CHAP. XXX.

HENRY VIII.

boke of the Ordinaunce to be obſerved by the Officers of the King's Eſchecker for fees-taking. This ordinance for regulating fees in the exchequer was made in the time of Henry VI. [a] To theſe productions of this reign may be added two pieces that have lately been brought to light: one intitled, "A Replication of a Serjaunte at the Lawes "of England to certayne Pointes alleaged by a Student of "the ſaid Lawes of England, in a Dialogue in Engliſhe "between a Doctor of Divinity and the ſaid Student;" the other, "A litle Treatiſe concerning Writs of Sub-"pœna." The latter is thought to be written by St. Germyn, in vindication of the paſſages in his Doctor and Student that had been attacked by the ſuppoſed Serjeant in the former tract [b].

Some publications of this period, on the controverſies about religion, may, from the incidental diſcuſſion of certain points of eccleſiaſtical juriſprudence, be reckoned in the claſs of law-books. Such was "A Treatiſe concerning "the Diviſion between the Spiritualty and Temporalty;" which was alſo printed under the title of "The Paceſier "of the Diviſion between the Temporalty and Spiritualty." This is attributed to St. Germyn; and the principal part of Sir Thomas More's Apology is levelled at this work. To this St. Germyn replied, in another tract intitled, "*Salem* "*and Bizance*; a Dialogue betwixte two Engliſhe Men, "whereof one was called Salem, and the other Bizance," which occaſioned Sir Thomas More's "Debellacyon of "Salem and Bizance." The two laſt works were printed in 1533 [c]. To theſe may be added other treatiſes, the authors of which are not known: "A Treatiſe concerning "divers of the Conſtitutions provincial and legatine:" "A Treatiſe concerning the Power of the Clergy and the "Laws of the Realm;" both printed by Godfrey. "The

[a] Typ. Antiq. 447, 448.

[b] Theſe two pieces are now printed for the firſt time in Mr. Hargrave's firſt volume of Law Tracts.

[c] Typ. Ant. vol. I. 402, 411, 478.

true

"true Difference between the Regal Power and the Eccle-"siaſtical Power[q]." "The Liberties of the Clergy col-"lected out of the Laws of the Realm, by John Goodall." "A Dialogue between a Knight and a Clerk on Power ſpi-"ritual and temporal[r]." We find alſo a tranſlation of the Conſtitutions provincial and legatine, printed in 1534.

Printing of law-books.

NEXT to the performances of writers, thoſe of printers are to be reckoned among the helps to the ſtudy of the law. At the opening of this reign, Pynſon was continued in the appointment of king's printer, and he was ſucceeded by Thomas Berthelet, in 1529. Berthelet was the firſt who had this office granted to him by patent: the grant was for life, and he kept it during the whole of this reign[s]. The printing of law-books lay principally with theſe printers, with John and William Raſtell, and with Robert Redman; all of whom printed the ſtatutes, and various law-treatiſes, over and over again.

IT is unneceſſary to enumerate the ſeveral collections of the ſtatutes at large that were printed in this reign[t]; it is ſufficient to obſerve of them in general, that they uſually bore the title of *Magna Charta*, or *Liber Magnæ Chartæ*, and they commonly contained all the acts down to the time of their publication. But ſome of thoſe editions deſerve more particularly to be remembered. In 1531, Berthelet printed ſome ſtatutes with the common title of *Magna Charta, cum aliis Statutis*. Some few months after, in 1532, he printed another collection, with the title of *Secunda Pars Veterum Statutorum*. On the back of the leaf he informs the reader, that the following ſtatutes were known to few, and were now printed for the firſt time,

[q] This book has been attributed by ſome to Henry VIII.; by others to biſhop Fox. Typ. Antiq. vol. I. 354.

[r] Typ. Antiq. vol. I. 324. 384. 402. 437.

[s] Ibid. 241. 417.

[t] The following are different editions of the ſtatutes at large: By Pynſon, in 1519, 1526, and 1527; by Wynkyn de Worde, in 1528; by Redman, in 1525, and 1539. Typ. Antiq. 177. 265. 275. 279. 386. 396.

CHAP. XXX. HENRY VIII.

having been moſt of them examined with the parliament-rolls; and becauſe ſome other ſtatutes, printed with *Magna Charta*, were intitled *Vetera Statuta*, he thought the preſent might very properly be called by the title he had given them [u]. Theſe titles ſeemed to pleaſe the editor; for in 1540, we find theſe two books again printed by Berthelet [x]. In 1543, the ſame printer publiſhed, in one volume, all the ſtatutes from Hen. III. to the firſt of Hen. VIII. [y]. Before that, in 1534, there was printed by Redman, an edition of the ſtatutes in Engliſh, tranſlated by *George Ferrer*, which was reprinted in 1542 [z].

NEXT to the ſtatutes at large, the abridgement of them preſents itſelf. The Abridgement, mentioned in the former reign, ſeems to have been frequently reprinted. *Le Breggement de toutz les Eſtatuts* was printed by Pynſon in 1521; and again, with additions by Wm. Owein of the Middle Temple, in 1528 [a]. In 1527, an abridgement of the ſtatutes was printed in Engliſh, by John Raſtell [b]; and in 1533, with conſiderable additions, by Wm. Raſtell, under the title of "*The grete Abregement of the Statutys of Englond, untyll the 22d yere of Henry* VIII [c];" which was reprinted with the ſame title by Petit, and alſo by Myddylton, in 1542, containing the abridgment of ſtatutes down to 33 Hen. VIII [d].

THUS far of collections of the ſtatutes at large, and of abridgements of them. We find ſome ſpecimens of thoſe partial publications that have become of late days very common from the uſe they are of in practice. In 1538 was printed, *A booke, containing the ſtatutes which the king had enjoined to be put in execution by juſtices of peace, ſheriffs, bailiffs, conſtables, and other miniſters of juſtice* [e]. It ſhould be added to this account of the ſtatutes, that they

[u] Typ. Antiq. 419.
[x] Ibid. 436.
[y] Ibid. 443.
[z] Ibid. 394. 554.
[a] Ibid. 267, 268. 281.
[b] Typ. Antiq. 330.
[c] Ibid. 429.
[d] Ibid. 554. 573.
[e] Ibid. 432.

were

were alſo printed regularly after every ſeſſion of parliament.

THE printing of the year-books was carried on with great earneſtneſs during this reign; but, as has been before obſerved, owing to their being generally printed without a date, the time of their appearance, for the moſt part, cannot be aſcertained[e]. We know that they were moſtly printed by Pynſon, by Berthelet, and by Redman. The earlieſt that has been found with a date, was printed in 1517, by Pynſon[f]. They were uſually printed ſingle; but thoſe from 22d to 28th of Ed. III. inclusive, were printed in one publication, in 1532. The famous *Annus Quadrageſimus* was not printed till 1534[g]. Many remained unprinted at the cloſe of this reign. Several antient law-books were printed and reprinted. In 1522, we find the *Natura Brevium*, ſince called the *Old Natura Brevium*: in 1525, *The Olde Tenors, newly corrected*[h]. In 1531 was printed, by William Raſtell, *The Regyſter of the Wryttes orygynal and judycyall*[i]. Britton was printed by Redman, but without a date; as was *Statham's Abridgement* by, or rather for, Pynſon, who employed Tailleur, a printer of Roan in Normandy, to print Littleton, and many other books, amongſt which this was moſt probably one, as it bears Tailleur's mark[k]. The *Novæ Narrationes* were printed, but without a date.

MOST of theſe books were reprinted by all the printers during this reign; law-books and ſchool-books being thoſe articles which the early printers were more frequently called upon to multiply than any other. But none paſſed through the preſs ſo often as Littleton's Tenures; the print-

[e] However, thoſe verſed in Typographical Antiquities have fixed the date of ſome. The 46th Ed. III. in 1517; the 7th and 48th Ed. III. in 1518; the 50th Ed. III. in 1519; the 47th Ed. III. in 1520. Theſe were printed by Pynſon, as was the *Liber Aſſiſarum*, without a date: Typ. Antiq. 264, 265. 300.

[f] Typ. Antiq. 302. 400.

[g] Ibid. 420. 394.

[h] Ibid. 274.

[i] Ibid. 475.

[k] Ibid. 241. 284. 399.

ing

CHAP. XXX. HENRY VIII.

ing of which ſeems to have raiſed a violent competition between two famous printers of theſe days[l].

THERE was not leſs concern in this reign than in the former, about the eccleſiaſtical part of our law. *Lyndwode's Provinciale* underwent repeated impreſſions. In 1529, The Legatine Conſtitutions of Otho and Ottoboni were printed by Wynkyn de Worde[m]. We find alſo a book without a date, intitled, *Tractatus Juris Canonici*[n].

The Regiſter.

WE cannot diſmiſs this catalogue of new-printed books, without making a few remarks upon the moſt diſtinguiſhed of them, The Regiſter of Writs. The Regiſter of Writs is ſaid to be the oldeſt book in the law; a character which may, in a great meaſure, be true, but ſhould not be allowed without ſome conſideration. It is not more certain than extraordinary, that the forms of writs were very early ſettled, in their ſubſtance and language, nearly in the manner in which they were drawn ever after. However, this uniformity was not ſo exact, as that the writs publiſhed and uſed in the reign of Henry VIII. were all of them identically the ſame with thoſe uſed at the firſt origin of this invention, in the reign of Henry II. It is not to be wondered that there ſhould be a difference in theſe

[l] In an edition of Littleton, printed by Pynſon, in 1525, there is the following addreſs to the reader, containing a bitter invective againſt Redman. *En tibi, candide lector, jam caſtigatior (ni fallor) Littletonus occurrit. Curavi ut e calcographiâ meâ non ſolum emendatior, verum etiam elegantioribus typis ornatior prodeat in lucem, quam elapſus eſt e manibus Roberti Redman, ſed verius* RUDEMAN, *quia inter mille homines* RUDIOREM *haud facile invenies. Miror profecto unde nunc tandem ſe fatetur typographum, niſi forte quam diabolus futurum nauclerum, et illum calcographum fecit. Olim nebulo iſte profitebatur ſe bibliopolam tam peritum quam unquam ab Utopia exibit: Bene fit, liber eſt. qui præ ſe ſpeciem libri ferat, præſtetque nihil; tamen auſus eſt ſcurra polliceri ſuâ curâ reverendas ac ſanctas leges Angliæ ſcite vereq; omnes imprimere. Utrum verba dare uſus, an verax ſit, tu Littletono legendo, ſcilicet ſuâ curâ ac diligentia excuſo, illico videas. Vale.* Pynſon attacked him in another edition of Littleton, and in one of Magna Charta.

Pynſon was at this time jealous of Redman's riſing merit and pretenſions as a law-printer. But this ſome years after ſubſided, and a reconciliation probably took place, for Redman became ſucceſſor to Pynſon in his houſe and trade. Typ. Antiq. 274. 385.

[m] Typ. Antiq. 180. 287.

[n] Ibid. 287.

forms

forms at their infancy, and at this advanced ſtate of our law; but it is extremely remarkable that the difference ſhould be ſo ſmall.

As the writs in the printed Regiſter muſt be taken to be ſuch as they were uſed at the time of its publication, it will be curious and amuſing to compare them with thoſe in ſeveral antecedent periods of our law; with thoſe in Glanville and Bracton; thoſe in the reign of Edward I.; and thoſe in the Old *Natura Brevium*, in the reign of Edward III. This we ſhall attempt, by ſelecting ſome of the principal original writs.

To begin with Glanville. We find the writs of novel diſſeiſin and of mortauncеſtor, as given by that author [o], correſpond exactly with thoſe in the Regiſter, in the ſcope, ſubſtance and words; with the difference only of the *teſte* in the name of the grand juſticiar, as all writs were then; of the king's ſtile, which was then always in the ſingular number; and of a return conſiſtent with the order of judicature in thoſe times. On the other hand, the writ of right of advowſon [p], tho' it agrees in the main of it with that in the Regiſter, is not *verbatim* the ſame. The *aſſiſa ultimæ præſentationis* [q], differs only in a few words. The writ of debt [r] is *verbatim* the ſame, except that inſtead of alledging the *detinet*, it ſays, *injuſtè deforceat*. Theſe are a few out of the many obſervations that might be made, on a compariſon of the writs in Glanville with thoſe in the Regiſter.

THE writs in Bracton, as to their compellation, *teſte*, and direction, are nearer the preſent form than thoſe in Glanville. As to the ſubſtance of them, it appears, that the writ *de dote unde nihil habet* [s], *aſſiſa mortis anteceſſoris* [t], and *quare impedit* [u], agree with the Regiſter *ver-*

[o] Vid. ant. vol. I. 178. 189.
[p] Ibid. 137.
[q] Ibid. 185.
[r] Ibid. 158.
[s] Lib. 4. Tr. b. c. 1, 2. Vid. ant. vol. I. 378.
[t] Lib. 4. Tr. 3. c. 2. Vol. ant. vol. I. 358.
[u] Vid. ant. vol. I. 355.

batim.

CHAP. XXX. HENRY VIII.

batim. The writ of *aſſiſa ultimæ præſentationis* [x] agrees in ſubſtance, but not *verbatim:* and the writ of *intruſion* differs entirely [y] from the Regiſter.

IN the time of Edward I. the ſubject of writs was ſtudied with more nicety; therefore, after the near correſpondence we have ſeen between the precedents of the time of Henry III. and thoſe in the Regiſter, we muſt not wonder to find it then ſtill more. In the *Statutum Walliæ*, among the regulations made for the judicial polity of that principality, there are forms of writs preſcribed, which, no doubt, were copied from thoſe uſed in our courts; and theſe, with the ſingle difference of the returns, and the ſtile of the juſtices peculiar to the courts there, are *verbatim* the ſame with thoſe in the Regiſter: theſe are, the writ of dower, aſſiſe of mortauncеſtor, of novel diſſeiſin, of common of paſture, of debt, of covenant, of appointing an attorney, and *de coronatore eligendo* [z].

THE reigns of the three Edwards conſtituted a period when the learning of writs was cultivated with great attention. Accordingly we find, that the forms of them were ſo completely ſettled during that time, that the writs in the Old *Natura Brevium*, a collection made in the laſt of thoſe three reigns, agree *exactly* with thoſe of the Regiſter; only the writ of intruſion [a], which differed ſo widely in Bracton's time, was not yet reduced to the form of the Regiſter. In the time of Henry VIII. the writ of treſpaſs and aſſault, the earlieſt precedent of which (except ſome records in Riley's *Placita*, in Edward I.'s reign) is in the Old *Natura Brevium*, has a very trifling difference from that in the Regiſter. The writ in the former does not contain the following words of aggravation, *ita ut de vitâ ejus deſperabatur*, which are in the latter.

[x] Lib. 4. Tr. 2. c. 1, 2. Vid. ant. vol. I. 349. 351. [a] Vid. ant. vol. II. 97, 98.
[y] Lib. 4. Tr. 1, c. 2 Vid. ant. vol. I. 320. 396. [z] Vid. ant. vol. III. 39.

THESE

THESE differences, though many of them may appear in themſelves quite immaterial, yet ſerve in ſome meaſure to date the antiquity of the writs collected in this volume. It may be inferred from this comparative view, that the ſubſtance of original writs, in their conception, drift, and language, is very ancient; that the alterations they have undergone have been very few, and thoſe only in a ſmall turn of phraſe, the change of a word, or at moſt the addition of ſome ſmall circumſtance; that thoſe changes were made in general very early; that the forms were, moſt of them, ſettled *verbatim* at leaſt by the time of Edward III.; and in that ſtate were afterwards printed in the Regiſter in the reign of Henry VIII.

THIS obſervation as to the antiquity of writs, is only meant to apply to thoſe common-law remedies which we have been juſt recounting, and the like; for many of the writs in the Regiſter are evidently of later origin than the time of Edward III. being ſome of them framed upon ſtatutes paſſed ſince, and others contrived in conſequence of alterations in practice, or for other cauſes.

HAVING ſaid thus much concerning the probable antiquity of the Regiſter, we ſhould next conſider the contents of this volume; of which it will be ſufficient to ſay, that it contains writs, original and judicial, adapted to the purpoſe of redreſs in every poſſible caſe of injury to the perſon or property; to provide for every incident which may ariſe in the courſe of a judicial proceeding; and, finally, to give the full effect to ſuch proceeding by execution.

IT was by degrees that writs increaſed to the multitude and variety which is exhibited in this volume. A ſufficient foundation ſeems to have been laid for this ſuperſtructure even in Glanville's time. From the numerous writs, and the application of them, in Glanville's work, we can perceive, that at every turn and ſtop in proceeding, whenever there was a *dignus vindice nodus*, a writ was ready framed to remove the cauſe of delay, and expedite the progreſs of

the

CHAP. XXX.

HENRY VIII.

the ſuit; ſo that there were, in his time, writs contrived ſuitable to very many occaſions. In the time of Bracton we find them greatly increaſed; and yet, perhaps, this increaſe was not ſo much in the new kinds of writs, though that too was conſiderable, as in the variety of forms to ſuit ſimilar caſes of the ſame kind. Thus, for inſtance, where we find in Glanville only one precedent of an original writ, or at moſt two; in Bracton, there are ſometimes ſeven or eight different forms, fitted to the ſpecial circumſtances of particular caſes.

In the times of Glanville and Bracton, writs were *formata*; that is, every particular variation was *formed*, as we are told, by expreſs authority of parliament, and the clerks in chancery could not alter an iota of that which had been ſanctioned by the legiſlature. If the increaſe of writs was ſo rapid under the great difficulty of applying to parliament in every new caſe, it is not to be wondered, that after the ſtatute of Weſtminſter 2. had allowed the clerks to make writs *in conſimili caſu*, the number and variety of them ſhould multiply to the degree they did; and that where there were ſeven or eight different precedents of one kind in Bracton, there ſhould be ten or more in the Regiſter in the preſent reign. The conſtruction of *ſimilar caſes* left ſuch a latitude, when applied to every writ at that time exiſting and in practice in the chancery, that the maſters, who were appointed for this ſpecial purpoſe, deviſed new writs with great readineſs, on moſt occaſions, where they were warranted by any colour of former precedent; ſo that, in conſequence of this ſtatute, the buſineſs of making new writs became intirely a matter of legal diſcretion.

When things had taken this courſe, writs came under a very different conſideration from that in which they ſtood formerly. In early times, when they were in a ſtated form, and that form was in general known only to thoſe in the chancellor's office, the courts uſed to conſider themſelves

ſelves as bound to abide by them, whatever they were; looking upon them as precepts iſſuing out of an office where themſelves had no controul or direction, and taking for granted that they were in the uſual courſe: but after this ſtatute, writs were no longer a point of official knowledge. The maſters, whoſe particular buſineſs was the making of writs, were choſen for their learning in the law; and as they could frame them only on principles of legal analogy, the courts took upon them to judge of the legality of them, as a matter to which they were equally competent with the maſters. Hence it was that writs became a new learning among the profeſſors of the law: and we find in the reign of Henry VI. no leſs than ten inns of chancery eſtabliſhed for this particular ſtudy; which was conſidered as containing the firſt principles of the law, and that in which young men could employ their noviciate with the greateſt advantage.

THIS, in time, had very material conſequences. The knowledge of writs was ſo far from being peculiar to the maſters, that they were not even the moſt knowing in their own art. This knowledge was in the hands of every body; and he who had moſt knowledge of the law, was the beſt able to word a writ. It then happened, that the maſters, as they grew to be of leſs conſideration for this particular ſkill, in time neglected the ſtudy entirely; and the practicers were under the neceſſity, for the ſafety of their cauſe, to get lawyers of eminence to ſettle the form of a writ. This they preſented at the office to be put to the ſeal, under the inſpection of a maſter; till at length even that formality ceaſed; and in this reign it had become the practice to paſs them only thro' the curſitors' office, without any interference of a maſter, and ſo preſent them for ſealing. Thus, by a ſingular revolution, did the making of writs become again a matter, as it were, *de curſu*; in which the chancery took no further concern than what related to the ceremony of the ſeal.

THE

CHAP. XXX.

HENRY VIII.

THE maſters in chancery in this reign were men quite of another profeſſion: they were moſt of them civilians and eccleſiaſtics; and it had been a rule with the chancellor to preſent them to churches not exceeding twenty marks in value [b].

WHEN things were in this ſtate, the Regiſter was printed; by which this kind of learning ſeemed to be made more declaredly *publici juris* than ever. Whether it is to be attributed at all to the publication of this book, which might have taken off any peculiar ſanctity heretofore aſcribed to its forms; or to the inattention and want of ſkill in the then ſet of maſters; or to the unaccountable change of opinions in matters of law, as well as in every thing elſe: whatever was the cauſe, it ſo happened, that ſoon after the preſent period, this repoſitory of chancery-learning began to be looked upon with leſs reverence than formerly. In the reign of queen Mary, it was ſaid by a judge on the bench, that a writ was not exceptionable becauſe not to be found in the Regiſter: the truth of the caſe was now to be the guide in drawing a writ, and not the preciſe form that was exhibited in the Regiſter [c].

INDEED the knowledge of writs had long been ſo general, that probably the ſame opinion was held reſpecting this collection at the time it was publiſhed. However that may be, it was certainly at that time a valuable addition to the law-library. For though it was not then conſidered as furniſhing a collection of forms and rules concluſive and incontrovertible; yet it muſt be received as a ſet of precedents of the higheſt authority, and approaching nearer to abſolute perfection than any thing then in print. With regard to poſterity, it ſtands in a different light. The revolution which had begun to take place in the methods of redreſs, and which was now becoming every day more general, rendered great part of this famous volume obſolete before the world was put in poſſeſſion of it; and the current

[b] Hiſt. Chanc. 36. [c] Plowd. 229.

has

has ever ſince ſet ſo ſtrong the ſame way, that, at this time, the Regiſter is reduced to a piece of juridical antiquity; and is oftener recurred to as a matter of hiſtorical curioſity than of practical uſe. The ſelection made by Fitzherbert is abundantly more than ſufficient for the few enquiries now made into the nature of writs.

Miſcellaneous facts.

IT appears from a manuſcript of this reign, relating to the government and diſcipline of the Middle Temple, that the members of that ſociety were divided into two companies, called *Clerks Commons*, and *Maſters Commons*. The firſt conſiſted of young men during their firſt two years ſtanding, or thereabouts, till they were called up to the Maſters Commons. The Maſters Commons was divided into three companies, that is, *No Utter Barriſter*, *Utter Barriſters*, and *Benchers*. The firſt of theſe were ſuch as from their ſtanding, or neglect of ſtudy, were not called upon by the Elders or Benchers to diſpute and argue ſome point of law before the Benchers: thoſe diſputes were called *Mootings*. *Utter Barriſters* were ſuch as were five or ſix years ſtanding, and were called upon to argue at the Mootings; ſo that making an Utter Barriſter, was conferring a ſort of degree for the party's progreſs in learning. *Benchers* were ſuch Utter Barriſters as had been in the houſe fourteen or fifteen years; they were choſen by the Elders of the houſe to *read*, expound, and declare ſome ſtatute openly to all the ſociety. During the time of his reading, this perſon was called a *Reader*, and afterwards a *Bencher*.

THERE were, as they expreſſed it, two principal times of their *Learning*: theſe were called *Grand Vacations*. One begun the firſt Monday in Lent; the other, the firſt Monday after Lammas; each continued three weeks and three days. It was at theſe ſeaſons that the readings were; in the former, by the Benchers themſelves; in the latter, by the Readers. The young members of two years were required to be preſent at theſe readings, under pain of forfeiting twenty ſhillings for every default. The

CHAP. XXX.

HENRY III.

Grand Vacations were employed in other exerciſes for the advancement of knowledge; an Utter Barriſter was to oppoſe ſome point alledged by the perſon reading. The young members were called upon to argue ſome point in preſence of three Benchers; they were followed by the Utter Barriſters; and, laſtly, the Benchers were to decide. This was all carried on in Law-French. Such was the form of Mooting. Exerciſes of this kind were performed not only in the Grand Vacations, but in Term.

AFTER the Term and Grand Vacations, ſuch young men as were *No Utter Barriſters*, were to argue ſome points in Law-French before the Utter Barriſters, who were to decide in Engliſh: theſe were called *Mean Vacation-Moots*, or *Chapel-Moots*. Further, every day in the year but feſtivals, the ſtudents of each meſs, being three, uſed to argue among themſelves after dinner and ſupper.

THE *Middle Temple* uſed to provide two Readers, being Utter Barriſters, for the two inns of chancery, *Strand Inn* and *New Inn*. Theſe read to the ſtudents there in Term and Grand Vacation: the ſtudents there mooted as in the Temple, and each Reader uſed to bring two with him from the Temple to argue and moot. It ſeems, alſo, that each of the four inns of court ſent two perſons to every inn of chancery to argue, and after ſuch debate the Reader uſed to give his opinion.

SUCH was the education of antient time in the inns of court and chancery. But this was all voluntary, none being, as the ſame manuſcript acquaints us, compelled to learn. We are informed alſo by the ſame authority, that the young ſtudents of the *Middle Temple* had their ſtudies and places of learning ſo unfortunately ſituated, that they were very much annoyed by the walking and communication of thoſe who were no learners. In the term-time, they were diſturbed by clients and clients ſervants reſorting to attornies and practicers, ſo that they might as well be in the open ſtreets as in their ſtudies. The ſame writer complains, that they had no place to walk in, and talk, and confer their learning, but in the church; which place, all

the

the term-time, had in it no more quietneſs than the *Pervyſe of Pawle's* [d], by occaſion of the confluence and concourſe of ſuch as were ſuitors in the law [e]. Owing to this houſe having no revenue for the encouragement and ſupport of ſtudents, it is obſerved by this writer, that many a good wit was compelled to forſake ſtudy, before he had acquired a perfect knowledge in the law, and *to fall to practiſing, and become a typler in the law* [f].

In the 32d Henry VIII. an order was made in the Inner Temple, that the gentlemen of that company ſhould reform themſelves in their cut or diſguiſed apparel, and not wear long beards; and that the treaſurer of that houſe ſhould confer with the other treaſurers of court for an uniform reformation, and to know the juſtices opinion therein [g]. In Lincoln's Inn, by an order made 23d Hen. VIII. none were to wear cut or panſied hoſen or breeches, or panſied doublet, on pain of expulſion [h]; and all perſons were to be put out of commons during the time they wore beards [i]. The firſt ſerjeants at law that received the honor of knighthood, were knighted in 26th of Hen. VIII [k].

In the 37th Henry VIII. a further increaſe was made in the fees of the judges: To the chief-juſtice of the king's bench, 30l. per ann.; to every other juſtice of that court, 20l. per. ann.; to every juſtice of the common-pleas, 20l. per ann [l]. There is a manuſcript of this reign which ſets forth the whole ceremony of calling ſerjeants; but it is too long for this place, and may be ſeen in Dugdale [m].

[d] We have before noticed the cuſtom of Serjeants chooſing their pillar at St. Paul's, and taking down their client's caſe on their knee *. That cuſtom, together with the mention of the *Pervyſe of Pawle's*, on this occaſion, ſeems to open a paſſage in Chaucer's character of the Serjeant at law.

A ſergeaunt of the law both ware and wiſe,
That oftin had yben at the Pervyſe.
PROL. CANT. TALES.

* Vid. ant. vol. II. 360.

[e] Dugd. Orig. 193.
[f] Ibid.
[g] Ibid. 148.
[h] Ibid. 241.
[i] Ibid. 244.
[k] Ibid. 137.
[l] Ibid. 110.
[m] Ibid. 114.

CHAP. XXXI.

EDWARD VI.

PHILIP and MARY.

The Reformation eſtabliſhed—Act of Uniformity—The Roman Catholic Religion re-eſtabliſhed—and the Papal Authority—The Royal Authority of a Queen—The Poor Laws—Tipling and Gaming Houſes—Payment of Tythes—Traverſe of Offices—Sale of Horſes—Adminiſtration of Juſtice—Criminal Law—Repeal of Treaſons and Felonies—Houſe-breaking—Offences againſt the Common-Prayer—Unlawful Aſſemblies—Robbing in a Booth or Tent—Of the Revivor of Stat. 25 Hen. VIII. c. 3.—Trial of Felons in Foreign Counties—Clerks Convict—Repeal of Treaſon, Felonies, and Præmunire—Riotous Aſſemblies—Puniſhment of Gypſies—Stealing of Women—Of Bail—Of Witneſſes in Treaſon.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

IT could hardly be expected that the ſhort period of twelve years ſhould be productive of much alteration in our laws: but theſe two reigns, on the contrary, hold a diſtinguiſhed place in our juridical hiſtory. An attention to the reformation of religion in the former, and a determination in the latter to bring all things back to their antient ſtate, almoſt wholly engaged the princes on the throne. Theſe revolutions called for a frequent interference of the parliament. In the midſt of theſe changes, ſome acts were paſſed, which had great influence on the adminiſtration of juſtice; and others, relating to our criminal law, which

are

are more particularly deſerving of notice. Mean-while, the activity and deſigns of the government were ſuch, that theſe two reigns are fruitful of intereſting facts regarding the practice and execution of our penal laws.

THE attack made on the hierarchy in the reign of Henry, by taking away the authority of the Pope over perſons and cauſes of a ſpiritual nature, prepared the way for a complete reformation. When the ſyſtem of papal ſubordination was once broken, a new regulation in doctrine and worſhip might be accompliſhed with leſs obſtruction and difficulty. This was the work of Edward VI.'s reign.

GREAT part of the nation were diſpoſed to an alteration in the eſtabliſhed form of religion, from a conviction of its vanities and foppery. Thoſe who ſtill adhered to the old ſuperſtition, ſaw themſelves without the ſanction they once derived from the holy ſee, and the privileges of churchmen. The clergy, now reduced under ſubordination to the king as ſupreme head, had ſunk into the condition of their fellow-ſubjects. In this ſtate of things there was leſs danger to be apprehended from oppoſition to any reformation that might be attempted.

The Reformation eſtabliſhed.

THE firſt act of the legiſlature was intended for the abolition of the maſs, with all its numberleſs abuſes and ſuperſtitions, which was to be done by reſtoring the communion to its primitive inſtitution. This was by ſtat. 1 Ed. VI. c. 1. which contains a long and accurate preamble concerning the appointment of this ſacrament by Chriſt; ſtating, that it is "called in Scripture a ſupper, the table of "the Lord, the communion and partaking of the body and "blood of Chriſt; but that many perſons had condemned in "their hearts the whole thing, on account of certain abuſes "heretofore committed in the miſapplication of it." For theſe reaſons it was enacted, in the firſt place, that whoſoever ſhall deprave, deſpiſe, or contemn the ſacrament, by contemptuous words, or otherwiſe, ſhall ſuffer impriſonment, and make fine, at the king's pleaſure: the offence

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

is to be enquired of, by the oaths of twelve men, at the quarter-ſeſſions; the indictment to be brought in three months after the offence; and a writ is to be directed to the biſhop of the dioceſe to attend in perſon, or by deputy, at the ſeſſions.

BUT the principal object of the act was to reſtore the communion in both kinds, which, the preamble ſays, "was more agreeable both to the firſt inſtitution of the "ſacrament of the body and blood of Chriſt, and alſo more "conformable to the common uſe and practice of the apoſ-"tles, and of the primitive church, for 500 years and "more after Chriſt: and further, that it was more "agreeable to the firſt inſtitution, and the uſage of the "primitive church, that the people being preſent ſhould "receive the ſame with the prieſt, than that the prieſt "ſhould receive it alone." It is therefore enacted, that the ſacrament ſhall be miniſtered to the people within the church of England and Ireland, and other the king's dominions, under both kinds; and the miniſter ſhall not, without lawful cauſe, deny the ſame to any perſon. However, there is no enacting clauſe concerning the prieſt not taking it alone; nor are there any penalties annexed.

THE next ſtatute made by the parliament was ſtat. 1 Ed. VI. c. 2. and this had the Reformation in view. Having ſtated that elections of biſhops by *congé d'élire* were mere ſhadows of elections, and attended with great delay and expence, and that they ſeemed derogatory and prejudicial to the king's prerogative, it provides, that they ſhall in future be appointed by the king's letters patent. All proceſs was to be in the king's name, but the *teſte* in that of the biſhop; except the archbiſhop of Canterbury, who might uſe his own ſeal.

THEN follows ſtat. 1 Ed. VI. c. 12. which repeals [*] ſtat. 5 Rich. II. ſtat. 2. c. 5. and ſtat. 2 Hen. V. c. 7. that had

[*] Sect. 2.

been

been made againſt Lollards, and had been put in execution in the laſt reign: beſides theſe, it repeals ſtat. 25 Hen. VIII. c. 14. concerning the puniſhment of heretics and Lollards; the ſtatute of the ſix articles, 31 Hen. VIII. c. 14.; ſtat. 34 & 35 Hen. VIII. c. 1. concerning the books of the Old and New Teſtament in Engliſh, the printing, reading, having, or ſelling them; and alſo ſtat. 35 Hen. VIII. c. 5. which qualifies the ſtatute of the ſix articles. All theſe ſtatutes in particular, and every other act of parliament concerning doctrine and matters of religion, were thereby repealed and made void. By the ſame act, there are penalties inflicted on thoſe who deny the king's ſupremacy, or affirm that the biſhop of Rome[b], or any other perſon, is, or ought to be, by the laws of God, ſupreme head of the church of England and Ireland.

THE laſt remains of ſuperſtitious eſtabliſhments were deſtroyed by ſtat. 1 Ed. VI. c. 14. which gave to the king all chantries, colleges, and free chapels; all lands given for the finding of a prieſt for ever, or for the maintenance of any anniverſary, *obit*, light or lamp in any church or chapel, or the like; all fraternities, brotherhoods, and guilds (except thoſe for myſteries and crafts), with all their lands and poſſeſſions. There are ſeveral exceptions in this act, which have ſaved ſome of the leaſt objectionable of theſe inſtitutions (ſtripped, however, of their ſuperſtitions), and ſuch as were only included in the expreſſions of the act, but not in its deſign; as the univerſities, and colleges for learning and piety.

THIS is followed by ſtat. 2 & 3 Ed. VI. c. 1. for the uniformity of ſervice, and adminiſtration of the ſacraments. This act ſtates, that there had been for a long time divers forms of common-prayer; as the uſe of *Sarum*, of *York*, of *Bangor*, and of *Lincoln*; and beſides theſe, many more

[b] Sect. 6.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

forms had of late been uſed, as well in morning and evening prayer, as in the communion, commonly called the maſs: that the king had endeavoured in vain to prevent other innovations of this kind, and therefore had appointed the archbiſhop of Canterbury and other biſhops to draw one convenient and meet order of prayer and adminiſtration of the ſacraments, to be uſed all over England and Wales, which they had now performed in a book intitled, "*The Book of "the Common-Prayer and Adminiſtration of the Sacraments, "and other Rites and Ceremonies of the Church, after the "Uſe of the Church of England:*" wherefore it was enacted, that every miniſter in cathedrals, pariſh-churches, and other places, ſhould be bound to ſay and uſe the matins and even-ſong, celebration of the Lord's ſupper, commonly called the maſs, and adminiſtration of each of the ſacraments, and all their common and open prayer, in ſuch order and form as is mentioned in the aforeſaid book, and not otherwiſe, under certain penalties which we ſhall hereafter mention. That the clergy might be relieved from the reſtraint which had been impoſed on them by the Romiſh church, in violation of the firſt command given by Heaven to mankind, it is declared by ſtat. 2 and 3 Ed. VI. c. 21. that all laws, canons, conſtitutions, and ordinances, which forbid marriage to any eccleſiaſtical or ſpiritual perſon who by God's law may lawfully marry, ſhall be void: and to compel the performance of marriage, where engagements had been made, the ſtat. 32 Hen. VIII. c. 38. (only as far as concerned pre-contracts) was repealed by ſtat. 2 and 3 Ed. VI. c. 23.; and the eccleſiaſtical judge is thereby authoriſed to give ſentence for ſolemnization of marriage, upon a pre-contract, as before that act.

THE foregoing laws were rather intended to inſtitute and build up, than to deſtroy; but ſuch ſteps having been taken, the Reformation was puſhed on with more vigour, and a ſort of perſecution was begun againſt the old ſuperſtition. It was enacted by ſtat. 3 and 4 Ed. VI. c. 10. that ſince the common-prayer had been ſet forth,

con-

containing nothing but the pure word of God, the corrupt, vain, untrue, and ſuperſtitious ſervices ſhould be diſuſed; and therefore all antiphoners, miſſals, grailes, proceſſionals, manuals, legends, pies, portuaſſes, primers, in Latin or Engliſh, couchers, journals, ordinals, and all other books, ſhould from thenceforth be aboliſhed: all perſons and bodies corporate having any ſuch books or images, taken out of churches or chapels, were to deſtroy ſuch images, and deliver ſuch books to the biſhop or his commiſſary within three months to be deſtroyed; and perſons who omitted ſo to do, were to forfeit for every book 20s. for the firſt offence; 4l. for the ſecond; and for the third, impriſonment at the king's will. And for putting to utter oblivion, as the ſtatute ſays, the uſurped authority of the ſee of Rome, as well as for the neceſſary adminiſtration of juſtice, the king was empowered, in like manner as Henry VIII. had been, by ſtat. 3 and 4 Ed. VI. c. 11. during three years to appoint thirty-two perſons to examine the eccleſiaſtical laws, and reform them; and by the ſame ſtatute, c. 12. to appoint ſix prelates and ſix other perſons to draw up a form and manner of making and conſecrating archbiſhops, biſhops, prieſts, deacons, and other miniſters of the church.

THE execution of theſe two commiſſions took up the attention of the reformers, and ſome time was employed in altering the common-prayer-book, where exceptions had been made to it, or it was otherwiſe thought convenient to amend or enlarge it. After this was completed, at leaſt the form of ordination and the prayer-book (for the eccleſiaſtical laws took longer time, and after all were not finiſhed ſoon enough to be confirmed), a ſecond act of uniformity was paſſed, namely, ſtat. 5 and 6 Ed. VI. c. 1. This act begins by ſtating, that many perſons refuſed to come to their pariſh-churches, and other places where prayer, adminiſtration of the ſacraments, and preaching was uſed: it enacts therefore, that all perſons ſhall faithfully *endeavour themſelves* to reſort to their pariſh-church or chapel where the common-prayer and ſuch ſervice was uſed, upon every Sun-

Act of uniformity.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

Sunday and holy-day, and there abide during the time of common-prayer and preaching, upon pain of the cenſures of the church, which the biſhops are ſolemnly in God's name required to ſee executed; and they are thereby empowered to reform and puniſh all ſuch offences. And becauſe, ſays the ſtatute, many doubts had ariſen about the ſaid ſervice, "*rather by the curioſity of the miniſters and* "*miſtakers, than of any other worthy cauſe,*" the king had cauſed the book of common-prayer to be faithfully peruſed and made perfect, and now annexed it, ſo explained and perfected, to this act; at the ſame time adding a form and manner of conſecrating archbiſhops, biſhops, prieſts, and deacons, to be of like force and authority as the former, with the ſame proviſions as by ſtat. 2 and 3 Ed. VI. c. 1. were ordained; which ſtatute is declared to be in force for eſtabliſhing this book, now explained and perfected, and the form of conſecration and ordination. Any perſon being preſent at any other form of prayer than according to this book, is, for the firſt offence, to be impriſoned ſix months; for the ſecond, a whole year; and for the third, during life: for the better obſervation of this act, curates are directed once a-year to read it on a Sunday in the church, *at the time of the moſt aſſembly.* The next ſtatute [c] appoints the faſts and feaſts, as they are now in the calendar.

THE laſt ſtatute made upon the occaſion of theſe alterations in religion was ſtat. 5 and 6 Ed. VI. c. 12. to confirm and explain the former ſtat. 2 and 3 Ed. VI. c. 21. concerning the marriage of prieſts. The ſtatute ſays, that evil-diſpoſed perſons had taken occaſion, from certain words in that act, to ſay that it was but *a permiſſion, like that of uſury and other unlawful things*; and therefore, that children born from ſuch nuptials ſhould rather be accounted baſtards than legitimate. To avoid this ſlander, the ſtatute enacts poſitively, that the marriage of prieſts and ſpiritual perſons is true, juſt, and lawful, to all intents and purpoſes, and their children legitimate, as any other born in wedlock, as to inheritance and every other legal right.

[c] Chap. 3.

IT was upon theſe acts of parliament that the reformed church ſtood at the death of Edward VI.

The Catholic religion re-eſtabliſhed;

QUEEN Mary ſoon overturned every thing which had been done in the former reign for a reformation of religion. After an act repealing all new-created treaſons, felonies, and caſes of præmunire, and another to eſtabliſh her own legitimacy, and declare null and repealed all ſentences, orders, and laws to the contrary; an act was paſſed, ſtat. 1 Ma. ſt. 2. c. 2. repealing all the under-mentioned ſtatutes, being all that were paſſed in her brother's reign for the reformation of the church; namely, ſtat. 1 Ed. VI. c. 1. againſt ſuch as ſpeak unreverently of the body and blood of Chriſt; ſtat. 1 Ed. VI. c. 2. relative to the election of biſhops; ſtat. 2 and 3 Ed. VI. c. 1. concerning uniformity of ſervice and adminiſtration of the ſacraments; ſtat. 2 and 3 Ed. VI. c. 21. made to take away all poſitive laws againſt the marriage of prieſts; ſtat. 3 and 4 Ed. VI. c. 10. made for the aboliſhing of divers books and images; ſtat. 3 and 4 Ed. VI. c. 12. made for the ordering of eccleſiaſtical miniſters; ſtat. 5 and 6 Ed. VI. c. 1. made for the uniformity of common-prayer and adminiſtration of the ſacraments; ſtat. 5 and 6 Ed. VI. c. 3. made for the keeping of holy-days and faſting-days; and ſtat. 5 and 6 Ed. VI. c. 12. touching the marriage of prieſts, and legitimating their children: and it was moreover enacted, that all ſuch divine ſervice and adminiſtration of ſacraments as were moſt commonly uſed in England in the laſt year of Henry VIII. ſhould be uſed through the realm, and no other.

THUS was the national worſhip brought back to the ſtate it was in at the death of Henry VIII.; and that it might be performed without diſturbance or impediment, it was enacted by ſtat. 1 Ma. ſt. 2. c. 3. that any perſon who by word or deed ſhould maliciouſly moleſt any preacher, authoriſed to preach, in his ſermon, preaching, or collation; or ſhould maliciouſly diſturb any lawful prieſt, preparing or cele-

CHAP. XXXI.

EDW. VI, PHILIP and MARY.

celebrating the maſs, or other ſuch ſervice, ſacraments, or ſacramentals, as were moſt commonly uſed in the laſt year of Henry VIII. or ſpoil or deface the ſacrament commonly called the ſacrament of the altar, or the *pix*, or canopy where the ſacrament was; or break any altar, crucifix, or croſs, in any church, chapel, or church-yard; ſuch offender ſhould be taken before one juſtice, who, if he thought fit, was to commit him to cuſtody: and within ſix days the ſame juſtice, with another, was to examine him; and if he was convicted by two witneſſes, or his own confeſſion, they were to commit him for three months, and further to the next quarter-ſeſſions; when, if he did not repent, he was to be again committed till he became reconciled and penitent. If ſuch offenders were not immediately taken, the pariſh was to forfeit 5l. to be levied as in caſes of hue and cry by the ſtatute of Wincheſter, and ſtat. 3 Hen. VII. c. 1. Notwithſtanding this ſtatute, the ordinary might puniſh theſe offences by eccleſiaſtical cenſures, ſo as none were puniſhed twice. The penal proviſions of this act are much ſtricter than any the Reformers had made in the former reign, to ſecure their eſtabliſhment, in matters of the like kind.

Severer methods were now preparing for the correction of thoſe who did not conform to the religion of the court. By ſtat. 1 and 2 Ph. and Ma. c. 6. there is a revivor of ſtat. 5 Ric. II. ſt. 2. c. 5. concerning arreſting of heretical preachers; of ſtat. 2 Hen IV. c. 15. touching repreſſing of hereſies, and puniſhment of hereticks; and of ſtat. 2 Hen. V. c. 7. concerning the enormity of hereſy and Lollardy, and the ſuppreſſion thereof. After theſe three penal laws were revived againſt hereſy, there follows a very long act of parliament, containing a hiſtory almoſt of the return of the nation into the boſom of the Romiſh church; and the complete re-eſtabliſhment of the pope's authority here, as it had been in the twentieth year of Henry VIII. before the innovations begun in that king's reign.

and the papal authority.

This

THIS is ſtat. 1 and 2 Phil. and Ma. c. 8. It opens by ſtating, that "much falſe and erroneous doctrine had been "taught, and ſpread abroad here ſince the twentieth year "of Hen. VIII. ſo that as well the ſpiritualty as the tempo-"ralty had ſwerved from the obedience to the ſee apoſtolic, "and declined from the unity of Chriſt's church, and ſo "continued until her Majeſty was firſt raiſed up by God "to the throne, and then married to the king; *to whom* "*(as unto perſons undefiled, and by God's goodneſs preſerved* "*from the common infection)* and to the whole realm, the "apoſtolic ſee had ſent *the lord cardinal Pole, legate de* "*latere*, to call them home again into the right way, from "whence they had a long while wandered: that they, ſeeing "their errors, had acknowledged them (which the two houſes "did upon their knees [d]) to that moſt reverend father, and "by him were received, at the interceſſion of the king and "queen, into the unity and boſom of the church; and that "they then made an humble ſubmiſſion and promiſe, for a "declaration of their repentance, to repeal ſuch acts "as had been made ſince the twentieth year of "Henry VIII. againſt the ſupremacy of the pope." Then follows the ſupplication of the two houſes to the king and queen, for them to intercede with the cardinal to obtain from the pope a remiſſion of all cenſures and ſentences which they had incurred by the laws of the church, and to be received into the church: all which having been performed, they now proceeded in this ſtatute to accompliſh their promiſe, and repeal all laws made againſt the ſupremacy of the ſee of Rome.

THE firſt repeal was of that part of ſtat. 21 Hen. VIII. c. 13. made againſt licences and diſpenſations from Rome for pluralities and non-reſidence; then the whole of ſtat. 23 Hen. VIII. c. 9. againſt citing out of the dioceſe where a perſon dwells, except in certain caſes: ſtat. 24 Hen. VIII.

[d] Burn. Ref. vol. II. 232.

c. 12.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

c. 12. that appeals in ſuch caſes as had been uſed to be purſued to the ſee of Rome, ſhould not be had or uſed within the realm: ſtat. 25 Hen. VIII. c. 19. called the ſubmiſſion of the clergy: ſtat. 25 Hen. VIII. c. 20. for non-payment of firſt-fruits to the ſee of Rome, and conſecration of biſhops within the realm: ſtat. 25 Hen. VIII. c. 21. concerning exonerating the king's ſubjects from exactions and impoſitions before that time paid to the ſee of Rome; and for having licences and diſpenſations within the realm, without ſuing further for them. All theſe ſtatutes are totally repealed; as was ſtat. 26 Hen. VIII. c. 1. concerning the king's highneſs being ſupreme head of the church of England, and to have authority to reform and redreſs all errors, hereſies, and abuſes in it: ſtat. 26 Hen. VIII. c. 14. for the nomination and conſecration of ſuffragans: ſtat. 27 Hen. VIII. c. 15. empowering the king to name thirty-two perſons, clergy and lay, for the making of eccleſiaſtical laws: ſtat. 28 Hen. VIII. c. 10. for extinguiſhing the authority of the ſee of Rome: ſtat. 28 Hen. VIII. c. 16. for the eaſe of ſuch as had obtained pretended licences and diſpenſations from the ſee of Rome: all that part of ſtat. 28 Hen. VIII. c. 7. which concerns a prohibition to marry within the degrees mentioned in the act: ſtat. 31 Hen. VIII. c. 9. authoriſing the king to make biſhops by his letters patent: ſtat. 32 Hen. VIII. c. 38. concerning pre-contracts, and degrees of conſanguinity: ſtat. 35 Hen. VIII. c. 3. for the ratification of the king's ſtile: ſuch part of ſtat. 35 Hen. VIII. c. 1. as concerned the oath againſt the ſupremacy; and all oaths thereupon had, made, and given, were declared to be utterly void and repealed: ſtat. 37 Hen. VIII. c. 17. that doctors of the civil law, being married, might exerciſe eccleſiaſtical juriſdiction: that part of ſtat. 1. Ed. VI. c. 12. ſect. 7. which puniſhes thoſe who deny the king's ſupremacy. That clauſe and all other clauſes in that act contrary to the ſupremacy of the pope, and all other acts of parliament made ſince the twen-

twentieth of Henry VIII. againſt the ſupreme authority of the pope's holineſs, are generally repealed.

But leſt the repeal of theſe laws, and the admiſſion of papal authority in all its plenitude, without any ſaving for ſuch eſtabliſhments and accidents which had been produced of late years, ſhould bring the property and condition of many into great hazard, and introduce the extremeſt confuſion, it was neceſſary to go further; and the parliament made another ſupplication to their majeſties to intercede with the cardinal, that the following points ſhould be ſettled by the pope's authority, *that all occaſions*, ſay they[e], *of contention, grudge, ſuſpicion, and trouble, may be taken away:* 1ſt, that all biſhoprics, cathedrals, or colleges, now eſtabliſhed, might be confirmed; 2d, that marriages made within ſuch degrees as were not contrary to the law of God might be confirmed, and the iſſue declared legitimate; 3d, that inſtitutions into benefices, and 4th, all judicial proceſs might be confirmed; and laſtly, that all ſettlements of land of biſhoprics, monaſteries, or other religious houſes, might continue as they were, without any trouble from eccleſiaſtical cenſures or the laws.

A SUPPLICATION likewiſe from the clergy[f] prayed, that the lands and goods of the clergy might remain as they were. The cardinal made a diſpenſation as to all theſe particulars[g], and granted them fully; which diſpenſation was now ratified in every point by the parliament. It is, however, in addition to this, enacted[h], that all perſons and bodies corporate, as well as the crown, ſhall enjoy all the poſſeſſions alluded to, as they were intitled to enjoy them before the firſt day of that parliament; and all aſſurances of land by Henry VIII. and Edward VI. are confirmed. But to encourage a renewal of like monaſtic inſtitutions, it was enacted, that perſons ſeiſed in fee might give lands to ſpiritual corporations without licence of mort-

[e] Sect. 25. [f] Sect. 31. [g] Sect. 32. [h] Sect. 36.

main,

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

main, or writ of *ad quod damnum*, notwithſtanding the ſtatutes of mortmain[1]; with reſerve of a tenure in frank-almoigne, or a tenure by divine ſervice, notwithſtanding the ſtatute of *quia emptores*: this licence to alien in mortmain to continue only for twenty years.

In fine it was declared, that the ſee of Rome was to have and enjoy ſuch authority, pre-eminence, and juriſdiction, as his holineſs did or might exerciſe by his ſupremacy (and the biſhops ſuch eccleſiaſtical juriſdiction) before the 20th year of Henry VIII. In this manner was the Roman catholic religion and the papal authority again eſtabliſhed by law.

Having ſo far conſidered ſuch ſtatutes as effected alterations in religion, we ſhall now mention a remarkable one reſpecting the regal ſtate, and then proceed to thoſe concerning perſons and private property, with the adminiſtration of juſtice.

The royal authority of a queen.

The ſtat. 1 Mar. ſect. 3. c. 1. ſets forth, that becauſe the ſtatutes of the realm attributed all prerogative and pre-eminence to the name of *king*, together with the puniſhment and correction of offenders; therefore ſome malicious and ignorant perſons had pretended to think that the *queen* could not take the benefit and privilege of them: it then proceeds to make a declaration of the law on this point, and enacts, that the law of this realm is, that the kingly or regal office, with all its dignity, prerogative, and power, being inveſted either in male or female, ought to be *as fully deemed and taken in the one as in the other*; and whatever the law has appointed the king to have or do, the ſame the queen may enjoy and exerciſe without doubt or queſtion.

When the ſpeaker of the houſe of commons brought in this bill, many wondered what could be the intention of ſuch a law on a matter which ſeemed to be without diſ-

[1] 3 & 8. 51.

pute.

pute. The ſecret deſign of this act was afterwards related by *Fleetwood*, the recorder of London, to Lord *Leiceſter*, from whoſe minutes of the ſtory a learned prelate has made it public [k]. The bill, as firſt brought in, declared alſo that the queen had as much authority as *any other of her progenitors*. It was objected to this, that ſhe was thereby declared to have as much authority as William the Conqueror, and might, like him, ſeize all the lands of Engliſhmen, and give them to ſtrangers: this ſuggeſtion, together with the jealouſy then entertained of the Spaniſh match, induced the houſe to go into a committee, where the bill was at length qualified, and made to ſpeak the language above-mentioned.

But the original motive for the act was this: a book had been preſented to the queen by the imperial ambaſſador, in which were ſketched the outlines of a plan of government for the queen to adopt. She was to take advantage of the notion, that all limitations by ſtatute on the regal power regarded kings, and not queens, of England; ſhe was to declare herſelf a conqueror; *or*, that ſhe ſucceeded by the common law, and not by ſtatute, which could not, upon the above-mentioned principle, bind her; and thus ſhe was to be at liberty to eſtabliſh religion and government as ſhe pleaſed. It is ſaid, that the queen, very much to her honour, expreſſed a diſlike of this bold performance, and thought the deſign contrary to her coronation oath; and having communicated it to *Gardiner*, in the ambaſſador's preſence, committed it to the flames, with ſome rebuke of his excellency for preſuming to tempt her with ſuch projects. Gardiner was alarmed at this bold beginning of the Spaniſh influence: and to prevent ſuch deſigns for the future, he drew this act, in which, though he ſeemed to intend an advantage to the queen, by putting her title beyond diſpute; yet he really meant that

[k] Burn. Ref. vol. II. 258.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

ſhe ſhould be reſtrained by all thoſe laws to which the former kings of England had conſented.

We have not had occaſion to ſpeak of any parliamentary proviſion on the article of purveyance ſince the time of Edward III.[1] The only object had ſince been, to procure a due and regular execution of thoſe acts, without making any new ones[m]. As a popular meaſure, in the reign of Edward VI. the operation of purveyance was ſuſpended for three years, except for barges, ſhips, carts, and things neceſſary for carriages: it was provided, that for poſt-horſes a penny a mile ſhould be paid; for carts four-pence, if for the houſehold; if for the wars, three-pence[n]. This act, however, had no long continuance: but in the next reign ſome regulations of a permanent nature were made on this head. It was ordained by ſtat. 2 and 3 Ph. and Ma. c. 6, that no commiſſions of purveyance ſhould be for any more than ſix months: they were to contain the counties within which the purveyance was to be made, and oppoſite each county blanks, where were to be written the things to be purveyed in each, with their ſeveral prices, and the name ſubſcribed of the conſtables who were employed to procure them, and were privy to their delivery; a docket of which, ſubſcribed by the commiſſioner of purveyance, was to be lodged with the ſeveral conſtables upon the delivery; who were to give it to the juſtices of the place; and they were to certify the contents of ſuch dockets to the ſtewards of the houſhold. All former ſtatutes againſt purveyors and takers were thereby extended to their undertakers, deputies, and ſervants; and all commiſſions for purveyance were henceforward to be in the Engliſh language. By another chapter of the ſame ſtatute[o], it was ordained, in conformity with an antient privilege of the two univerſities, that there ſhould be no pur-

[1] Vid. ant. vol. II. 370.
[m] Vid. ant. vol III. 272, 273.
[n] Stat. 2. and 3. Ed. VI. c. 3.
[o] Ch. 15.

veyance

veyance within five miles of Oxford or Cambridge, except when the king or queen came there.

THE article of vagrancy and begging ſeems to have become a greater grievance than ever; and in the ſollicitude to correct and ſuppreſs the effects of this evil, the parliament, during theſe two reigns, more than once changed its ſyſtem of conduct. The firſt interpoſition was by ſtat. 1 Ed. VI. c. 3. which laments the increaſe of vagabonds, and declares them to be *more in number than in other regions*. The poor laws. The deſign now was to treat ſuch offenders with extreme ſeverity: this act, therefore, begins with repealing all former laws for the puniſhment of vagabonds and ſturdy beggars; it then ordains, that any perſon may apprehend thoſe living idly, wandering, and loitering about without employment, being ſervants out of place, or the like, and bring them before two juſtices, who, upon proof by two witneſſes, or confeſſion of the party, were to adjudge ſuch offender to be a vagabond, and to cauſe him to be marked with a hot iron on the breaſt with the mark of V, and adjudge him to be a ſlave to the perſon who brought and preſented him, and to his executors, for two years. The perſon was to keep him upon bread, water, or ſmall-drink, and refuſe-meat, and cauſe him to work by beating, chaining or otherwiſe, in any work or labour he pleaſed, be it ever ſo vile. If ſuch ſlave abſented himſelf from his maſter within the two years, for the ſpace of fourteen days, then he was to be adjudged by two juſtices to be marked on the forehead, or the ball of the cheek, with a hot iron with the ſign of an S, and farther adjudged to be a ſlave to his maſter for ever; and if he run away a ſecond time, he was to be deemed a felon. Any perſon to whom a man was adjudged a ſlave, had authority to put a ring of iron about his neck, arm, or leg. A ſimilar courſe of treatment was by act directed for clerks convict, which will be conſidered in another place.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

ANY child of the age of five years, and under fourteen, wandering with or without ſuch vagabonds might be taken, and adjudged by a juſtice to be ſervant or apprentice to the apprehender till twenty years of age if a female, and twenty-four if a man-child: the child to be treated as a ſlave, and puniſhed with irons or otherwiſe, if he run away. The maſter might aſſign and transfer ſuch ſlaves for the whole or any part of their time. If ſuch ſlaves, either during their ſlavery, or after they were ſet free, beat or wounded their maſters, or conſpired with others ſo to do, they were to ſuffer as felons, unleſs the perſon injured would take the offender as a ſlave for ever.

IF vagabonds were not apprehended in the before-mentioned manner, every juſtice was required to make ſearch for, and examine all perſons of that deſcription; and having enquired of any one ſo apprehended, the town, city, or village where he was born, he was to ſend him, with a writing on parchment teſtifying his vagrancy and ſettlement, from conſtable to conſtable, to the head officer of ſuch place; to be made a ſlave to the inhabitants thereof, in ſome public works, for the term, and under all the circumſtances before-mentioned in the caſe of any private maſter; with a penalty on the place, if ſuch ſlave was ſuffered to paſs three working-days without employment. Such towns and the inhabitants might aſſign or transfer their ſlaves, as private maſters. If it happened that the vagabond was not born at that place, he was to be made a ſlave to the inhabitants for the lie he had told, and was to be marked with an S. Foreign vagabonds were to be treated in the ſame manner as Engliſh, except the marking in the breaſt or face; and they were to be ſent to the next port to work till they could be conveyed abroad, at the coſt of the inhabitants.

THUS far of vagabonds: thoſe idle perſons who, from their infirmities, could not be properly treated as ſuch, and who were born, or had been for the moſt part converſant

ſant and abiding for the ſpace of three years in any place, were to be ſought out before a certain day mentioned in the act, by the head-officer of the place, and provided with cottages, or other convenient houſes to be lodged in, and relieved and cured by the devotion of the good people of the place. None but ſuch as were born there, or had been converſant and abiding for the above ſpace, were after that day to remain and beg abroad within the precinct of the place: and a penalty was impoſed on the head-officer ſuffering it three days. For the clearing away of ſuch as were not ſo ſettled, head-officers were required to make a ſearch every month, and ſend them away in carts or otherwiſe, from conſtable to conſtable, to their proper ſettlement, under penalty for neglect of ſuch ſearch. If ſuch infirm perſons were not wholly diſabled from working, the inhabitants were to provide them work in common, or appoint them to ſuch private perſons as would; and ſuch as refuſed to work, or run away, were to be puniſhed diſcretionally with chains, beating, or otherwiſe. For the promotion of this plan, the parſon or curate every Sunday, after reading the goſpel, was to exhort the people to remember the poor people, their brethren in Chriſt, born in the ſame pariſh, and needing their help.

THE parliament did not reſt content with this act. The great and unexampled ſeverity of thoſe proviſions about ſlavery had prevented it from being carried into execution. Something new was therefore done on this ſubject a few years after. By ſtat. 3 and 4 Ed. VI. c. 16. the beforementioned ſtatute and every other act on this ſubject, except ſtat. 22 Hen. VIII. was repealed; and it was ordained, that the ordering of vagrants and beggars ſhould depend upon ſtat. 22 Hen. VIII. c. 12.* which ſtatute was confirmed for ever: in addition to which this ſtatute re-enacts all the proviſions of the former act of this reign reſpecting ſettlements, the paſſing of vagrants, the providing for the infirm, and ſetting them to work, in the very words of

* Vid. ant. 225.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

that ſtatute, except the puniſhment of ſlavery. The direction about children was altered in this way: the child was to be brought into the open ſeſſions by the apprehender, who was to promiſe to bring it up in honeſt labour till, if a woman, the age of fifteen; if a man, of eighteen; upon which the juſtices were to adjudge the child to be a ſervant, *according as the law and cuſtom of the realm is of ſervants without wages.* If the child ran away, it was to be puniſhed by the ſtocks, or at the maſter's diſcretion, who might alſo have a juſtice's warrant under the ſtatute of labourers; and if any perſon inticed ſuch child away, the maſter might have an action on the ſtatute of labourers. Two neighbours might complain to the ſeſſion if the child was maltreated, and the juſtices might diſcharge him from the ſervice, and aſſign him to another maſter.

In the following parliament this matter was again taken up. By ſtat. 5 and 6 Ed. VI. c. 2. the ſtat. 22 Hen. VIII. c. 12. and ſtat. 3 and 4 Ed. VI. c. 16. were confirmed; ſubject, however, to the following corrections. The firſt of theſe amendments has more the appearance of a compulſory levy for ſupport of the poor, than any thing we have yet met with. In cities, boroughs, and towns corporate, the mayor or head-officer, and in other pariſhes the vicar or curate and the churchwardens, were to have a regiſter of the inhabitants and houſholders, and of the needy perſons not able to ſupport themſelves; and with this, they were, in the church, quietly after divine ſervice, to call together the inhabitants and houſholders, and elect and nominate out of them, yearly, two or more to be collectors of alms. Theſe collectors, the Sunday following, while the people were at church, and had heard God's holy word, were gently to aſk and demand of every man and woman, what they would be content to give weekly towards the relief of the poor, which was to be written in the regiſter. After this, the collectors were to gather and diſtribute

ſuch

ſuch alms weekly to the poor for their ſupport, or to put them to labour, as it ſeemed beſt. Theſe collectors were to account to the principal perſons beforementioned every quarter, at which any of the pariſh might be preſent; and when they went out of office, they were to deliver over all ſurpluſſes to the common cheſt of the church. If they refuſed to account, the ordinary might proceed againſt them with ſpiritual cenſures. If any refuſed to contribute, the parſon, vicar, or curate, and churchwardens were gently to exhort him towards the relief of the poor: if he would not be perſuaded, then, upon certificate of the parſon, vicar, or curate, the biſhop might ſend for him, and try to perſuade him, and ſo, according to his diſcretion, take order for the reformation thereof.

In the next reign we find another act for the relief of the poor. By ſtat. 2 and 3 Ph. and Ma. c. 5. the two favourite ſtatutes, 22 Hen. VIII. c. 12. and 3 and 4 Ed. VI. c. 16. were confirmed, and declared to be in full force; after which, this act goes on to exact the ſame proviſions as had been made by ſtat. 5 and 6 Ed. VI. about appointing collectors, with their gathering, diſtribution, and accounts. To this it was now added, that if a pariſh was too ſmall to ſupport its own poor, then, upon certificate to the juſtices of the county, two of them, upon examination of the matter, might grant a licence under ſeal to ſuch of the poor as they thought proper, to beg abroad. In towns, the chief officer was to exhort a wealthy pariſh to aſſiſt a poorer. If perſons ſo licenſed to beg exceeded the limit preſcribed to them, they were to be puniſhed as vagabonds, according to ſtat. 22 Hen. VIII. Such licenſed perſons were to have a badge on the breaſt, and back of the outer garment. This act was only temporary, and at the end of the firſt ſeſſion of the next parliament it expired; ſo that the regulation of the poor, at the cloſe of this reign, ſtood upon ſtat. 22 Hen. VIII. c. 12. ſtat. 3 and 4 Ed. VI. c. 16. and ſtat. 5 and 6 Ed. VI.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

c. 2. and theſe were afterwards ſuperſeded by other regulations in the reign of queen Elizabeth.

FOR the better ordering of the military ſtate, ſeveral proviſions were made by ſtatute in the reign of Ed. VI. reſpecting ſoldiers [p] and muſters; and ſome acts paſſed for maintaining in vigour and readineſs the antient militia [q].

TO take away temptations to idleneſs is the moſt effectual way of guarding againſt the increaſe of that order of people who are the objects of the foregoing laws. A law was made to leſſen the number of tipling and gaming-houſes. By ſtat. 5 and 6 Ed. VI. c. 25. two juſtices have authority to remove and put away the common ſelling of ale and beer in common alehouſes and tipling-houſes, in ſuch towns and places as they thought meet. None were to keep ſuch houſe, unleſs admitted and allowed in open ſeſſions, or by two juſtices; and they were alſo to give a recogniſance for not uſing unlawful games, and for the maintenance of good order and rule. This was to be certified to the ſeſſions, where the juſtices might inquire by indictment, information, or otherwiſe, if ſuch perſons had broke their recogniſance. Perſons ſelling liquors without ſuch authority, might be committed to gaol for three days, and till they entered into a recogniſance not to keep any ſuch houſe. The licences to keep gaming-houſes, which were ſanctioned, as we have ſeen, by the ſtatutes of Hen. VIII. [r] were greatly abuſed, and became the ſource of much evil. To remedy this, it was enacted, by ſtat. 2 and 3 Ph. and Ma. c. 9. that every licence, placard, or grant, for the keeping any bowling-alley, dicing-houſe, or for other unlawful games, ſhould be null and void.

Tipling and gaming-houſes.

THE parliament were not inattentive to ſuch objects as concerned the public weal, and improvement of the country. Among theſe, the firſt was agriculture. We find a

[p] Stat. 2 and 3 Ed. VI. c. 2. and ſtat. 4 and 5 Ph. and Ma. c. 3.

[q] Stat. 4 and 5 Ph. and Ma. c. 2.

[r] Vid. ant. 294.

ſtatute

ſtatute of Edward VI. for the improvement of common and waſte lands [s], in confirmation of the ſtat. of Merton, c. 4. and ſtat. Weſt. 2. 13 Ed. I. * c. 46.; and further, all perſons recovering in an aſſiſe on either of thoſe ſtatutes, were to have treble damages. It was however provided, that where houſes had been built upon waſte grounds, not having three acres incloſed, and an orchard, garden, or pond, not exceeding two acres, which did no hurt to the waſte, and were a great convenience to the owner, they ſhould not be conſidered as within the meaning of the above ſtatutes. This proviſo was in favour of huſbandry and cultivation. The preferring of tillage to paſture, as had been done by former ſtatutes, with the ſupport of farm-houſes, and other expedients for promoting huſbandry, were inſiſted upon, and encouraged by ſeveral ſtatutes [t].

THE courſe of trade, and the conduct of manufactures, ſtill continued to engage the notice of the legiſlature; but the number of acts about buying and ſelling, retaining ſervants and apprentices, are too tedious to make a part of our enquiry. The principal of theſe was ſtat. 5 and 6 Ed. VI. c. 14. which gives a definition, and directs the puniſhment, of certain offenders againſt the fair dealer, called ingroſſers, foreſtallers, and regraters.

AMONG the regulations reſpecting trade, we may reckon the repeal of the ſtat. 37 Hen. VIII. c. 9. concerning uſury. It is complained by ſtat. 5 and 6 Ed. VI. c. 20. that the former act had been conſtrued to give a licence and ſanction to all uſury not exceeding ten per cent.; but this conſtruction is declared to be utterly againſt ſcripture, and therefore all perſons are forbid to lend, or forbear by any device, for any uſury, increaſe, lucre, intereſt, or gain whatſoever, on pain of forfeiting the thing,

[s] Stat. 3 and 4 Ed. VI. c. 3.
* Vid. ant. vol. I. 163 and vol. II. 209.
[t] Stat. 5 and 6 Ed. VI. c. 5. Stat. 2 and 3 Ph. and Ma. c. 2.

and

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

and the uſury, or intereſt, and of being impriſoned and fined; and ſo the law ſtood till the 13th of Elizabeth.

RESPECTING games and diverſions, an act was made in the ſpirit of thoſe in the time of Henry VIII. * about hand-guns, by which ſhooting hail-ſhot was prohibited abſolutely [a], even to perſons licenſed to ſhoot by the former acts. On the other hand, a ſtatute of Henry VIII. againſt the ſhooting of wild-fowl was repealed [b].

A PROPER adminiſtration of juſtice and of ſervices of truſt was promoted by an act againſt the ſale of offices. This is ſtat. 5 and 6 Ed. VI. c. 16. which enacts, that if any perſon ſell an office, or take any money or other profit, directly or indirectly, or any promiſe of it, for any office or deputation of office, or to the intent that any perſon ſhall have an office which concerns the adminiſtration or execution of juſtice; the receipt, or comptrollment or payment of any of the king's treaſure; or ſurveying of any of the king's caſtles, manors, lands; or any of the cuſtoms; or the keeping of any of the king's towns, caſtles, or fortreſſes; or any clerkſhip in a court of record; the perſon ſo taking any reward or promiſe of reward for ſelling, ſhall be judged to loſe and forfeit all right, intereſt, and eſtate, which he has in ſuch office; and the perſon making ſuch offer to purchaſe, ſhall be deemed incapable to enjoy the ſaid office: and all bargains, bonds, covenants, and agreements, concerning ſuch a tranſaction, are declared void. This act, however, is not to extend to offices of inheritance; nor to the parkerſhip, or keeping of any park, houſe, manor, garden, chaſe, or foreſt; nor to the chief-juſtices of the king's bench and common-pleas, nor to juſtices of aſſize; who are left at the ſame liberty to diſpoſe of offices as before this act.

Payment of tythes.

SEVERAL regulations were made by ſtat. 2 and 3 Ed. VI. c. 13. reſpecting the payment of tythes; all which contri-

[a] Vid. ant. 295. [b] Stat. 2 and 3 Ed. VI. c. 14. [c] Stat. 3 and 4 Ed. VI. c. 7.

buted

buted to ſecure the clergy in a more regular receipt of that inconvenient, tho' ſubſtantial and effective, proviſion. The act begins by confirming the ſtat. 27 Hen. VIII. c. 20. and 32 Hen. VIII. c. 7. * both made on the ſame ſubject, and with the ſame view. In order to further the intention of the makers of thoſe two laws, it moreover enacts, that every one of the king's ſubjects ſhall truly and juſtly, without fraud or guile, ſet forth and pay his predial tythes, in their proper kind, as they riſe and happen, in the manner they had been, or ought to have been paid for the laſt forty years before that act: and none ſhall carry away ſuch tythes before he has ſet forth the tenth part, or agreed for it with the parſon, vicar, or proprietor, under the penalty of forfeiting the treble value of the tythes ſo carried away. So far a temporal remedy in the ſecular courts is given for a breach of this duty. In the next clauſe of the act, a remedy is given in the ſpiritual court for the like injuſtice; for the act ſays, as often as the predial tythes ſhall be due, the party to whom they ought to be paid, or his deputy, may come and view them, to ſee that they are juſtly ſet forth. And if any perſon carry them away before they are ſet forth, or withdraw them; or prevent the parſon, vicar, or proprietor, or their deputies, from viewing them, as beforementioned, by reaſon whereof the tythe is loſt, impaired, or hurt; then, upon complaint to the ſpiritual judge, the party offending is to pay double the value of the tythes ſo taken, loſt, withdrawn, or carried away, beſides coſts of ſuit.

THESE are the two general proviſions relating to the collection of predial tythes: the remainder of this act is taken up with other matters incident to tythes of various kinds; all of which have been conſidered in a former part of this Hiſtory [y]. Perſons [z] who depaſture tythable cattle in waſte-grounds whereof the pariſh is not certainly known,

* Vid. ant. 222. [y] Vid. ant. 85. [z] Sect. 3.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

known, are to pay the tithe of ſuch cattle to the parſon or proprietor of the pariſh, hamlet, or town, where they dwell. Waſte-grounds which had paid no tythes before this act, by reaſon of their barrenneſs, were, at the end of ſeven years next after being fully improved, to pay tythe of corn and hay growing there [a]. Every perſon exerciſing merchandize, bargaining and ſelling, clothing, handicraft, or other art or faculty, who had paid perſonal tythes within forty years before this act, is yearly, before Eaſter, to pay for his perſonal tythes the tenth part of his clear gains; his charges and expences, according to his eſtate, condition, or degree, to be therein abated and deducted. But theſe proviſions were not meant to infringe either compoſitions real [b], or any cuſtom by which handicrafts-men might have formerly paid their perſonal tythe [c]. If any perſon refuſe to pay his perſonal tythe, as above ordered, the ordinary may call him before him, and may examine him by all lawful means other than by his own corporal oath [d], concerning the true payment thereof.

OFFERINGS and the tythes of fiſh are to be paid as heretofore, according to the cuſtom of different places [e]. It was provided, that the inhabitants of the city of London and Canterbury, with their ſuburbs, and every other town or place where they have been uſed to pay their tythe by their houſes, ſhall not be taken as within the meaning of this act [f]. A cuſtom which had prevailed in Wales, of demanding a tythe of cattle and other goods given at the marriage of any one, was hereby abrogated [g].

THE reſt of this act concerns judicial proceedings for recovery of tythes. Suits for ſubtraction of tythes, or any of the beforementioned duties, are to be in the eccleſiaſtical court, and not before any other judge [h]. Any

[a] Sect. 5.
[b] Ibid. 6.
[c] Ibid. 8.
[d] Vid. ant. 32.
[e] Sect. 10, 11.
[f] Ibid. 12.
[g] Ibid. 16.
[h] Ibid. 13.

party

party disobeying the ecclesiastical sentence may be excommunicated; and if he wilfully so remain for forty days after publication thereof in the parish-church or place where he dwells, the spiritual judge may signify the same to the king in chancery, and thereupon require process *de excommunicato capiendo*. That such suits may not be wantonly delayed by prohibitions, before any prohibition shall be granted, the party suing for it is to deliver to some of the judges of the court a true copy of the libel depending, and under the copy is to be written the suggestion; and if the suggestion is not proved by two honest and sufficient witnesses, within six months after the prohibition awarded, there is to go a consultation; and double costs and damages are to be recovered against the person suing the prohibition, to be assessed by the court granting the consultation. However, lest it might be imagined that the jurisdiction of the spiritual judge was intended to be hereby enlarged, it is provided, that [1] he shall not hold plea of any thing contrary to stat. West. 2. 13 Ed. I. c. 5. *articuli cleri*, *circumspecte agatis*, *silva cædua*, the treatise *de regiâ prohibitione*, or stat. 1 Ed. III. c. 10. [2] or of any matter which belongs to the king's court.

To protect the clergy in another instance, an act was made in the same sessions to moderate and qualify the penalty of deprivation from *all* their ecclesiastical preferment, inflicted by stat. 26 Hen. VIII. c. 3. on those who were certified by the collector not to have paid their tenths. It was now declared, by stat. 2 and 3 Ed. VI. c. 20. that such defaulter shall be deprived *ipso facto* of that only dignity, benefice, or other spiritual promotion, whereof the certificate shall be made; and they are no longer to be thereby disabled from enjoying any other benefice or preferment. The papistical piety of queen Mary dictated another application of tenths and first-fruits of ecclesiastical prefer-

[1] Sect. 15. [2] Vid. ant. vol. II. 194. 215. 291. 375. 388.

ments.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

ments. They were by ſtat. 2 and 3 Ph. and Ma. c. 4. no longer to be paid to the queen; and the tenths before that paid according to ſtat. 26 Hen. VIII. c. 3. were to be employed to other godly purpoſes.

THE ſtatutes which next deſerve our notice, are ſuch as relate to certain ſpecial modes of redreſs; as the traverſe of offices, the impounding of diſtreſſes, and the ſale of ſtolen horſes; after which will naturally follow ſuch alterations and improvements as were made, during theſe two reigns, in the more general remedies, and the execution of juſtice.

Traverſe of offices.

THE ſtat. 2 and 3 Ed. VI. c. 8. was made in favour of ſuch perſons as uſed ſometimes to be precluded of their rights * by untrue finding of offices. As for inſtance, perſons holding terms for years, or by copy of court-roll, were often put out of their poſſeſſion by reaſon of inquiſitions, or offices found before eſcheators, commiſſioners, and others, intitling the king to the wardſhip or cuſtody of lands, or upon attainders for treaſon, felony, or otherwiſe; and this, becauſe ſuch terms for years and intereſts in copyhold were not found: after which they had no remedy, during the king's poſſeſſion, either by traverſe or *monſtrans de droit*, becauſe ſuch intereſts were only chattels or cuſtomary hold, and not freehold. In like manner perſons having any rent, common, office, fee, or other profit *apprendre*, if ſuch intereſt were not found in the office intitling the king, they had no remedy by traverſe, or other ſpeedy means, without great and exceſſive charges, during the king's right therein. To redreſs theſe hardſhips on the ſubject, it is declared, that all perſons in the above caſes ſhall enjoy their rights and intereſts, the ſame as if no office or inquiſition had been found, or as they might if their intereſt had been regularly found at the ſame time in ſuch inquiſition or office[1]. Remedy was given where a perſon was found, untruly, to be heir of the king's tenant, and the like. And where a per-

* Vid. ant. 231. [1] Sect. 3.

ſon

ſon is untruly found lunatic, ideot, or dead, and in ſome other caſes, it is enacted, that the party grieved ſhall have a traverſe, and proceed to trial therein; and have like advantages as in other caſes of traverſe upon untrue inquiſitions and offices [m]. The ſame of untrue finding, when a perſon is attainted of treaſon, felony, or *præmunire*, the party grieved may have a traverſe, or *monſtrans de droit*, without being driven to a petition of right [n]. In all traverſes taken according to this act, it is directed, that the perſon purſuing his traverſe ſhall ſue out a writ of *ſcire facias*, one or more, as the caſe ſhall require, againſt ſuch perſon as ſhall have an intereſt either by the king or by his patentee, in like manner as upon traverſes and petitions in other caſes, with like pleas to the defendants in the *ſcire facias* [o].

THE proviſions of this act do not come into ſuch common uſe as thoſe of the following. The ſtat. 1 and 2 Phil. and Mar. c. 12. has made ſome regulations on a ſubject which had not been touched by the parliament ſince the reign of Edward I [p]. It is thereby enacted, that no diſtreſs ſhall be driven out of the hundred where it is taken, except to a pound overt, within the county, not above three miles diſtant from the place where it was taken: and no cattle or goods taken by diſtreſs at one time, are to be impounded in ſeveral places, whereby the owner ſhall be conſtrained to ſue ſeveral replevins, under pain of an hundred ſhillings, and treble damages to the party grieved. Only four-pence is to be taken for poundage of one diſtreſs, under the penalty of 5l. For the more ſpeedy delivery of cattle taken by diſtreſs, every ſheriff, at his firſt county-day, or within two months next after he has received his patent of office, is to appoint, and proclaim in the ſhire-town, four deputies at the leaſt, dwelling not above twelve miles from each other, who are to have authority, in his name, to make replevies, and deliverances of diſtreſſes, under the penalty of 5l. for

[m] Sect. 6. [n] Sect. 7. [o] Sect. 13. [p] Vid. ant. vol. II. 112.

every

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

every month that he neglects to make such appointment.

THE stat. 2 and 3 Ph. and Ma. c. 7. made some regulations respecting the sale of horses in fairs and markets, which were designed to prevent the disposal of stolen horses, and thereby put a check upon that offence. The complaint was, that such horses used to be sold in houses, stables, or some bye-place, and the toll taken in private; "whereby "the true owners," says the act, "were not able to try the "falsehood and covin between the buyer and seller," and so were without remedy. It therefore enacts, That the owner, or chief keeper of every fair and market overt shall appoint a certain open place, within the town, where horses used to be sold at the time of the fair or market; in which place there shall be appointed a sufficient person to take toll from ten o'clock in the morning to sun-set, under pain of forty shillings. This toll-gatherer is to take such tolls as are due for horses at that place, between those hours, and *at no other time or place*; and is to have before him, at the time, the parties to the bargain, with the horse so sold; and shall write in a book, kept for that purpose, the names and place of abode of the parties, and the colour, *with one special mark* at the least, of the horse. This book is to be brought, the next day after the fair or market, to the owner or chief keeper thereof, who shall cause a note to be made of the number of horses sold, and subscribe his name, or set his mark to it.

Sale of horses.

IT is moreover declared, that the sale in a fair or market overt of any horse that is thievishly stolen or feloniously taken, shall not alter the property, unless it be, during the time of the fair or market, openly ridden, walked, or kept standing for an hour at least, between ten o'clock in the morning and sunset, in the open place where horses are commonly used to be sold, and the contract be made in the above manner; and the owner may seize such horse, or bring an action of detinue or replevin for it. The justices in their sessions may enquire of all offences against this act.

Some

Some further provisions of the like kind were afterwards made in the reign of queen Elizabeth [p].

Adminiſtration of juſtice.

We come now to ſuch acts as were made to promote a better adminiſtration of juſtice. It was enacted by ſtat. 2 and 3 Ed. VI. c. 25. that whereas the county courts in ſome ſhires were held from ſix weeks to ſix weeks, and attornies, not aware of that private cuſtom, fued out proceſs with like returns as if they were held monthly, to the great delay and impediment of ſuitors, no county-court ſhall be longer deferred than one month. In order to quiet poſſeſſions, and facilitate the giving evidence of titles, it is enacted by ſtat. 3 and 4 Ed. VI. c. 4. that, reſpecting all letters patent made ſince 4th Feb. 27 Hen. VIII. a perſon may make title by way of declaration, plaint, avowry, title, bar, or otherwiſe, to lands, honours, and hereditaments, under the king's patentees, by ſhewing forth an exemplification or *conſtat* of the letters patent, which ſhall be of the ſame force and effect as the originals.

The proceſs of the law was improved in one point by ſtat. 1 Ed. VI. c. 10. The writs of proclamation ordained by ſtat. 6 Hen. VIII. c. 4. * in caſes of outlawry, were to be directed to the ſheriff of the county where the party lived; but when the defendant lived in Wales, or a county palatine, they were made into the adjoining county. The preſent act directs, that where a defendant dwells in Wales, or in the county-palatine of Cheſter, or of the city of Cheſter, the juſtices of the court ſhall have authority to award a writ of proclamation to the ſheriffs of thoſe places: to them alſo are to be directed [q] writs of *capias utlagatum*, as immediate officers of the king's bench and common-pleas. The ſame was done by ſtat. 5 and 6 Ed. VI. c. 26. with reſpect to the county-palatine of Lancaſter. For receiving ſuch proceſs, thoſe ſheriffs are required to have deputies in the court of king's bench and common-pleas. As the ſtatute

[p] Stat. 31 El. c. 12. * Vid. ant. 261. [q] Sect. 4.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

of fines did not extend to the county-palatine of Cheſter, the ſame proviſion was made by ſtat. 2 and 3 Ed. VI. c. 28. to give effect to fines levied before the high-juſtice of Cheſter, or his deputy, as had been made in the laſt reign reſpecting fines in the county of Lancaſter[r]. By ſtat. 1 Ed. VI. c. 7. it is enacted, that no ſuit ſhall be diſcontinued by reaſon of the king's death; that the ſubſequent judicial proceſs ſhall be made out in the ſtile of the reigning king, and the variance in ſuch proceſs between the names of the kings ſhall not be error; that no aſſiſe of *novel diſſeiſin*, of *mortaunceſtor*, *juris utrùm*, or attaint, depending before the juſtices of aſſiſe, ſhall be diſcontinued by reaſon of death, new commiſſion, aſſociation, or not coming of ſuch juſtices; that though any plaintiff be made duke, archbiſhop, marquis, earl, viſcount, baron, biſhop, knight, juſtice of the one bench or the other, or ſerjeant at law, no writ or action ſhall be abateable; and that a juſtice of aſſiſe, of gaol-delivery, or of the peace, or a perſon being in any other of the king's commiſſions whatſoever, though preferred to any of the above honours, ſhall yet remain juſtice and commiſſioner, and execute his commiſſion as before.

Moreover it was enacted, that where a perſon is found guilty of any felony whatſoever, for which judgment of death ſhould or may enſue, and ſhall be reprieved, without judgment, and committed to priſon; any who ſhall be afterwards aſſigned juſtices to deliver that gaol, may give judgment of death, as the former juſtices might have done; and that no proceſs or ſuit before juſtices of aſſiſe, gaol-delivery, *oyer* and *terminer*, of the peace, or other commiſſioners, ſhall be diſcontinued by the publiſhing of any new commiſſion or aſſociation, or by altering the names of the juſtices or commiſſioners; but that the new juſtices and

[r] Vid. ant. 240.

other

other commiſſioners may proceed as if the old commiſſion had ſtill remained.

It was enacted by ſtat. 1 Ma. ſt. 2. c. 7. that all fines whereupon proclamation has not been duly had, by reaſon of the adjournment of the term, ſhall be of the ſame force under ſtat. 4 Hen. VII. c. 24. as if the term had been regularly holden. The ſtat. 35 Hen. VIII. c. 6. which gave a *tales de circumſtantibus* to a plaintiff, was by ſtat. 4 and 5 Ph. and Ma. c. 7. extended to any iſſue to be tried between the king and a private party, or ſuch as purſue any ſuit for the king and themſelves; but ſuch *tales* muſt be on the requeſt of the king, or of the party ſueing *qui tam.*

An explanation was made of ſtat. 32 Hen. VIII. c. 2.* concerning the limitation of actions, as to certain caſes, where it was often not poſſible, from the natural courſe of things, to lay the *eſplees*, ſeiſin, or preſentment within ſixty years. It was therefore declared by ſtat. 1 Ma. ſt. 2. c. 5. that that act ſhould not extend to any writ of right of advowſon, *quare impedit*, aſſiſe, *jure patronatûs*, nor to any writ of right of ward, writ of raviſhment of ward, for the wardſhip of the body, or of any honor, caſtle, or lands, nor to the ſeiſor of ſuch wardſhip.

In reviewing the changes made in our criminal law during theſe two reigns, we ſhall firſt go thro' the ſtatutes of Edward VI. and then proceed to thoſe of queen Mary. The criminal law was very materially affected by ſtatutes made in the reign of Edward VI. which we ſhall now mention in the order in which they were made. The ſtatute of 1 Ed. VI. c. 12. makes a kind of date in the hiſtory of offences, by repealing many harſh laws, and making ſeveral beneficial proviſions as well for the protection of the ſubject, as the puniſhment of delinquents. It is introduced by a preamble not unworthy of notice. Having ſaid, "that on the part of a prince, the people ſhould wiſh for "clemency and indulgence, and rather too much forgive- Criminal law.

* Vid. ant. 267.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

"neſs and remiſſion of royal power and puniſhment, than "exact ſeverity and juſtice to be ſhewed; and that, on the "part of the ſubject, he ſhould rather obey for love, than "ſtrait laws; yet," it goes on, "ſharper laws, as a "harder bridle, ſhould be made to ſtay thoſe men and facts "that might elſe give occaſion of further inconvenience." This conſideration "cauſed king Henry VIII. and other "his progenitors to make ſtatutes very *ſtrait, ſore, extreme, "and terrible*, although then not without great conſidera-"tion moved and eſtabliſhed[s]; and, for the time, to the "avoidance of further inconvenience, very expedient and "neceſſary. But as in tempeſt or winter, one courſe and "garment is convenient; in calm or warm weather, a "more liberal caſe or lighter garment both may and ought "to be followed and uſed; ſo we have ſeen divers ſtrait "and ſore laws made in one parliament (the time ſo re-"quiring), in a more calm and quiet reign repealed. "Which example the king being willing to follow, is con-"tented and pleaſed that the ſeverity of certain laws be mi-"tigated and remitted." It is therefore ordained, that no act or deed being by ſtatute made treaſon or petit-treaſon, ſhall be ſo deemed, but only ſuch as are treaſon or petit-treaſon by ſtat. 25 Ed. III. ſt. 5. c. 2. and by this preſent act: and [t] all offences made felony by parliament ſince 23d April in the firſt year of Henry VIII. and all acts making ſuch offences felony, are repealed: with the exception of all ſtatutes concerning the counterfeiting of the coin of this realm, or of any other current within the realm; or concerning the bringing in of counterfeit money: nor was this repeal to extend to ſtat. 27 Hen. VIII. c. 2.* concerning thoſe who counterfeited the king's ſign manual, privy ſignet, or privy ſeal, their counſellors, aiders, and abettors [t]; nor to ſtat. 27 Hen. VIII. c. 17.† concerning a ſervant embezzling his maſter's goods [u]. It alſo declares, that in all caſes of felony, except thoſe mentioned

Repeal of treaſons and felonies.

[s] Sect. 4. * Vid. ant. 274. [t] Sect. 8. † Vid. ant. 283. [u] Sect. 18.

in

in this act, every one found guilty upon his arraignment, or who confeſſes, or ſtands mute, or will not anſwer directly, ſhall have his clergy [x].

It alſo repeals, as we have before obſerved, the ſtatutes of Richard II. Henry V. and Henry VIII. againſt heretics: and after ſpecifying theſe ſtatutes by name, it repeals generally all acts of parliament concerning doctrine and matters of religon [y]. It likewiſe repeals [z] ſtat. 31 Hen. VIII. c. 8. that proclamations made by advice of the council ſhould be obeyed, as acts made by parliament; and ſtat. 34 and 35 Hen. VIII. c. 23. for the due execution of ſuch proclamations.

So far this act is employed in repealing certain laws of a ſevere caſt; the remainder of it is taken up either in enacting ſome new offences, or making ſome beneficial qualifications of criminal proceedings.

In the firſt place, it was ordained, if any perſon, by open preaching, expreſs words or ſayings, affirmed that the king was not, or ought not to be, ſupreme head of the church of England and Ireland, immediately under God; or, that the biſhop of Rome, or any other perſon, was or ought to be by the laws of God ſupreme head of the ſame churches; or that the king was not king of England, France, and Ireland; or if any one did compaſs or imagine, by open preaching, expreſs words or ſayings, to depoſe the king from his eſtate, or deprive him of his titles; or did openly publiſh or ſay, that any perſon other than the king of right ought to be king; every ſuch offender, his aiders or abettors, ſhould for the firſt offence forfeit all his goods and chattels, and ſuffer impriſonment during the king's pleaſure; for the ſecond offence, forfeit the iſſues and profits of his lands, benefices, and other ſpiritual promotions, for life, with his goods and chattels, and be impriſoned during life; the third offence to be high-treaſon [a]. If the above offences

[x] Sect. 10. [y] Sect. 3. [z] Sect. 5. [a] Sect. 6.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

were committed by writing, printing, overt deed, or act, it was high-treaſon for every offence [b]. It was, beſides, enacted, for confirming the ſucceſſion eſtabliſhed by ſtat. 35 Hen. VIII. c. 1. * that if any of the king's heirs, or perſons to whom the crown was limited by that act, uſurped the one of them upon the other, or interrupted the king in the quiet enjoyment of the crown, it ſhould be adjudged high-treaſon.

After enacting the above treaſons and offences, this ſtatute takes away clergy from perſons convicted or attainted of the following crimes: of murder of malice prepenſed; of poiſoning of malice prepenſed; of breaking of any houſe by day or by night, any perſon being then in the ſame houſe where the breaking ſhall be committed, and thereby put in fear or dread; for robbing of any perſon or perſons in the highway, or near the highway; or for felonious ſtealing of horſes, geldings, or mares; of felonious taking of any goods out of any pariſh-church, or other church or chapel. In all theſe caſes clergy is taken away, if the party is found guilty by verdict or confeſſion, or will not anſwer directly, or ſtands wilfully and maliciouſly mute [c].

For removing doubts and defining the extent of crimes, in two inſtances, it is declared [d] that concealment, or keeping ſecret any high-treaſon, ſhall be adjudged miſpriſion of treaſon; and that [e] all wilful killing by poiſoning ſhall be deemed wilful murder of malice prepenſed; it having been declared high-treaſon in the former reign [f].

Some proviſions are made reſpecting incidents of trials, and the like. It is declared, that the ſtatutes made in the time of Henry VIII. and all clauſes of ſtatutes concerning challenge for the county, hundred, or peremptory challenge; or concerning the trial of foreign pleas, pleaded by murderers, felons, or other offenders, ſhall remain in force [g];

[b] Sect. 7.
[c] Vid. ant. 280.
[d] Sect. 10.
[e] Sect. 30.
[f] Sect. 13.
[g] Vid. ant. 282.
[h] Sect. 11.

which are ſtat. 35 Hen. VIII. c. 6. ſtat. 4 Hen. VIII. c. 2. ſtat. 22 Hen. VIII. c. 2. And where-ever a common perſon may have his clergy, as a clerk convict who may make his purgation; and alſo in all caſes where the privilege of clergy is taken away by this act (wilful murder and poiſoning of malice prepenſed only except); a lord of parliament and peer of the realm, having place and voice in parliament, by claiming the benefit of this act, though he cannot read, without any burning in the hand, loſs of inheritance, or corruption of blood, is to be deemed, for the firſt time only, as a clerk convict who may make purgation [h]; and ſuch a perſon is to be tried for *any* of the offences limited in this act by his peers, as in caſes of high-treaſon [i].

THAT the objection of bigamy might no longer be a cauſe for precluding any one from his privilege of clergy, it is declared, that perſons who have been ſundry times married to ſingle women or widows, ſhall, notwithſtanding, have this benefit [k]; and that the wife of any one attainted, convicted, or outlawed of any treaſon, petit-treaſon, miſpriſion of treaſon, murder, or felony, ſhall notwithſtanding enjoy her dower; a point which had been attempted in former parliaments in caſes of felony, but without ſucceſs [l]. The preſent act, as far as concerned treaſon, was repealed a few years after, as will be ſeen preſently.

FINALLY, reſpecting proſecutions it was enacted, that no perſon ſhould anſwer for any of the before-mentioned treaſons, by open preaching of words only, unleſs he was thereof accuſed within thirty days after the open preaching or words ſpoken; the accuſation to be made to one of the king's council, a juſtice of aſſiſe, or of the peace; and if the accuſers happened to be out of the realm during the thirty days, then the party was to be accuſed within ſix

[h] Sect. 14.
[i] Sect. 15.
[k] Sect. 16.
[l] Sect. 17. Vid. ant. vol. II. 467, 468.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

months [m]. Further it is enacted, that no one ſhall be indicted, condemned, or convicted for any treaſon, petit-treaſon, miſpriſion of treaſon, or for any words before ſpecified, unleſs he be accuſed by two ſufficient and lawful witneſſes, or willingly, without violence, confeſs the ſame; concerning which laſt proviſion we ſhall ſay more hereafter.

Houſe-breaking.

AT preſent we ſhall make a remark upon one article of that clauſe of the ſtatute which takes away clergy from thoſe who are convicted "of *breaking of any houſe by day* "*or by night*, any perſon being then in the ſame houſe, "and thereby put in fear and dread." Theſe words, upon the face of them, appear to have enacted a nullity; for, as the breaking of a houſe by day or by night, though any body ſhould be put in fear, is not in itſelf a felony, it ſtands in no need of clergy, and the taking it away is in effect inflicting no penalty at all: however, it is not to be ſuppoſed, that an act made upon ſuch full conſideration as this ſeems to have been, would have contained a ſentence that was neither law nor ſenſe, in ſo material a point as this; and whatever may be the modern conſtruction of theſe words, they certainly, at the time, bore a meaning entirely conſonant to the notions of law then prevailing. It is moſt probable, that the parliament here meant to take away clergy from *burglary*; the deſcription of which offence, we have ſeen, was in early times very large, and was not yet contracted to the preciſe compaſs in which it now is: and at the time this act was made, that offence might, in the minds of ſome, be ſufficiently deſcribed in the words of the ſtatute. The breaking a houſe by day or by night was, as before appears, in the reign of Edward III. burglary [n], though nothing was taken; and, notwithſtanding Fitzherbert, in his abridgement of that caſe, has ſaid it muſt be *with an intent to take away goods*, that requiſite

[m] Sect. 19. [n] 21 Aſſ. 95. Fitz. Cor. 264. Vid. ant. vol. III. 223, 224.

is

is not in the original report, but was added by himſelf, and might, perhaps, be only his own opinion, or at moſt only the opinion of his time. As to burglary being in the night only, the firſt determination, which expreſsly and finally ſays that it ſhall not be conſidered as ſuch, unleſs the breaking be by night, is a caſe in 4 Ed. VI. three years after this act[o]: if ſo, the breaking here deſcribed, without any thing more, comprehended a burglary as then underſtood; and probably the ſpecifying whether by day or by night, was to obviate the doubts, which, moſt likely, long ſubſiſted, before it was ſolemnly agreed that it muſt be by night.

But ſoon after this ſtatute, this offence began to be more expreſsly ſettled and defined. After the determination in 4 Ed. VI. which confined it to the night, we find a writer of queen Mary's time expreſsly ſaying, that there muſt be a *felonious intent* to rob or murder; as alſo, that it muſt be in the *night*[p]. When burglary was defined in this manner, the ſtatute 1 Ed. VI. c. 12. was defrauded, as it were, of its ſubject; and as the words no longer expreſſed any exiſting felony, they took away clergy from none. But that ſuch a proviſion might not be vain and uſeleſs, the courts, to whom are given the oracles of the law, have ſince thought proper to ſupply by conſtruction the defect which had thus accidentally been brought on the ſtatute. They argued, that the *breaking a houſe by night*, here certainly meant, that *breaking* and entering *by night, with intent to commit felony*, which is now called burglary; and that, as breaking a houſe by day is in itſelf no felony, therefore the breaking here meant, is ſuch a one as is attended with a *ſtealing* in a houſe after the breaking. In this manner were two crimes raiſed by conſtruction in the place of one originally intended, upon

[o] Bro. Cor. 185. [p] Staunf. lib. 1. c. 24.

which

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

which the ſtatute might have its effect to take away clergy*.

Offences againſt the common-prayer.

THE next ſtatute which enacts any penalties, is the act of uniformity, 2 and 3 Ed. VI. c. 1. which inflicts ſeveral puniſhments on offences againſt the book of common-prayer. Thus it is ordained, that if any miniſter refuſe to make uſe of this book, or uſe any other, or ſhall preach or ſpeak any thing in derogation of it, and ſhall be thereof convicted by verdict, by his own confeſſion, or by *the notorious evidence of the fact*†, he ſhall forfeit the profits of ſuch of his ſpiritual benefices as the king pleaſes, for a whole year, and ſuffer impriſonment for ſix months; for the ſecond offence, ſhall be deprived *ipſo facto* of all his ſpiritual promotions, and be impriſoned a whole year; and for the third offence, be impriſoned during life. And if he has no benefice or ſpiritual promotion, he ſhall for the firſt offence be impriſoned for ſix months; and for the ſecond offence, during life. So far of the clergy.

AGAIN, if *any perſon whatſoever* ſhall, in any interludes, plays, ſongs, rhimes, or by other open words, ſpeak any thing in derogation of this book; or ſhall, by open fact or open threatenings, compel or procure any miniſter in any cathedral or church to ſing or ſay any prayers, or miniſter any ſacrament otherwiſe than in this book; or ſhall interrupt any miniſter in ſuch ſinging, ſaying, or miniſtering, he is to forfeit for the firſt offence 10l.; for the ſecond offence, 20l.; for the third offence, all his goods and chattels, and to be impriſoned during life: and if the 10l. is not paid in ſix weeks after conviction, he is to be impriſoned for three months; and if the 20l. is not paid in the ſame time, he is to be impriſoned for ſix months inſtead thereof: all theſe offences to be determined either

* The ſtatutes which take away clergy from *burglary*, and from *larceny in a houſe, with a breaking*, and *without a breaking*, create much confuſion. I have attempted to repreſent their diſtinct offices in a plain and obvious manner in the *Chart of Penal Law*.

† We have before ſeen, that this was legal evidence in the canon law. Vid. ant. 24.

at

at the aſſizes or ſeſſions, with liberty to every archbiſhop or biſhop to be aſſociated to the juſtices. The indictment muſt be at the next ſeſſions or aſſize; and the lords of parliament are to be tried for theſe offences by their peers. The juriſdiction of biſhops is not hereby taken away; but they are to enquire and puniſh ſuch offenders by eccleſiaſtical cenſures, ſo, however, as no one be puniſhed both by the ſpiritual and temporal court for the ſame fact.

Unlawful aſſemblies.

THE next penal ſtatute was 2 and 3 Ed. VI. c. 5. againſt unlawful aſſemblies; an act which was occaſioned by the late riots in many parts of England, and which provided ſome very heavy penalties to prevent the like diſorders. It was made high-treaſon for twelve perſons or more, being aſſembled together, to attempt to kill or impriſon any of the king's council; or to alter any laws; and to continue together for the ſpace of an hour, being commanded by a juſtice of peace, mayor, ſheriff, or the like, to depart. It was made felony for twelve perſons to practiſe to deſtroy any park, pond, conduit, or dove-houſe; or to have common or way in any ground; or to pull down any houſes, barns, or mills; or to burn any ſtack of corn; or to abate the rents of any lands, or the prices of victual; and to continue together an hour, being commanded in like manner to depart. Concerning the proviſions of this act, we ſhall have occaſion to ſpeak in the next reign. By c. 15. of the ſame ſtatute, the publiſhing any falſe prophecy upon occaſion of arms, fields, and the like, to the intent to make diſſenſion, was to be puniſhed for the firſt offence, by one year's impriſonment, and the forfeiture of 10l.; for the ſecond offence, by forfeiture of all the party's goods, and impriſonment during life. Both theſe acts, being temporary, were left to expire in a few years. The remainder of the criminal acts paſſed in this reign are, the 9th, 10th, and 11th chapters of ſtat. 5 and 6 Ed. VI. Theſe are very material laws, and come now under conſideration. We ſhall begin with the laſt, concerning treaſon.

THIS

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

THIS ſtatute enacts certain treaſons of the ſame kind with ſome made in the reign of Henry VIII.; however, with ſuch qualifications as diſcover more temper and moderation. If any perſon by open preaching, expreſs words or ſayings, affirmed that the king, or his heirs, or ſucceſſors, as appointed by ſtat. 35 Hen. VIII. c. 1. (being in poſſeſſion of the crown) was a heretic, ſchiſmatic, tyrant, infidel, or uſurper, he was for the firſt offence, to forfeit all his goods and chattels, and to be impriſoned during the king's pleaſure; for the ſecond offence, to loſe the iſſues and profits of his lands during life, and of all ſpiritual promotions, and ſuffer perpetual impriſonment; and for the third offence, he was to be adjudged a traitor. But if the ſame offence was committed by *writing*, printing, painting, carving, or graving, it was made high-treaſon in the firſt inſtance. It was alſo enacted, that if any perſon rebelliouſly withheld any of the king's caſtles, fortreſſes, or holds, or his ſhips, ordnance, artillery, or other munitions of war, and did not give them up within ſix days after proclamation, it ſhould be high-treaſon. It was alſo provided, in purſuance of ſtat. 26 Hen. VIII. c. 13. and ſtat. 35 Hen. VIII. c. 2.* that ſuch treaſons, if committed out of the realm, ſhould be tried by commiſſion in any county; and outlawry pronounced againſt ſuch offender, though out of the realm at the time, was to be valid: to which it was now added by this ſtatute, that if ſuch perſon ſhould within a year after the outlawry pronounced ſurrender himſelf to the chief-juſtice of England, and offer to traverſe the indictment, he ſhall be received ſo to do; and if he is acquitted by verdict, he ſhall be diſcharged from the outlawry and all its forfeitures.

PERSONS who committed the above offences by open preachings or words, muſt have been accuſed within three months. It is moreover declared, generally, that perſons *convict* of high-treaſon ſhall forfeit all lands and tenements in which they have an eſtate of inheritance; and,

* Vid. ant. 493.

in

in repeal of ſtat. 1 Ed. VI. c. 12. ſect. 17. that wives whoſe huſbands have been attainted of treaſon ſhall not have dower [t].

THE reſt of this ſtatute is much in favour of the ſubject. There is a clauſe concerning miſpriſion of treaſon, ſimilar to that in ſtat. 1 Ed. VI. c. 12.; but the preſent, by the particular wording of it, evidently ſhews what was the deſign of theſe repeated declarations on this point: for the act ſays, that the concealment or keeping ſecret of any high-treaſon ſhall be deemed and taken *only* miſpriſion of treaſon; by which it was intended ſo far to ſet a limit to conſtructive treaſons. The next clauſe contains a wiſe proviſion concerning witneſſes on trials; and is thought to have been made in conſequence of what paſſed on the late trial of the duke of Somerſet, when the oppreſſion attending a contrary way of proceeding had excited a general indignation. It enacts, that no perſon ſhall be indicted, arraigned, condemned, convicted, or attainted, for any treaſon that now is, or hereafter ſhall be, unleſs he be thereof accuſed by two lawful accuſers; which, ſo far, ſeems to be little more than had been ordained by ſtat. 1 Ed. VI. c. 12. But this ſtatute goes further: it directs, that ſuch "accuſers, at the time of the arraignment of "the party accuſed, if they be then living, ſhall be brought "in perſon before the party ſo accuſed, and avow and "maintain That that they have to ſay againſt the party "to prove him guilty, unleſs he ſhall willingly, without "violence, confeſs the ſame." The particular meaning of this and the other ſtatute of this king, with their effect and conſequences, will be conſidered, when we ſpeak of the ſtatute of Philip and Mary which was ſuppoſed to have repealed them.

THE ſtat. 5 and 6 Ed. VI. c. 9. next comes under conſideration. This act was made to explain the ſtat. 23

Robbing in a booth or tent.

[t] Vid. ant. 471.

Hen.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

Hen. VIII. c. 1. * upon which there had arisen three doubts; 1st, whether the owner or dweller must not be in the very chamber where the robbery was committed; a doubt that arose from a strict adherence to the notion of a proper robbery, where the taking must be in the presence of the person robbed: 2dly, whether the offender would lose his clergy if the owner or dweller was asleep; apprehending, probably, that in that state he could not be said to be put in fear, according to the requisite of the statute: 3dly, whether a booth or tent in a fair or market, in which dealers used to dwell and sleep during the continuance of such fairs, could be considered as a dwelling-house under that statute. To remove these doubts, it was declared and enacted, that any person found guilty for robbing of a person in any part or parcel of their dwelling-houses or dwelling-places, the owner or dweller in the same house, or his wife, his children, or servants, being then within the same house or place, where the robbery and felony shall happen to be committed and done, or in any other place within the precinct of the same house or dwelling-place, shall in no wise be admitted to his clergy, whether the owner or dweller in the same house, his wife and children then and there being, shall be sleeping or waking. Further, that any one found guilty of robbing a person in a booth or tent in a fair or market, the owner, his wife, his children, or servants, or servant, then being within the same booth or tent, shall not be admitted to the benefit of his clergy; but shall suffer death *in such manner as is mentioned in stat.* 23 *Hen. VIII. c.* 1. for robberies done in dwelling-houses, without any consideration whether the owner or dweller in such booths or tents, his wife, children, or servants, being in the same booths, be sleeping or waking. The latter part of this act is stated in this particular manner, because, as we shall presently see, there have arisen great doubts whether this stat. 23 Hen. VIII. c. 1. (or at least stat. 25 Hen. VIII. c. 3.

* Vid. ant. 186.

which

which is a ſupplement to it) be now in force; which, upon the preſent appearance of things in the courſe of this Hiſtory, muſt be anſwered in the negative; as they were, among other ſtatutes taking away clergy, repealed by ſtat. 1 Ed. VI. c. 12. ſ. 10. as we have before ſeen.

Of the revivor of ſtatute 25 Hen. VIII.

BUT as the doubt concerning theſe ſtatutes ariſes upon the next act, namely, ſtat. 5 and 6 Ed. VI. c. 10. we ſhall proceed to examine that. The preamble recites, that ſtat. 23 Hen. VIII. c. 1. had taken clergy away in certain robberies and burglaries; but extended only to thoſe who were convicted in the county where the fact was committed; and as ſuch felons often carried their ſpoil into another county, and if they were indicted there for the ſimple larceny, they had their clergy; that it was for theſe reaſons enacted, by ſtat. 25 Hen. VIII. c. 3. * that they ſhould loſe their clergy, as if indicted in the ſame county where the robbery or burglary was committed. Then it recites, that ſtat. 25 Hen. VIII. was repealed by a clauſe in ſtat. 1 Ed. VI. and that ſince offenders of this kind had enjoyed their former impunity; for redreſs whereof this ſtatute now enacted, "that the ſaid ſtat. 25 Hen. VIII. c. 3. "touching the putting of ſuch offenders from their cler-"gy; and every article, clauſe, or ſentence, in the ſame, "touching clergy, ſhould from thenceforth, touching "ſuch offences, remain, and be in full force, in ſuch man-"ner and form as it was before the making of ſtat. 1 Ed. VI. "c. 12." This is the effect of ſtat. 5 and 6 Ed. VI. c. 10.

IT became in after-times a queſtion, founded upon the operation of this ſtatute, whether the whole of ſtat. 25 Hen. VIII. c. 3. and alſo ſtat. 23 Hen. VIII. c. 1. were not thereby revived. The occaſion of this queſtion was as follows. A man was indicted † for wilful burning of a houſe. This offence, among others, was deprived of clergy by ſtat. 23 Hen. VIII. c. 1. which extended to principals and acceſſaries before the fact being convicted

* Vid. ant. 317. † Powlter's Caſe, 10 Rep.

by

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

by verdict or confeſſion; but did not reach the caſe of perſons wilfully ſtanding mute, and the like: to remedy which defect, ſtat. 25 Hen. VIII. c. 3. ſ. 2. ouſted of their clergy ſuch offenders in thoſe caſes; and after that, made the proviſion we have before rehearſed concerning perſons indicted in one county for goods taken by robbery or burglary in another. Then came ſtat. 1 Ed. VI. c. 12. ſ. 10. which took away clergy from all felonies except thoſe enumerated in the act. Theſe are for the moſt part ſuch as were before deprived of clergy by ſtat. 23 Hen. VIII.; but there is no mention of *wilful burning of houſes*, nor of acceſſaries before the fact. Therefore, as ſtat. 23 Hen. VIII. and 25 Hen. VIII. were repealed, and ſtat. 1 Ed. VI. c. 12. had not provided for burning of houſes, it was a doubt in the caſe abovementioned, by what exiſting law the offender was ouſted of his clergy. It was there contended (and that ſeems to have been the opinion of *lord Coke*), that this ſtat. 5 and 6 Ed. VI. c. 10. revived *the whole* of ſtat. 25 Hen. VIII. and conſequently, that wilful burning being named in the firſt clauſe among the offences enumerated in ſtat. 23 Hen. VIII. is ouſted by the general words, *every article, clauſe, or ſentence, contained in the ſame concerning clergy*. However, others[a] are of opinion, that, general as theſe words may ſeem, they muſt be reſtrained to that particular miſchief, which, it appears by the preamble, was alone in contemplation to be remedied: and ſome[b] remark, very juſtly, that the enacting clauſe in the latter part of it reſtrains theſe general words, ſo much relied on by lord Coke, to *ſuch offences* as are ſtated in the preamble.

BUT there was another ground of argument in the caſe beforementioned, on which, lord Coke ſays, ſome of the judges relied. The ſtat. 1 Ed. VI. c. 12. having taken away clergy only from principals, the ſtat. 4 and 5 Ph. and

[a] Among whom are *lord Hale* and *ſir Michael Foſter*.

[b] Namely, *ſir Michael Foſter*.

Ma.

Ma. c. 4. was made to take it away from acceſſaries before in the ſame offences; but this ſtatute, moreover, takes it away from acceſſaries before *in wilful burning*. Now ſome of the judges, ſays lord Coke, thought this ſolved the difficulty, and gave an interpretation to the former acts. For if the principal ſhould have his clergy, it would be abſurd, and what was never ſeen in our law, that clergy ſhould be taken from the acceſſary; and ſecondly, it would be in vain to take away clergy from the acceſſary, and leave the principal to have his clergy; for if the principal had his clergy before judgment, the acceſſary ſhould not be arraigned. And this *ſir Michael Foſter* thinks was the real ground upon which that determination reſted: ſo that, upon the whole, he is of opinion, that both 23 and 25 Hen. VIII. were repealed by ſtat. 1 Ed. VI; that the ſtat. 5 and 6 Ed. VI. c. 10. revived ſtat. 25 Hen. VIII. only *in part*, for the purpoſe therein mentioned; that therefore, both ſtat. 23 and ſtat. 25 Hen. VIII. continue otherwiſe repealed; and that the ſtat. 4 and 5 Ph. and Ma. put the matter out of doubt with regard to *arſon*[*].

WHATEVER ingenuity there may be in this way of reconciling the repugnance of ſtatutes *when they are made*, and allowing this to be a probable inference from the ſtat. 4 and 5 Ph. and Ma.; yet it is very difficult to imagine, that the legiſlature, having in contemplation to take away clergy from *principals*, ſhould take it only from *acceſſaries* expreſsly, and leave it to legal conſtruction to make the ſame concluſion as to principals; a method hardly ſuitable to the preciſion and determination of a legiſlative act. When we look back to the form and hiſtory of theſe ſtatutes, we find a want of conſiſtency in the parliament at different times, which only increaſes the obſcurity. The ſtat. 5 and 6 Ed. VI. c. 9. ſeems, from the language of

[*] Foſt. 331 to 336.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

it, to conſider the ſtat. 23 Hen. VIII. as ſtill in force; for it ſays, it *hath been* doubted reſpecting that ſtatute in ſome points, and therefore provides for the explanation of thoſe doubts: whereas, had that ſtatute been looked on as repealed; if any doubts upon it had been thought worthy a parliamentary expoſition; or rather, if it had been thought proper to re-enact any of its proviſions; that ſtatute, it ſhould ſeem, would have been ſpoken of in another tenſe; namely, that it *had* been doubted. If the parliament entertained an opinion that ſtat. 23 Hen. VIII. was then in force, it muſt have been founded on the next chapter of ſtat. 5 and 6 Ed. VI.; which being thought to revive *in toto* ſtat. 25 Hen. VIII. (an act ſupplementary to ſtat. 23 Hen. VIII.) thereby alſo revived ſtat. 23 Hen. VIII. which opinion we have above ſeen was held by lord Coke many years after. Nor is it any objection to this ſuppoſition, that the reviving ſtatute of 5 and 6 Edward VI. is placed in the ſtatute-book ſubſequent to the explanatory act[x]; as there are many inſtances in this reign where acts that are later in point of time, are placed before former acts of the ſame ſeſſion[y].

HOWEVER the parliament might have formed their opinion on this point at the time, they ſoon afterwards thought differently; for early in the next reign it will be ſeen, there happened a caſe which called upon them to make, as it were, a deciſion on this queſtion. They paſſed a ſpecial act for the purpoſe of taking away clergy from an acceſſary before the fact in murder; which offenders, as we have ſeen, are not deprived of that privilege by ſtat. 1 Ed. VI. c. 12.; and they thereby ſeemed to declare, that ſtat. 23 Hen. VIII. which had provided for this caſe, was not then in force. Purſuing the ſame idea, the legiſlature made an act ſome few years after, by ſtat. 4 and 5

[x] Cap. 9. and cap. 10.

[y] Stat. 5 and 6 Ed. VI. c. 3. of holidays and faſts, was introduced and paſſed both houſes before the act of uniformity, cap. 1.

Ph.

Ph. and Ma. to take away clergy from acceſſaries before in all the offences where it was taken from principals by ſtat. 1 Ed. VI. c. 12. and alſo from acceſſaries in arſon; in which this ſtatute is very particular: for tho' it was intended evidently as a ſupplement to ſtat. 1 Ed. VI. yet it rather deviated from that, and purſued the words of ſtat. 23 Hen. VIII. which was at the ſame time regarded as a law not then in force; and by taking clergy from acceſſaries in arſon, when no ſtatute in force took it from the principals, created the above-mentioned doubt; and at length furniſhed, as it is thought, the reſolution of it. Thus, in every point of view, theſe ſtatutes are involved in obſcurity; and the main and only queſtion which renders the diſcuſſion of the point intereſting, can be ſolved no otherwiſe than by the aſſiſtance of refinement and conjecture.

Trial of felons in foreign counties.

To return to the order of time from which we have digreſſed, namely, ſtat. 5 and 6 Ed. VI. c. 10. of perſons committing a burglary or robbery in one county, and flying with the thing ſtolen into another; which leads us to mention another act made for the like furtherance of criminal juſtice, and the removal of like impediments: this was ſtat. 2 and 3 Ed. VI. c. 24. The preamble of the act ſtates two defects of the law. Firſt, that where a perſon, who was felonioufly ſtruck in one county, died in another, a lawful indictment could not be taken in either; for the jurors of the county where he was ſtruck, could take no knowledge of the death; nor could thoſe where the death happened, for the ſame reaſon, take cogniſance of the ſtroke: ſo that there was no way of puniſhing ſuch offenders, neither by indictment, nor, as the ſtatute ſays, by appeal. The ſecond was, where thieves who had robbed or ſtolen in one county, conveyed their plunder into another: in which caſe, tho' the principal was attainted in one county, yet the jurors of the other could take no cogniſance of ſuch attainder; and therefore the acceſſary

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

went unpuniſhed. It appears, by a caſe mentioned in the laſt reign *, that the ſecond defect here ſtated was an obſtacle to juſtice; and however they might *try* a robbery, or murder, which was not complete in either county, by a jury of two; and tho' an *indictment* might be found of ſuch *ſtealing*; yet there is no caſe which had yet warranted an *indictment* of *killing*, where the ſtroke was in one county, and the death in another; but there is an expreſs determination in the reign of Henry VII. that though ſuch a murder might be proſecuted by appeal, it could not by indictment †. To remedy theſe defects, and remove all doubt, it was enacted, as to the firſt, that the jurors of the county where the death happens, may enquire, and an appeal may be brought, of the ſtroke in another; and in the ſecond caſe, that an indictment againſt an acceſſary ſhall be as valid as if the principal offence had been committed within the ſame county. The commiſſioners before whom the indictment is taken, are to write to the *cuſtos rotulorum* where the principal was attainted or convicted, to certify whether he was attainted, convicted, or otherwiſe diſcharged; which certificate is to be under the ſeal of the *cuſtos rotulorum*; and upon the receipt of it, the juſtices are to proceed againſt the acceſſary, as if the principal offence had been committed in that county.

SOME few other ſtatutes were made concerning crimes and puniſhments. The ſtat. 25 Hen. VIII. c. 6. making ſodomy felony without clergy, being repealed by the general clauſe of ſtat. 1 Ed. VI. c. 12. was revived by ſtat. 2 and 3 Ed. VI. c. 29. And becauſe it had been doubted whether the clauſe of ſtat. 1 Ed. VI. c. 12. which takes clergy from thoſe ſtealing horſes, geldings, or mares, inflicted the ſame penalty on thoſe who ſtole *one* horſe, gelding, or mare; it was declared by ſtat. 2 and 3 Ed. VI.

* Vid. ant. 397. † Vid. ant. 178. 396.

c. 33.

c. 33. that it ſhould. This ſingular ſcruple was entertained in conſideration of this being a penal law, but the like had never been countenanced in caſes regarding property; for the ſtatute of Glouceſter, giving an action of waſte againſt one who holds for a term of years, had always been conſtrued to extend to a holding for *a year*[a].

THERE was a law made to puniſh offences committed in churches and church-yards by riotous and outrageous quarrels, as then often happened between the reformed and thoſe of the antient religion. Such offenders are conſidered in three different lights by this act, and differently puniſhed. Firſt, it is enacted by ſtat. 5 and 6 Ed. VI. c. 4. if any perſon, by words only, quarrel, chide, or brawl in any church or church-yard, he ſhall, if the offence be proved by two lawful witneſſes, be ſuſpended, if a lay man, *ab ingreſſu eccleſiæ*; if a clerk, from the miniſtration of his office, at the diſcretion of the ordinary. Secondly, if any one ſmite, or lay violent hands upon another, he ſhall be deemed *ipſo facto* excommunicate. And thirdly, if any maliciouſly ſtrike with a weapon, or draw a weapon to the intent to ſtrike ſuch perſon, and be convicted by verdict of twelve men, or his own confeſſion, or by *two lawful witneſſes*, before the juſtices of aſſiſe, of *oyer* and *terminer*, or of the peace, in their ſeſſions, he ſhall have his ears cut off; and if he has no ears, ſays the ſtatute, he ſhall be marked in the cheek with a red-hot iron having the letter *F* therein, that he may be known for a *fray-maker and a fighter*; and ſhall moreover be deemed *ipſo facto* excommunicate.

Clerks convict.

BEFORE we quit this ſubject of penal law, it will be proper to mention a proviſion made at the beginning of this reign with regard to clerks convict, which puniſhed vagrancy, as we have before ſeen, with ſlavery. It was enacted by ſtat. 1 Ed. VI. c. 3. that no clerk convict ſhould

[a] Plowd. 467.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

make his purgation, but ſhould be *a ſlave* for one year to him who would become bound, with two ſureties, in 20l. to the ordinary, to the king's uſe, to take him into ſervice; and he was then to be treated as vagabonds were directed by that act to be treated in the like caſe. Again, a clerk attainted or convict, who by law could not make his purgation, might be delivered by the ordinary to any man who would become bound, with two ſufficient ſureties, to keep him as his ſlave five years, to be uſed as a vagabond; and every perſon to whom ſuch a one was adjudged ſlave, might put a ring of iron about his neck, arm, or leg. This extravagant puniſhment, eſpecially under ſo hateful an appellation as that of ſlavery, was ill borne by the ſpirit of the nation; and was therefore repealed by ſtat. 3 and 4 Ed. VI. c. 16. as has been before related.

Repeal of treaſon, felony, and præmunire.

THIS was the ſtate of our criminal law at the time of queen Mary's acceſſion, when a ſtatute was made ſimilar to that paſſed at the beginning of Edward VI.'s reign, to aboliſh all new-created treaſons and felonies; though the repealing act of Edward VI. and the mildneſs of that reign, had left very little occaſion for ſuch a ſtatute. However, ſuch a beginning had ſome ſmall effect in conciliating the minds of the nation to her government, till another ſpirit could with more ſafety diſcover itſelf. The preamble of the act, in ſtating a reaſon for making it, ſeems to glance at ſtat. 5 and 6 Ed. VI. c. 11. For it ſays, that "many honourable and noble perſons have of late "(*for words only, without other opinion, fact, or deed*) "ſuffered ſhameful death, not accuſtomed to nobles: to "remove the occaſion of which in future, the queen was "pleaſed" that no act, deed, or offence, being made treaſon, petit-treaſon, or miſpriſion of treaſon, by writing, cyphering, deeds, or otherwiſe, ſhall be ſo deemed, but only ſuch as is ſo declared by ſtat. 25 Ed. III. And again, that all offences made felony (not being felony before), or appointed

appointed to be within the caſe of *præmunire*, by any act made ſince the firſt day of Henry VIII.'s reign, ſhall be repealed and void.

THUS was the deſcription of treaſon once more reduced to the words of the ſtatute of Edward III. and the few felonies made in the laſt reign were aboliſhed. But, notwithſtanding this appearance of clemency, ſome treaſons and felonies were very ſoon enacted by parliament. In the next ſeſſions of that ſame parliament, it was ordained by ſtat. 1 Ma. ſt. 2. c. 6. in protection of a ſpecies of coin for which no law had before provided, that perſons who counterfeited gold or ſilver coin, not the proper coin of this realm, but current with the queen's conſent (and by ſtat. 1 and 2 Ph. and Ma. c. 11. thoſe who bring ſuch coin into the realm) ſhall be adjudged traitors; as alſo thoſe who counterfeit the queen's ſign manual, privy ſignet, or privy ſeal; for the ſtatute of Henry VIII. concerning theſe ſeals was repealed by the general clauſe of the former law.

Riotous aſſemblies.

IN the ſame ſeſſion an act was made againſt riotous aſſemblies, and to repeal the law made for the like purpoſe in the laſt reign [b]. This is ſtat. 1 Ma. ſt. 2. c. 12. which together with that of Edward VI. deſerves notice, as they furniſhed a model for a ſimilar one made in later times; with this difference, that thoſe of Edward and Mary inflicted only the penalty of ſingle felony, that of George I. of felony without clergy. The act in queſtion declares it felony for any perſons to the number of twelve, being aſſembled together, to intend, or go about with force and arms, and of their own authority, to change any laws; and, being commanded by the ſheriff, or by any juſtice of the peace, mayor, or bailiff of any town or city, by proclamation in the queen's name, to retire to their houſes, to continue together for one hour after ſuch commandment, or to attempt any of the above-mentioned facts: and if perſons

[b] Vid. ant. 475.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

to the number of twelve ſhould go about to overthrow pales, hedges, ditches, or other incloſures, the banks of any fiſh-pond or conduits for water, to the intent the ſame ſhould lie open; or to have common there; or to deſtroy deer or conies; or to pull down any houſes, barns, mills; or to burn any ſtacks of corn; or to abate rents of lands or price of victuals, and ſhould refuſe in like manner to depart after proclamation, it was made felony. The raiſing of people to the number of twelve, by ringing of bells, ſound of trumpet, or in any way, was likewiſe made felony, if the perſons ſo met together came within the former clauſes of the act; and if the *wife*, ſervant, or any other relieved any perſons, ſo aſſembled, with *victuals*, weapons, or other things, they were to be deemed felons. Thus far of riots committed by twelve perſons. If the like offences were committed by perſons above the number of two, and under that of twelve, they were to be impriſoned for one year: and finally, it was ordained, in a more comprehenſive manner, that if perſons to the number of forty aſſembled for the above purpoſes, or to do *any other felony or rebellion*, and ſo continued together for three hours after proclamation, they ſhould be adjudged felons: and any copyholder or farmer being required by the king's officer to aſſiſt in ſuppreſſing ſuch offenders, and refuſing ſo to do, was to forfeit his copyhold or leaſe during his life. This act was only temporary, and ſoon expired.

SOME other of the penal laws of this reign were only temporary, and expired at the demiſe of the crown. Such was ſtat. 1 and 2 Ph. and Ma. c. 3. concerning reporters of news. The execution of ſtat. 3 Ed. I. c. 34. and 2. Ric. II. ſt. 1. c. 5. was thereby referred to juſtices of the peace; and it was moreover enacted, that any perſon convicted of ſpeaking maliciouſly any ſlanderous news of the king or queen, ſhould, for the firſt offence, be ſet in the pillory, and have both his ears cut off (unleſs he paid 100l.) and ſuffer three months impriſonment; and if ſlanderous

news

news were ſpoken of any common perſon, there was the ſame puniſhment, except that the impriſonment was to be only for one month; and if it was by book, rhime, ballad, letter, or writing, the offender was to have his right hand ſtricken off; and for the ſecond offence, he was to ſuffer impriſonment during life, and forfeiture of all his goods. The queen's jealouſy of offenders of this kind was ſuch, that an act was made in the ſame ſeſſion [c] which declared, that "perſons who *have* by expreſs words *prayed*, or here-"after ſhall pray, that God would ſhorten the queen's "days, or take her out of the way (as the conventiclers "in London were then ſaid to have done), ſhould be deemed "traitors:" but with reſpect to offenders who had committed this crime during that ſeſſion of parliament, and were indicted, ſuch perſons might, upon their arraignment, ſubmit themſelves to the queen's mercy, and then no judgment was to be paſſed; which *proviſo* took off the edge, in ſome degree, of this *ex poſt facto* law.

But the next act [d], of the ſame ſeſſion, went further; for, complaining that "the late clemency of the queen, in "relaxing penal laws, had given occaſion to many *cankard* "*and traitorous hearts* to imagine and attempt things againſt "the government;" ſome proviſions were now again made in the ſpirit of ſeveral acts of [e] Henry VIII. and of one in the late reign. If any, by open preaching, expreſs words or ſayings, did compaſs or imagine to deprive the king of his ſtile and honour, or to deſtroy him; or to levy war againſt the king and queen; or did maliciouſly or adviſedly ſay that the king ought not to have ſuch title and ſtile; ſuch offender was to forfeit all his goods and iſſues of his lands during life, with perpetual impriſonment; and, for a ſecond offence, he was to be adjudged a traitor. To do the ſame by writing, printing, overt deed, or act, was made

[c] Cap. 9. [d] Cap. 9. [e] Vid. ant. 273. 274. 469.

high-

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

high-treaſon in the firſt inſtance. There is another treaſon made to protect the king's perſon, if he ſhould ſurvive the queen, and continue governor to the child of which the queen was then ſuppoſed to be pregnant. This act contains two clauſes concerning trials for treaſon, which we ſhall hereafter mention. It requires that indictments for words, under this act, ſhould be brought within ſix months; and now again declares, what had been twice decided by ſtatutes in the reign of Edward VI. that concealment of high-treaſon ſhall only be miſpriſion of treaſon.

THESE are all the penal ſtatutes made reſpecting the government; in which we ſee more caution and moderation than in thoſe of Henry VIII. from which they were copied, though they went a little further than thoſe on the like ſubject in the reign of Edward VI. The remaining ſtatutes regarded common offences; and were, one concerning Egyptians, another reſpecting acceſſaries in certain felonies, and the laſt about the ſtealing of maidens.

Puniſhment of gypſies.

THE ſtatute of Henry VIII.[f] made againſt Egyptians, or gypſies, was found not ſtrict enough to reſtrain thoſe people from coming into the kingdom; but many ſtill reſorted hither, uſing, as the preſent act ſays, "their old "accuſtomed deviliſh and naughty practices and devices, "with ſuch abominable living as is not in any Chriſtian "realm to be permitted, named, or known." It is therefore enacted, by ſtat. 1 and 2 Ph. and Ma. c. 4. that any one conveying ſuch perſon into the realm, ſhall forfeit 40l.; and the Egyptian ſo conveyed, and continuing here one month, ſhall be adjudged a felon without benefit of clergy or ſanctuary. As to thoſe within the realm, ſuch as do not depart within twenty days after proclamation of that act, ſhall forfeit all their goods, to be ſeized by any one; half to the king, and half to the party ſeizing them: and if they do not depart in forty days after the proclamation, it is

[f] Vid. ant. 190.

made

made felony without clergy or ſanctuary. Perſons who leave that way of life within the twenty days above-mentioned, are to be diſcharged of the penalties of the act.

STAT. 4 and 5 Ph. and Ma. c. 4. to which we have before alluded, takes away clergy from acceſſaries before the fact, in the following offences: in petit-treaſon; wilful murder; robbery in any dwelling-houſe or houſes, robbery in or near any highway; the wilful burning of any dwelling-houſe, or any part thereof, or any barn, then having corn or grain in the ſame. Clergy is taken from all theſe offenders, being outlawed, or being otherwiſe attainted or convicted, or ſtanding mute of malice, or challenging peremptorily above twenty perſons, or not anſwering directly to the offence. This act was made as a ſupplement to ſtat. 1 Ed. VI. c. 12. which had taken away clergy from the principals in all theſe crimes. But in addition to the ſtatute of Edward VI. this act provides for the caſe of *burning of houſes*, which that act had omitted. The arguments and conſequences which have been founded on this particular circumſtance, have been fully conſidered before [x].

To this ſtatute is added a clauſe, which is to be found in ſeveral laws of theſe two reigns, that lords of parliament and peers ſhall be tried by their peers, for any offence mentioned in this act, as hath been accuſtomed by the laws of the realm: a caution which probably was occaſioned by ſome doubt then ſubſiſting, whether that privilege was allowed in new-made felonies and treaſons; though one ſhould think it was ſufficiently ſecured by the terms of *Magna Charta* [b].

THE ſtat. 4 and 5 Ph. and Ma. c. 8. was intended to carry further the policy of the ſtatute of Henry VII. [i] re- Stealing of women.

[x] Vid. ant. 480, 481.

[b] *Nullus liber homo, &c. &c. niſi per judicium parium ſuorum*, ca. 29. Vid. ant. vol. I. 249.

[i] Vid. ant. 145.

ſpecting

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

ſpecting the ſtealing of heireſſes. As that act only puniſhed a man who committed ſuch an act againſt the conſent of the woman; this ſtatute was to reſtrain the like indecorum, even in ſome inſtances where ſhe did conſent. It is enacted, that if any perſon above the age of fourteen years ſhall unlawfully convey, or cauſe to be conveyed, away any woman-child unmarried, within the age of ſixteen years, out of the poſſeſſion, and againſt the will of her father or mother, or of ſuch perſon as then ſhall happen to have by any lawful means the order, keeping, education, or governance of any ſuch child, he ſhall ſuffer two years impriſonment, or elſe pay a fine, to be aſſeſſed in the ſtar-chamber.

AGAIN, if ſuch perſon ſhall ſo deflower ſuch woman-child, or by ſecret letters, meſſages, or otherwiſe, contract matrimony with her (except with conſent of ſuch as have title of wardſhip), he ſhall ſuffer impriſonment for five years, or elſe pay a fine, to be aſſeſſed in the ſtar-chamber; one moiety to the king, the other to the party grieved. Beſides this, it was provided, that if any woman-child, above the age of twelve, and under ſixteen years, conſent to ſuch contract, then the next of kin, to whom the inheritance ſhall come after her deceaſe, ſhall immediately enjoy all her lands in poſſeſſion, reverſion, or remainder, during the life of ſuch perſon as ſhall ſo contract matrimony. The offences herein deſcribed are to be heard and determined in the ſtar-chamber on a bill of complaint or information, and before the juſtices of aſſiſe by inquiſition or indictment.

THESE are all the ſtatutes which were made concerning crimes in the reign of queen Mary and her conſort. It remains now to ſpeak of ſuch as regarded the method of bringing offenders to juſtice, and what had been ordained in theſe two reigns reſpecting witneſſes, particularly in trials of treaſon.

Of bail.

WE have ſeen that the firſt ſtatute which empowered juſtices of the peace out of ſeſſions to let to bail, was the ſta-

ſtatute of Richard III. * This was intended in relief of the ſubject againſt malicious impriſonment upon ſlight accuſations; but as this authority was entruſted only to one juſtice, it was thought proper by ſtat. 3 Hen. VII. c. 3. to repeal this act, and give the ſame juriſdiction to *two at leaſt*, one to be of the *quorum*, who were to bail perſons mainpernable by law till the ſeſſions or gaol-delivery, and to certify thither ſuch bail, under the penalty of 10l. However, the reſtrictions of this ſtatute had been diſregarded, and the authority to let perſons to bail had been abuſed. For tho' the act requires two juſtices at leaſt to diſcharge this office, it became uſual for one to take the bail, and inſert the name of a brother juſtice, who was ſeldom preſent. By this practice, the buſineſs was conducted neither with the ſolemnity nor caution which was required; and it often happened that perſons not properly bailable were let to bail, under pretence that the charge amounted only to ſuſpicion. To remedy the former inconveniences, ſeveral proviſions were made by ſtat. 1 and 2 Ph. and Ma. c. 13. Firſt, as to the queſtion of bail, who are and who are not intitled to that indulgence, it ordains, that ſtat. [k] Weſtm. 1. c. 15. ſhall in future be the law of bail and mainprize. Secondly, that what paſſes before the juſtices may be known and examinable afterwards, it directs, that when any one is brought before them on a charge of manſlaughter or felony, or ſuſpicion thereof, they ſhall take the information of thoſe who make the charge againſt the party, in writing; and ſhall alſo take the examination of the party accuſed; which is the firſt authority given by our law to examine a man as to his own criminality; it being generally held, that *nemo tenetur prodere ſeipſum*. Theſe examinations are to be certified to the next gaol-delivery. The two juſtices are required to be preſent at this bailment, which is to be certified alſo to the gaol-delivery;

* Vid. ant. 128. [k] Vid. ant. vol. II. 131.

but

CHAP XXXI.

EDW. VI. PHILIP and MARY.

but one only may take the examination, and not till then can the accuſed be admitted to bail.

In like manner all coroners are directed to put into writing the material evidence given upon the inqueſt: and both they and juſtices of the peace are empowered to bind witneſſes by recognizance to give evidence on the indictment; and ſuch bonds and inquiſitions are to be certified in like manner as the examination and bailment. In default of this, the coroners and juſtices are liable to be fined by the juſtices of gaol-delivery.

As theſe proviſions concerning examinations were by the above ſtatute ordained only in caſes where the party was let to bail, it is enacted by ſtat. 2 and 3 Phil. and Mar. c. 10. that they ſhall be taken where the perſon accuſed is committed to cuſtody. It is to be obſerved, that the county of Middleſex and city of London are not within ſtat. 1 and 2 Phil. and Mar. c. 13.

Of witneſſes in treaſon.

We ſhall now ſpeak of the three ſtatutes of Edward VI. and queen Mary, concerning witneſſes in caſes of treaſon; the fate of which ſtatutes has been very ſingular; being diſregarded while in force, and even ſuppoſed to be repealed; till having long lain dormant, they were, upon further conſideration, held to be in force; again eſteemed as repealed; and at length regularly obſerved, and looked upon as a part of our criminal law. During theſe reverſes, they were conſidered in various lights, and underwent very different conſtructions. To underſtand, therefore, the operation theſe ſtatutes have been held to have on one another, it will be neceſſary to look beyond the preſent reigns, to thoſe times when this point was more fully debated.

It is the opinion of lord *Coke*, though perhaps not well-founded, that two witneſſes were required on a trial of high-treaſon at common law. Whether this ſuppoſed rule had been violated in ſome recent inſtances, and a confirmation of it by parliament was thought expedient; or,

as

as others think, and hiſtory proves, one witneſs (or no witneſs [1]) had been held ſufficient to prove this, as it was to prove any other crime; whatever might be the occaſion, it was ordained by ſtat. 1 Ed. VI. c. 12. and by ſtat. 5 and 6 Ed. VI. c. 11. that no perſon ſhall be indicted, arraigned, condemned, convicted, or attainted for any treaſon, petit-treaſon, or miſpriſion of treaſon, unleſs he be thereof accuſed by two ſufficient and lawful witneſſes, as the firſt ſtatute ſays, or two lawful accuſors, as the latter expreſſes it: to which it is added by the latter ſtatute, that they ſhall, upon the arraignment, if living, be brought in perſon before the accuſed, to avow and maintain what they have to ſay. After theſe two ſtatutes, the ſtat. 1 and 2 Phil. and Mar. c. 10. enacts generally, that all *trials* for treaſon ſhall be had and uſed only according to the due order and courſe of the common law of this realm, and not otherwiſe. The queſtion which has ariſen upon this ſtatute is, what operation it has upon thoſe two ſtatutes of Edward VI. The opinions upon this queſtion have been various at different times.

We find, very ſoon after the ſtatute had been paſſed, namely, in [m] 2 and 3 Phil. and Mar. and more ſolemnly in the fourth year, the judges came to a reſolution, that the ſtatute of Edward VI. was repealed by that of Philip and Mary. But they conſidered this repeal as partial, and founded a diſtinction upon the particular wording of the laſt act. The ſtatutes of Edward VI. requiring two witneſſes to indict, arraign, convict, and attaint; the ſtatute of Philip and Mary declaring, that all *trials* for treaſon ſhall be according to the due order and courſe of the common law; they inferred, that, at leaſt upon the *trial*, there was no longer need of two witneſſes. The practice of the courts ſeems to have been eſtabliſhed in purſuance of this opinion gi-

[1] Becauſe a fact was tried by jurors, and not by witneſſes. Vid. ant. vol. II.

[m] Dyer. 132. 268, 269. and Plowd. 3.

ven

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

ven by all the judges; for in all the ſtate trials during the ſubſequent reigns, the ſtatutes of Edward VI. are either forgotten; or, when any argument is attempted to be grounded on them, they are pronounced by the judges as repealed, and no longer in force.

In the reign of Charles I. we find that lord *Coke*, in a work publiſhed after his death [n], expreſſes himſelf of opinion that the ſtatutes of Edward VI. are ſtill in force. *Sir Matthew Hale* has given divers contradictory opinions upon this point. In his Summary, he is clear that two witneſſes are neceſſary on the *trial*, notwithſtanding the ſtatute of Philip and Mary [o]. In his Pleas of the Crown he poſitively ſays, that two witneſſes are required upon the indictment only, and not upon the trial [p]. In another place he reprobates the diſtinction between the indictment and trial, looking on the indictment as an inſeparable incident to the trial, and in truth a part of it [q]. However, in the ſame paſſage, he ſpeaks very doubtfully as to the main queſtion; though a little further on [r] he ſpeaks of two witneſſes being required by the ſtatute to be examined face to face in caſes of treaſon; which muſt be meant of ſtat. 5 and 6 Ed. VI. Thus did this great lawyer differ from himſelf upon this point.

We ſhall now conſider the opinion of lord Coke; which, being more deciſive than that of the former writer, and being that which has been adopted by *ſir Michael Foſter*, may be conſidered as cloſing this queſtion. After diſcuſſing ſuch points as had been made on theſe ſtatutes by thoſe who went before him, he proceeds to give what he calls his own opinion, upon due conſideration of the matter [s]. He thinks that the ſtat. 1 and 2 Phil. and Mar. does not repeal the ſtat. 1 Ed. VI. and ſtat. 5 and 6 Ed. VI. For that ſtatute, ſays he, extends only to

[n] 3 Inſt. 24, &c.
[o] 262.
[p] 2 H. P. C. 286.
[q] 1 H. P. C. 298 to 300.
[r] Ibid. 306.
[s] 3 Inſt. 26.

trials

trials by verdict; whereas the indictment is no part of the trial, but an information or declaration for the king: *the evidence of witneſſes to the jury is no part of the trial*; for by law, *the trial in that caſe is not by witneſſes, but by the verdict of twelve men*; and ſo there is a manifeſt diverſity between the *evidence to a jury*, and a *trial by jury*. When the ſtatute ſpeaks of *trials awarded*, that expreſſion, he ſays, proves that it had in view the *venire facias* for trial; for neither the indictment nor the evidence can be ſaid to be *awarded*[t]. Thus far our author has explained himſelf upon this doubt, in a manner that may be thought extremely technical and refined; but he ſeems to lay ſome ſtreſs upon it, and to be perfectly ſatisfied that he is right.

UPON this idea our author goes on, and is of opinion that this ſtatute of Philip and Mary had a very different object from that which had till then been generally ſuppoſed[u]. He thinks it was intended to abrogate all acts of parliament preſcribing a different method of trial from that according to the due order and courſe of the common law. Many proviſions introducing new trials had been made in the reign of Henry VIII. and ſurely never was there a period in our law, when a reformation of this kind was more wanted; that the common law might, in this inſtance, be brought back to its firſt principles.

To give ſome inſtances of theſe innovations in the courſe of the common law; it had been ordained by ſtat. 23 Hen. VIII. c. 4. that treaſons in Wales, and where the king's writ runneth not, ſhould be tried by ſpecial commiſſion in ſuch ſhires as the king ſhould appoint. By ſtat. 33 Hen. VIII. c. 20. perſons confeſſing treaſon and afterwards becoming lunatic, might notwithſtanding be proceeded againſt in their abſence, and a verdict and judgment gi-

[t] 3 Inſt. 27.

[u] This conſtruction of the ſtatute was, however, glanced at by the court in 2 and 3 Phil. and Mar. where they held the ſtatutes of Ed. VI. to be repealed. Dyer, 136.

ven,

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

ven, on which execution might be ordered. By ſtat. 33 Hen. VIII. c. 23. perſons charged with treaſon, or miſpriſion thereof, being examined by three of the council, and vehemently ſuſpected by them, might be tried by ſpecial commiſſion in any county: by this act, too, the peremptory challenge of thirty-five, in caſes of treaſon[o] and miſpriſion of treaſon, was taken away. By ſtat. 28 Ed. III. c. 13. a trial *de medietate* was allowed in treaſon.

ALL theſe acts (and there are ſeveral others) introduced a manner of trial derogatory to the due order and courſe of the common law; he therefore conſiders *them* as repealed by the ſtat. 1 and 2 Ph. and Mar. c. 10. and the regular and ancient order of proceeding reſtored [p].

As to the two ſtatutes of Henry VIII. reſpecting treaſon out of the realm, and piracy, there is no particular obſervation made by our author in this place; but in other parts of the ſame work, he ſpeaks of them as ſtill in force. Probably he thought, conſiſtently with former judgments, that as theſe ſtatutes extended the mode of trial according to the order and courſe of the common law, in the room of a proceeding by the civil law, it would have been inconſiſtent with the explanation above given, to have ſuppoſed theſe proviſions repealed, which ſo far tended to effect the deſign aſcribed to the ſtatute of Philip and Mary. It was accordingly, in 2 and 3 Phil. and Mar. agreed that theſe ſtatutes, for that reaſon, were not repealed by the act in queſtion [q].

THIS opinion of lord Coke is adopted by ſir Michael Foſter, who has added his own thoughts upon the queſtion. He thinks the legiſlature plainly indicated their opinion concerning the object of the ſtat. Ph. and Ma. when by another clauſe of it they enact, that in all caſes of high-treaſon concerning coin current within the realm, or for

[o] 3 Inſt. 26, 27. [p] Dyer, 131, 75.

counter-

counterfeiting the king or queen's ſignet, privy ſeal, great ſeal, or ſign manual, ſuch manner of trial, and none other, ſhall be obſerved and kept, as heretofore hath been uſed by the common law of the realm, any law, ſtatute, or other thing to the contrary notwithſtanding: for, if the former clauſe had been intended by the legiſlature to take away the neceſſity of two witneſſes in *all* treaſons, why ſhould they have added this to take it away in *ſome?* It would have been uſeleſs and nugatory; whereas it moſt certainly was meant to effectuate ſomething which was not within the former part of the act. He thinks this is made very clear by the eleventh chapter of the ſame ſtatute, which enacts, that in caſes concerning the coin therein enumerated, offenders ſhall be indicted, tried, convicted, or attainted, by *ſuch like evidence*, and in ſuch manner and form as hath been uſed and accuſtomed within this realm, at any time *before the firſt year* of our late ſovereign lord king Edward VI. by which clauſe the matter of evidence is extended as well to the trial as the indictment; and the time ſeems to be pointed out when two witneſſes firſt became neceſſary[y].

THUS, though not by the common law, yet by ſtat. 1 Ed. VI. c. 12. two witneſſes are required both on the indictment and trial for high-treaſon, petit-treaſon, and miſpriſion of treaſon; and by ſtat. 5 and 6 Ed. VI. c. 11. they are to be brought face to face with the priſoner.

IN addition to what has been ſaid reſpecting this famous ſtatute 1 and 2 Phil. and Mar. c. 10. it ſhould be remarked, that after the clauſe ordaining all trials to be had according to the common laws of the realm, there is another which provides for the trial of treaſons *made by that act*, much in the manner and terms uſed by ſtat. 5 and 6 Ed. VI. c. 11.; for it ordains, that upon the arraignment for any treaſon mentioned in this act, all perſons

[y] Foſt. 239.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

(or two of them at the leaſt) who ſhall write, declare, confeſs, or depoſe any thing againſt the perſon arraigned, ſhall, if living and within the realm, be brought forth in perſon before the party arraigned, *if he require the ſame*, and object and ſay openly in his hearing what they can againſt him, concerning the treaſons in the indictment.

In ſupport of lord Coke's opinion, it may be remarked, that the very words of the ſtatute of Philip and Mary upon which this queſtion aroſe, are uſed in ſtat. 13 El. c. 1. in a manner which plainly demonſtrates them to have been then underſtood as he ſuggeſts. That act ſpeaks of perſons attainted *according to the uſual order and courſe of the common laws of this realm*, OR *according to the act made in* 30 *Hen. VIII. intitled, an act concerning the trial of treaſons committed out of the king's dominions.* This ſeems like a clear parliamentary expoſition of the words, and to be in itſelf concluſive, that they were intended to mark the common-law trial, in contradiſtinction to that and other new ones ordained in the time of Henry VIII.

Upon theſe ſtatutes ariſes an obſervation, which none of the above writers have made, but which ſhould be taken into conſideration, in order to underſtand this point fully. In the preceding part of this Hiſtory it has been remarked, that the office of the grand inqueſt was to preſent offenders on their own knowledge, and that it often happened for a perſon to be indicted without any one appearing as proſecutor, or accuſor. When it afterwards became the cuſtom to hear the informations of others, and upon this ground to find the indictment; it was a rule of evidence that the accuſor, as he was called, who had preferred the charge to the grand inqueſt, ſhould not be a witneſs to prove the fact in court; becauſe[a] he might be ſuppoſed to be in the ſame mind he was in

[a] Vid. ant. vol. III. 136.

when

when he delivered his information; and inſtead of a confirmation and corroboration, as there ought to be, he could only give the jury a repetition of what he had before ſaid.

A PRACTICE like this can only be explained by recurring to the original of the trial by petty-jury. We have ſeen that the petty-jury were originally brought as *witneſſes*, to declare on their oath their opinion as to the guilt or innocence of the party charged by the indictment. It was therefore above all things expedient, that no perſon who either had been of the former jury, or had appeared before them as proſecutor of the indictment, ſhould be allowed to join himſelf to thoſe who were to try the propriety of *his* act. It was, accordingly, a rule eſtabliſhed in the reign of Edward I. that no indictor ſhould be on the petty-jury*. In proceſs of time, the petty-jury uſed to take occaſionally other helps than their own knowledge: they uſed to read depoſitions of abſent perſons, and ſometimes hear witneſſes; but as theſe papers or perſons were called in merely as aſſiſtants to them, and the trial was ſtill conſidered as preſerving the character of the old proceeding unaltered by this innovation, it was nothing more than reaſonable that the ancient rule ſhould be ſtill adhered to: and that as thoſe who had preferred the indictment could not be of the petty-jury; ſo now they ſhould not, in the light of *witneſſes*, aſſiſt in informing that jury.

THIS ſeems to have continued invariably the practice for many years. We have already ſeen that it was enacted by ſtat. 25 Ed. III. ſt. 5. c. 3.[a] that none of the indictors ſhall be put in the inqueſt upon the deliverance; which *indictors*, in the old writers, it ſhould ſeem, meant as well the proſecutor as the grand inqueſt. There are many inſtances, in the ſubſequent period, of witneſſes challenged becauſe they were indictors[b]. In the reign of Edward IV. the rule was recogniſed in caſes

[a] Vid. ant. vol. II. 268.
[b] Vid. ant. vol. II. 459.
[b] Bro. Chal. 101. 142. 12 and 40 Aſſ.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

of felony; though it was ſaid not to hold in miſdemeanors, contrary to the opinion in the time of Edward III.[c]. It appears that this rule was ſtill preſerved at the time of the ſtatute in queſtion; for in the 4th and 5th of Phil. and Mar. it was agreed, amongſt other things, by all the judges, that it was a good challenge to a witneſs to ſay, he was one of the accuſors; that is, one of thoſe who were witneſſes on the indictment: for, ſays the book, accuſors and witneſſes ſo far differ, that the former offer themſelves voluntarily, but the latter do not come till they are called; and therefore an accuſor ſeems hardly unbiaſſed[d].

THIS being the prevailing opinion, it is beyond a doubt, that a new regulation reſpecting evidence was made by the ſtatutes of Edward VI. independent of the *number* of witneſſes. The very ſtile of ſtat. 5 and 6 Ed. VI. c. 11. ſeems to intimate, that the bringing before the court the accuſors who had been examined before the grand jury, was ſomething new. For it enacts, with ſome earneſtneſs and preciſion, that "the ſaid accuſors at the time of the arraignment of the party accuſed, if they be then living, *ſhall be brought in perſon before the party* ſo accuſed, *and avow and maintain* that they have to ſay againſt the ſaid party, to prove him guilty of the treaſons contained in the bill of indictment laid againſt the party arraigned; unleſs the ſaid party arraigned ſhall willingly, without violence, confeſs the ſame." If we can rely upon a co-temporary expoſition of theſe ſtatutes of Edward VI. and Philip and Mary, this was the opinion held by the learned of thoſe days. For at a meeting of the judges, to which we have before alluded, in the fourth year of Philip and Mary, they came to the following reſolutions amongſt others: that as the repealing ſtatute enacts all *trials* for treaſon to be ac-

[c] 7 Ed. IV. Bro. Chal. 166. [d] Bro. Cor. 220.

cording

cording to the order of the common law, and not otherwiſe; and as a common-law trial is by a *jury and witneſſes, and not by accuſors*; therefore, upon *trial* of any treaſon under ſtat. 25 Ed. III. there needed *no accuſors*; that is, the witneſſes to the grand jury were not to be called on the trial, and brought face to face to the priſoner, according to ſtat. 5 and 6 Ed. VI. though accuſors ſtill expected to be at the finding of the indictment [e].

As to the number of witneſſes, we find, that before the repealing ſtatute, and while the ſtatutes of Edward VI. were unqueſtionably in force, the effects of theſe proviſions had been baffled by ſome ſingular explanations. It was reſolved in the 1ſt of Mary, that if a perſon knew the fact of his own knowledge, and told it to another, that other perſon would make a good ſecond witneſs, under the ſtatute of Edward VI.; and in the like manner, he who heard it at ſecond or third hand [f]. When ſuch ſtrained interpretations were adopted to get rid of the check put on ſtate-proſecutions, while thoſe beneficial laws were in force, we cannot wonder that they ſo readily availed themſelves of this ſtatute of Philip and Mary, and pronounced it a repeal in that reſpect of the ſtatutes of Edward VI.

WHEN this point was ſo ſettled, and trials were conducted in purſuance of it, every thing fell back into its old ſtate. Theſe two ſtatutes were the only proviſions which had ever been made as to evidence, either defining the quality or number of perſons whoſe teſtimony ſhould be neceſſary to prove a fact; and when they were looked on as repealed, we need only turn back to former periods to judge what ſecurity was left for perſons labouring under the weight of a proſecution for treaſon. Trials for treaſon at common law, notwithſtanding the boaſted ſecurity of juries, were a certain mode of deſtroying a man. Juries ſeem to have ſurrendered to the court their right of judging and deter-

[e] Bro. Cor. 220. [f] Dyer, 99. b.

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

mining. They uſed to convict without a ſingle witneſs, only upon depoſitions; thoſe ſometimes not ſigned by the party making them, and the contents amounting to nothing but hearſay. They might by law, and they often did in fact, convict upon the arraignment, without any thing like proof. This was a ſerious matter in caſes of treaſon, where paſſion, prejudice, and intereſt, carry men ſo far. The law was the ſame in all caſes of trial by jury, in common felonies and miſdemeanors; but in theſe inſtances, it was not pregnant with ſuch bad conſequences as in the former; there was not uſually that heat in proſecuting; and, in the latter, the judgment did not reach to life.

THE ſtatute of Edward VI. in enacting that the accuſors ſhould appear at the trial, legitimated a teſtimony to which before there lay a legal objection; and this proviſion ſeemed to be equally expedient for the proſecutor and defendant. The proſecutor, on the credit of whoſe teſtimony the bill had been found, gained, by the ſtatute, a right of *avowing and maintaining* what he, moſt likely, was alone, or beſt, able to teſtify. The priſoner, who was thus enabled to croſs-examine the moſt formidable of the witneſſes againſt him, being thoſe on whoſe teſtimony the bill was found, ſo far obtained a great advantage.

HOWEVER, though theſe benefits of the ſtatute were thus for a time defeated, another proviſion reſpecting witneſſes ſeems to have had ſome of thoſe good effects on trials of felonies, which this ſtatute was intended to produce in trials of treaſon. The ſtat. 1 and 2 Ph. and Ma. c. 13. directs juſtices of the peace to bind by recogniſance all perſons who declare any thing material reſpecting any felony, to appear at the next gaol-delivery, and to give evidence againſt the party ſo indicted, *at the time of his trial*; and, as it is more fully expreſſed in ſtat. 2 and 3 Ph. and Ma. c. 10. *to give evidence againſt the party*. Theſe ſtatutes, by providing a compulſory method of obliging perſons to give evidence againſt the party at the gaol-delivery, that is,

both

both on the indictment and on the trial, took away the challenge to accusors, and gave the prisoner that candid and open trial so much to be wished. If we may venture a conjecture, it is, most probably, from the time of these two statutes that we are to date the disuse of this challenge to an accusor. This challenge was supported upon the principle, that an accusor was a volunteer, and sort of party, and therefore not entitled to that credit which an indifferent witness enjoyed, who appeared and delivered his evidence under the compulsion of legal process. An accusor was now compelled to give evidence equally with a witness, and stood thereof in the same legal situation [g]. When persons were bound in the same manner to give evidence in cases of treason, there was no reason why the like analogy should not operate with respect to them; and that the evidence of an accusor should in that case be in the like manner legal and valid. This probably soon became the law and practice; for in the time of queen Elizabeth, the distinction between an accusor and a witness seemed quite forgotten. A vestige however of this old law seems still to remain in the practice of indorsing on the indictment the names of witnesses examined before the grand jury: this, as has been before observed, might originally be intended to shew the court who were the *accusors*, and on that account were to be challenged, if attempted to be produced as *witnesses* [h].

After all, notwithstanding the repeal of the statutes of Edward VI. and the many instances which follow in the subsequent reigns of partial and oppressive proceedings

[g] In the ecclesiastical court, all voluntary preferrers to the office were considered as parties. These stood precisely in the situation of persons giving information to a grand inquest, and it was from this idea of canonical jurisprudence that the challenge to accusors was adopted *. Some little confusion may arise from the term, because *accusation* is a mode of ecclesiastical prosecution contradistinguished from those by *inquisition* and *denunciation*, upon which two last the office always proceeded. Vid. ant. 36, &c.

[h] Vid. ant. vol III. 136.

* An Apolog. for Eccles. Proc. part. II. 88.

on

CHAP. XXXI.

EDW. VI. PHILIP and MARY.

on trials, the reigns of Edward VI. and queen Mary conſtitute a period when a jury firſt began to be a fair and effective tribunal, aſſuming the right of judging for itſelf; and when perſons whoſe fate was to be determined by their verdict, repoſed a full confidence in their uprightneſs, independence, and integrity. There is an inſtance in the reign of Philip and Mary, where a jury perſiſted in acquitting a * ſtate priſoner, againſt the direction of the court, and, it was well known, againſt the wiſhes of the ſovereign. Whatever judges might pronounce reſpecting the exiſting law, it never went from the memory of priſoners, that a ſtatute had once expreſsly declared, there ſhould be two witneſſes to prove a treaſon, and that they ſhould be called face to face. As to trials of felony, it was an expreſs recommendation of queen Mary, at the beginning of her reign, to her judges, that they ſhould ſuffer priſoners to call witneſſes for their defence.

THE defence of priſoners, in all criminal proſecutions, ſeemed to depend on the like indulgence, and not upon any right to call witneſſes; for in ſtat. 1 Ed. VI. c. 1. ſect. 6. where a proceeding by indictment before juſtices of the peace in ſeſſions is directed, it was thought neceſſary to ordain, that the party arraigned *ſhall be admitted* to purge or try his innocence by as many, or more, witneſſes, and of as good honeſty and credence, as the witneſſes which depoſed againſt him.

THUS many circumſtances contributed actually to render this mode of trial a more deliberate and complete examination of a matter of criminality than it had ever been before. While enlarged notions reſpecting the power and importance of this inſtitution began to prevail, it was more and more conſidered as independent in ſome degree of the court, and as having an authority and judicature of its own; the progreſs of which opinions will be ſeen in the ſequel.

* Sir Nicholas Throckmorton.

CHAP.