſper, inculke, preach, and perſuade, "and from time to time inſtill into poor and unlettered "people the advancement and continuance of the ſaid "biſhop's feigned and pretended authority." For theſe reaſons it was enacted, that if any one by writing, cyphering, printing, preaching, or teaching, deed or act, obſtinately or malicioufly held or ſtood with, to extol, ſet forth, maintain, or defend, the authority of the biſhop of Rome, or invented any thing for the advancement of it, he ſhould incur the penalties of ſtat. 16 Rich. II. c. 5. that is, a *præmunire* [e]; being a proceſs originally contrived for repreſſing the incroachments of papal power. To engage all perſons in an expreſs obligation to ſupport the king againſt the Pope, an oath was framed, by which the taker renounced the Pope and all his authority and juriſdiction; and this oath was to be taken by all officers and miniſters ſpiritual

[c] S. 21, 25. [d] Stat. 28 Hen. VIII. c. 10. [e] Vid. ant. vol. III. 166.

and

and lay; every religious perſon; all thoſe who took orders, or any degree in the univerſity; and it was made high-treaſon to refuſe this oath when it was required to be taken: ſo that all hopes of reconciliation with the church of Rome ſeemed cut off by this ſtatute.

THAT the king's power to diſpoſe of the crown might not be thwarted or interrupted by the marriage of any of his family againſt his will, it was, by ſtat. 28 Hen. VIII. c. 18. made high-treaſon, both in the man and woman, if any one eſpouſed, married, or took to wife any of the king's children, being lawfully born, or otherwiſe commonly reputed for his children; or any of the king's ſiſters, or aunts on the part of the father; or any of the lawful children of the king's brethren or ſiſters, or even to contract marriage with them, without the king's licence under the great ſeal; or to deflower any of them, being unmarried. Theſe were the penal laws made in this ſhort parliament, in the 28th year of the king.

To diſobey the king's proclamations.

THE next treaſon that was made, was to enforce obedience to the king's proclamations. The late proceedings of the king about the Articles of Religion, and other injunctions which had been publiſhed by his ſole authority, had been excepted againſt as contrary to law; becauſe the king had, without conſent of parliament, altered ſome laws, and laid taxes on his ſpiritual ſubjects[f]. This occaſioned the famous ſtatute 31 Hen. VIII. c. 8. The preamble of this act ſets forth "the contempt and diſobe-"dience of the king's proclamations by ſome who did not "conſider *what a king by his royal power might do*; which, "if it continued, would tend to the diſobedience of the "laws of God, and the diſhonour of the king's majeſty, "who may full ill bear it. Conſidering alſo that many oc-"caſions might require ſpeedy remedies, and that de-"laying theſe till a parliament met, might occaſion great

[f] Burn. Ref. vol. I. 251.

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"prejudices to the realm; and that the king, by his royal "power *given of God, might do many things* in ſuch "caſes;" it was therefore enacted, that the king for the time being, with advice of his council, might ſet forth proclamations, with pains and penalties in them, which were to be obeyed as if they were made by an act of parliament. This, however, was not to go ſo far as that any one ſhould ſuffer in his eſtate, liberty, or perſon, by virtue thereof; nor that by any of the king's proclamations, the laws or cuſtoms of the realm ſhould be ſubverted. The ſtatute directs the method in which theſe proclamations were to be iſſued, and how thoſe ſhould be puniſhed who diſobeyed them; and then adds, that if any offended againſt them, and, in further contempt, went out of the kingdom, it ſhould be high-treaſon. The ſame power of iſſuing proclamations was given to the counſellors of the king's ſucceſſor while under age, with the like penalties for diſobeying them; a power of which the Protector, in the next reign, availed himſelf, in order to bring about the changes in religion[z].

Statute of the ſix articles.

In the ſame parliament was paſſed the famous act of the ſix articles, ſtiled, "An Act *for aboliſhing Diverſity of Opinions*," by which the parliament enacted ſix of the ſtrongeſt points in the Romiſh religion, under the ſevereſt penalties. The preamble ſays, that "the king hoped "that a full and perfect reſolution of the ſaid articles ſhould "make *a perfect concord and unity amongſt all his ſub-* "*jects.*" The ready way to effect this, it was thought, would be, to eſtabliſh them by law, ſince the convocation of biſhops and learned men had agreed upon them as ſettled orthodox doctrine. It was therefore enacted, by ſtat. 31 Hen. VIII. c. 14. *firſt*, that if any one by word, writing, printing, cyphering, or any otherwiſe, did teach, preach, diſpute, or hold opinion againſt the real preſence,

[z] Burn. Ref. vol. I. 251.

he

he ſhould ſuffer death as a heretic by burning, and forfeit as in caſe of high-treaſon; *ſecondly*, that if any one preached in any ſermon, or collection openly made, or taught in any common ſchool or congregation, or obſtinately affirmed or defended that the communion in both kinds was neceſſary; or *thirdly*, that prieſts might marry; or *fourthly*, that vows of chaſtity might be broken; or *fifthly*, that private maſſes ſhould not be uſed; or *ſixthly*, that auricular confeſſion was not expedient; it ſhould be adjudged felony. To theſe it was added, that if any prieſt, or any other who had vowed chaſtity, did marry, or contract matrimony; or if any prieſt who was or ſhould be married, did carnally uſe his wife, or any woman to whom he was contracted, or *was openly converſant or familiar with*, both the man and the woman ſhould be guilty of felony. This ſevere branch againſt unchaſte practices was not reliſhed by the popiſh clergy, and is ſaid to have been put in by *Cromwell*, to make this bloody law cut with two edges. If that was the deſign, the clergy got relieved from this well-intended ſtroke the next year; when, by ſtat. 32 Hen. VIII. c. 10. this latter part of the law was changed from felony to forfeiture and impriſonment.

AFTER this act of the ſix articles, there was another brought in by *Cranmer*, which was intended to mitigate the late laws about religion. In this meaſure the king very readily concurred, being then engaged in a war, and wiſhing every thing to remain quiet at home. This was ſtat. 34, 35 Hen. VIII. c. 1. intitled, *An Act for the advancement of True Religion, and aboliſhment of the contrary*. One deſign of this proviſion was to put a ſtop to the uſe of *Tindal*'s tranſlation, and to promote the reading the authoriſed tranſlation in Engliſh; after which it enacted, that if any ſpiritual perſon did preach, teach, defend, or maintain, any matter or thing contrary to the good inſtructions and determinations *that had or ſhould be ſet forth* by the king, he ſhould, for the firſt offence, recant; if he refuſed to recant, or offended a ſecond time,

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he was to abjure, and bear a faggot; which if he refuſed to do, or offended a third time, he was to be burnt as a heretic. But lay-perſons ſo offending were, for the third offence, or for refuſing to abjure, and bear a faggot, only to forfeit all their goods, and ſuffer perpetual impriſonment; ſo that the laity offending againſt the ſix articles and other popiſh doctrines, were intirely freed from the hazard of burning, and the ſpiritualty ſuffered only on the third conviction. They were alſo permitted to bring witneſſes in their defence [h].

THE marriage between the king and *Anne of Cleves* being pronounced void, an act paſſed to confirm the ſentence; and it was now declared, as it had been on former occaſions of the ſame kind, that by word or deed to accept, take, judge, or believe, that marriage to be good, or to attempt to repeal that act, ſhould be high-treaſon. This was by ſtat. 32 Hen. VIII. c. 25. In the following year, another of this whimſical monarch's unfortunate queens gave occaſion to the penalty of high-treaſon being inflicted on tranſactions of a very nice and ſingular nature. Queen *Catharine Howard* was attainted by ſtat. 33 Hen. VIII. c. 21. of high-treaſon for incontinence; and it was enacted further, that if the king, or any of his ſucceſſors, ſhould marry a woman who was before incontinent, it ſhould be high-treaſon if ſhe concealed it; and any perſon knowing it, and not revealing it to the king, or one of his council, before the marriage, or within twenty days after, ſhould be adjudged guilty of high-treaſon. Further, if the queen, or wife of the prince, ſhould, by writing, meſſage, words, tokens, or otherwiſe, move any one to have carnal knowledge with them, or any others ſhould move either of them to that end, it ſhould be high-treaſon.

A *third act* was made for the *ſucceſſion* to the crown, which entirely overturned the former appointments: this was ſtat. 35 Hen. VIII. c. 1. There was a new oath,

[h] Burn. Ref. vol. I. 308.

deviſed

deviſed in place of that before ſworn, as well againſt the ſupremacy of the pope, as to maintain the ſucceſſion ordained by that act. It was made high-treaſon to refuſe that oath, or to do any thing contrary to this act, or to the peril and ſlander of the king's heir, as limited therein. The king's ſtile and title was ſettled by ſtat. 35 Hen. VIII. c. 3. in the following words: "Henry VIII. by "the grace of God, King of England, France and Ireland, "Defender of the Faith, and of the Church of England, "and alſo of Ireland, in earth the Supreme Head;" and it was declared high-treaſon to attempt to deprive him of it.

THIS variety of penal laws ſhews a want of temper in the legiſlature, which is hardly to be paralleled. The paſſions and caprice of the king ſeemed to be adopted by the parliament, which condeſcended to enforce by ſtatute every thing he could aſk or wiſh; ordaining for law the ſtrangeſt inventions that ever were thought worthy to become the objects of penal juriſprudence.

IT follows, that we ſhould now ſpeak of ſuch ſtatutes as were made reſpecting common offences: theſe, though not ſo numerous as the former, were of conſiderable importance, and are many of them in force at this day. The variation made in the crime of larceny by ſome that have already been mentioned, requires a more particular notice; after theſe, we ſhall proceed to other felonies; and, laſtly, to miſdemeanours: but firſt it will be proper to conſider two ſtatutes relating to homicide, which are the only two in this reign upon that head.

ONE of theſe ſtatutes was to remove a doubt concerning the killing a robber. We have ſeen, that in former times, a perſon killing a houſe-breaker went without puniſhment[1]. But now, the ſtatute 24 Hen. VIII. c. 5. ſays, there was "a queſtion and ambiguity," whether, when perſons attempted to commit robbery or murder, in or nigh the common highway, cart, horſe, or foot way;

[1] Vid. ant. vol. II.

or

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or in a manſion-houſe, meſſuage, or dwelling-place; or felonioufly attempted to break a dwelling-houſe in the night-time, and were killed in ſuch attempt by the perſon they meant ſo to rob or murder, or by any perſon being in their dwelling-houſe, ſo attempted to be burglarioufly broken; whether the perſon killing was to forfeit his goods, as in chance-medley: to remove this doubt, the ſtatute declares, he ſhall not ſuffer any kind of forfeiture, but be as fully acquitted and diſcharged, as if he had been acquitted of the fact.

Puniſhment of poiſoning.

THE other ſtatute concerning homicide, is very remarkable; and as it enacted a new treaſon, it might perhaps have been ranked among that ſeries of acts. This is ſtat. 22 Hen. VIII. c. 9. It was occaſioned by one *Richard Rooſe*, a cook, having put ſome poiſon into a veſſel of yeaſt, in the biſhop of Rocheſter's kitchen, by means of which ſeventeen perſons of the biſhop's family, and ſeveral others, were poiſoned, and died. This very heinous offence raiſed a kind of indignation in the legiſlature; and it was declared by that act, that the ſaid poiſoning ſhould be adjudged high-treaſon, that *Richard Rooſe* ſhould be attainted accordingly, by authority of parliament, and ſhould be boiled to death; and, as if none would commit this offence but ſuch as were of the ſame employment with the preſent offender, it was enacted, not only that thenceforth every wilful murder by means of poiſoning ſhould be high-treaſon, but that ſuch offenders ſhould all be boiled to death.

Of larceny.

IT became neceſſary that the crime of larceny ſhould be puniſhed in a ſeverer manner than it had been at common-law. The occaſions and temptations to commit this crime were much increaſed, ſince the improvements in arts and commerce had ſupplied the articles of perſonal property in greater number; and as thoſe were often ceſt[illegible], and made a part of dreſs, or of the furniture of houſes, there was need of additional penalties to guard them from violation. Beſides theſe conſiderations, a dwelling-

dwelling-houſe, on all accounts, deſerved every protection the law could afford it. Stealing in this only place of ſecurity for a man's property, called for a more exemplary puniſhment; but more particularly when attended with violence of any kind. To theſe cauſes may be aſcribed the ſtatutes made in this and the ſubſequent reigns concerning larceny: what thoſe were we ſhall now enquire.

THE definition of larceny, after various changes, had, as we have ſeen in the reign of Edward IV[k]. become ſettled, in the following terms: *The felonious taking and carrying away of the perſonal goods of another.* In judging of offences, courts were tied up to this definition, and often found themſelves embarraſſed by a ſtrict conſtruction of it. To correct this, and to puniſh in a manner adequate to the crime, the aid of the legiſlature had ſometimes been called in, to enlarge the terms of this definition in particular inſtances. Thus it was made larceny to ſteal hawks, by a ſtatute of Edward III. and to ſteal records, by one of Henry VI.[l]; neither of which being *perſonals*, could be brought within the letter of the above definition.

THOSE two ſtatutes reſpected the *objects* of larceny. The ſtat. 21 Hen. VIII. applied to another part of this definition, and aſſiſted in aſcertaining, at leaſt in one inſtance, what ſhould be deemed a felonious *taking*. A breach of truſt, and embezzlement of effects confided to the cuſtody of a perſon, were thought not to be a *felonious taking and carrying away*. This kind of fraud had of late grown common, from the impunity it enjoyed; and many now thought, that, as it carried in it much of the miſchief, it deſerved the puniſhment annexed to felony. It was accordingly enacted, by ſtat. 21 Hen. VIII. c. 7. that if a ſervant, to whom caſkets, jewels, money, goods, or chattels, have been delivered to keep, withdraw himſelf,

Servants embezzling goods.

[k] Vid. ant. vol. III. 419. [l] Vid. ant. vol. II. 456. and vol. III. 279.

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ſelf, and go away with the ſame, or any part thereof, with intent to ſteal, contrary to the truſt and confidence repoſed in him; or if, being in ſervice, without aſſent of his maſter he embezzle the ſame, with intent to ſteal or convert to his own uſe, to the value of forty ſhillings, it ſhall be felony. It is mentioned in the preamble of this act, as a doubt whether this kind of taking was larceny; a doubt raiſed, perhaps, by the caſe determined in 13 Ed. IV. [m] which we have before mentioned, and which is thought, and not improbably, to have given ſome occaſion for making this ſtatute.

THO' the inſtance of bailment there before the court was, or might be thought ſomething like this of truſts repoſed in ſervants, and was determined to be felony; yet the principles there laid down and agreed to, almoſt unanimouſly, led to an oppoſite concluſion; and there needed all the helps of diſtinctions and technical nicety to take even that caſe out of the general rule there laid down. Beſides, there is at the bottom of that report an opinion, which qualifies any inference which otherwiſe might be poſſibly drawn from it as to this point; for, admitting that a cook and a butler would be guilty of felony, if they converted the goods within their reſpective departments to their own uſe, it is there ſaid, that if the ſame things were bailed to a ſervant, *perhaps* [n], as they would be in his poſſeſſion, he could not commit felony of them [o]. About three years before it was ſaid by one of the judges, "If "one commits the care of his goods to his ſervant, the "ſervant cannot take them felonioufly, becauſe they were "in his poſſeſſion" [p]. Theſe were direct authorities upon the point, and, joined with the reaſoning upon *bailment* and *poſſeſſion*, ſufficiently ſhew what were the opinions of lawyers in thoſe times reſpecting this queſtion.

[m] Vid. ant. vol. III. 410.
[n] *Per aventure.*
[o] 13 Ed. IV. 10.
[p] 10 Ed. IV. 14. Bro. Coro. 155. Vid. ant. vol. III. 410.

So

So ſtrictly have courts adhered to the notion of poſſeſſion, and its conſequences, that in 3 Hen. VII. the judges went ſo far as to agree with *Brian* (who, it may be obſerved, was one of the judges that diſſented from the opinion of felony in 13 Ed. IV. in the exchequer-chamber), that neither a ſhepherd nor a butler could commit larceny of their ſheep or plate, becauſe it could not be done *vi et armis*[r]; ſo much were the opinions changed from what they had been in the reign of Ed. IV. when theſe caſes were ſtated for felony, and allowed without debate. This doctrine we have ſeen was again diſcuſſed in the laſt reign; and it ſeemed, in the inſtance there ſtated, to be agreed upon ſo decidedly againſt the felony, as to call for a formal declaration of the law by ſtatute. Thus ſtood the law upon this ſubject towards the end of Henry VII.'s reign, and ſo we may ſuppoſe it was underſtood at the time this ſtatute was made. After all theſe authorities, we may be excuſed in differing from thoſe[s] who think that the point of law which is the ſubject of this ſtatute was ſo well ſettled before, that the doubt about it mentioned in the preamble, is one of thoſe which have much enervated the principles of the common law, and could not be the doubt of any lawyer.

Clergy was taken from this new felony by ſtat. 27 Hen. VIII. c. 17. which ſtatute was excepted in the general repealing law, ſtat. 1 Ed. VI. c. 12.; but becauſe the commencement of the ſeſſions was miſ-recited, it was held[t], that the ſaving was of no effect: ſo that ſtat. 27 Hen. VIII. c. 17. ſtood repealed, and ſtat. 21 Hen. VIII. c. 7. continued a clergyable felony, till the general repealing act of queen Mary, where, among other felonies, it was repealed: it was afterwards revived by ſtat. 5 Eliz. and is in force at this day.

Thus far the definition of larceny was extended in ſome particular caſes as to the *object* of it, and *the mode of*

[r] Bro. Coro. 137. [s] Barr. Stat. 478, 479. [t] Plowd. 359.

taking.

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taking. There was another conſideration of this offence which deſerves notice; and that was, *the circumſtances* under which it might be committed.

Larceny in a houſe.

THE time or place where a theft was committed, made no part of the legal notion of it. Whether it was in a houſe, or from the perſon (unleſs from the perſon violently, and by putting in fear, for then it was robbery, a crime of a very different nature), the additional audacity of the offender conſtituted in law no additional degree of guilt: ſo the law had been for many centuries. The attendant circumſtances of aggravation under which this crime might be committed, drew the notice of the legiſlature now, for the firſt time. In this and the ſubſequent reigns many laws were made concerning *ſtealing in a houſe*, making all together a collection of ſtatutes ſo very ſimilar, as to render it difficult to diſtinguiſh the different aim and object of ſome of them.

THESE ſtatutes we ſhall hereafter notice among thoſe which took away clergy; but we muſt touch on them now, with a view of pointing ſome obſervations to the ſubject we are upon at preſent. The firſt of them is ſtat. 4 Hen. VIII. c. 2. which took away clergy from all felonies committed in a church, or hallowed place; from robbery or murder in the highway, or *in a houſe*, the owner, his wife, child, or ſervant, within, and put in fear. This new regulation being a temporary law, was ſuffered to expire; and theſe offenders were left once more to their former impunity; till ſtat. 23 Hen. VIII. c. 1. took away clergy from thoſe who *rob any perſon in his dwelling-houſe*, the owner, his wife, child, or ſervant, then being within, and put in fear. It takes away clergy alſo from thoſe who rob any church or chapel, or other holy place; from murder; robbery in or near the highway; from burning a dwelling-houſe, or barn with corn or grain; and from petit treaſon. This ſtatute includes alſo acceſſaries before the fact.

THERE

THERE is ſomething in the wording of this ſtatute that is worthy of obſervation: it is the different conſtruction which has been put on the ſame expreſſion, when applied to different ſubjects; namely, *to rob*, when it is meant of a houſe, and when of a perſon. The words are, *if any rob any perſon in his dwelling-houſe*, &c. and *if any rob another in or near the highway*, &c.; the obvious and plain conſtruction of which clauſes, on the firſt view, ſhould ſeem to be, that the locality of the offence *in* or *near* the *highway*, or *in a dwelling-houſe*, were the only circumſtances particularly neceſſary to be defined.

BUT doubts aroſe, ſoon after the ſtatute, whether the parliament had not ſomething more in view than a mere robbery *from the perſon in a houſe*, and did not really intend by thoſe words to ſignify the robbery *of a houſe*. To explain this doubt, and give this act the full effect which, probably, it was at firſt intended to have, the ſtat. 5 and 6 Ed. VI. c. 9. was made to explain the very paſſage now under conſideration, concerning which there had ariſen ſome doubts: to reſolve which that act declares, that though the owner be *in any part* of the houſe, or *precinct* of the ſame, yet ſtill the robber ſhould loſe his clergy. After this explanation, the difference between robbing a perſon *in the highway* and *in a dwelling-houſe*, firſt originated. For what could this *robbing a perſon in a houſe* be? It could not be a robbery, properly ſo called, for that muſt be from the perſon, and with violence, which could not be the caſe here; for the explanatory words ſay, that the perſon might be in any other chamber of the houſe; nor could it be with violence, for the ſtatute ſays, it might be committed while the perſon was aſleep; which is a condition not compatible with the violence neceſſary to conſtitute a proper robbery. It only remained to imagine a kind of *conſtructive* robbery, by ſuppoſing the violence committed on the houſe, and not on the perſon. Conſiſtently with this, robbing a perſon in a houſe has been conſtrued to ſignify a violence done to the

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the houſe by *breaking*, as well as a ſtealing. Later ſtatutes have purſued this notion, only expreſſing it leſs equivocally, in the phraſe of *robbing a houſe*, inſtead of *robbing a perſon in a houſe*.

By ſtat. 33 Hen. VIII. c. 12. [a] clergy was taken away from perſons ſtealing in any of the king's houſes, whether with a breaking or without.

There is only one more ſtatute relating to robbery, which we ſhall now mention. We have ſeen, that in an appeal, the party proſecuting not only procured a puniſhment to be inflicted on the offender, but alſo recovered the thing ſtolen. This was not ſo in an indictment; and as this mode of proſecuting was now more practiſed than formerly, it was intended to render it equally advantageous to the perſon reſorting to it. It was accordingly enacted, by ſtat. 21 Hen. VIII. c. 11. that if a man robbed or took away any money, goods, or chattels, from the perſon, or otherwiſe, and is indicted, arraigned, and found guilty thereof; or otherwiſe attainted, by reaſon of evidence given by the party, or by procurement of the party ſo robbed, or the owner of the ſaid money or goods; the perſon robbed, or the owner of the things, ſhall be reſtored to them; and the juſtices of gaol-delivery, or other juſtices before whom the conviction was, may award writs of reſtitution, in like manner as in an appeal.

Having thus gone through all the ſtatutes of this king on the offence of larceny and robbery, we ſhall proceed to examine what new felonies were created. Theſe are of a miſcellaneous nature. It was made felony by ſtat. 22 Hen. VIII. c. 11. to cut down or break up any part of the *pow*-dike, and *oldfield* dike, in Norfolk, and the Iſle of Ely; as it was alſo to ſell, exchange, or deliver, any horſe, gelding, or mare, to a Scotchman, by ſtat. 23 Hen. VIII. c. 16. or into Scotland, or the batable to the uſe of a Scotchman

[a] Sect. 27.

was

was made felony, to be determined by the wardens of the Marches, by ſtat. 32 Hen. VIII. c. 6. It was declared felony by ſtat. 31 Hen. VIII. c. 2. to fiſh with nets, hooks, or baits, in any ſeveral pond, ſtew, or moat, with intent to ſteal fiſh, from ſix in the evening to ſix in the morning, againſt the will of the owners; or to break up the head of any ſuch pond, ſtew, or moat, by day or by night, whereby any fiſh were taken or deſtroyed: and fiſhing in the above manner in the day-time was puniſhed with impriſonment for three months. This was the firſt law which laid the penalty of felony upon any treſpaſſes reſpecting fiſh.

PENAL reſtrictions to protect theſe objects of diverſion and pleaſure, where the royal amuſements were concerned, were carried further by another chapter of this ſame ſtatute [x]; the latter branch of which act deſerves particular notice, becauſe it ſeems to have furniſhed the proviſions which were afterwards revived in the famous *Black Act* of modern times, and was itſelf framed upon the policy of one made in the laſt reign [y]. The following facts were made felony: to take in the king's grounds any egg or bird of a falcon, goſhawk, or laner, out of the neſt (which had been puniſhed with a year's impriſonment by ſtat. 11 Hen. VII. c. 17.); to find or take up any falcon, jerfalcon, jerkin, facer or facerit, goſhawk, laner or lanerite, of the king's, and having on it the king's arms and verveles, and not to bring or ſend it within twelve days to the maſter of the king's hawks. Then follow the proviſions concerning parks. To enter into any foreſt, chaſe, or park, of the king, queen, prince, or any of the king's children, or into any other ground of theirs, incloſed with a wall or pale, ordained for the keeping of deer, between the riſing and ſetting of the ſun, with the face hid, or covered with hood or viſor, or painted, or otherwiſe diſguiſed, to the intent not to be known, in order to ſteal deer, or drive any of them from the foreſt; or, at any time of the day, with the face

[x] Ch. 11. [y] Stat. 9 Geo. I. [z] Vid. ant. 144.

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hid and diſguiſed, to kill conies within any ground being the king's warren within any of the parks above-mentioned; or in the night to enter into any park, chaſe, or foreſt, or warren, of the above deſcription, with intent to ſteal deer or conies, was made felony.

THE ſtat. 37 Hen. VIII. c. 6. contains many penalties for the puniſhment of perſons guilty of various ſpecies of malicious miſchief. It was made felony to burn, cut, or deſtroy any frame of timber prepared for building a houſe. The penalty of 10l. to the king, beſides treble damage to the party, was given in the following inſtances of wilfulneſs and malice: for cutting the head of any ponds, ſtews, or pipes of any conduit; burning a cart laden with merchandize, or any heap of wood prepared for making coals, billets, or talwood; the barking of fruit-trees; the cutting out the tongue of any beaſt; or cutting off the ear of any ſubject, otherwiſe than by authority of law, chance-medley, ſudden affray, or adventure; ſome of which enormities have been puniſhed in different manners by later ſtatutes.

AMONG the number of miſdemeanours for which various kinds of penalties were ordained in this reign, beſides thoſe juſt mentioned, ſuch only as make the ſubject of the three following ſtatutes, can deſerve a place in this hiſtorical view of our laws: theſe are, ſtat. 22 Hen. VIII. c. 10. of Egyptians; ſtat. 32 Hen. VIII. c. 9. of ſelling pretenced titles, and embracery of jurors; and ſtat. 33 Hen. VIII. c. 1. of cheating with privy tokens; with others concerning unlawful games and ſhooting.

Law againſt gypſies.

THE firſt of theſe laws deſcribes that ſet of people who were then new-comers in this country, as "outlandiſh "perſons calling themſelves *Egyptians*, uſing no craft or "feat of merchandize, who come into this realm and go "from ſhire to ſhire and place to place in great company, "and uſed great ſubtil and crafty means to deceive the "people, bearing them in hand, that they by palmeſtry "could tell men's and women's fortunes; and thus many "times by craft and ſubtilty had deceived the people of "their

"their money, and alſo had committed many heinous felonies and robberies." This was the deſcription given of theſe wanderers. It was now enacted, that if any ſuch perſons came within the realm, they ſhould forfeit all their goods and chattels, and ſhould leave the kingdom within fifteen days after command ſo to do, upon pain of impriſonment. All ſheriffs and juſtices of the peace were empowered to ſeize their property for the king's uſe. If they were to be tried for any felony, they were not to be entitled to the privilege of ſtat. 8 Hen. VI. which gave a jury *de* [a] *medietate linguæ*. As to all thoſe then within the realm, they had ſixteen days to depart; and if they overſtaid that time, they were to be impriſoned, and forfeit all their goods and chattels.

THE ſtat. 32 Hen. VIII. c. 9. ſtates the inconveniencies which enſued from maintenance, embracery, champerty, ſubornation of witneſſes, ſiniſter labour, buying of titles and pretenced rights of perſons not being in poſſeſſion. It enacts, that all former laws againſt maintenance, champerty, and embracery, ſhall continue in force, and be put in execution: and it moreover enacts, that no one ſhall bargain, buy, or ſell, any pretenced rights or titles in lands or tenements; and if any ſuch bargain, ſale, promiſe, covenant, or grant, be made, and the ſeller has not himſelf nor his anceſtors been in poſſeſſion of the ſame, or of the reverſion or remainder, or taken the rents or profits, for one whole year next before the ſale, both buyer and ſeller ſhall forfeit the whole value of the land, half to the king, and half to the perſon who ſues for it. A proviſo was added, allowing perſons in poſſeſſion, by taking the yearly profits, to buy any pretenced title or right of any other perſon. Maintenance of any ſuit, embracery of jurors, or ſubornation of witneſſes, are ſeverally puniſhed, in addition to the penalty of former ſtatutes, with a forfeiture of 10l.

[a] Vid. ant. vol. III. 270.

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half to the king and half to the party ſuing, which muſt be within a year. The buying of pretenced titles had grown more frequent, ſince uſes had become ſo common; and thus gave occaſion to this ſtatute.

Cheating by falſe tokens.

CHEATING was at common law an offence puniſhable by fine, impriſonment, and pillory. Some new proviſions are made by ſtat. 33 Hen. VIII. c. 1. reſpecting one ſpecies of it. This ſtatute ordains, that if any one falſely and deceitfully obtain, or get into his hands or poſſeſſion, any money, goods, chattels, or other things of another perſon, by colour and means of any falſe token, or counterfeit letter made in another man's name, and ſhall be convicted thereof by witneſſes before the chancellor, or by examination of witneſſes, or confeſſion in the ſtar-chamber, or before the juſtices of aſſiſe, of the peace, or by action in any court of record, he ſhall ſuffer any corporal pain (except death) which ſhall be adjudged. It ſhould ſeem that no alteration was made by this ſtatute in the offence, which remains as at common law; only the juriſdiction over it was extended, and the power of puniſhing enlarged. Juſtices of aſſiſe and of the peace are authoriſed by proceſs, or otherwiſe, to cauſe perſons ſuſpected of this offence to be taken and kept till the aſſiſes or ſeſſions.

Gaming.

AMONG the penal laws of this king we find ſome reſtrictions impoſed upon certain diverſions, with a more ſtrict hand than the legiſlature had applied in any former time. Gaming and the killing of game were the objects of ſeveral acts of parliament. The two acts that aimed directly at the latter, were intended rather for repreſſing the depredations of thoſe who have ſince been called poachers,[a] than to circumſcribe the amuſement of the ſportſman. By ſtat. 14 and 15 Hen. VIII. c. 10. no perſon of whatſoever eſtate, degree, or condition, was to trace, deſtroy, or kill any hare in the ſnow; juſtices of peace in their ſeſſions, and ſtewards of leets, had authority to enquire of ſuch offenders, and to fine them 6s. 8d. for every hare killed. The ſtat.

[a] Vid. ant. vol. III. 215.

25 Hen.

25 Hen. VIII. c. 11. was for the protection of wild-fowl, which uſed to be taken while the old were moulting, and while the young were not able to fly. To prevent this, it was ordained, that between the laſt day of May and of Auguſt, none ſhould take wild-fowl in nets, or other engines, on pain of a year's impriſonment, and fourpence fine for every fowl, to be enquired of by juſtices of the peace. There was a proviſo, that any gentleman, or other who can ſpend forty ſhillings per annum of freehold, might hunt and take them with ſpaniels, without uſing any net or engine, except it was a long bow. There were penalties alſo on thoſe who took their eggs.

THIS exception in favour of the long-bow was in the ſame ſpirit which the legiſlature manifeſted in the laſt reign and in this, by ſeveral proviſions made before and after this act. This martial weapon, which the Engliſh archers were ſo famous for managing, had lately been going out of repute; and croſs-bows and hand-guns were now the faſhionable inſtrument, whether for diverſion or uſe. Theſe new-invented weapons, from their commodious form, had been applied to the deſtruction of game, which was an additional reaſon for endeavouring to diſcourage them, and to bring the long-bow again into vogue. To effect this, ſeveral acts were made, which, by a ſide-wind, became in effect ſo many game-laws. In the preamble of ſtat. 19 Hen. VII. c. 4. the unlawful application of the croſs-bow to kill the king's deer, and the univerſal diſinclination to uſe the long-bow, that had made us once ſo formidable to our enemies, is very ſtrongly and feelingly ſtated; and it is there enacted, that no perſon, without the king's ſpecial licence, under his placard, ſigned and ſealed with his privy-ſeal or ſignet, ſhould occupy or ſhoot in any croſs-bow (unleſs he ſhot out of a houſe for defence thereof), except he be a lord, or have lands of freehold of 200 marks per annum, on pain of forfeiting it, with its apparel, to any perſon who would take it. By ſtat. 3 Hen. VIII. c. 13. the

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qualification was raiſed to 300 marks, and all licences granted before that act are declared void. Hitherto the ſtatutes were confined to croſs-bows; but ſtat. 6 Hen. VIII. c. 13. prohibited ſhooting either in croſs-bows or hand-guns; which latter, probably, were juſt come into faſhion: beſides forfeiture of the inſtrument, there was a penalty of 10l.: no man was to keep ſuch inſtruments in his houſe on pain of impriſonment, and a penalty of 10l. All placards were declared void, and the offence was to be examined before the council, as well as before juſtices of the peace. By ſtat. 14 and 15 Hen. VIII. c. 7. the qualification was leſſened to 100l. per ann. in a man's own right, or the right of his wife; and the penalty was lowered to forty ſhillings. All placards were declared void. Some ſmall variation was made in this regulation by ſtat. 25 Hen. VIII. c. 17. This, like the former acts, declared void all former placards.

THESE were followed by ſtat. 33 Hen. VIII. c. 6. which repealed all the former laws, and is the principal act upon this ſubject. The chief regulations of this act were theſe: the prohibited inſtruments here mentioned are the croſs-bow, hand-gun, hagbut or demihake; and they were not to be uſed or kept under penalty of 10l. unleſs by a perſon having 100l. per ann. But hand-guns that were not full a yard in ſtock and gun, and hagbuts and demihakes not being three quarters of a yard, were forbid to all perſons under pain of 10l.; and perſons having 100l. per ann. might take ſuch ſhort inſtruments, or any croſs-bows, from perſons who had them. This act contains a number of proviſions too long to enumerate. Among others one was, that all placards ſhould in future be void. Lords and gentlemen, and inhabitants of cities and towns, might ſhoot at butts or banks with hand-guns of a proper length.

THUS far proviſion was made for prohibiting the new-inverted weapons. Meantime, the legiſlature did not neglect to make regulations for encouraging the exerciſe of the

the long-bow. As the former courſe of acts had an eye to the unlawful deſtruction of the game, the latter kept in view the many unlawful games in which the people indulged themſelves in preference to that of ſhooting in the long-bow: ſo that as the former were a ſpecies of game-laws, the latter were acts againſt gaming. The firſt of theſe acts was ſtat. 3 Hen. VIII. c. 3. which act was made perpetual, and the policy of it purſued by ſtat. 6 Hen. VIII. c. 2. but both theſe were repealed by ſtat. 33 Hen. VIII. c. 9. This act is ſtill in force, and, as it contains more general and effective proviſions than any later ſtatute, for ſuppreſſing public gaming-houſes, it is particularly worthy of notice.

THIS act purports to be made in conſequence of the complaint and petition of the bowyers, fletchers, ſtringers, and arrowhead-makers; and it enacted, that every perſon, not being lame or decrepid, within the age of ſixty (except ſpiritual perſons, the judges and juſtices of aſſiſe), ſhould uſe and exerciſe ſhooting in long-bows, and have a bow and arrows continually in his houſe for that purpoſe. Fathers and governors of thoſe of tender age were to teach them to ſhoot; having for every male child of ſeven years old in his houſe, till he was ſeventeen, a bow and two ſhafts to induce him to learn. Where ſuch young people were ſervants, their maſters were to abate out of their wages the prices of ſuch bows and arrows. After ſeventeen years, ſuch young perſons were to provide themſelves with a bow and four arrows. If any father, or maſter of a family, or ſervant, failed herein, he was to forfeit ſix ſhillings and eightpence. Theſe proviſions are followed by ſeveral about building butts, the prices of yew, and other bows: and all breaches of theſe regulations were made cogniſable by the juſtices in ſeſſions and ſtewards in their leets.

THESE are followed by the regulations about unlawful games, which are as follow: No perſon by himſelf, or

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his ſervant, or other perſon, for his gain, livery, or living, was to keep, have, hold, occupy, exerciſe or maintain any common houſe, alley, or place of bowling, coyting, cloyſh-cayls, half-bowl, tennis, dicing-table, or carding, or any other manner of game prohibited by any ſtatute heretofore made, or any unlawful game hereafter to be invented, on pain of forfeiting, for every day of keeping ſuch place or ſuffering ſuch game, forty ſhillings; and every perſon uſing and haunting ſuch houſes and plays, and there playing, for every time ſix ſhillings and eight-pence. Every placard to keep a common gaming-houſe contrary to this act, was to ſpecify the game and perſons to play at it, or was to be void; and perſons obtaining ſuch placard, before they put it into execution, were to find ſureties not to uſe the placard contrary to this ſtatute: but theſe placards were declared void by a ſubſequent ſtatute [b]. Juſtices, mayors, and other head-officers, are authorized to enter into houſes where games are ſuſpected to be exerciſed contrary to this act, and to arreſt the keepers and perſons there reſorting, and keep them in priſon till they reſpectively find ſureties not again to offend. Such head-officers are directed to make ſearch weekly, or, at furtheſt, once a month, for ſuch houſes; and if they neglected for a month, they were to forfeit forty ſhillings. No artificer, huſbandman, apprentice, journeyman, labourer, or ſerving-man, was to play at tables, tennis, dice, cards, bowls, or any other unlawful game, out of Chriſtmas, under pain of twenty ſhillings for every ſuch offence. At Chriſtmas they were only to play in the houſes or in preſence of their maſters. None, at any time, were to play at ball in open places, out of a garden, or orchard, under pain of 6s. 8d. All leaſes of houſes, where unlawful games were exerciſed, are declared void. There are two proviſos to this act; one

[b] Stat. 2 and 3 Ph. and Ma. c. 9.

allowing

allowing maſters to licenſe their ſervants to play at cards, dice, or tables, with them, or with any other gentleman, in their maſter's houſe or preſence; the other allowed any nobleman, or perſon, having 100l. per ann. to licenſe his ſervants, or family, to play within the precinct of their houſes, gardens, or orchards, at cards, dice, tables, bowls, or tennis. All other ſtatutes againſt unlawful games were repealed, ſo that this act became the code of law upon this important article of Police.

THE laſt penal law made in this reign was for the puniſhment of an offence which had been encouraged, if not occaſioned, by the many bloody laws concerning treaſon which had gone before it; and may be reckoned as one very ſtrong inſtance of the ill conſequences attending a multiplicity of penal laws. Many evil-diſpoſed perſons availing themſelves of the then ſtate of things, when almoſt every public offence was treaſon, and every treaſon was infallibly puniſhed as the law directed, had endeavoured to bring thoſe whom they diſliked under ſuſpicions, by dropping papers conveying accuſations of crimes againſt perſons by name. To repreſs this abominable practice, it was by ſtat. 37 Hen. VIII. c. 10. ordained to be felony without clergy for any perſon to make, or cauſe to be made, a writing compriſing a charge of treaſon, and to leave it in an open place where it might be found; unleſs the party ſo doing ſubſcribed his name to it, and within twelve days appeared in perſon before the king or his council, and there affirmed the truth thereof, and did his endeavours to prove it. A proviſion of this kind was never more neceſſary than at this period; although the act did not quite diſcountenance this mode of information, it inflicted a proper puniſhment on the worſt ſpecies of it. In puniſhing with death thoſe who ſo inſidiouſly endangered the lives of others, this act ſo far purſued the ſpirit of our old law, which adjudged to death ſuch perjured perſons,

as,

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as, by their falſe oaths, had effected the conviction and execution of an innocent man [c].

THE remaining ſtatutes of this reign which any way affect our criminal juriſprudence, are ſuch as were contrived to bend and accommodate the proceedings at common law, ſo as to facilitate the trial, and inſure the puniſhment of offenders; ſuch as extended the common-law trial to caſes which were before cogniſable by another rule of determination; ſuch as inſtituted or altered ſome new-invented tribunals of criminal juſtice; and, laſtly, thoſe that deprived many offenders of the benefit of clergy and ſanctuary.

THE firſt act that made any change in the courſe of criminal proſecutions, is ſtat. 3 Hen. VIII. c. 12. Complaint had been made, that ſheriffs and other officers returned jurors for the king, who would readily perjure themſelves for corrupt purpoſes. To remedy this, power was given to juſtices of gaol-delivery, and of the peace, to reform the pannel, by putting in and taking out of names: this was confined to juries that were to enquire for the king. The next was ſtat. 4 Hen. VIII. c. 2. which has been before mentioned as taking away clergy from certain offences. The ſecond clauſe of that act was pointed againſt an abuſe of the plea of ſanctuary, when felons uſed to alledge that they had been taken out of a privileged place in ſome foreign county, in order to delay the trial, which by law ought to be in ſuch alledged county. To prevent this, it was ordained by this act, that ſuch foreign pleas ſhould be tried by the jury of the county that was to try the felony. This act was temporary, and having expired by the meeting of a new parliament in the 7th of the king, was revived and made perpetual by ſtat. 22 Hen. VIII. c. 2. Another deviſe to elude juſtice was, for murderers and felons, upon untrue ſuggeſtions, to re-

[c] Vid. ant. vol. II. 353.

move

move themſelves and their indictments before the king's bench, which could not afterwards remit them into the county, till ſtat. 6 Hen. VIII. c. 6. gave the court that authority to remand both, and to command the juſtices of gaol-delivery, of the peace, or other, as the caſe might be, to proceed thereon. By ſtat. 23 Hen. VIII. c. 13. the challenge of a juror, in trials of murder and felony in cities and towns corporate, for want of freehold, was taken away.

Trial of treaſon committed in Wales;

AFTER ſo far deviating from the old rule which governed trials, as to make an *incidental circumſtance* triable in a foreign county, the parliament ventured further, and made *offences* committed in one county and place triable in another. To remedy the diſorders following from the relaxed ſtate of the judicial œconomy in Wales and its marches, it was enacted, as has been related, by ſtat. 26 Hen. VIII. c. 6. among other regulations for the reformation of judicature there, that coiners and felons within any lordſhip marcher of Wales ſhould be tried in the next Engliſh county; and when theſe lordſhips were divided into counties, by ſtat. 34, 35 Hen. VIII. c. 26. it was declared [d], that this proviſion ſhould ſtill continue in force. In the mean time it had been enacted, by ſtat. 32 Hen. VIII. c. 4. that all treaſons, and miſpriſions of treaſon, committed within the principality of Wales and its marches, or whereſoever the king's writ runneth not, ſhould be tried by a commiſſion of *oyer and terminer whereſoever* the king ſhall appoint.

and committed out of the realm.

THE policy of trying treaſons in *any* county that the king ſhould pleaſe to appoint, had been firſt begun by ſtat. 26 Hen. VIII. c. 13. which enacted, that any offence *made treaſon by that act, or that was before* held treaſon, committed out of the limits of the realm, *in any outward parties*, ſhall be enquired of *in ſuch county* of the realm,

[d] Sect. 85.

and

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and before ſuch perſons, as it ſhould pleaſe the king to appoint by commiſſion: and to enforce this new method of proceeding, it was alſo enacted, that proceſs of outlawry againſt offenders in treaſon being reſident out of the realm, or in any parts beyond the ſeas, at the time of the outlawry pronounced, ſhould be as good and valid as if they were within the kingdom at the time. The proviſion of this act was extended by ſtat. 35 Hen. VIII. c. 2. to offences *hereafter to be made* or declared treaſon, miſpriſion or concealment of treaſon; and it was added alſo by this laſt ſtatute, that peers ſhould, notwithſtanding, be tried by their peers in this caſe, as well as in others; leſt the novelty of this proceeding, enacted generally, ſhould be conſidered as ſo far excluding peers from their common-law trial.

We here ſee the ſteps the legiſlature made in the introduction of this novelty of foreign trials. Firſt, coining and felonies committed in Wales and the marches, were to be tried in the *next* Engliſh county, by ſtat. 26 Hen. VIII. Next, in the ſame year, it was ordained, that treaſons committed *out of the realm* might be tried in *any* county. About ſix years afterwards, it was enacted by ſtat. 32 Hen. VIII. that treaſons committed in *Wales* ſhould be enquired of in *any* county: and now, in the next year we find two ſtatutes which directed, that treaſons or murders done *within* the realm, might be tried in *any* county the king ſhould pleaſe to appoint. The next to theſe is ſtat. 33 Hen. VIII. c. 20. concerning trials of lunatics who had committed treaſon, of which we ſhall ſay more hereafter. After this is chap. 23. of the ſame ſtatute, which ordained, that any perſon being examined before the king's council, or three of them, upon any treaſon, miſpriſion of treaſon, or murder, and who confeſſed the ſame, or was violently ſuſpected, ſhould be tried by a commiſſion of *oyer and terminer in ſuch ſhire* as ſhould be appointed by the king. In ſuch trials, the challenge

challenge of a juror for want of a freehold of forty ſhillings a-year was taken away; and a peremptory challenge was, for the future, to be allowed *in no caſe* of high-treaſon, or miſpriſion. There was the like ſaving of the right of peers in this, as had been in the former act.

THE ſtatute for the trial of *lunatic* traitors, juſt alluded to, has more remarkable circumſtances in it than thoſe concerning the locality of trial; and is a cruel inſtance of the anxiety in the government that no offender ſhould, by any poſſibility, eſcape puniſhment. It directed, that if any perſon was of ſound memory, when examined before the king's council on a charge of high-treaſon; and after his examination and confeſſion thereof, he ſhould happen to fall to madneſs, or lunacy; yet, if it ſhould appear by the teſtimony of four of the council, that he was at the time of examination of ſound memory, a commiſſion of *oyer and terminer* might be iſſued into *any ſuch ſhire as the king pleaſed*, where the offender was to be indicted and arraigned *in his abſence*, witneſſes heard, verdict found, judgment paſſed, and the party to be executed thereon, as if the proceeding had been in his preſence.

IF the ſimplicity and moderation of our old law was violated by the many new-fangled treaſons and other penalties enacted in this reign, the candour of the antient method of trial was not leſs deſtroyed by the extravagant innovation of this ſtatute; nor was that which we mentioned next before, very compatible with the original notion upon which the trial by jury was founded.

THESE laſt-mentioned ſtatutes, as they took away ſome of the great advantages derived from the trial by jury, tended to reſtrain it; unlike that act which made treaſons committed out of the realm capable of being tried by a jury in any county, which ſo far contributed to impart to a new ſort of offenders the benefit of this tribunal. The ſame may be ſaid of that ſtatute which made *piracy* examinable by a jury, in a proceeding at common law. This act

Trial of pirates.

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act was made in the following year, upon the ſame ideas, and with the ſame deſigns.

THERE were two ſtatutes made for the trial of pirates and robbers on the ſea, ſtat. 27 Hen. VIII. c. 4. and 28 Hen. VIII. c. 15. containing the ſame proviſions in every reſpect; with this only difference, that the former allowed *three* of the commiſſioners to be a quorum, the latter required *four*. All piracy, theft, robbery, and murder upon the ſea, were heretofore tried before the admiral, his lieutenant, or commiſſary, according to the courſe of the civil law; the nature of which is, ſays the preamble of the ſtatute, "that before any judgment of death can be given "againſt offenders, either they muſt plainly confeſs their "offence (which they will never do without torture or "pains), or elſe their offence be ſo plainly and directly "proved by witneſſes indifferent, ſuch as ſaw their "offence committed; which could not always be got; "either becauſe they murdered thoſe they robbed, or "the parties who were preſent at the fact, being ſea-"faring people, were continually changing place." Theſe are the reaſons ſtated in the act for recurring to a new mode of inquiry. It was therefore ordained, that all ſuch offences done upon the ſea, or in any haven, river, or creek, where the admiral pretends to have juriſdiction, ſhall be enquired and determined in ſuch county as ſhall be limited by the king's commiſſion, as if the offence had been committed on land. Theſe commiſſions are to be directed to the admiral, his lieutenant, deputy, and three or four ſuch other ſubſtantial perſons as ſhall be named by the lord chancellor, authoriſing them, or four of them at the leaſt, to hear and determine ſuch offences after the common courſe of the laws of the realm, in caſes of treaſon, felony, murder, robbery, and confederacies committed upon land; with the ſame order, proceſs, judgment, and execution: and perſons convicted thereby are to ſuffer ſuch pains of death, loſs of land, goods, and chattels, as

if

if they had been attainted and convicted of any treaſon, felony, or robbery, without benefit of clergy or ſanctuary. This ſtatute gives a common-law trial in a caſe which was not before cogniſable thereby, but only by the civil law. Piracy ſtill remains an offence by that law, as it was before this ſtatute; but it is now ſubject to forfeiture of lands and goods, like a felony. It is not made *felony*, nor has it the properties of felony. There is no corruption of blood, nor are there any acceſſaries before or after the fact; at leaſt as the crime ſtood upon this act; though alterations to that effect have been made by later ſtatutes [e]; and it has been held, that a pardon of all felonies does not pardon piracy [f].

As the admiral had, by the common law, cogniſance of crimes *on the ſea*, the court of the conſtable and marſhal [g] heard and determined all offences committed on land out of the realm: both theſe courts proceeded according to the civil law; and the new regulations made by theſe three ſtatutes relating to piracy and treaſons done out of the realm, in preſcribing theſe new modes of trial, ſo far extended the juriſdiction of the common law; and have therefore been held not to be repealed by ſtat. 1 Ph. and Mar. which ordained, that all trials for treaſon ſhould be according to the due order and courſe of the common law.

Trial of bloodſhed in the palace.

THERE was a new criminal court erected by ſtat. 33 Hen. VIII. c. 12. to be held before the lord great maſter [h], or lord ſteward of the king's houſhold; and in their abſence, before the treaſurer, comptroller, and ſteward of the Marſhalſea, or two of them, whereof the ſteward of the Marſhalſea was to be one. They were to hear and

[e] Stat. Will. III. and Geo. II.

[f] 3 Inſt. 113.

[g] Vid. ant. vol. III. 194.

[h] This great officer was a new appointment made by Henry for his favourite, Charles Brandon, duke of Suffolk. By ſtat. 32 Hen. VIII. c. 39. he was to have all authority that the lord ſteward of the houſhold had. This act was repealed by ſtat. 1 Mar. ſtat. 3. c. 4. and the office of lord ſteward reſtored. The title in the ſtatute of Henry VIII. is the *lord great maſter of the houſhold*, or, *grand maiſtre del hoſtel du Roy*.

determine

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determine all treaſons, miſpriſions of treaſon, murders, manſlaughters, bloodſheds, and malicious ſtrikings by reaſon whereof blood was ſhed, within any of the palaces or houſes of the king, while he was perſonally reſident there. The enquiry was to be by a jury of yeomen officers in the cheque-roll. The puniſhment of malicious ſtriking and bloodſhed was, that the right hand ſhould be ſtruck off; and, "for a declaration of the ſolemn and due "circumſtance of the execution," as the ſtatute ſays, it aſſigns ſome part in this bloody rite to almoſt every officer in the houſhold; which is ſaid by the act to have been a ceremony of long time uſed and accuſtomed. It probably was ſo; for the ceremonial ſeems to outdo even all the exquiſiteneſs of penal legiſlation which we have before related in this remarkable reign. The act directs, with great preciſion, that the ſerjeant-ſurgeon is to be preſent to ſear the ſtump, when the hand is ſtricken off; the ſerjeant of the pantry, to give bread to the offender after the operation; and the ſerjeant of the cellar, with a pot of red wine to give him to drink; the ſerjeant of the ewry, with cloths; the yeoman of the chandry, with ſeared cloths; the maſter-cook, with a dreſſing-knife, who is to deliver it to the ſerjeant of the larder to hold it upright during the execution; the ſerjeant of the poultry, with a cock to wrap about the ſtump; the yeoman of the ſcullery, with a pan of coals to heat the ſearing-irons; and the ſerjeant ſerror, to bring the ſearing-irons; the groom of the ſalcery, with vinegar and cold water; and laſtly, the ſerjeant of the wood-yard to bring a block, with a betel, a ſtaple, and cords to bind the hand upon the block till execution is done. This formality, which probably was deſigned to ſtrike terror into the whole houſhold, and prevent the diſorders it was meant to puniſh, ſounds more like the ordinance of ſome rude people in the infancy of legiſlation, than the proviſion of a wiſe and poliſhed nation. This barbarous judgment, we are informed, was actually executed

cuted on Sir Edmund Knivet, at Greenwich, for ſtriking a man, the king then being there. This was in 33 Hen. VIII. and probably was a proceeding under this act of parliament[1]. It ſhould be remembered, that this is a different tribunal from that erected by ſtat. 3 Hen. VII. c. 14[2]. which is to be held before the ſteward, treaſurer, and comptroller, for felony in conſpiring the death of the king, any lord, or privy-counſellor.

OTHER methods of enquiry were contrived in this reign for the determination of offences againſt certain ſtatutes. Theſe were numerous and various; and yet hardly deſerve notice. Among theſe may be reckoned the following. By ſtat. 21 Hen. VIII. c. 20. an alteration, which has been noticed in another place, was made in the conſtituent members of the ſtar-chamber. By ſtat. 31 Hen. VIII. c. 8. a particular juriſdiction was framed to enquire of thoſe who diſobeyed the king's proclamations, which was again qualified by ſtat. 34 and 35 Hen. VIII. c. 23. The trial of this offence was to be in the ſtar-chamber, before certain great officers of ſtate enumerated in the firſt act; but by the latter it was to be before any nine privy-counſellors, two of whom were to be the chancellor, treaſurer, preſident, privy-ſeal, chamberlain, admiral, or a chief-juſtice. By ſtat. 31 Hen. VIII. c. 14. the act of the ſix articles, ſome direction was given for enquiry concerning offences againſt that act; and this underwent ſome change by ſtat. 35 Hen. VIII. c. 5. By the former act commiſſions were to be awarded to the biſhop of the dioceſe, his chancellor, commiſſary, and others, to enquire of thoſe offences. Juſtices of the peace alſo, in their ſeſſions, and ſtewards of leets, might, by the oaths of twelve men, enquire thereof. By the latter, no one was to be put to his trial but upon a preſentment or indictment found by twelve men before ſpecial commiſſioners, or juſtices of the

[1] Bro. Peine, 16.

[2] Vid. ante, 145.

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peace, or of oyer and terminer; and theſe were to be found within one year after the offence committed.

A REIGN ſo fruitful as this in penal laws, did not want expedients for putting them in force. To anſwer this purpoſe more effectually, the common-law proceedings were varied, commiſſions of a new ſort were framed, and new methods of examinations were deviſed: all this contributed to introduce much novelty and confuſion. Much of this confuſion and moſt of theſe novelties were removed by the great repealing ſtatutes 1 Ed. VI. and 1 Mar. and 1 and 2 Ph. and Mar. While theſe innovations were multiplying, we are pleaſed to find ſome regulations reſpecting the antient tribunals. It was in conformity with a former ſtatute [k] declared, by ſtat. 33 Hen. VIII. c. 24. that no juſtice, nor other man learned in the laws of the realm, ſhould exerciſe the office of juſtice of aſſiſe in the county where he was born, or then inhabited. By ſtat. 33 Hen. VIII. c. 10. the juſtices of the peace were required to divide themſelves, two at leaſt, into every hundred, and hold a ſeſſion for ſuch reſpective diviſions, ſix weeks before the quarter-ſeſſion, to enquire of vagabonds, giving of liveries and badges, maintenance, embracery, unlawful games, and other offences, and hear and determine the ſame. But this ſix weeks ſeſſion was found to be too burthenſome, and was repealed by ſtat. 37 Hen. VIII. c. 7. which directed the juſtices to take cogniſance of all thoſe offences at their quarter-ſeſſions.

WE now come to conſider the alterations made in the law of clergy and ſanctuary. The acts upon this head are ſuch as either take thoſe privileges from certain offenders, or ſuch as make any regulation concerning perſons who were ſtill to be indulged with them. In order to ſhew the ſteps by which the legiſlature advanced in aboliſhing theſe antient exemptions from the proceſs of criminal juſtice, it will be, perhaps, the cleareſt method, to take a

[k] Stat. 8 Ric. II. c. 2. Vid. ant. vol. III. 200.

view

view of them all together, in the order in which they were paſſed.

The benefit of clergy taken away.

The taking the benefit of clergy from certain offences had been begun in the laſt reign, when it was taken from the deſertion of ſoldiers, and from petit-treaſon[1]. It was thought proper now to purſue the ſame courſe with robbers and murderers, who, ſays the preamble of the ſtatute, "*bear them bold of their clergy, and live in manner* "*without fear or dread*;" for reformation of which it was enacted, by ſtat. 4 Hen. VIII. c. 2. that all perſons committing murder or felony, in any church, chapel, or hallowed place; or who of malice prepenſed rob or murder any perſon in the king's highway, or rob or murder any perſon in his houſe, the owner or dweller of the houſe, his wife, child, or ſervant, then being therein and put in fear or dread, ſuch perſon ſhall not be admitted to his clergy. There was an exception in favour of thoſe in holy orders. This act was only temporary, in order to try the temper of the people, as to ſuch innovations upon the antient ſuperſtition of the realm: it was to laſt only to the next parliament. The manner in which this ſtatute was received by the clergy, will appear from a tranſaction which we ſhall relate at length: it will be thence ſeen with what zeal and what arguments they maintained this claim, even at the period when it was ſo near its final diſſolution; and how far they had weight, even with this abſolute monarch, to ſuſpend, for a time, the effect of his reſolution to aboliſh their privileges.

In the 7th Hen. VIII. while the parliament was ſitting, the abbot of Winchcome, in his ſermon at Paul's Croſs, declared to the people, that this act was contrary to the law of God, and the liberties of the church; and that all thoſe who were parties to the enacting of it, had incurred the cenſures of holy church. In ſupport of this declaration, he ſhewed them a decree which pronounced, that *tam minores quàm majores ordines ſunt ſacri*; and therefore, that all

[1] Stat. 7 Hen. VII. c. 1. ſtat. 12 Hen. VII. c. 7. Vid. ant. 156.

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who had received any kind of orders, were exempt from temporal puniſhment *pro cauſis criminalibus*, before the temporal judge. This critical time for ſo open an attack on the legiſlature was probably choſen, in order to prevent a revivor of this ſtatute, which, by the terms of its continuance, had now expired. Such conduct was noticed by the king, who, at the inſtance of ſeveral temporal lords, and members of the houſe of commons, reſolved, that the point ſhould be fully and ſolemnly debated before the judges, and the king's temporal council[m]. There was accordingly a meeting held at Blackfriars; and there appeared ſeveral divines and canoniſts to argue the matter on both ſides, for the king and for the clergy. Upon this argument, it was thought that thoſe who ſpoke for the temporal power had the advantage, and many preſſed that the biſhops ſhould be required to uſe their authority with the abbot, and make him recant what he had preached; but they ſtrenuouſly declined it; and ſaid, on the contrary, that they were bound by the law of holy church to maintain the abbot's opinion with all their power: and thus the matter reſted for ſome months, without any thing deciſive being concluded upon.

The queſtion of clergy debated before the council.

An incident ſoon happened which revived this queſtion, and brought it once more to iſſue in a more ſolemn manner. *Doctor Horſey*, chancellor to the biſhop of London, had cauſed one John Hunne to be taken up on a charge of hereſy, and had committed him to the Lollards tower, as it was called, in St. Paul's. Soon afterwards this man was found hanging in his chamber; and a ſuſpicion of murder fell upon the gaoler and *Doctor Horſey*. This was increaſed by the former taking refuge in the ſanctuary at Weſtminſter; and the world were ſatisfied of the juſtneſs of their ſuſpicions, when the coroner's inqueſt found them both guilty of the murder. Before this verdict was given, the

[m] *Juſtices et temporal counſeil del roy.* Keilw. 181.

biſhops,

biſhops, perceiving what courſe the affair was likely to take, and foreſeeing the conſequences it might be productive of, ſince the late diſpute at Blackfriars, thought they would make their ground more ſure, by ſtriking the firſt blow; and therefore they ſummoned *Doctor Standiſh* (who was the principal of thoſe who had argued at the late meeting againſt the exemption from temporal juriſdiction) to appear before the convocation. Here they objected to him, that he had maintained certain opinions which were contrary to thoſe taught by holy church. The particular articles were exhibited to him in a formal bill by the archbiſhop of Canterbury, and were none other than what had been the ſubject of controverſy at Blackfriars. The Doctor, finding that they meant to make this a matter of hereſy, applied to the king for protection againſt the perſecution of the clergy, which he had excited only by his zeal for maintaining the temporal authority of the king's courts. The clergy alſo addreſſed the king; proteſted that they did not proceed againſt this man for any thing he had ſaid at the conference in behalf of the king's power, but for doctrines advanced at certain lectures ſince; and adjured the king, by his coronation oath, and as he would avoid the cenſures of the church, to aſſiſt them in their enquiry. The temporal lords and the judges, with the commons houſe of parliament, in their turn addreſſed the king, and preſſed him by the like obligation of his coronation oath, to maintain his temporal juriſdiction, and give all aſſiſtance to Doctor Standiſh, who was attacked by the malice of the clergy, for advancing what was the ſame in effect as he had urged in oppoſition to the ſermon of the abbot; and that the biſhops were attempting to eſtabliſh all the points maintained in that famous diſcourſe. Upon this the king conſulted with *Doctor Veſey*, the dean of the chapel; and it being his opinion, that the making the clergy anſwer before the temporal judges, as uſed in this country, was very compatible with the law of God, and the liberties of the

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church, Henry once more called an aſſembly at Blackfriars, conſiſting of the judges and all the council, as well thoſe of the ſpiritualty as temporalty [n], and certain perſons of the parliament. There the bill againſt Doctor Standiſh was read, and the whole matter again fully diſcuſſed. The ſubſtance of the arguments on both ſides, at the former aſſembly and at this, was as follows:

THOSE who maintained the exemption of the clergy from temporal juriſdiction in criminal caſes, inſiſted on the papal decree before-mentioned. They contended this was expreſs, and all perſons who were of the Chriſtian religion were bound to obey it, under pain of a mortal ſin; and *therefore*, that the putting of the clergy to anſwer for offences before the temporal tribunal, was *peccatum in ſe*. They ſaid, the privilege of clergy was eſtabliſhed by the expreſs command of Jeſus Chriſt, in theſe words, *nolite tangere Chriſtos meos*; and every law of man which militated with this divine command, was damnable in itſelf; and *therefore*, they again concluded, that bringing clerks before the temporal courts for crimes, was *peccatum in ſe*. They ſaid, that the temporal judge could no more juſtify the arraigning his *ſpiritual father*, than he could juſtify the arraigning his *natural father*, which would be a breach of God's expreſs commandment, "*Honour thy father*," &c. which words extend as well to the ſpiritual as the natural father; and no diſobedience of the ſon in breaking this law could be juſtified by uſage or cuſtom.

TO this it was anſwered, that the ſtat. 4 Hen. VIII. and the arraignment of clerks before the temporal judges, were compatible with the law of God and the liberties of the holy church; that this proceeding had in view the public good of the whole kingdom, which ought to be favoured by all laws. As to the papal decree, and that a breach of it was *peccatum in ſe*, God forbid, ſaid they,

[n] *Tout le counſeil del roy ſpiritual et temporal.* Keilw. 183.

that

that ſuch a concluſion ſhould be made; for there is another decree of equal authority, which requires all biſhops to be reſident at their cathedrals at every feaſt of the year, tho' we ſee that the greater part of them never comply with it. Beſides, this decree was never received in England, and therefore cannot bind here; and the uſage, both before and after the making of it, has always been to the contrary. That before the time of St. Auſtin, marriage was permitted to prieſts; but then a decree was made to forbid it: and becauſe this decree was received in England, as well as in many other places, therefore it became the law that prieſts ſhould not marry. But in ſome parts of the world this law was never received; as among Chriſtians in the Eaſt, where prieſts had always been allowed to marry. In like manner, this decree, never having been received here, was of no binding authority. That the words *nolite tangere Chriſtos meos* were not ſpoken by our Saviour, but more than a thouſand years before his time by *David*; and that the "*anointed*" there ſpoken of were the true believers, as contra-diſtinguiſhed from the unbelievers, who at that time were very numerous in Paleſtine. As to the interpretation put on the fifth commandment, they ſaid, that it would be no breach of it for the ſon to arraign his natural or ſpiritual father; and if they ſhould both be convicted, he might commit his ſpiritual father to the ordinary, and reſpite judgment againſt his natural father, and yet be in perfect obedience to the commandment. But admitting, for ſake of argument, that the temporal judge could not juſtify the arraigning his ſpiritual father, the argument would not hold, nor prove that he might not exerciſe the like judicial authority over all other clerks; for every clerk is not his ſpiritual father. However, after all, they ſaid, this commandment was not to be taken in the literal ſenſe here put upon it; but was to receive a reaſonable interpretation according to the ſubject matter.

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THESE are ſtated to be the arguments uſed by both ſides in this famous conteſt. Upon theſe the judges gave their opinion; which was, that thoſe of the convocation who had agreed to the citing of Doctor Standiſh, had incurred a *præmunire*. Afterwards, the ſame perſons met at *Baynard's Caſtle*, in the preſence of the king; when cardinal Wolſey, in the name of all the clergy, threw himſelf at the king's feet, and making an humble proteſtation in maintenance of the clergy's claim to exemption in criminal caſes, he conjured the king to ſuſpend his deciſion till the matter had been determined by the Pope. The archbiſhop of Canterbury joined in the ſame prayer. The king ſaid, that they had not anſwered the arguments of Doctor Standiſh; and added with firmneſs, "By the order and "ſufferance of God we are king of England; and the "kings of England who have gone before us never had any "ſuperior but God alone; and therefore know, that we "will maintain the right of our crown and temporal juriſ- "diction, as well in this point as in others, in as ample a "manner as our predeceſſors have done before us. And "as to your decrees, we are well aſſured, that you your- "ſelves of the ſpiritualty act in contradiction to the words "of many of them, as has been ſhewn you by ſome of "our ſpiritual counſel on this occaſion; and beſides that, "you interpret your decrees at your pleaſure; therefore "we will not conform to your will and pleaſure more than "our progenitors have."

The king's determination.

WITH this peremptory declaration of the king the buſineſs concluded. The biſhops promiſed that Doctor Standiſh ſhould be diſcharged from the proceſs inſtituted againſt him; and Doctor Horſey was ſo far reſcued from temporal authority, that having remained in a kind of free cuſtody in the houſe of the archbiſhop of Canterbury till the popular clamour was ſomewhat abated, he ſurrendered himſelf privately to the court of king's bench; and having pleaded

pleaded not guilty to the coroner's inquiſition, the king's attorney confeſſed the plea, and he was diſcharged *.

THE clergy ſeem, in this inſtance, not to have loſt any part of their wonted felicity in contending with the ſecular power: they appear to have gained a victory in the deciſion, however they might have failed in argument. It is probably to be aſcribed to the zeal of the clergy diſplayed on this occaſion, that a ſtatute founded on good ſenſe, and ſo neceſſary for the public ſecurity, was ſuffered to expire: nor was it till the king had declared hoſtilities againſt the whole papal authority, that the parliament ventured again to abridge the privilege of clergy. This was in the 23d year of his reign, when clergy was taken from murder and robbery in certain circumſtances: but previous to that, two acts were made reſpecting abjuration and ſanctuary, of which it will be neceſſary firſt to take notice.

THE privilege of ſanctuary underwent a like diſcuſſion with that of clergy. On the occaſion of a claim of this ſort, made by the prior of St. John's, the general queſtion of ſanctuary was brought before the council, in 11 Hen. VIII. The king himſelf was there preſent, and expreſſed a doubt, whether it could ever have been the deſign of our antient kings and popes, in their grants of ſanctuary, to give that privilege in caſes of murder and larceny committed out of the ſanctuary *ſub ſpe redeundi*, all which he judged to be an abuſe: he there ſignified his determination that this privilege ſhould be reduced to the compaſs of its original deſign. It ſeems the abbot of Weſtminſter, in conjunction with cardinal Wolſey, had framed an oath to be taken by all ſanctuary-perſons, by which they bound themſelves not to commit treaſon or felony, either within or without the ſanctuary, *ſub ſpe redeundi*: there was however no ſanction to enforce this oath, but ſuch as could be inflicted by the ſpiritual court for perjury. Moſt

* Keilw. from 180. b. to 185. b.

places

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Abjuration and ſanctuary.

places of ſanctuary, therefore, became reſorts for felons, debtors, and delinquents of all ſorts, where they lived at no ſmall expence upon the plunder of the public *.

We ſhall now ſee what was done by the parliament towards reforming the abuſes then complained of. It was endeavoured, by ſtat. 21 Hen. VIII. c. 2. to ſecure the departure out of the kingdom of all abjured perſons. It enacted, that every perſon who had taken ſanctuary for felony or murder, where he ought by law to abjure, ſhould, after his confeſſion, and before his abjuration, be marked, by order of the coroner, with a hot iron, on the brawn of the thumb, with the letter A, that he might be known for an abjured perſon. It was moreover provided, that any felon or murderer who ought to abjure, refuſing to take his paſſage as limited by the coroner, ſhould loſe the benefit of his ſanctuary, and be taken out and committed to priſon, to be dealt with according to law. But the baniſhment of ſo many abjured perſons began now to be thought not the wiſeſt policy; as many able and expert artificers and labourers were thereby furniſhed to foreign countries. A new method of ordering theſe abjured perſons was ſtruck out by ſtat. 22 Hen. VIII. c. 14. which directed the oath of abjuration to be altered; and that, inſtead of abjuring the realm, as before, ſuch an offender "ſhould "abjure from all his *liberty* of this realm, and from his li- "beral and free habitations, reſorts, and paſſages, to and "from the univerſal places of this realm, which ap- "pertained to the liberty of the king's ſubjects unde- "famed:" and having made this abjuration, he was to be directed by the coroner to any ſanctuary within the realm, which the offender ſhould chuſe, there to remain as *a ſanctuary-perſon abjured* during his natural life, and to be burnt in the hand, as directed by the former ſtatute. If he came out of ſuch ſanctuary, he was to ſuffer death as an abjured perſon returning to the kingdom. Such ſanctuary-perſon committing any petit-treaſon, murder, or

* Kelw. 188, &c.

felony,

felony [p], either in or out of ſanctuary, was to loſe all benefit of ſanctuary. Thus was abjuration put upon a new footing; and ſuch offenders as uſed to avail themſelves of this privilege to eſcape puniſhment, were kept hereafter within the reach of the law.

Clergy again taken from certain offenders.

WHEN ſuch proviſion was made for the due confinement of ſanctuary-perſons, a like policy was purſued in regard to thoſe intitled to clergy; and that benefit was alſo taken away in many caſes where it was before enjoyed. This was effected by ſtat. 23 Hen. VIII. c. 1. an act which partly had in view the ſtat. 4 Hen. VIII. c. 2. upon which we have juſt ſaid ſo much; and partly ſome former ſtatutes relating to the purgation of clerks convict. The preamble recites the ſtatute of Weſtminſter 1ſt, ſtat. 3 Ed. I. c. 2. which enjoined biſhops not to deliver clerks indicted of felony without due purgation [q]: and ſtat. 4 Hen. IV. c. 3. [r] which ordained, that perſons convicted of treaſon not againſt the king's perſon, and notorious thieves delivered to the ordinary as clerks convict, ſhould not make purgation, but be ſafely kept in cuſtody, according to a conſtitution provincial to be made, but which never was made: ſince which, the ſtatute complains, it continually happened, that perſons convicted according to law, and committed to the ordinary, "were delivered for corruption "and lucre;" or, "were ſuffered to make their pur-"gation by ſuch as nothing knew of their miſdeeds." To remedy ſuch abuſes, it was enacted by this ſtatute in the following manner: In the firſt place, clergy was taken away from certain offences; and, in the next place, ſome proviſions were made reſpecting thoſe who were ſtill to enjoy the benefit of clergy; which proviſions were calculated to render that benefit leſs miſchievous than it had been. It was enacted, that no perſon found guilty,

[p] Vid. ſtat. 33 Hen. VIII. c. 25. the preamble of which gives ſome idea how ſanctuary-perſons lived in thoſe privileged places.

[q] VII. ant. vol. II. 134.

[r] Vid. ant. vol. III. 240.

after

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after the laws of the land, of petit-treaſon; for wilful murder of malice prepenſed; for robbing of any church, chapel, or other holy places; for robbing of any perſons in their dwelling-houſes or dwelling-place, the owner or dweller in the ſame houſe, his wife, his children, or ſervants then being within, and put in fear and dread by the ſame; or for robbing of any perſon in or near about the highways; for wilful burning of any dwelling-houſes or barns wherein any grain or corn ſhall happen to be; nor their abettors, procurors, helpers, maintainers, or counſellors, ſhall be admitted to the benefit of their clergy, except only ſuch as are within holy orders, that is to ſay, of the orders of ſub-deacon [1] and above.

As to thoſe in the orders of ſub-deacon and above, when delivered to the ordinary as clerks convict of any of the above-mentioned offences, they were in no wiſe to be ſuffered to make their purgation, nor to be ſet at liberty; but to remain in priſon during life, except they found two ſufficient ſureties to be bound for their good abearing. However [2], the ordinary, if he pleaſed, might, by this act, degrade ſuch clerk convict, according to the laws of the church; and ſend him to the king's bench, where judgment of death might be paſſed on him.

By this ſtatute, a ſevere blow was given to the benefit of clergy, and to the perſonal immunity of the clergy in general; for though they were not involved in all the penalty of this act, and their lives were ſpared, when they were guilty of the above offences; yet they were condemned in ſuch caſe to perpetual impriſonment, and even to death, if the ordinary ſo pleaſed to direct. It was in aid of this act that ſtat. 23 Hen. VIII. c. 11. made it felony, without benefit of clergy or ſanctuary, for a clerk convict to break the priſon of the ordinary and eſcape.

[1] Vid. ant. 6. [2] Sect. 6.

SUCH

SUCH a reformation in the puniſhment of offenders as was made by ſtat. 23 Hen. VIII. c. 1. deſerved every attention and ſupport to render it effectual and complete. But this act, from the terms of it, extended only to ſuch perſons as were *found guilty* after the due courſe of the law; therefore criminals, to prevent their being *ſo* found guilty, would ſtand mute, or by other means prevent a verdict. Again, in caſes where a robbery or burglary was committed in one county, and the thing ſtolen was carried into another, the offender, if found guilty in ſuch *other* county, could not, under this act, be deprived of his clergy; becauſe the jury could not enquire of the robbery or burglary in the firſt county, but only of the larceny in their own. Theſe defects were remedied by ſtat. 25 Hen. VIII. c. 3. which enacts, that all perſons arraigned for any offence mentioned in ſtat. 23 Hen. VIII. c. 1. who ſhall ſtand mute of malice or froward mind, or challenge peremptorily above the number of twenty (to which number felons had been confined by a late ſtatute)[p], or will not anſwer directly to the indictment, ſhall loſe their clergy, in like manner as if they had pleaded and been found guilty. And further, that perſons indicted for ſtealing goods in any county, and found guilty, or who ſtand mute, challenge, or will not anſwer as above deſcribed, ſhall loſe their clergy, in like manner as if found guilty where the robbery or burglary was committed.

THE ſixth chapter of the ſame ſtatute made ſodomy felony; or, as the ſtatute expreſſes it, "the deteſtable "and abominable vice of buggery committed with man-"kind or beaſt." This crime, we have before ſeen, was variouſly puniſhed by our old law[x]; but now it was made a common-law felony, and thoſe who were convicted thereof by verdict, confeſſion, or outlawry, were to ſuffer

[p] 22 Hen. VIII. c. 14. [x] Vid. ant. vol. II. 352.

death

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death and forfeiture as felons; and no perſon *offending in any ſuch offence*, was to be admitted to his clergy: which laſt words go further than the former ſtatute in deſcribing the perſons who ſhall loſe their clergy; unleſs they are to be conſidered as reſtricted by the foregoing, which confines the penalty of death and forfeiture to thoſe convicted by verdict, confeſſion, or outlawry. In the next year an act was made [y] to extend the proviſions of the famous ſtat. 23 Hen. VIII. c. 1. to Wales.

CLERGY was taken from offenders in one or more inſtances by other ſtatutes. By ſtat. 27 Hen. VIII. c. 17. clergy and ſanctuary were taken from ſervants embezzling their maſters' goods within ſtat. 21 Hen. VIII. c. 7. After theſe various experiments towards the abolition of clergy, the legiſlature now ventured further, and deprived perſons in holy orders of the exemption with which they were ſtill indulged by ſtat. 23 Hen. VIII. c. 1. and other ſtatutes. For it was enacted by ſtat. 28 Hen. VIII. c. 1. that in all offences within ſtat. 23 Hen. VIII. c. 1. ſtat. 25 Hen. VIII. c. 3. and ſtat. 25 Hen. VIII. c. 6. (concerning houſe-breakers and other offenders ſtanding mute, and concerning ſodomy), perſons in holy orders ſhall be under the ſame pains and dangers, and be uſed and ordered as perſons not within holy orders: ſo that real clerks were now liable to a capital puniſhment for felony, as well as nominal clerks.

THE remaining ſtatutes concerning clergy are ſtat. 33 Hen. VIII. c. 1. and 14. ſtat. 33 Hen. VIII. c. 12. ſect. 26. and ſtat. 37 Hen. VIII. c. 10. which two laſt we ſhall defer for the preſent. The firſt of theſe made it felony to practiſe witchcraft and inchantment, under pretence of diſcovering where ſtolen goods were to be found; and offenders of this kind, being *lawfully convicted*, were to loſe the privilege of clergy and ſanctuary:

[y] Stat. 26 Hen. VIII. c. 12.

ſo

ſo that perſons who ſtood mute, challenged peremptorily above twenty, or would not directly anſwer, were not deprived of clergy by the words of this act. It was on this account that future acts made to take away clergy, were more particular in naming all poſſible inſtances of conviction and trial in which clergy ſhould be loſt, as will be ſeen in the ſtatutes on this ſubject made in ſubſequent reigns.

By ſtat. 33 Hen. VIII. c. 14. perſons making pretended prophecies, grounded upon coats of arms, badges, ſignets, fields, beaſts, letters of names, or other fancies, were declared to be guilty of felony, without benefit of clergy or ſanctuary: a very ſharp law upon the folly and deluſions of mankind; though a fit companion to that which went immediately before. It cannot be denied that both theſe practices might be abuſed to dangerous purpoſes; and, probably, ſome experience of that kind might have juſtified the parliament in contriving ſuch ſevere means of ſuppreſſing them.

Certificates of attainder.

Since the ſtatute of Henry VII. it was proper that a regiſter of clerks convict and attainted ſhould be kept, that ſuch perſons might not have their privilege more than once. For this purpoſe it was enacted by ſtat. 34 and 35 Hen. VIII. c. 14. that the clerk of the crown, of the peace, or of aſſiſe, within forty days, or, if no term, within twenty days after the beginning of the term following the forty days, any attainder, outlawry, or conviction was had, ſhall not only certify a tranſcript, in few words, of the indictment and proceedings, the name of the clerk, with time and place, and certainty of the felony, to the king's bench, there to remain of record; but alſo deliver a tranſcript of the indictment to the ordinary to whom the clerk was committed. The clerk of the crown in the king's bench was to receive them; and upon the requeſt of any juſtice of gaol-delivery, or of the peace, was to certify

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certify the names of ſuch clerks, with the cauſes of their conviction or attainder.

Sanctuary taken from certain offenders.

HAVING gone through all the ſtatutes that relate to clergy, we ſhall now return to the 26th year of this king, and take a view of the remaining acts about the privilege of ſanctuary. The privilege of ſanctuary was taken from all offenders in high-treaſon, by ſtat. 26 Hen. VIII. c. 13*. In the following year a law was made in aid of the regulation which had been lately eſtabliſhed for the due ordering and ſafe cuſtody of ſanctuary-perſons. It was directed by ſtat. 27 Hen. VIII. c. 19. that all perſons privileged in any ſanctuary ſhould wear a badge, and that any perſon who appeared abroad, out of the ſanctuary, without ſuch badge, ſhould immediately loſe his privilege, and be committed to the common gaol. Such perſons were not to appear out of their lodging before ſun-riſing, or after ſun-ſetting, upon pain of impriſonment; and for the third offence they were to loſe their privilege. That the inhabitants of theſe privileged places might not look beyond the limits of their confinement, in any caſe where their neceſſities could be ſupplied within, the governors of ſuch ſanctuaries were empowered to hold plea of debt under 40l. and of treſpaſſes and covenants between privileged perſons and other inhabitants of the ſanctuary.

NOTWITHSTANDING this attempt to regulate the œconomy of ſanctuaries, ſome few years after, it was thought more expedient to aboliſh certain of theſe privileged places; and not to allow thoſe which remained to extend any immunity to offenders of a particular deſcription. It was enacted by ſtat. 32 Hen. VIII. c. 12. generally, that all ſanctuaries, except pariſh-churches and their church-yards, cathedral churches, hoſpitals, and churches collegiate, and all chapels dedicated and uſed as pariſh-churches, ſhould be extinguiſhed and of no effect. But *Wells* in

* Sect. 3.

Somerſet-

Somerſetſhire, *Weſtminſter*, *Northampton*, *Norwich*, *York*, *Derby*, *Launceſton*, and *Manchester*[a], were ſtill to continue places of ſanctuary. This act was principally occaſioned by the diſſolution of religious houſes, many of which had privilege of ſanctuary; and the ſcites of them would ſtill have enjoyed the ſame privilege, though the ſociety which was to have the direction and government of it no longer exiſted; ſo that great diſorders would probably have enſued, if a like proviſion had not been made.

It was moreover enacted, that the following offenders ſhould no longer enjoy the privilege of ſanctuary in any place whatſoever; namely, thoſe who committed wilful murder, rape, burglary, robbery in or near the highway, or in a houſe, putting the owner, his wife, children, ſervants, or any other within the ſame in fear of life; thoſe who were guilty of felonious burning of houſes, or barns with corn; robberies of churches, chapels, or other hallowed places, with their abettors and procurors; and all thoſe from whom clergy was taken by any of the foregoing laws. Several new regulations were ordained by this act reſpecting ſanctuaries. The chancellor was empowered to appoint commiſſioners to make perambulations, and to ſettle the boundaries of them. Not above twenty perſons were to be admitted at one time into any ſanctuary. Their names were to be called over every day; and if any made default three days together, he was to loſe his privilege.

This was the laſt law made in this reign concerning theſe unhappy objects, who at this period ſeem to, and muſt, from the nature of the thing, have been very numerous, and not to be managed but with great difficulty. The inſtitution itſelf, after all the care of the legiſlature to regulate it, was pregnant with evils, which never could be remedied but by entirely aboliſhing it. The beſt part of the

[a] And inſtead of Manchester, *Chester*, by ſtat. 33 Hen. VIII. c. 15.

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laws we have juſt mentioned, was that which took away this privilege from certain offences. Theſe ſomewhat abated the miſchief, till this relick of ſuperſtition was quite deſtroyed in the reign of James I.

IT may be thought, that as many of theſe ſtatutes relate to a ſubject which is now no more, a ſhorter account of them would have been ſufficient; but the ſubſtance of them could not well be compreſſed in a ſmaller compaſs; and if they deſerved conſideration in a hiſtory of the changes in our law, they deſerved, at leaſt, to be treated in a manner that would render them intelligible. Indeed, if the conſideration of a ſubſequent revolution was to have weight with the hiſtorian, not only theſe ſtatutes, but moſt of the many criminal regulations, on which we have juſt been ſpending ſo much time, might be conſigned to oblivion. For the ſweeping acts of Edward VI. and queen Mary repealed all the ſtatutes taking away clergy, all thoſe for trying treaſon in a way differing from the courſe of the common law, and all thoſe creating treaſons and felonies; and when theſe were abrogated, what remained to poſterity of the penal laws of Henry VIII.?

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HENRY VIII.

Leaſes for Years and at Will—Leaſes by Tenant for Life, &c.—Of Fines—Manner of ſuffering Recoveries—Uſes—A Uſe in Tail—Operation of the Statute of Uſes—Covenants to raiſe a Uſe—A Leaſe and Releaſe—Conſtruction of Wills—The Court of Chancery—Court of Requeſts—Preſident and Council of the North—Action of Covenants—Of Aſſumpſit againſt Executors—Of Trover—Debt and Accompt—The Criminal Law—Of Trials in two Counties—The Eccleſiaſtical Court—King and Government—Bills of Attainder—Torture—Of the Statutes—Of the Year-Books—Fitzherbert—Saint Germain—Raſtell—Printing of Law Books—The Regiſter—Miſcellaneous Facts.

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THOUGH our courts, during this reign, furniſhed deciſions upon almoſt every queſtion in the law, we ſhall only ſelect ſuch of them as relate to the new points then moſtly agitated; the alterations made by parliament having taken up too great a ſpace to allow us to enlarge much on this part of our Hiſtory.

MANY queſtions concerning leaſes of various kinds were agitated in this reign, and ſome were adjudged upon ſuch ſufficient grounds, as to ſtand the teſt of future examination without being ſhaken. Of thoſe which were only agitated, but not decided upon, was a doubt upon a very common method of letting lands, whether it ſhould be conſtrued a leaſe for years, or at will: this led to much enquiry

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quiry into the nature of a leaſe at will, and how it differed from a term for years.

Leaſes for years and at will.

In the third year of the king a leaſe came into queſtion, where one had let to another to hold *at his own will*; but it having been long laid down [b], that a leaſe at will muſt be at the will of both parties, it was held by three juſtices in the common-pleas, that this ſhould be conſtrued to be at the will both of the leſſor and leſſee; for if it was at the will of the leſſee, he might keep it, perhaps, for his life, contrary to the rule of law, which ſays no freehold ſhall paſs without livery [c].

But the occaſion when the properties of this ſort of leaſe were thoroughly diſcuſſed was in *Potkyns*'s caſe, in 14 Hen. VIII. A leaſe had been made to him in the 10th year of Henry VII. for term of a year to commence at Michaelmas, and continue till the end of *the ſaid year, and ſo to the next year, de anno in annum*, as long as the parties pleaſed. Theſe were the terms of the leaſe. Potkyns held the land for twenty-four years; at the end of that time the leſſor determined the leaſe, and brought an action of waſte: upon which it was moved in arreſt of judgment, that it was only a holding at will, and therefore the defendant was not liable to waſte under the ſtatute. The objection was thus pointed: that the leaſe being only for a year, and beyond that from year to year, as long as the parties pleaſed, the firſt was a leaſe for a year, but the remainder was only at will; for, ſaid they, every leaſe for years ſhould have a certain determination, otherwiſe it is not a leaſe for a *term* of years: and here there is no certain determination, for it is at will; therefore they concluded the firſt to be a good leaſe for a year, and the remainder to be only at will. This point was frequently argued at the bar, and when it came for the court to give judgment, there was as great a difference of opinion among

[b] Vid. ant. vol. III. 336. [c] 3 Hen. VIII. Keilway 162.

the

the judges; for *Fitzherbert* and *Brooke* held it to be clearly a leaſe at will after the firſt year; but *Pollard* and *Brudnell* the chief juſtice held it to be ſtill a leaſe for a year. As this was a matter of ſome importance, being that upon which it was ſo depend whether there ſhould be any longer ſuch a deſcription of eſtates as thoſe at will, it may be curious to hear what was ſaid on both ſides.

It was ſaid by *Fitzherbert*, who thought it was an eſtate at will after the firſt year (for there was no doubt about the firſt year), that if it was not a leaſe for years at the commencement, it could not be made ſo by occupation. And in anſwer to what had been urged by the counſel, he ſaid, it was a conceit to contend, that if the party held from year to year at the will of both, the *will* was only to be exerciſed at the commencement of every year: the will certainly extended to every part of the year; ſo that they might determine it at any part thereof. Again, when the counſel had ſaid, that the word *will* was void, he ſaid it was not ſo: but that operated as a ſort of condition; for if I let land for a year *at my will*, the leſſee would aſſuredly have it only at my will. Thus if I let for years, at my will, (but leave *will* out) as a leaſe for a year, and ſo from year to year, without limiting the years; this, for want of a certain determination, could not be a leaſe for years; therefore it muſt follow, that it was a leaſe at will. Again, if a leaſe was made for years generally, without any certain limitation of years, then, in the opinion of ſome, he would have it only two years; for two years would ſatisfy the plural noun in the leaſe: but if it was for twenty years *at will*, this would be determinable at will by either party. The ſtat. Weſtm. 2. expreſsly requires that the leſſee ſhould have ſuch an eſtate as the leſſor could not determine; if a leaſe, therefore, for years was made to commence at ſuch a feaſt, this would not be good, becauſe it wanted the other limitation, when it was to end. The conceit of there being ſevera leaſes for a year was reprobated equally

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by *Brooke*. He ſaid, that a leaſe for years ſhould be perfect by the firſt wording of it, or it was not a leaſe for years: and this, he ſaid, was an entire leaſe and not ſeveral, and the whole commenced at once, notwithſtanding this pretended ſeparation from year to year. Thus, if land was let from Michaelmas next, reſerving rent till the Michaelmas following, and *ſo* the next year, and the third, this was a good leaſe for three years, becauſe the beginning and determination of it was ſufficiently certain, without waiting for any after-circumſtances to explain it.

THE eſtates known in the law were fee-ſimple, fee-tail, for term of life, for term of years, and at will; and each was created by ſpecial words peculiar to itſelf: waſte lay againſt tenant for life and for years by the ſtatute; but tenant at will was at the common law. If a leaſe was made to a man till he was promoted to a benefice, and he had livery, he had an eſtate for term of life: ſo of a leaſe to baron and feme during the coverture; becauſe theſe depended on a condition that had a human determination. Not ſo of other conditions; for a leaſe ſo long as ſuch a tree grew, is but at will; becauſe, ſaid *Brooke*, it is not natural for an eſtate to depend on ſuch a condition. He thought that all eſtates for years ſhould be certain in their determination, and not at the will of any one, for that would be a contrariety; for which reaſon he could not agree with thoſe who ſaid, that *a leaſe for ten years at will*, ſhould be determined at will; for the words *at will* were inconſiſtent and contrary, and therefore were void. He admitted an eſtate for years might be determinable at will, on a condition, but not otherwiſe; as on condition *if ſuch a one is not ſatisfied, or declare his diſſent, then it ſhall ceaſe*. This is a good condition, although only at the will of a ſtranger. He admitted that to be certain in its determination, which could be made ſo by conſtruction of the words creating it. That a leaſe *for years*, he agreed, might be conſtrued good for *two years*, becauſe that ſatisfied the plural term, and

and was the greateſt certainty that could be obtained out of the words. A leaſe for a thouſand days was good, becauſe it was as certain to count by days as by years. If one leaſed for a year, and ſhewed the commencement of the term, and ſo the ſecond, third, and fourth year, this would be good for four years, becauſe it was ſufficiently certain when it commenced, and when it was to determine; but if it was *from year to year*, there was no certainty at all. Thus a leaſe for years, ſo long as *I. S.* lived, if no livery was made, would be only at will, becauſe by the firſt words of its creation there was an uncertainty of determination; ſo there was no certainty in the firſt words of creation, when a leaſe was *from year to year*; but if it was for *one year, and ſo for the next year, and ſo from year to year*, it would be good for the firſt and ſecond year; but for the others, for want of certainty, it would be only at will. He ſaid, he ſaw no difference between the above leaſe after the firſt two years, and one *for as many years as we can agree*; which, for want of certainty, would clearly be a leaſe only at will. Such were the reaſons given by the two judges who thought this a leaſe at will.

On the other ſide, it was argued by *Pollard*, that conſidering how many leaſes were made in this way, it would be more reaſonable to ſupport it as a leaſe for years; and he thought it a very good leaſe for years. He ſaid, that altho' a leaſe *for years, and ſo from year to year*, would be at will, becauſe it was not determinable upon any certainty; yet, if a leaſe was made *for a year, and* so *from year to year, as long as the parties agreed*, the word *ſo* implied that the leſſee ſhould have the ſubſequent years in the ſame manner as he had the firſt; and it would be a good leaſe for ten or twenty years, if the parties ſo long agreed. The ſame as if the king granted a ward and marriage, and ſo *from ward to ward durante minore ætate*; in which caſe, if the ward died within age, and the next heir was likewiſe within

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age, the patentee would have that ward alſo, in the ſame manner he had the firſt. And as it was agreed by the other ſide, that a leaſe for *a year, and ſo for the next*, was good for the next by reference, why ſhould it not alſo be good, if *from year to year?* He ſaid, that if a leaſe was made for ten years at will, the words *at will* would be void; the ſame as in a feoffment in fee, an *habendum* for years would be void. As to the certain determination, he thought it ought to be determinable on a certainty, or on what, though not a certainty at firſt, might become certain; for a leaſe determinable on condition was not intirely certain in its determination. He ſaid, that in caſe of a leaſe from year to year at the will of the parties, when the leſſee entered into any one of the years, neither the leſſor nor the leſſee could determine his will for that year; and if they went on ſo for ten years, it would be an intire leaſe, and not, as ſome ſaid, a ſeveral leaſe every year.

In all this the chief-juſtice *Brudnell* agreed with *Pollard*. He added, that a leaſe for years determinable on an uncertain event, was no uncommon thing. Thus a leaſe for years by an infant might be determined when he came of age; a leaſe by a tenant for life was determinable by his death; a leaſe with proviſo that when the leſſor had a mind to occupy the land, then the leaſe ſhould ceaſe, was held good, though determinable at will. He ſaid a leaſe for three years, and ſo from three years to three years, was a common way of letting parſonages, and theſe were eſteemed good leaſes. Again, a leaſe till the leſſee had levied 10l. of the rents and profits, was a good leaſe; and yet there was no certainty when it ſhould determine: the ſame in this caſe, when the will was determined, then that certainty of determination had taken place, which was marked by the terms of the original creation.

Such were the arguments uſed on both ſides of this famous queſtion, which after all was not determined, tho' they all agreed in giving judgment againſt the plaintiff.

For

For notwithſtanding the leaſe was at an end, as ſtated in the declaration, it was ſtated in the writ, *quem* TENET *ad terminum*, inſtead of *tenuit*; which variance was held fatal; and the principal queſtion was left in its former ſtate, with the addition of all the topics which this ſolemn diſcuſſion had furniſhed on both ſides [d]. In 28 Hen. VIII. a caſe ſimilar to one that had been mentioned by the chief-juſtice, is to be found in *Dyer*. A parſon leaſed his rectory for the term of three years, and after the end of the three years, for another term of three years then immediately next and enſuing; and after the end of that three years, to the end of another three years, during all the term of the natural life of the leſſor: and it was held, by the opinion of moſt of the benchers of the Middle Temple, and ſeveral juſtices of the common-pleas, that the termor ſhould have only an eſtate for nine years, if the leſſor ſo long lived, for it wanted words to make an eſtate for the life of the leſſor; but if it had been, *and ſo from three years to three years*, during the life of the leſſor, this perhaps would have done: and it was ſaid, that for the leſſee to have a leaſe for the life of the rector, he ſhould have livery of ſeiſin [e].

OTHER caſes upon leaſes happened in this reign, which, though of leſs importance than the above, are more worth mention, becauſe they were determined upon and became guides in future times. Theſe not being upon any particular head of enquiry, can be given only in a miſcellaneous way. In 28 Hen. VIII. we find a caſe came before the court, of a leaſe for term of years, with a reſervation of all woods and underwoods; and it was a queſtion, whether an action of waſte would lie againſt the leſſee for cutting trees. It ſeemed to *Baldwin* and *Shelley* that it would not; for the wood being excepted, made no part of the land demiſed, and the ſtatute forbids waſte

[d] 14 Hen. VIII. 10. b. [e] 28 Hen. VIII. 8. Dyer, 24. 151.

in

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in terris, boſcis, ſeu gardinis ſibi DIMISSIS. However, they thought there might be a remedy by treſpaſs [f].

THE nature of the poſſeſſion of leſſee for years was agitated in a caſe where the leſſor made a feoffment while the termor was on the land, and in occupation of it: it was doubted whether the feoffee obtained thereby the freehold and rent. *Shelley* thought the feoffment was good, becauſe the termor and the leſſor having diſtinct intereſts, the one a chattel, and the other a freehold, the freehold might well paſs from the one without infringing the right of the other; though it would be otherwiſe, if the new eſtate had been a leaſe for years. But, on the other hand, *Baldwin* and *Fitzherbert* were of opinion, that nothing paſſed by the feoffment, unleſs the termor agreed to it; for the leſſor had no right in the poſſeſſion during the term; and the livery and ſeiſin being nothing but a transfer of the poſſeſſion, it could not be made without injury to the termor: they held, therefore, that the common courſe ſhould be adhered to, namely, for the leſſor to grant the reverſion, and the termor to attorn. *Baldwin* added, that if the feoffment was made with the concurrence of the termor, the term and the rent would be gone, for this would be a complete ſurrender: but *Fitzherbert* denied this, for the termor's intereſt could not be ſurrendered without his aſſent; and he quoted ſeveral caſes where it had been held, that the termor's conſent to a livery made by the leſſor was conſiſtent with the continuance of his term. However, after this canvaſs, the point went off without a deciſion [g].

A LEASE was not uncommonly made with a condition by which the leſſee was bound not to alien to a particular perſon. It happened that a leſſee being ſo bound, aliened to one who aliened to the perſon prohibited by the leaſe: it became a queſtion, whether this was a breach of the

[f] 28 Hen. VIII. Dyer, 192 190. [g] 28 Hen. VIII. Dyer, 33. 13.

condition;

condition: it ſeems to have been the opinion of *Dyer* that it was not, becauſe every condition ſhould be taken ſtrictly[h]. He likened it to a feoffment on condition that the feoffee ſhould not infeoff *I. S.* and the heir infeoffed *I. S.* which was no breach of the condition. Another caſe of this ſort happened in the court of augmentations. A leaſe had been made for years, on condition, that if the leſſee during his life aſſigned his term to another without aſſent of the leſſor, the leſſor might enter. The leſſee deviſed the term without his aſſent; and it was argued that this was a breach of the condition. It ſeemed to *Brooke*, and *Hales*, maſter of the rolls, that this was a forfeiture, for the deviſee ſhall be ſaid to be in of the aſſignment made in the life-time of the leſſee; and they took a difference between an aſſignment made by the law, and by the leſſee himſelf; for they conſidered it as a clear caſe, that had the term been taken by an execution, there would have been no forfeiture. But this, like the former caſe, went off without a deciſion[i].

A LEASE for years was made of land with a ſtock of ſheep upon it, and a rent was reſerved. All the ſheep died, and it was doubted whether the rent ſhould be apportioned. The ground upon which thoſe reſted, who thought it ſhould be apportioned, was, that it was the act of God, without any default in the leſſee. But it was ſaid, that the law was otherwiſe; for if the ſea overflowed the land, or it was burnt with wild-fire, the rent would not be apportioned, but the whole rent ſhould iſſue out of the remainder; though where part was evicted by an elder title, the rent ſhould be apportioned. And of this opinion were *Bromley*, *Portman*, *Hales*, ſerjeants; *Locke*, juſtice; *Brooke*, and others of the Temple; but *Marvyn*, *Browne*, juſtices, *Townſhend*, *Griffith*, and *Foſter*, were of a contrary opinion: though all thought it conſiſtent with reaſon

[h] 31 Hen. VIII. Dyer, 45. 1. [i] 31 Hen. VIII. Dyer, 45. 3.

and

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and equity that the rent ſhould be apportioned. This caſe was afterwards made the ſubject of a *reading* in one of the inns of court, as was very common in thoſe days; and there it was the opinion of *More* the reader, together with *Brooke*, *Hadley*, *Forteſcue*, and *Browne*, juſtices, that the rent ſhould be apportioned [k].

No little debate, nor ſmall difference of opinion, aroſe upon the effect of leaſes made by tenants for life and other tenants, who tho' poſſeſſed of a greater eſtate than for their own lives, yet could not make leaſes that extended beyond that period, without infringing the claims and titles of thoſe who followed them; all which ſhewed the need there was for the parliament to take up the ſubject, and make ſome ſpecific declaration thereon, as was actually done in this reign [l].

Leaſes by tenant for life, &c.

We find it laid down by *Fitzjames*, chief-juſtice of the king's bench, in 24th year of the king, with the concurrence of many others, that if a tenant for life leaſed land for years, and died, the leaſe became void, and the rent determined: the ſame of a parſon's leaſe; and though his ſucceſſor received the rent, the leaſe was not good againſt him; for being void by the death of the leſſor, it could not be perfected by any acceptance or ratification [m]. In a ſubſequent caſe, we find a difference made between a leaſe for years and for life; for after recogniſing the foregoing opinion, it was ſaid, that if a parſon made a leaſe for life, and died, and his ſucceſſor accepted fealty, he ſhould be bound by it during his life [n]. In the caſe of a leaſe for years, made by the biſhop of London, reſerving rent to him and his ſucceſſors, it was argued, whether it was void by the biſhop's death; and it was held by many that it was: though it was agreed, ſays Dyer, that an abbot, biſhop, or thoſe who have an

[k] 35 Hen. VIII. Dyer, 56, 15.
[l] Vid. ant.
[m] 24 Hen. VIII. New Caſes, 152.
[n] 32 Hen. VIII. New Caſes, 151.

eſtate

eſtate of inheritance, as tenants in tail, might make a leaſe for years rendering rent; and it would not be void by their death, but voidable only at the pleaſure of their ſucceſſor, or the iſſue; for if they accepted the rent, the leaſe would be good. But they adhered to the former opinion, that in the caſe of a parſon, or tenant for life, ſuch leaſe would be abſolutely void[h]: and ſo it was again held, in the caſe of a parſon's leaſe, in 38 Hen. VIII[i].

WITH regard to leaſes by tenant in tail, it was held by the juſtices of both benches, where *ceſtui que uſe* in tail and his feoffees made a leaſe for years, and died, and the iſſue aliened the land by fine, before he had made any entry upon the termor, or received any rent, and the alienee accepted the rent; they held, that the alienee could not have avoided the leaſe, even if he had not accepted the rent[k]; and that it could not be avoided without entry by the iſſue.

A METHOD had been contrived, by which tenant in tail could make a leaſe for years that would be good againſt the iſſue. The tenant in tail and the intended leſſee would acknowledge the land to be the right of *A.* a ſtranger; and then *A.* would, by the ſame fine, grant and render to the leſſee for years, with remainder to the leſſor and his heirs[l]. This device is mentioned in a caſe in 36th of the king, which was four years after the *enabling act*, and the ſtatute which made a *fine* a bar to the iſſue. As, therefore, before the one of thoſe acts, a leaſe let in this way would not bind the iſſue; and after the other, the tenant was by law enabled to let under certain terms; ſo this contrivance ſeems to be neceſſary, ſince thoſe acts, in caſes where it was intended to grant a leaſe of longer date than twenty-one years, or three lives, or not within the other terms of the enabling act.

[h] 32 Hen. VIII. Dyer, 46. 9.
[i] New Caſes, 154.
[k] 33 Hen. VIII. Dyer, 51. 17.
[l] 36 Hen. VIII. New Caſes, 142.

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It was moſtly in conjunction with the preſent faſhionable conveyances, that topics of real property were agitated in the courts; a fine, a recovery, a deed to raiſe or convey uſes, or a will, was uſually the occaſion upon which any litigation of this ſort aroſe. To acquaint ourſelves, therefore, more intimately with the learning of real property in this reign, we ſhall now proceed to conſider the methods in which it was moſt commonly transferred. Firſt, of fines and recoveries.

Some queſtions upon the nature of fines and recoveries were agitated in our courts, and deſerve not leſs attention than the ſtatutes which have already been mentioned reſpecting thoſe two methods of conveying lands and hereditaments.

Of fines.

In the 19th of the king, a very important queſtion (which has already been alluded to[a]) was agitated, upon the effect of this ſtatute of fines. A tenant in tail had levied a fine with proclamations; and the five years paſſed in his life-time: he died, and it was made a queſtion, whether his iſſue ſhould be barred? This was argued at Serjeant's-inn before all the juſtices, who were divided in opinion. *Englefield*, *Shelley*, and *Coningeſby*, thought that the iſſue ſhould not be barred; for they ſaid, that by ſtat. 4 Hen. VII. c. 24. a fine was to conclude both privies and ſtrangers, with certain ſavings; namely, to all perſons and their heirs (other than the parties to the fine), their right and intereſt which they had at the day the fine was engroſſed, ſo that they brought their action, or made their entry, within five years after the ingroſſing; ſaving alſo, to all other perſons, ſuch right, title, and intereſt, as would firſt grow, remain, deſcend, or come to them after the fine engroſſed, or proclamation made, by force of any entail, or other cauſe or matter done before the levying of the fine. They contended, by this laſt ſav-

[a] Vol. ante. 239.

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ing the iſſue in tail were aided; for they are the firſt to whom a right would deſcend after the engroſſing of the fine: and though the father was privy to the fine, yet the iſſue is neither party nor jury; for he claims by the donor, and not by the donee, notwithſtanding he muſt convey himſelf to the land by the father. For, they ſaid, it was not like where a father diſſeiſed a grandfather of his land in fee, and levied a fine: then the grandfather dies, and afterwards the father; in which caſe the fine would bar the ſon, becauſe he could not convey the fee-ſimple to himſelf but through the father, who was party to the fine, and therefore as heir to him he was privy to the fine.

THE juſtices on the other ſide were *Fitzjames*, *Brudnell*, *Fitzherbert*, *Brooke*, and *More*. They ſaid, that the intent of the makers of the ſtatute, as appears by the words of it, was, that a fine ſhould be at an end, and ſhould conclude as well privies as ſtrangers; and if no exception had been made in the above words, all perſons, as well the iſſue in tail as others, would be concluded. As to the exceptions, they ſaid, in the firſt there was no aid given but to femes covert; in the ſecond, all ſtrangers are aided who had title to the land at the time of the fine levied, if they brought their action, or made their entry within five years; but the iſſue are not aided by either of theſe two exceptions. The third ſaving is in favour of all other perſons, which muſt be intended all ſtrangers to the fine, and not privies; and by virtue of that ſaving, all ſtrangers to a fine, to whom a remainder in tail, or a diſcent in tail, ſhall firſt accrue after the ingroſſment, ſhall be aided. Thus if tenant in tail diſcontinued, and the diſcontinuee levied a fine with proclamations, and the five years paſſed, and then the tenant in tail died, the iſſue might have another five years, by virtue of that ſaving in the act. The intention of the makers was not that he who claimed by the ſame title as his anceſtor who levied

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the fine, ſhould be aided; for ſuch iſſue in tail is privy to his anceſtor by whom he is to make his diſcent, and all privies are clearly concluded by ſuch a fine: they therefore were of opinion, that the iſſue in tail were barred by ſuch fine. All the juſtices agreed, that if a ſtranger to a fine, to whom a remainder in tail or other title firſt accrued after the fine, did not make his claim within five years, his iſſue would be barred for ever[t]. This, no doubt, became the governing opinion on the ſtat. 4 Hen. VII. till, to remove all difference of ſentiment, it was ſo declared by ſtat. 32 Hen. VIII. as has been before ſhewn.

THERE is nothing further in the books of importance on the ſubject of fines, till the 27th year of the king; when we find a caſe, where a fine had been levied *ſur grant et rendre*; in which the conuſee granted to the conuſor the lands in tail, on condition that he and his heirs carried the ſtandard of the conuſee, when he went to battle; and if he or his heirs failed therein, then the land ſhould remain to a ſtranger. Upon its being put to the court, whether this was a good remainder, *Fitzherbert* ſaid, he had never before ſeen a fine levied upon condition; and though he thought ſuch a fine clearly good when levied, he doubted whether the juſtices would be willing to take ſuch, becauſe it was a very old language in the law-books, that *finis finem litibus imponit*; which ſeemed to him not much promoted by ſuch conditions. As to the remainder, he thought it good; and that the ſtranger took it before the condition broken: and when it was objected that the remainder, as it depended on a condition, could not take effect till the condition was broken, he maintained what he had firſt ſaid; but had it been a feoffment, he ſaid, that if the remainder did not take effect at the time *livery* was made, it could not afterwards. However, no judgment was given[u].

[t] 19 Hen. VIII. Dyer, 2. 1. [u] 27 Hen. VIII. 24.

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