Miſnoſmer 9. *Coron.* 274. 3 *H.* 6. 26. *a.* *(b)*, *B. Miſnoſmer* 6. *per Rolf.*

It ſeems by the caſe of *Gerard* before cited, which was a record of a plea in the time of *E.* 4. tho the defendant may plead *miſnoſmer* of his chriſtian name, yet the king may aver *conus per l'un noſme & l'autre*, tho it be otherwiſe in an appeal, but in all caſes of pleading *miſnoſmer*, he muſt plead over to the felony: *Vide Dy.* 88. *a. b.* 21 *E.* 4. 71. *a. b.*

But, as hath been before ſaid, there is little advantage comes by theſe pleas to the priſoner upon theſe reaſons; 1. Becauſe, if this exception be taken in the country at the gaol-delivery, the court may allow the exception, and direct a new bill according to what the priſoner ſays his true name or addition is, for, as hath been ſaid, whoſoever pleads *miſnomer* or a falſe addition muſt give himſelf the true name and true addition by his plea, and *that* will be concluſive to him.

2. Becauſe this plea of *miſnoſmer* or untrue addition ſhall be always tried by the ſame inqueſt, that is to paſs upon the priſoner, and is ready at the bar, and at common law ſhould never be ſent to be tried in a foreign county. 34 *H.* 6. 50. *a.* 1 *E.* 4. 3. *a.* tho the book of 5 *E.* 4. 2. *a.* as to the addition of place be contrary.

But however in all caſes of indictments of felony, tho the plea in itſelf were a foreign plea, and triable in another county, yet by the ſtatute of 22 *H.* 8. *cap.* 14. (continued by 28 *H.* 8. *cap.* 1. made perpetual by the ſtatute of 32 *H.* 8. *cap.* 3.) all foreign pleas ſhall be tried by a jury of the ſame county where the party is indicted, but *that* ſtatute extends not to treaſon, nor to an appeal of felony, but 32 *H.* 8. *cap.* 2. extends to appeals of felony, but not to an indictment of treaſon, ſo that foreign pleas in caſe of indictments of treaſon ſtand as they did at common law. *Co. P. C.* *p.* 27. [239]

And *note*, that regularly in all pleas, whether to the writ, or in bar by matter of record, or by matter of fact, or both, if the plea do not confeſs the felony, as the plea of a pardon in caſe of an indictment, or a releaſe in caſe of an appeal, tho his plea be found againſt him by iſſue tried, or adjudged againſt him by the court, yet he ſhall not

(b) The caſe in 1 *H.* 5. 5. *b.* was a miſnomer of the ſirname, and in the abridgement of that caſe, by *Fitzh. Coron.* 274. there is a *quære* added, *quære ſi ſoit en noſme de bapiſme*, and in 3 *H.* 6. 26. *a.* it was not the point of the caſe, but only ſaid *obiter arguendo*; and *Gerard's* caſe is to the contrary. See alſo *Layer's* caſe, *State Tr. Vol.* VI. *p.* 237.

be convicted thereupon, but plead over to the felony *not guilty*, as well upon an indictment, as upon an appeal, and this *in favorem vitæ*, 22 *E.* 4. 39. *per cur'*. 9 *H.* 4. 1. *b.*

III. A third ſort of pleas in abatement by matter *dehors* is matter of record.

If *A.* be indicted of the murder of *B.* and there is another indictment afterwards taken of the ſame death againſt the ſame perſon, and he is arraigned upon the ſecond indictment, becauſe it is the king's ſuit the ſecond ſhall not abate; yet uſually the juſtices quaſh the other by judgment.

Yet *nota* the common courſe to prefer a new indictment of murder to the grand jury, altho an inquiſition of murder be returned by the corener, and if the coroner's inquiſition be inſufficient indeed, it ſhall be quaſhed, but if ſufficient, it is uſual to arraign the priſoner upon both indictments, and an acquittal upon one ſhall be upon both; and this is done, becauſe otherwiſe the coroner's inqueſt will ſtand as a charge on record againſt the priſoner, tho acquitted upon the indictment, and proceſs of outlawry will iſſue thereupon

So it is the conſtant uſe at this day to prefer two indictments upon
[240] the ſame killing againſt the ſame perſon, one of murder, and the other of manſlaughter upon the ſtatute of 1 *Jac.* for ſtabbing, and the priſoner arraigned upon both pleads to both, and the jury charged with both, *viz.* that if they find him guilty of both indictments, to return it ſo, if not guilty of murder, yet to inquire whether guilty upon the other indictment.

If a duke, or an earl, or baron be indicted by a common name of *J. S. miles*, or *J. S. armiger*, he may plead the *miſnoſmer* to the indictment, *viz.* that he is a duke, or an earl, or baron, or peer of the realm, *nient noſme*, &c. becauſe that title is part of his name, and intitles him to be tried by his peers; but then he muſt ſhew forth a writ teſtifying it upon his plea pleaded, becauſe it is but dilatory, and ſhall not be tried by the country, but by the record 35 *H.* 6. 46. *a. per Forteſcue.* 6 *Co. Rep.* 53. *a.* counteſs of *Rutland*'s caſe, *Per curiam.*

And thus far touching dilatory pleas.

See Index to 2 Hawk. P.C. Tit. Abatement.

CHAP.

CHAP. XXXI.

Concerning pleas in bar *of an indictment of felony or treaſon, and firſt, of* auterfoits acquit.

PLEAS in bar of the indictment of felony or treaſon are of two kinds, *viz.* 1. Such as are purely matters of record, or 2. Such as are mixt, partly conſiſting of matters of record, partly of matters of fact.

Of the former ſort are the pleas of pardons, either general by act of parliament, or ſpecial by the king's charter.

But becauſe the buſineſs of pardons is not only a large title and full of variety, but is alſo applicable to all offenſes criminal, whether the party be indicted or not indicted, or whether convicted, or attainted, outlawd, or put in *exigent*, I ſhall reſerve the diſcuſſion of pardons towards the end of this book. [241]

Of the latter ſort are many pleas conſiſting of matters of record and alſo matters of fact. And they are of theſe ſorts principally.

1. *Auterfoits acquit* of the ſame felony.
2. *Auterfoits attaint* or *convict* of the ſame felony.
3. *Auterfoits attaint* of another felony.
4. *Auterfoits convict* of another felony and had his clergy.

Now as to the plea of *auterfoits acquit*, (as alſo *auterfoits attaint de meſme felony ou treaſon,*) it conſiſts of two kinds of matters. 1. Matter of record, namely, the former indictment and acquittal, and before what juſtices, and in what manner, *viz.* by verdict or otherwiſe; and 2. Matter of fact, namely, that the priſoner is the ſame perſon that was acquitted, that the fact is the ſame of which he was acquitted, and whereof he is now indicted. This plea, tho the priſoner miniſtreth rudely, yet counſel ſhall be aſſigned to him to put his plea in due form, becauſe it is a ſpecial plea.

Mr. *Stamford* tells us, that the priſoner need not have the record of his acquittal *in poigne*, becauſe the plea is not dilatory, but in bar, (and ſo in the other caſe of *auterfoits attaint*, as it ſeems,) according to the difference taken by *Frowick*. 21 *H.* 7. 9. *a.*

But if that ſhould be law, it were in the power of every priſoner to delay his trial as he pleaſeth, by pleading *auterfoits acquit* or *attaint* in another

another court, and ſo to put the king to reply *nul tiel record*, and then day given over to the next gaol-delivery to have the record, and to remove it by *certiorari* into the king's bench, if the trial be there, or the tenor of it by *certiorari* into chancery, and by *mittimus* into the court where the trial is.

For regularly, if a record be pleaded in bar, or declared upon in the ſame court, the other party ſhall not plead *nul tiel record*, but have [242] *oyer* of the record; but if it be in another court, he ſhall plead *nul tiel record*, and a day given to procure the certificate of the record, or the tenor thereof. 5 *H.* 7. 24. *a. b.*

But it ſeems, that for the avoiding of falſe pleas and ſurmiſes and to bring offenders to ſpeedy trial in capital cauſes the priſoner muſt ſhew the record of his acquittal, or vouch it in the ſame court one of theſe ways.

1. By removing the tenor of the record of his acquittal into chancery by *certiorari*, and having it *in poigne*, or ſent to the juſtices by *mittimus ſub pede ſigilli* and thus the priſoner pleading *auterfoits acquit* ſhewed the record of his acquittal *ſub pede ſigilli* 2 *E.* 3. 26 *b. Coron.* 150.

2. Or elſe if he be arraigned in the king's bench upon an indictment removed, or found before them, and were formerly acquitted of the ſame felony, either before juſtices of peace or gaol-delivery, the court will give him a writ of *certiorari* to remove the record before them, and reſpite his plea till he can remove his acquittal into the court, that ſo he may form his plea upon it, for the record is part of his plea, and thus it was done. 20 *E.* 2. *Coron.* 232. and thereupon his plea is put into form ſetting out the record in certain, *Et hoc vocat recordum acquietanciæ prædictæ coram ipſo rege hic ad mandatum domini regis miſſum & coram ipſo rege remanens*; and thus it is pleaded in 2 *E.* 4. in *Hodſon*'s caſe, who was arraigned in the king's bench for murder, and pleaded an acquittal before the juſtices of peace in *Lincolnſhire*.

But it is to be obſerved, that the record muſt be removed by writ; for altho the king's bench may take an indictment or other record of the juſtices of peace *propriis manibus*, where it is to be proceeded on for the king, yet they cannot take a record of an acquittal to ſerve the priſoner's plea without writ. 8 *E.* 4. 18. *b.* 3 *E.* 3. *B. Coron.* 218.

If a man pleads *auterfoits acquit de meſme felonie*, and vouch the record, the court may examine proof, that it is the ſame felony, and thereupon allow it without any ſolemn confeſſion by the king's attorney, 26 *Aſſiz.* 15. But the ſafeſt way is the confeſſion of the king's attorney,

or

or an inqueſt charged to inquire, whether it be the ſame fact, *Vide R. Entries* 385. *a.* his plea allowed by the teſtimony of the juſtices of peace before whom he was acquit, *ideo conſideratum eſt quòd prædictus B. de feloniâ prædictâ ſit quietus & eat inde ſine die.*

3. If the priſoner be indicted and arraigned in the country before juſtices of gaol-delivery, &c. and the priſoner pleads *auterfoits acquit* of the ſame felony before the ſame juſtices in that county, or other juſtices of the ſame county, that were before them, then he concludes his plea, *Et hoc vocat recordum acquietanciæ, prædictiæ coram præfatis juſticiariis* at ſuch a gaol-delivery; and if it be in the king's bench, he mentions the term and roll, and thus is the plea in 13 *E.* 4. *Clud*'s caſe in the king's bench.

So that the priſoner, tho he doth not ſhew the record *ſub pede ſigilli*, yet he muſt plead it certain, and have the record in court and remove it thither, if it be not in the ſame court, and not expect till *nul tiel record* be pleaded, for it is part of the priſoner's plea, tho the court may favour him with time to procure the removal of the record.

Now the matter of fact of his plea conſiſts in his averment, that he is the ſame perſon. and that the felony, whereof he was acquitted, is the ſame whereof he is indicted, which is iſſuable, and the king's attorney may take iſſue upon it, or confeſs it if it be true, and then thereupon judgment ſhall be entered, *quòd eat ſine die*, or the court may examine proofs and allow it. 26 *Aſſiz.* 15.

But it is to be known, that there muſt not only be an acquittal by verdict, but a judgment thereupon, *quòd eat ſine die*, for the bare verdict of his former acquittal is not a ſufficient bar without a judgment pleaded alſo, tho the acquittal regularly is a warrant for entry of the judgment at any time after.

And *note* alſo, that a formal acquittal by judgment is not only a bar of a new indictment for the ſame offenſe, but if the party be outlawd upon that new indictment, he may aſſign his former acquittal for error in that outlawry, and reverſe it for that cauſe, and in that caſe the judgment is not only for the reverſal of the outlawry, but alſo farther, *quòd ipſe tàm de indictamento de morte & murdro prædict' &c. quàm de utlegariâ prædictâ eat ſine die*, and ſuch is [244] the judgment in *Clud*'s caſe 14 *E.* 4. where *that* error is aſſigned to reverſe the outlawry.

Now for the full declaration of this plea theſe things are conſiderable. 1. What ſhall be ſaid the ſame felony whereof the party was acquitted.

acquitted. 2. What manner of acquittal there muſt be to make it a bar. 3. In what ſuits *auterfoits acquit* is a plea.

I. As to the firſt of theſe.

If *A.* and *B.* be indicted as principals in robbing or killing of *D.* and *B.* be convict as principal, and *A.* be acquitted, if after this *A.* be indicted, as acceſſary after the fact, this formal acquital as principal, is no bar, for it is another offenſe, 27 *Aſſiz.* 10. *Coron.* 200. 8 *H.* 5. 6. *b. Coron.* 463. *Stamf. P. C. fol.* 105. *a.*

But if *A.* be indicted as acceſſary before the fact, he may (as it is held,) plead *auterfoits acquit* as principal, becauſe it is in effect the ſame offenſe. 2 *E.* 3. 26. *b. Coron.* 150. 282. but antiently the law was otherwiſe. 8 *E.* 2. *Coron.* 424. *Itinere Kant'.*

If *A.* be indicted in the county of *B.* for the murder of *C.* and it be ſuppoſed that the murder was committed 1 *Martii* 17 *Car.* and he be acquitted. and after indicted again in the ſame county, ſuppoſing the murder 21 *Car.* yet notwithſtanding that variance he may plead *auterfoits acquit*, and aver it to be the ſame felony, for the day is not material, and beſides the death is of a perſon certain, who can be but once killed. 3 *Aſſiz.* 15. 25. *E.* 3. *Coron.* 136. 22 *Aſſiz.* 55.

And the ſame law ſeems to be in an indictment of robbery, tho it is poſſible ſeveral robberies may be committed at ſeveral days, for ſtill it lies in averment, that it is the ſame notwithſtanding the variance.

If a man be indicted for the robbery or murder of *John a Stiles* and acquitted, and after indicted for the robbery or murder of *John a Nokes*, yet he may plead *auterfoits acquit*, and aver it to be the ſame perſon notwithſtanding the variance in the ſirname, for a man may [245] have divers ſirnames, and he may aver, *que conus per l'un noſme & l'autre.* 26 *Aſſiz.* 15. *Coron.* 189. 11 *H.* 4. 41. *a.*

If *A.* be indicted in the county of *B.* for a robbery or other felony ſuppoſed to be done at *D.* in the county of *B.* and be acquitted, and be afterwards indicted for a robbery upon the ſame perſon in the county of *B.* but at another vill, yet he ſhall plead *auterfoits acquit* notwithſtanding the variance of the vill, and may aver it to be the ſame; but if he be afterwards indicted in the county of *C.* for a robbery ſuppoſed to be committed in the ſame county of *C.* (as it muſt be,) he ſhall never plead *auterfoits acquit* of the ſame robbery in the county of *B.* for the juſtices in the county of *B.* can only inquire touching a felony in that county, and therefore it can never be averred to be the ſame, but it is ſaid, that it is otherwiſe in an appeal. 4 *H.* 7. 5. *b.*

And

And therefore the book of 41 *Aſſiz.* 9. where an acquittal pleaded in a foreign county was allowd, muſt be intended of an indictment removed out of that county, where he was firſt indicted and acquitted.

If *A.* rob *B.* in the county of *C.* and carry the goods into the county of *D.* tho he cannot be indicted of robbery in the county of *D.* yet he may be indicted of larciny in the county of *D.* becauſe the goods were carried thither; but ſuppoſe he be acquitted of larciny in the county of *D.* yet that acquittal is no bar to an indictment of robbery in the county of *C.* becauſe it is another offenſe.

Nay it ſeems, it is no bar to an indictment of larciny in the county of *C.* for tho he be acquitted in *D.* it may be becauſe the goods were never brought into that county, and ſo the felony in *C.* may not be in queſtion, neither can the grand inqueſt or petit jury in the county of *D.* take notice of any felony committed in the county of *C.* and ſo the felony in *C.* is a diſtinct felony from *that* contained in the indictment in *D.*

If *A.* commit a burglary in the county of *B.* and likewiſe at the ſame time ſteal goods out of the houſe, if he be indicted of larciny for the goods and acquitted, yet he may be indicted for the burglary notwithſtanding the acquittal.

And *è converſo*, if indicted for the burglary and acquitted, yet he may be indicted of the larciny, for they are ſeveral [246] offenſes, tho committed at the ſame time. And burglary may be where there is no larciny, and larciny may be where there is no burglary.

Thus it hath happened, that a man acquitted for ſtealing the horſe, hath yet been arraigned and convict for ſtealing the ſaddle, tho both were done at the ſame time.

But if a man be acquit generally upon an indictment of murder, *auterfoits acquit* is a good plea to an indictment of manſlaughter of the ſame perſon, or *è converſo*, if he be indicted of manſlaughter, and be acquit, he ſhall not be indicted for the ſame death, as murder, for they differ only in degree, and the fact is the ſame. '4 *Co. Rep.* 46. *b. Holcroft*'s 'caſe *per cur*', and upon the ſame reaſon *auterfoits acquit* upon an indictment of murder is a good bar to an indictment of petit treaſon, and *è converſo*.

II. As to the ſecond, what manner of acquittal is a good plea.

It muſt be an acquittal upon trial either by verdict or battle.

And

And therefore, if *A.* be accuſed and committed for felony, but no bill preferred, or *ignoramus* found, ſo that at the end of the ſeſſions he is quit by proclamation, and delivered, yet he may be afterwards indicted. for he is not *legitimo modo acquietatus*.

If *A.* be aſſaulted upon the highway, or in his houſe by thieves or burglars to rob him, and he kill one of the thieves, which is no felony in law, and this matter be ſpecially found by the coroner's inqueſt or grand inqueſt, whereupon he is diſcharged, yet he may be indicted *de novo* ſeven years afterwards for murder or manſlaughter, and cannot plead the acquittal by the grand inqueſt.

But if he had been indicted generally of murder or manſlaughter, and pleaded to it *not guilty*, and this ſpecial matter had been found by the petit jury, and thereupon judgment given, *quòd eat ſine die*, if he be afterwards indicted for the ſame fact, he may plead *auterfoits acquit*. *Crompt. fol.* 28. *a. Bull's* caſe 26 *Eliz.*

[247] Therefore it is no prudence to have the matter in any caſe found ſpecially by the grand inqueſt or coroner's inqueſt, tho the fact being truly found by them amounts not to felony, as in the caſe before; and ſo *per infortunium*, or *ſe defendendo*.

If *A.* be indicted for felony, and be erroneouſly acquit by the miſtaken direction of the judge, as, for that the felony was not committed the day mentiond in the indictment, yet that miſtake lies not in averment, but to another indictment ſetting the day right he may plead *auterfoits acquit*. 2 *Co. Inſtit.* 318.

If *A.* be indicted of murder or other felony, and plead *non culp.* and a ſpecial verdict found, and the court do erroneouſly adjudge it to be no felony, yet as long as *that* judgment ſtands unreverſt by writ of error, if the priſoner be indicted *de novo*, he may plead *auterfoits acquit* and ſhall be diſcharged: *vide* 9 *H.* 5. 2. *b.* for it is the king's own ſuit, and tho the error appear, and regularly the judgment againſt the king is *ſalvo jure regis*, yet it is otherwiſe in caſe of life.

But if the judgment be reverſt the party may be indicted *de novo*; *quære*, whether in that caſe upon the reverſal upon the point of the verdict the party ſhall not be executed, for the judge *a que* ſhould have given that judgment, but it ſeems *in favorem vitæ* he ſhall be arraigned *de novo*, for poſſibly he hath other matter for his defenſe.

If at common law *A.* had committed murder, and had been arraigned within the year upon an indictment, and had been acquitted, tho this arraignment ſhould not have been, yet it ſtands as a good

acquittal

acquittal pleadable to another indictment or appeal: *vide* 8 *H.* 5. 6. *b. Coron.* 463. 16 *E.* 4. 11. *a.*

A. was indicted for the murder of *B.* by poiſoning, and the indictment runs *quòd* B. *fidem adhibens perſuaſioni dicti* A. *neſciens prædictum potum cum veneno fore intoxicatum recepit & bibit, per quod prædictus* B. *immeditatè poſt receptionem veneni prædicti obiit*; but it is not alleged, *quòd venenum prædictum recepit & bibit*; upon this he was arraigned and acquitted, and had judgment, *quòd eat ſine die.* Afterwards he was indicted again for the ſame offenſe, and pleaded *auterfoits acquit*, and ſhewed the record in certain, and [248] pleaded over to the felony and murder *not guilty.*

It was reſolved, 1. That the indictment was inſufficient for this cauſe. 2. That in this caſe *auterfoits acquit* was no plea, becauſe the indictment itſelf was inſufficient, for it containd not any matter of felony. 3. And ſo he is not *legitimo modo acquietatus*, and ſo the difference is between this caſe and thoſe above of an erroneous judgment, for here the foundation itſelf, namely the indictment contained no felony. 4. But if the error be only in the proceſs in an appeal or indictment, and yet the priſoner appear and plead *not guilty* and be acquit, this acquittal is pleadable 19 *E.* 3. *Coron.* 444. 5. But if he had been attainted upon this inſufficient indictment and judgment given, he ſhould not have been *auterfoits arraigne* upon a new indictment for the ſame offenſe, unleſs the former judgment had been firſt reverſed. 6. But *auterfoits convict* or *auterfoits acquit* by verdict, &c. is no plea, unleſs judgment be given upon the conviction or acquittal in any caſe, 4 *Co. Rep.* 44, 45. *Vauxe's* caſe.

And the true reaſon of this judgment is rightly given by my lord *Coke, P. C.* 214. becauſe the judgment upon the acquittal is only, *quòd eat ſine die*, which may be upon the defect in the indictment, which the judges are bound to look into, and it ſhall be ſuppoſed, that it was given upon that defect, and not upon the verdict, for the judgment is the ſame in both, but the judgment upon a conviction is, *quòd ſuſpendatur*, which is all the judgment that can be given.

But in the caſe of the ſpecial verdict above, where an erroneous judgment of acquittal is given, yet it is concluſive to the king till the judgment be reverſed by error, for the judgment could be only given upon the verdict, the indictment being ſufficient, and ſo is the diverſity.

And

And *note* generally, that where *auterfoits acquit* or *attaint* is pleaded, yet in *favorem vitæ* he ſhall plead over to the felony, and be tried for the ſame, tho his ſpecial plea be found or adjudged againſt him, *Vauxe*'s caſe, *ubi ſupra, &c. & 22 E.* 39. *b.*

[249] III. The third general is where, and in what ſuits *auterfoits acquit* is a good plea.

If *A.* be appeald of murder of *B.* by *C.* as ſon and heir of *B.* and is acquitted, and in truth *C.* was not the heir, but *D.* and thereupon *D.* brings an appeal, this *auterfoits acquit* is no plea, becauſe not brought by the right party. 21 *H.* 6. 28. *b.* neither is it a bar to the king, but he may be indicted notwithſtanding that acquittal, or if *D.* be nonſuit in his new appeal, he may be arraigned upon that appeal at the king's ſuit. 21 *H.* 5. 28. *b*

If an appeal of murder or robbery be brought by *A.* againſt *B.* and *B.* is thereupon acquit by verdict, regularly this is a good bar to an indictment preferred by the king for the ſame robbery or murder both at common law and at this day.

But an acquittal by battle upon an appeal is held to be no bar to an indictment for the ſame offenſe: *vide Stamf. P. C. Lib.* II. *cap.* 36. *p.* 106. *b.* (*)

And at common law, if *A.* had been arraigned upon an indictment for murder or robbery, tho within the year, if an appeal be after brought for the ſame crime *auterfoits acquit* upon the indictment had been a good bar to the appeal, 16 *E.* 4. 11. *a.*

And therefore the juſtices at common law would rarely arraign a priſoner upon an indictment, eſpecially for murder within the year after the death in favour of the appeal. 22 *E.* 4. *Coron.* 44. unleſs the appellant had been an infant 32 *H.* 6. *Coron.* 278 & 279. or the evidence had been very pregnant. 21 *H.* 6. 28. *b.*

But now by the ſtatute of 3 *H.* 7. *cap.* 1. in caſe of murder or manſlaughter the juſtices ſhall proceed to arraign the priſoner upon an indictment, tho within the year; and if the principal or acceſſary

[250] be acquitted or attainted within the year and day, yet this ſhall be no bar to an appeal againſt them, as if there had

(*) The reaſon aſſigned for this by *Stamford* is, becauſe trial by battle does not lie againſt the king, wherefore he ſhall not be bound by ſuch trial, yet *Stamford* makes a *quære* of this, for *Bract. Lib.* III. *cap.* 9. §. 8. is expreſs to the contrary, and ſays, that if he be acquit by battle, he ſhall go quit not only againſt the appellants, but alſo from the ſuit of the king, *quia per hoc purgat innocentiam ſuam verſus omnes, ac ſi ſe poneret ſuper patriam, & patria omnino ipſum acquietaverit.*

been

been no ſuch acquittal, and therefore tho upon the indictment the offenders be acquit within the year, the court ought not to diſcharge them, but at diſcretion to bail or commit them, till the year and day be paſt, *vide le ſtatute.*

So that by this ſtatute *auterfoits acquit* or *attaint* upon an indictment of murder or manſlaughter is no bar of an appeal for the ſame death, tho on the other ſide *auterfoits acquit* or *attaint* upon an appeal ſtands ſtill a good bar to an indictment for the ſame murder or manſlaughter. *Stamf. P. C. ubi ſupra.* 4 *Co. Rep.* 40. *a. Darley*'s caſe.

But *auterfoits convict* of murder or manſlaughter, and had his clergy upon an indictment is a good bar to an appeal notwithſtanding this ſtatute, for indeed the ſtatute itſelf hath this exception, *the benefit of clergy not being had*, 4 *Co. Rep.* 45. *b. Wigg*'s caſe, and this, tho an appeal were depending, whereunto the priſoner had not pleaded at the time of his acquittal. 4 *Co. Rep.* 45. *b. Holcroft*'s caſe.

But the caſe of other appeals, as of robbery, rape, &c. are not within this ſtatute, and therefore *auterfoits acquit* upon an indictment within the year ſtands as at common law a good bar to an appeal of robbery, or any other offenſe other than murder or manſlaughter.

And yet at this day the judges never forbear to proceed upon an indictment of robbery, rape, or other offenſe, altho within the year, and the reaſon is, becauſe appeals of robbery eſpecially are very rare, and of little uſe ſince the ſtatute of 21 *H.* 8. *cap.* 11. gives reſtitution to the proſecutor upon an indictment, as effectually as upon an appeal.

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CHAP. XXXII. [251]

Concerning the plea of auterfoits attaint *or* convict *of the ſame felony, or any other offenſe.*

IF *A.* be indicted and convict of felony, but hath neither judgment of death, nor hath prayed his clergy, this is no bar of a new indictment for the ſame offenſe, if the firſt were inſufficient. 4 *Co. Rep.* 45. *a. Vauxe*'s caſe, and it ſeems, tho it were ſufficient, yet it is no bar without clergy or judgment; but if he had his clergy allowd him,

auterfoits convict and had his clergy is a good bar to an indictment, or an appeal for the ſame crime, and ſo remains at this day, notwithſtanding the ſtatute of 3 *H.* 7. *cap.* 1. 4 *Co. Rep.* 40. *a.* 45. *b. Wigg*'s caſe.

And ſo it is tho he prays his clergy, and the court will adviſe upon it, tho the clergy be not actually allowd. (*) 4 *Co. Rep.* 46. *a. Holtroft*'s caſe. *Co. P. C. cap.* 57.

Auterfoits attaint de meſme felonie, tho upon an inſufficient indictment, was at common law a bar to appeals, as well as indictments of the ſame offenſe. 4 *Co. Rep.* 45. *a. Vauxe*'s caſe, and remains ſo ſtill at this day in all caſes but in appeals of death, which is alterd by the ſtatute of 3 *H.* 7. *cap.* 1.

If *A.* be attaint of felony by outlawry, yet, if he reverſe the outlawry, he ſhall be put to anſwer the ſame felony, and plead to the indictment, whereof he was outlawd; but if he reverſe the outlawry for this error, becauſe he was *auterfoits acquit* for the ſame felony, (which, as before is ſaid, is aſſignable for error,) he ſhall be diſcharged of the indictment, for it ſtands as well a plea to the indictment, as an error in the outlawry.

[252] If *A.* be indicted of piracy and refuſing to plead hath judgment of *peine forte & dure*, and by the general pardon piracies are excepted, but the judgment of *peine forte & dure* is pardoned by the general words of all contempts, *quære*, whether he may be arraigned for the ſame piracy, but by the better opinion he may be arraigned of any other piracy committed before that award, 14 *Eliz. Dy.* 308. *a.*

If *A.* be attaint of treaſon or felony by outlawry, yet he ſhall not be *de novo* indicted or appeald for the ſame felony till the outlawry be reverſed, for *auterfoits attaint* of the ſame felony is a good plea. *Co. P. C.* 213.

Auterfoits attaint de murder is a good plea to an indictment of petit treaſon.

If *A.* had been indicted at common law of felony, and had judgment of death, yet he may notwithſtanding his attainder be arraigned for treaſon committed before the felony for the advantage of the king, who is to have the eſcheat, but not for a treaſon committed after the felony. 1 *H.* 6. 5. *b. Stamf. P. C. Lib.* II. *cap.* 37. *fol.* 107. *b.* But

(*) See the caſe of *Armſtrong* and *Liſle*, *Kel.* 103, 104.

in

In this my lord *Coke* differs from *Stamford*, and ſaith that for a treaſon committed *after* he ſhall be arraigned. *Co. P. C. p.* 213. *(a)*

If *A.* commit divers robberies, one upon *B.* another afterwards upon *C.* and afterwards another upon *D.* and they bring ſeveral appeals, and he be attaint at the ſuit of *B.* yet he ſhall be put to anſwer to the appeals of *C.* and *D.* for the benefit of the reſtitution of their goods. *Stamf. ubi ſupra.*

And if there be an indictment and attainder at the proſecution of *B.* yet *quære*, whether after at the proſecution of *C.* he may not be put to anſwer an indictment at his proſecution to have benefit of reſtitution upon the ſtatute of 21 *H.* 8. *cap.* 11. *Stamf. Lib.* 3. *cap.* 10.

It ſeems in that caſe there may be an inqueſt of office to inquire of the robbery of *C.* ſo as to intitle him to reſtitution without arraigning the party upon an indictment of *C.*

If *A.* commit ſeveral felonies and be attaint for one of thoſe felonies, and the king pardon that attainder and the felony, [253] for which he was attaint, if he be after indicted or appeald for the ſame felony, he may plead his attainder, and it will be no good replication to ſay he was pardoned after.

But yet he may be indicted or appeald for the other felonies, and if he plead his former attainder, it is a good replication to ſay he was pardoned after, whereby he is now reſtored to be a perſon able to anſwer to thoſe offenſes. 6 *H.* 4. 6. *b.* 10 *H.* 4. *Coron.* 227. *vide contra Co. P. C. p.* 213.

And ſo if a perſon attaint commit a felony after, and be pardoned the firſt felony and attainder, yet he ſhall be put to anſwer the new felony. 6 *H.* 4. 6. *b.*

If *A.* commit ſeveral felonies and be convict for one of them, but no judgment of death nor clergy given him, he may be indicted for all thoſe former felonies. *Stamf. ubi ſupra.*

But if he had been convict for any one felony and prayed his clergy, and read and been deliverd to the ordinary, he ſhould never be arraigned for any of thoſe former felonies. And it ſeems by the better opinion, that if he had prayed his clergy, *& tradito ei libro legit ut clericus*, but no award of *traditur ordinario*, yet he ſhould not be arraigned for any felony committed before his clergy allowd, for it was

(a) The caſe in 1 *H.* 6. 5. *b.* was of a treaſon ſubſequent to the felony, and therefore rather makes againſt *Stamford* in favour of lord *Coke*'s opinion.

the fault of the court, that they did not award *tradatur ordinario*. 4 *Eliz. Dy.* 211. *b. Co. P. C. cap.* 57.

And the reaſon is, becauſe the ſtatute of 25 *E.* 3. *cap.* 5. *pro clero* enacts, that he ſhall be arraigned of all his offenſes together, and then deliverd to the ordinary, and therefore if once deliverd to the ordinary, all his capital offenſes committed before are in effect diſcharged, and therefore at leaſt before the priſoner departs from the bar after his clergy allowd, he muſt be indicted, or otherwiſe he is for ever diſcharged.

But for any felony committed after conviction and clergy allowd, he may be indicted and arraigned, but not if he ſtands attainted and unpardoned.

[254] But at this day that old law concerning the diſcharge of offenſes by clergy allowd is alterd.

By the ſtatute of 8 *Eliz. cap.* 4. it is enacted, "That if any per-"ſon admitted to his clergy ſhall before ſuch his admiſſion have "committed any offenſe, whereupon clergy is not allowable by the "laws and ſtatutes of this realm, and not being thereof indicted and "acquitted, convicted or attainted, or pardoned ſhall and may be in "dicted or appeald for the ſame, and put to anſwer, as if no ſuch "admiſſion to clergy had been.

And by the ſtatute of 18 *Eliz. cap.* 7. delivery to the ordinary is taken away, and burning in the hand wholly ſubſtituted in lieu thereof, and that every perſon admitted to his clergy ſhall anſwer ſuch felonies or offenſes, as he ſhould have done, if he had been deliverd to the ordinary and made his purgation.

So that now clergy doth diſcharge all offenſes precedent within clergy, but not ſuch other offenſes, as are out of the benefit of clergy.

There remains one ſpecial kind of *auterfoits acquit* of another perſon, than he that pleads it, which I ſhall mention and ſo conclude this chapter.

The acceſſary upon his arraignment may plead the acquittal of the principal.

A gaoler arraigned for the voluntary eſcape of a priſoner for felony may plead the acquittal of the felon of the principal felony, and ſo may the reſcuer arraigned upon an indictment for reſcue of a felon, and that is the reaſon, that the gaoler and reſcuer ſhall never be arraigned till the principal felon be tried and convicted, becauſe if he be acquitted, the gaoler or reſcuer cannot be guilty of felony.

If

If *A.* ſteal the goods of *B.* and break priſon, *A.* may be arraigned or the felony of breaking priſon before the arraignment upon the principal felony, but if *A.* be arraigned upon the principal felony and acquitted before conviction of the felony for breaking the priſon, *A.* may plead this acquittal, for hereby that felony is purged before his conviction, this was Mrs. *Samford*'s caſe in *Kent* for ſtealing the goods of the earl of *Leiceſter*. (*) [255]

To conclude this whole matter of *auterfoits acquit, convict* or *attaint* theſe things are to be obſerved. 1. The party that pleads the record muſt plead it ſpecially ſetting forth the record. 2. He muſt either ſhew the record *ſub pede ſigilli*, or have the record removed into the court, where it is pleaded by *certiorari*, or if it be a record of the ſame court muſt vouch the term, year and roll, for the record is part of his plea. 3. He muſt make averments, as the caſe ſhall require, as that he is the ſame perſon, that it is the ſame offenſe. 4. No iſſue ſhall be taken upon the plea of *nul tiel record*, becauſe it is pleaded in court, but the king's attorney may have *oyer* of the record. 5. The averments are iſſuable. 6. If iſſue be taken upon them they ſhall be tried by the jury, that is returned to try the priſoner by the ſtatute of 22 *H.* 8. *cap.* 14. 7. He, that pleads theſe pleas, muſt alſo plead over *not guilty* to the felony, for if the pleas be adjudged againſt him, yet he ſhall be tried upon the *not guilty*.

See Index to 2 Hawk. P. C. Tit. Bar.

(*) *Vide ſupra, Part* I. *p.* 612.

CHAP. XXXIII.

Concerning pleas to the felony, viz. Not guilty.

REGULARLY, where a man pleads any plea to an indictment or appeal of felony that doth not confeſs the felony, he ſhall yet plead over to the felony *in favorem vitæ*, and that pleading over to the felony is neither a waving of his ſpecial plea, nor makes his plea inſufficient for doubleneſs. 22 *E.* 4. 39. *b.*

And therefore, if he pleads any matter of fact to the writ or indictment, or pleads *auterfoits convict*, or *auterfoits acquit* he ſhall [256]

plead

plead over to the felony; and altho he doth it not upon his plea, but his plea be found or tried againſt him, yet he ſhall not be thereby convict without pleading to the felony and trial thereupon. 22 *E.* 4. 39. *b.*

But if a man plead to the juriſdiction of the court, as if an indictment of rape be found before the ſheriff in his *Turn* and deliverd to the juſtices, becauſe the ſheriff hath no juriſdiction to take an indictment of rape, the priſoner may plead to it without anſwering to the felony, thus it was done, 22 *E.* 4. 22. *b.* which was one *Wheeler*'s caſe; ſo if the juſtices of the peace ſhould arraign one for treaſon.

Or if a man plead a plea, that confeſſeth the fact, as a releaſe in an appeal, he ſhall not plead over to the felony. 22 *E.* 4. 39. *b.* 9 *H.* 4. 1. *b.*

But yet even in that caſe it ſeems to me, that he may, if he pleaſe, plead over to the felony *not guilty*, and accordingly it is held by *Markham*, 7 *E.* 4. 15. *a.* in caſe of a releaſe.

If *A.* be indicted of felony and plead the king's pardon, for inſtance, if the indictment be of murder, and the party plead a pardon of felonies, or the like, he ſhall not need to plead over to the felony, becauſe it ſuits not with his plea.

And yet, if the pardon upon a demurrer of the king's attorney, or upon adviſement of the court be adjudged inſufficient, the party ſhall not be thereupon convict, but ſhall be put to plead to the felony and be tried for it, and yet the pleading of the pardon is a kind of confeſſion of the fact, but yet *in favorem vitæ* the party ſhall be put to anſwer the felony (*); and thus it was done in the caſe of *Rutaby*, (†) who was indicted for murder in *Durham*, and the indictment removed by *certiorari* into the king's bench, and there he pleaded the king's pardon of murder, which for ſome defects were adjudged inſufficient to pardon him.

He was thereupon remanded, and the indictment remitted, and tried for the fact in *Durham*, and, as I have heard, acquitted. *Hill* 1653.

[257] And regularly in all caſes of felony or treaſon, where a man pleads a ſpecial matter, tho he conclude his plea with *not guilty* to the felony, or doth not conclude it ſo, yet if his plea be tried or found, or ruled againſt him, he ſhall be put to his plea of *not*

(*) *Vide ſupra*, *p.* 239. (†) *Vid. ſupra*, *Part* I. *p.* 467, *Part* II. *p.* 212.

guilty

guilty and be tried for the felony, for tho a man ſhall loſe his land in ſome caſes for miſpleading, yet he ſhall not loſe his life for miſpleading. *Stamf. P. C. Lib.* II. *cap.* 34. *fol.* 98. *b.*

And therefore the book of 14 *E.* 4. 7. *a.* that ſaith, if the appelee demurs, and it be judged againſt him, it is peremptory, and he ſhall be executed, muſt be underſtood *cum grano ſalis*; and therefore *Brook* in abridging it, *B. Peremptory* 86. makes doubt of it.

But the true difference ſeems to be this, if a perſon be indicted or appeald of felony and he will demur to the appeal or indictment and it be judged againſt him, he ſhall have judgment to be hanged, for it is a confeſſion of the indictment, and indeed a wilful confeſſion, for he may have all the advantages of exception to the inſufficiency of the indictment or appeal by way of exception either before his plea of *not guilty*, or after his conviction and before judgment, as he might have by demurrer, and in caſe of his demurrer no judgment of *peine fort & dure* can be given, becauſe the demurrer is a plea, and thus the book of 14 *E.* 4. 7. *a.* and 7 *E.* 4. 29. *a.* are to be underſtood, and accordingly 2 *Co. Inſtit.* 178. *ſuper ſtat. Weſtm.* 1. *cap.* 12.

But if the priſoner pleads in bar, and concludes, as he ought to the felony, or plead a pardon, where he concludes not to the felony, and the attorney general demur, and he join in demurrer, and it be adjudged againſt the priſoner, yet he ſhall be put to anſwer the felony, for this demurrer is no confeſſing of the indictment, and it is all one, as if his plea were found againſt him by the jury, or by certificate of the biſhop, which yet is not ſo peremptory *(a)* but he ſhall be after tried for the felony. *Stamf. P. C. Lib.* II. *cap.* 34. *fol.* 98. *b.*

If *A.* be indicted of murder and he hath the king's pardon of manſlaughter, if he be arraigned upon the indictment for [258] murder, he muſt not plead generally *not guilty*, for then he waves his pardon, but he muſt confeſs the indictment as to manſlaughter and plead thereunto the king's pardon, and as to the murder, *viz. interfection' ex malitiâ præcogitatâ* he is to plead *not guilty*, and if he be found guilty of murder, he ſhall have judgment, if acquit of the murder, then his plea ſhall be allowd, and thus I directed it in Sir *Thomas Pettus*'s caſe in *Norfolk* about 24 *Car.* 2. and it is purſuant to the direction of the ſtatute of 13 *R.* 2. *cap.* 1. which requires, that before the pardon allowd it ſhall be inquired by the country,

(a) See 14 *E.* 4. 7. *a.*

whether the party were ſlain of malice prepenſe, and if ſo, the pardon to be diſallowd.

Now the plea to the felony conſiſts of two parts, *viz.* 1. The iſſue of *not guilty*. whereunto the clerk joins iſſue *cul. priſt.* 2. The putting himſelf upon the country, when the clerk demands how he will be tried.

If either of theſe fail, it is in law a ſtanding mute, whereupon in caſe of felony he is put to his penance, and in caſe of treaſon he hath judgment, as upon a *nihil dicit*, and ſo is attainted. 14 *E.* 4. 7. *a.*

In caſe of an indictment of felony or treaſon there can be no juſtification made, as a man cannot plead, that what he did was *ſe defendendo*, or in his defenſe againſt a burglar or robber, tho it amount in truth to no felony.

And the reaſon is, becauſe the indictment ſuppoſeth in treaſon, that the fact was done *proditoriè & contra ligeantiæ ſuæ debitum*, and in felony, that the fact was done *felonicè*, which is the point of the indictment, and muſt be anſwered directly, but upon *not guilty* pleaded he ſhall have the advantage of all ſuch defenſes, as he can make to acquit himſelf of the felony or treaſon, and may give all his ſpecial defenſe in evidence, tho the matter of fact be proved upon him, and ſo it is the moſt advantageous plea for the priſoner.

If dureſs and compulſion from others will excuſe him or his own neceſſary defenſe in ſafe-guard of his life, or any other matter, the [259] jury upon the general iſſue ought to take notice of it, and to find their verdict accordingly, as effectually, as if it were or could be ſpecially pleaded.

And now we have brought the priſoner to his trial, wherein we ſhall now proceed. And theſe trials of priſoners are of two kinds, *viz.* by battle, or by the jury.

The former doth not concern indictments, for therein there is no trial by battle, but concerns only appeals and approvers, and I ſhall therefore defer the diſcuſſion of trials by battle, till I come to conſider of appeals in the end of this book, and proceed to the buſineſs of trial by jury.

CHAP.

CHAP. XXXIV.

Touching the trial *of offenders* by jury, *and firſt,* the proceſs.

AFTER the priſoner hath pleaded and put himſelf upon the country, the next thing in order of proceeding is the trial of the offender.

And therein theſe things will be neceſſary to be conſidered. 1. The proceſs, that brings in the jury to try the priſoner. 2. The return to be made of them, and of what nature and quality they ought to be. 3. What is to be done, if they appear not, or be challenged off. 4. Concerning the challenge of the king, or of the priſoner unto them, if they do appear. 5. The trial and allowance, or diſallowance of the challenge. 6. The order of the ſwearing of the jury. 7. The evidence to be given to the jury, what, and how, and in what manner. 8. The demeanor of the jury before and at the time of the delivering of the verdict. 9. The verdict itſelf, how to be given and ordered by the jury and by the court. 10. What is to be done in caſe of miſcarriage of the jury either in their verdict, or the circumſtances that attend it. [260]

I. And firſt therefore I will conſider what, and how proceſs is to iſſue to bring in the jury.

And this will be various according to thoſe courts or judicatories, wherein the priſoner is to be tried, *viz.* 1. In the king's bench. 2. Before commiſſioners of *oyer* and *terminer.* 3. Before juſtices of gaol-delivery. 4. Before juſtices of peace, for theſe are the uſual tribunals, where matters of this nature are determined.

1. Therefore, as to the king's bench.

If the offence be committed in the county, where the king's bench ſits, and the indictment be originally taken in the king's bench, and the priſoner arraigned there, the court may proceed *de die in diem* in the term-time, and there needs not fifteen days between the *teſte* and return of the *venire fac'* to bring in the jury. 9 *Co. Rep.* 118. *b.* lord *Sanchar*'s caſe.

And the ſame law is, if the offenſe be committed in the ſame county where the king's bench ſits, and the indictment be taken before juſtices

juſtices of peace of the ſame county, and removed into the king's bench by *certiorari*, and the priſoner be there arraigned and plead.

But if the offence be committed, and the indictment taken in another county than where the king's bench ſits, and it be removed into the king's bench by *certiorari*, and the priſoner be there arraigned and pleads, there muſt be fifteen days between the *teſte* and return of the *venire fac'* or other proceſs. Lord *Sanchar's* caſe. 9 *Co. Rep. ubi ſupra.*

The *venire fac'* as all other proceſs of that court, iſſues in the king's name under the ſeal of the court and *teſte* of the chief juſtice, and always ought to bear *teſte* after the iſſue joined between the king and the priſoner.

2. As to the commiſſion of *oyer* and *terminer*. Tho there goes out a general precept in the name of three or more of the commiſſioners, and under their ſeals fifteen days before their ſeſſion directed to the ſheriff to return twenty-four jurors to try the iſſue between the king and the priſoners to be arraigned, yet this is but preparatory, and to have a jury in readineſs; for after the priſoners are arraigned and pleaded to the country a precept ought to iſſue to the ſheriff in nature of a *venire facias*, which may bear *teſte* the ſame day, that the priſoners plead, commanding the ſheriff to return twenty-four, &c. to try the iſſue upon ſuch a day, and this precept muſt be in the names and under the ſeals of the commiſſioners or three of them, whereof one of the *quorum*, 4 *Co. Inſtit. cap.* 28. *p.* 164. and not barely by an award upon the roll.

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Or they may make their precept returnable the ſame day that the priſoner pleads, *viz. ad horam primam poſt meridiem*, &c. for juſtices of *oyer* and *terminer* may take their indictment, and arraign the priſoner and try him the ſame day, againſt the opinion of 22 *E. 3. Coron.* 44. as appears by the precedents cited 4 *Co. Inſtit. ubi ſupra*, and by common experience.

If they make their precept returnable any day after, as for inſtance the ſecond day of the ſeſſions, they muſt not only make an adjournment, but record the adjournment, or elſe it will be intended returnable after their ſeſſions, for the ſeſſions is intended only the firſt day and no longer, unleſs an adjournment be entred.

3. Juſtices of gaol-delivery, after the priſoner hath pleaded, may take his pannel from the ſheriff without making any precept to him, 4 *H.* 5. *Enqueſt* 65. 4 *Co. Inſtit. cap.* 30. *p.* 168. the reaſon given is, becauſe juſtices of gaol-delivery ſend out a general commandment to the

the ſheriff before their ſeſſion to return juries againſt they come, otherwiſe it is, where they have a ſpecial commiſſion *per Hankf.*

But this is not the reaſon, for ſo it is done by juſtices of *oyer* and *terminer* and juſtices of peace, and yet they make ſpecial precepts of *venire fac' vide antea, cap.* 4.

4. Juſtices of peace, as to the point of their precepts of *venire fac'* agree with juſtices of *oyer* and *terminer*, for they are as to this purpoſe commiſſioners of *oyer* and *terminer*, and may indict, arraign and try the ſame day in caſes of felony, as it is agreed 4 *Co. Inſt. p.* 164. and uſual practice. [262]

Now there be certain general obſervations touching the proceſs againſt the jury.

1. In all caſes, where the proceſs is by writ or precept, as well the award, as the writ or precept ought to mention truly the *viſne*, from whence the jury ſhall come, and where it is only by award without writ or precept, as in caſe of the juſtices of gaol-delivery, the award ought to mention the *viſne*, from whence the jury ſhall come.

As if a murder be ſuppoſed to be at *D.* the *venire fac'* ought to return a jury *de vicineto de D.*

If the murder be alledged *apud civitatem Briſtol*, the *venire fac'* is moſt properly *de Briſtol*, and it is good, becauſe a city, 7 *H.* 4. 13. *a. Enqueſt* 36. but if it be from a place not a city, it muſt be *de vicineto de D.*

But tho it be a city, yet the *venire fac' de vicineto civitatis Briſtol* is good, tho it be alſo a county, as hath been often reſolved againſt the opinion of *Stamford, Lib.* III. *cap.* 4. *fol.* 154. *b.*

If the ſtroke be laid at *B.* and the death at *C.* in the ſame county, the *venire fac'* muſt be *de vicineto B. & C.* becauſe both make the felony.

But by the ſtatute *(a)*, where the ſtroke is in one county, and the death in another, the indictment ſhall be, where the death was, and the *viſne* ſhall be from the place, where he is alledged to die, for neceſſity, becauſe the proceſs is not to go into the other county.

If a murder be laid *in quadam platea vocat'* Kings-ſtreet *in parochiâ Sanctæ* Margaritæ *apud civitatem* Weſtm. the *viſne* ſhall be neither from *Kings-ſtreet*, becauſe it is alledged to be only *platea* nor *de vicineto civitatis Weſtm.* but *de vicineto parochiæ Sanctæ Margaritæ*, becauſe more certain. 6 *Co. Rep.* 14. *a. Arundel's* caſe.

(a) 2 & 3 *E.* 6. *cap.* 24.

But

But if a murder be laid *apud B. in parochiâ de C.* the *venire fac'* ſhall be *de vicineto de B.* becauſe more certain, for it ſhall be intended a vill or hamlet within a pariſh, and by common intendment a pariſh may contain many vills. 11 *Co. Rep.* 25. *b. Harper's* caſe. [263]

But at this day by the ſtatute of 22 *H.* 8. *cap.* 2. made perpetual by 32 *H.* 8. *cap* 3. if a foreign plea be pleaded in caſe of an indictment of felony, it ſhall be tried by the jury, that ſhould try the iſſue of *not guilty*, but in caſe of an indictment of treaſon, as I have before ſaid, that ſtatute takes not place, but it ſhall be tried by a jury of that place or county, where the foreign matter pleadeth ariſeth.

2. As to the number of the jury the *venire fac'* or precept is only *venire fac'* twelve, but the ſheriff ought to return twenty-four.

But the general precept, that iſſues before a ſeſſions of gaol-delivery, *oyer* and *terminer*, and of the peace before mentioned is to return twenty-four, and commonly the ſheriff returns upon that precept forty-eight.

But the award or precept to try the priſoner after he hath pleaded is only *venire fac'* twelve, and twenty-four are returned by the ſheriff upon that pannel.

3. Touching the manner of the precept, writ, or award.

If *A. B. C.* and *D.* be indicted for one felony or murder before any juſtices, they may iſſue one *venire fac'* or may iſſue ſeveral *venire fac'* or precepts, or awards of that kind.

If the *venire fac'* be joint, then if *A.* challenge twenty peremptorily, or challenge for cauſe, the jurors challenged ſhall be drawn againſt all, for each may have his ſeveral challenge, and the like, if it were in an appeal; ſo that, if there were eighty upon the pannel, they may be all challenged off by their ſeverel peremptory challenges, which is a great inconvenience, and therefore in ſuch caſe they antiently uſed to ſever the priſoners, and ſo put them to challenge apart, whereby they may poſſibly hit upon the ſame perſons. 9 *E.* 4. 27. *b.* 21 *H.* 6. 22. *a.* 22 *H.* 6. 4. *a.* therefore the beſt way is to make out ſeveral *venire fac'* and conſequently, if the pannel be challenged off, yet forty *tales* may be granted upon each *venire fac'*.

And if the *venire fac'* in an appeal be once granted jointly, it cannot be afterwards ſevered, neither can there be ſeveral *tales*, for if the *venire fac'* be joint, the *tales* muſt be joint. 27 *H.* 6. 5 & 6. [264]

And

And it ſeems, that in caſe of an indictment, tho it be the king's ſuit, if once a *venire fac'* iſſue joint, there cannot iſſue a ſeveral *venire fac'* nor a ſeveral *tales*, which in many caſes may much delay, if not fruſtrate the trial.

But before juſtices of gaol-delivery, where there is no precept but only an award, tho at firſt the award be joint, and the pannel accordingly returned by the ſheriff, and the priſoners challenge peremptorily ſeverally, whereby there are not enough left upon the pannel to try them, and a *tales* is awarded returnable the next day, yet the court may ſever the firſt award and alſo the *tales*. *Plow. Com.* 100. *a. b. Saliſbury*'s caſe adjudged.

It is therefore conſiderable, whether the difference between the caſes of the old books and this be, that thoſe were of an appeal, which is the party's ſuit, and this of an indictment, which is the king's ſuit, or rather, (as I think,) becauſe this was in caſe of juſtices of gaol-delivery, where there is neither writ nor precept, but a command *ore tenus*, and when the record is made up, then an award upon the roll, which the juſtices may model, as they pleaſe, at any time before the trial, and requires not ſuch ſtrict formality as a writ. 4 *H.* 5. *Enqueſt* 55.

II. The ſecond general is touching the return of the ſheriff upon the precept, and the quality of the jurors.

Upon the writ or precept, or command to the ſheriff he ought to make the return, whether the place or *viſne* be within a franchiſe or not, and cannot return a *mandavi ballivo*, as in ſome caſes of appeals, for here the writ is for the king, and therefore with a *non omittas propter aliquam libertatem.*

The writ commands him to return *duodecim liberos & legales homines de vicineto*; they muſt be, 1. Freemen and regularly freeholders. 2. *Legales*, without any juſt exception. And 3. They are to be *de vicineto*, but this is not neceſſarily required, for they of one ſide of the county are by law *de vicineto* to try an offenſe of the other ſide of the county.

But concerning the quality of the jurors more ſhall be ſaid, when we come to conſider of challenges. [265]

The jurors returned by the ſheriff were, at common law, thoſe, that were to try the priſoners, but by the ſtatute of 3 *H.* 8. *cap.* 12. all pannels returned by ſheriffs or their miniſters, (which be not between party and party,) before any juſtices of gaol delivery, or of the peace,

peace, whereof one of the *quorum*, ſhall be reformed by putting to, and taking out the names of the perſons impannelled, by diſcretion of the juſtices, before whom ſuch pannel ſhall be returned, and the pannels ſo reformed ſhall be good and lawful, and the ſheriff ſhall return the pannel ſo reformed upon pain of 20*l.*

This ſtatute, which began to be ſet on foot 11 *H.* 7. *cap.* 24. hath much reformed many practices of ſheriffs in packing of juries in caſes capital.

Note, tho the preamble of this ſtatute mentions inqueſts of inquiry, the body of the act ſeems to extend to all pannels, as well of the petit jury, as of the grand inqueſt, and ſo it hath been conſtantly practiſed, for if a priſoner be arraigned before the judge that ſits upon the crown-ſide, it hath been always uſual for the judge to ſend for a jury to the judge of *niſi prius*, and when the jury is brought, the ſheriff returns them between the king and the priſoner, which is by virtue of this ſtatute.

Where the jury muſt be *de medietate linguæ*, and other matters relating to the quality of the jurors will be conſidered, when we come to conſider of challenges.

III. The third general is to conſider what is to be done, if the jury appear not, or be ſo challenged off, that there are not enough upon the pannel to try the priſoner.

If the proceſs be in the king's bench, and the jury fill not, or be challenged off, that there are not enough to try the priſoner, there ought to iſſue a *diſtringas juratores*, and a command to return *tales*.

But if the whole jury be challenged off, then a new *venire facias*, and if none of the jury appear, then a *diſtringas juratores* ſhall iſſue. and no *tales*.

[266] But if ſome of the jury appear, but not a full jury, or if ſo many of them, that appear, are challenged off, that there remains not a full jury, a *diſtringas* ſhall iſſue with a *tales*.

If a full jury appear, and before they are ſworn one of them die, ſo that there remains not a full jury, a *tales* ſhall be granted, and ſo it is, if one juryman dies after he be returned and ſworn. 12 *H.* 4. 10. *a.* 20 *E.* 4. 11 *b.*

If a *tale* iſſue, and they do not appear full, or be challenged off, ſo that thoſe that appear upon the principal pannel and *tales* make not up a full jury, another *tales* may be granted. 14 *H.* 7. 1. *b.*

In

In caſe of felony a *tales* may be granted of a greater number than the principal pannel in reſpect of challenges, ſo that there may be forty *tales* or more. 14 *H.* 7. 7. but if ſeveral ſucceeding *tales* be granted, the latter muſt be leſs in number than *that* which was next before, unleſs the array of the preceding *tales* be quaſhed, and then the number of the next may equal it. 20 *H.* 6. 40. *a.*

The times between the *teſte* and return of the *tales* muſt be (as it ſeems,) as in the principal *venire fac'*, *viz.* if the indictment be in a foreign county and removed into the king's bench, fifteen days, if in the ſame county, *de die in diem.*

If the indictment be before juſtices of *oyer* and *terminer*, the *tales*, as well as the principal pannel, ought to be by precept in the names of three of the juſtices, and may be made returnable *de die in diem*, or *de horâ in horam* of the ſame day.

And as to all other matters they reſemble the proceedings in the king's bench, *viz.* the number, the manner, and times of granting it, and ſo need not be repeated.

Before juſtices of gaol-delivery this learning of *tales* is not of much uſe, becauſe there is no particular precept to the ſheriff to return either jury or *tales*, but the general precept before the ſeſſions and the award or command of the court upon the plea of the priſoner. 4 *H.* 5. *Enqueſt* 55. *Stamf. P. C. Lib.* III. *cap.* 6. *fol.* 155. *b*

And yet, *vide Plow. Com.* 100. *a.* in *Saliſbury*'s caſe before juſtices of peace and gaol-delivery, a *tales* granted returnable the next day. [267]

See 4 Blacks. Com. ch. 27. of Trial, &c. Index to 2 Hawk. P. C. Tit. Trial. See 2. Hawk. P. Coron. ch. XL. XLI. XLII.

CHAP. XXXV.

Concerning challenges, *and firſt, of* peremptory challenges.

CHALLENGES in reſpect of the parties taking them are of two kinds. 1. Challenges by the priſoner. 2. Challenges by the king.

Challenges by the priſoner are of two kinds. 1. Without cauſe ſhewn, which are commonly called peremptory challenges. 2. With cauſe

cauſe ſhewn, which again are of two ſorts. 1. Of the array. 2. To the poll.

In this chapter I ſhall conſider peremptory challenges what they are, and what is to be done upon them.

By the common law, if a man were outlawed of felony or treaſon, and brought a writ of error upon the outlawry, and aſſigned ſome error in fact, whereupon iſſue was joined, he ſhould not challenge peremptorily or without cauſe. *Stamf. P. C. Lib.* II. *cap.* 7. *fol.* 158. *a.*

The like law ſeems to be, if he had pleaded any foreign plea in bar or in abatement, which went not to the trial of the felony, but of ſome collateral matter only.

But if a man be indicted or appealed of treaſon or felony, and plead *not guilty*, or plead any other matter of fact triable by the ſame jury, and plead over to the felony, becauſe his life is now at ſtake he might challenge peremptorily and without cauſe any jurors under the number [268] of three whole juries, namely thirty-five of the jurors returned, and they are to be withdrawn out of the pannel; and this was *in favorem vitæ*, *Moore* 12.

And if twenty men were indicted for the ſame offenſe, tho by one indictment, yet every priſoner ſhould be allowed his peremptory challenge of thirty-five perſons. 9 *E.* 4. 27. *b.*

And if there were but one *venire fac'* awarded to try them, the perſons challenged by any one ſhould be withdrawn againſt them all. 9 *E.* 4. 27. *Plow. Com.* 100. *Saliſbury*'s caſe.

But if he had peremptorily challenged above thirty-five perſons, and inſiſted upon it, and would not leave his challenge, then in caſe of an indictment of high treaſon, it amounted to *nihil dicit*, and judgment of death ſhould be given againſt him.

But in caſe of petit treaſon or felony the priſoner was attiendy put to *peine fort & dure*, as declining the trial by law appointed, the conſequence whereof was only the forfeiture of his goods, but it amounted to no attainder, and conſequently no eſchear of his lands; *vide* 14 *E.* 4. 7. *a. Plow. Com.* 262. *b.* and thus the practice was until the beginning of *H.* 7. *vide* 17 *Aſſiz.* 6. 17 *E.* 3. 23. *a.*

But afterwards by the advice of all the judges of both benches it was reſolved, that the party ſo peremptorily challenging above thirty-five ſhould have judgment of death, and it amounted to an attainder, 3 *H.* 7. 12. *a. Co. P. C.* 227, 228, for having pleaded to the felony, and put himſelf upon the country here could be no ſtanding mute, and there-

fore

fore the judges reſolved on this courſe, as moſt conſonant to law, to be practiſed in all circuits. 3 *H.* 7. 12. *a.*

But for all this the better opinion of latter times, as well as of former is, that the judgment in caſe of ſuch a peremptory challenge of above thirty-five at the common law before 22 *H.* 8. in caſe of felony was not an attainder but only penance according to the reſolution of the judges in the time of *E.* 4. mentiond by *Huſſey* 3 *H.* 7. 12. *a. Stamf. P. C. Lib.* II. *cap.* 61. *fol.* 150. *b. Stamf. prærogat.* 46. *a. Plow. Com.* 262. *b. per Weſton.*

And in this caſe the jury it ſeems was not to be ſworn, but the judgment was given ſingly upon his peremptory challenge. [269]

And yet, if a priſoner plead *not guilty*, and put himſelf upon the country, and the priſoner challenge peremptorily under three juries, *viz.* thirty-five, whereby the jury remains, and a *tales* is granted, and the jury appears, and the priſoner then ſtands mute, yet the jury ſhall paſs upon him upon his plea of *not guilty*, which he had before pleaded. 15 *E.* 4. 33. *b.*

But by the ſtatute of 22 *H.* 8. *cap.* 14. it is enacted, "That no "perſon arraigned for petit treaſon, murder, or felony be admitted to "any peremptory challenge above the number of twenty, this act "was continued until 32 *H.* 8. *cap.* 3. and then made perpetual.

By the ſtatute of 33 *H.* 8. *cap.* 23. it is enacted, "That in caſes "of high treaſon, or miſpriſion of treaſon, peremptory challenge "ſhall not be allowd.

But notwithſtanding theſe ſtatutes, by the ſtatute of 1 & 2 *P.* & *M. cap.* 10. enacting, "That all trials for *any* treaſon ſhall be ac-"cording to the due order and courſe of the common law," peremptory challenge of thirty-five or under, is, at this day, allowable in caſes of high treaſon and petit treaſon. *Co. P. C.* 227. *Stamf. P. C. Lib.* 3. *cap.* 7. *fol.* 158. *a.*

And conſequently all the conſequences thereof, namely the attainder of the priſoner, that peremptorily challengeth above thirty-five in an indictment of high treaſon or petit treaſon, ſtand as at common law.

But as to all murders and other felonies the ſtatute of 22 *H.* 8. *cap.* 14 taking away the peremptory challenge of above twenty ſtands in force. *Co. P. C.* 227, 228.

But then ſuppoſe the priſoner in caſe of felony peremptorily challenges above twenty, what ſhall be done? ſhall judgment of death be given, as where he challenged above thirty-five at common law? And it ſhould ſeem, by the opinion of former times, it ſhould.

[270] For the ſeveral ſtatutes, that ouſt clergy in caſe of challenging above twenty, import, that by ſuch challenge the party ſhould be convict, otherwiſe clergy were needleſs to be ouſted upon ſuch challenge, as 25 *H.* 8. *cap.* 3. *vide* 11 *Co. Rep. Poulter*'s caſe 30 *b.* 4 & 5 *P.* & *M. cap.* 4.

But yet, if he challenge above twenty, as the law ſtands at this day, he ſhall not have judgment of death, but only his challenge ſhall be over-ruled, and the jurors ſworn for two reaſons. 1. Becauſe the ſtatute hath made no proviſion to attaint the felon, if he challenge above the number of twenty. 2. Becauſe the words of the ſtatute of 22 *H.* 8. are, *That he be not admitted to challenge above the number of twenty*, ſo that, if he challenge above twenty peremptorily, his challenge ſhall be only diſallowd. *Co. P. C. cap.* 102. *p.* 227, 228.

If *A.* be indicted and plead *not guilty*, the jury appears, he challengeth ſix of the jury for cauſe, and the cauſes found inſufficient, and the ſix are ſworn, and the reſt of the jury challenged off, whereby the inqueſt remains *pro defectû juratorum*, a *tales* granted and the jury appear, the priſoner may challenge peremptorily any of the ſix, that were before challenged for cauſe, allowd, and ſworn 32 *H.* 6. 26. *b.* 14 *H.* 7. 19. *a.* for it is poſſible a new cauſe of challenge may intervene after the former ſwearing. 2 *R.* 3. 13. *a.* but if a man challenge him for cauſe, he muſt ſhew a cauſe happened after the former ſwearing.

But if the priſoner upon the firſt pannel had challenged for inſtance fifteen peremptorily, and then the jury remains for default of jurors, and a *diſtringas* with a forty *tales* is granted, he ſhall challenge peremptorily no more than will fill up his number, *viz.* in caſe of felony at this day five more, and in caſe of treaſon or petit treaſon twenty more to make up his full number of twenty peremptory challenges in the firſt caſe, and thirty-five in the laſt.

See 2 Hawk. P. C. ch. XLIII. of challenges. 4 Blackſ. Com. ch. 27. pa. 352, &c. &c. Burn. Tit. Jurors, ſect. iv. of the challenge of Jurors. Index to Foſter. Tit. challenge.

CHAP.

CHAP. XXXVI.

Concerning challenges for cauſe, *in caſe of indictments for treaſon or felony.*

CHALLENGES for cauſe upon indictments are of two kinds, either for the king, or for the priſoner, and each of theſe are again of two kinds, either to the array, or to the poll.

The king may challenge the array or the poll. 4 *H.* 7. 3. *b.* *Stat.* 33 *E.* 1. *Ordinatio de inquiſitionibus*, but then he muſt ſhew cauſe of challenge, but he need not ſhew the cauſe upon his challenge to the poll, till the whole pannel be peruſed. *Stamf. P. C. Lib.* III. *cap.* 7. *fol.* 162. *b.*

Challenges by the priſoner for cauſe ſhewn are of two kinds, *viz.* Either to the array or to the poll, but it is no principal challenge either to the array or poll, that the ſheriff or juror is of the king's livery, but he muſt conclude to the favour. 3 *H.* 6. *Challenge* 17.

If an alien be indicted or appealed of felony, tho the indictment ought to be by a grand inqueſt of *Engliſh*, yet by the ſtatute of 28 *E.* 3. *cap.* 13. the trial ſhall be *per medietatem linguæ*, *viz.* half the jury to be of aliens, except in caſe of felony by *Egyptians*, within the ſtatute of 1 & 2 *P.* & *M. cap.* 4.

And this ſtatute extends to felonies, as well made after the ſtatute of 28 *E.* 3. as before, for the ſtatute is general *all manner of inqueſts.*

And this ſtatute extended to trial of aliens indicted of treaſon alſo, and ſo the law ſtood till 1 & 2 *P.* & *M. cap.* 10. which reſtored the common-law trial in treaſon, and conſequently ouſted *medietas linguæ.* 1 *Mar. Dy.* 145. *a. Shirley*'s caſe. *Co. P. C. p.* 27.

If upon an indictment of felony againſt an alien he plead *not guilty*, and a common jury be returned, if he doth not [272] ſurmiſe his being an alien before any of the jury ſworn, he hath loſt that advantage. *Dy.* 304. *a.* but if he pledge, that he is an alien, he may challenge the array for that cauſe, and thereupon a new precept or *venire facias* ſhall iſſue, or an award be made of a jury *de medietate linguæ.* 21 *H.* 7. 32. *b.* but it is more proper for him to ſurmiſe it upon his plea pleaded, and thereupon to pray it.

It ſeems, that upon indictments of treaſon or felonies, the priſoner pleading *not guilty* there ought at common law to be four hundreders returned: *vide Sat.* 33 *H.* 8. *cap.* 23. that ouſted challenge for ſhire or hundred in caſes of treaſon, but that ſtatute as to treaſon was altered by 1 *&* 2 *P. & M. cap.* 10.

But the ſtatute of 35 *H.* 8. *cap.* 6. requiring ſix hundreders, and that of 27 *Eliz. cap.* 6. requiring only two hundreders in perſonal actions extend not to trials upon indictments of treaſon or felony.

Yet I never knew any challenge for default of hundreders upon a trial of an indictment for felony or treaſon.

Challenges to the poll for cauſe are many, as in other caſes, which I ſhall not mention at large, becauſe they are all gathered up by my lord *Coke ſuper Lit.* §. 234. but ſhall only mention ſuch, as more ſpecially belong to capital cauſes.

By the ſtatute of 33 *H.* 8. *cap.* 12. for treaſon or felony committed in the king's houſe and tried before the lord ſteward all challenge except for malice is taken away. By the ſtatute of 25 *E.* 3. *cap.* 3. it is enacted, "That no indicter be put in inqueſt againſt the party "indicted, if he be challenged for that cauſe.

By the ſtatute of 2 *H.* 5. *cap.* 3. no man is to be admitted in any inqueſt upon the trial of the death of a man *(a)*, unleſs he have lands

(a) That is to ſay in capital cauſes: This ſtatute was introductive of a new law only with reſpect to the *quantum* of the freehold, for by the *common law* it was requiſite that a juror ſhould be a freeholder, ſo that, tho this ſtatute be repeald by the general words of 1 *&* 2 *P. & M. cap.* 10. as to treaſon, yet ſome freehold was ſtill neceſſary, and ſo it was allowd in *Fitzharris*'s caſe by *Pemberton* C. J. See *Stat. Tr. Vol.* III. *p.* 263. notwithſtanding it was ruled otherwiſe in the caſe of lord *Ruſſel* by the ſame judge, *Stat. Tr. Vol.* III. *p.* 634. and in the caſe of Col. *Sydney*, *Ibid. p.* 736. which laſt reſolutions were declared to be illegal by ſeveral acts of parliament. See 1 *W. & M. Seſſ.* 2. *cap.* 2. 7 *W.* 3. *cap.* 3. See alſo Sir *John Hawles*'s remarks on thoſe trials. *Stat. Tr. Vol.* IV. *p.* 169, *&* *p.* 189. By 4 *&* 5 *W. & M. cap.* 24. continued by 10 *Ann. cap.* 14. *&* 9 *Geo.* 1. *cap.* 8. 'tis not ſufficient, that a juror be a freeholder, but he muſt alſo have within the ſame county freehold or copyhold lands to the clear yearly value of ten pounds, and tho this ſtatute ſeems principally to regard counties at large, yet it hath been allowd to extend to trials in *London* for high treaſon. *Francia*'s caſe. *Stat. Tr. Vol.* VI. *p.* 58. and *Layer*'s caſe *Stat. Tr. Vol.* VI. *p.* 245. See the ſtatutes of 3 *Geo.* 2. *cap.* 25. *&* 4 *Geo.* 2. *cap.* 7. made perpetual by 6 *Geo. cap.* 37. whereby it is provided, "That all leaſeholders "upon leaſes for the term of 50 years or "more, or for 99 years, or any other term "determinable upon one or more lives of "an eſtate in poſſeſſion in land in their "own right of the yearly value of twenty "pounds or upwards over and above the "reſerved rent payable thereout, (or in "the county of *Middleſex* upon any leaſes, "where the improved rents or value a-"mount to fifty pounds or upwards *per* "*manum* over and above all ground rents "or other reſervations) may be ſummoned "or impannelled to ſerve on juries in like "manner as freeholders, *&c.* And that "the ſheriffs of *London* ſhall not impannel "or return any perſon to try any iſſue in "*King's-bench*, *Common Pleas*, and *Exche-*"*quer*, or to ſerve on any jury at the "ſeſſions of *oyer* and *terminer*, gaol-deli-"very, or ſeſſions of the peace, but ſuch "who ſhall be an houſholder within the "ſaid city, and have real or perſonal eſ-"tate

lands or tenements of the value of 40*s. per ann.* above all charges, if he be challenged: And by the conſtruction of this ſtatute, 1. It muſt be land of that value in the ſame county 9 *H.* 7. 1. *b.* Again 2. He muſt not only be ſeiſed thereof at the time of the pannel made, but alſo at the time that he comes to be ſworn, otherwiſe he may be challenged. 12 *H.* 7. 4. *a.*

And altho the ſtatute of 27 *Eliz. cap.* 6. hath raiſed it to 4*l. per annum*, yet that extends only to iſſues joined in the king's bench, common pleas, exchequer, and juſtices of aſſiſe, ſo that it reacheth not to trials of felons before juſtices of gaol-delivery, *oyer* and *terminer*, or of the peace, but theſe trials ſtand as they did by the ſtatute of 2 *H.* 5. as to the value of jurors, *vide ſtat.* 33 *H.* 8. *cap.* 23.

But yet by ſome ſubſequent ſtatutes the value of jurors freehold in caſes of trial of felony is changed.

By the ſtatute of 8 *H.* 6. *cap. ultimo* upon a trial *per medietatem linguæ*, aliens need not have 40*s. per ann.* ſo *defectus annui cenſûs* is no challenge as to the aliens, but ſtill it remains a good challenge as to the other half of the jury, that are denizens. *Stamf. P. C. fol.* 160. *b.* [274]

By the ſtatute of 23 *H.* 8. *cap.* 13. upon trials of felony or murder in cities or boroughs a citizen or burgher worth 40*l.* perſonal eſtate may paſs, tho he have no freehold, but knights or eſquires living there are not within this proviſion.

The ſtatute of 33 *H.* 6. *cap.* 2. concerning indictments of perſons living in *Lancaſhire* refers not to trials.

By the ſtatute of 11 *H.* 6. *cap.* 1. a challenge is allowd of any perſon living in the ſtews of *Southwark*, tho he be of ſufficient freehold.

When a priſoner challengeth for cauſe he ought to ſhew his cauſe preſently (*b*) becauſe it is the king's ſuit, 1 *H.* 5. 10. *b.* 38 *Aſſiz.* 22. (*c*) but ſome books are, that he ſhall not ſhew cauſe till the pannel be peruſed 6 *R.* 2. *Challenge* 105. but he muſt ſhew all his cauſes together *per* 24 *Eliz. C. B. Bracket's* caſe.

If in a trial upon an indictment of felony eleven be ſworn, and the twelfth challenged, whereby the inqueſt remains for default of jurors,

" tate to the value of one hundred pounds, " and that no perſon ſhall be impannelled " or returned to ſerve on any jury for the " trial of any capital offenſe, who ſhall " not be qualified to ſerve as a juror in civil " cauſes; and the ſame matter and cauſe " alleged by way of challenge and ſo " found ſhall be admitted as a principal " challenge, and the perſon ſo challenged " may be examined on oath as to the truth " of the ſaid matter.

(*b*) *Mo.* 846. *Luke* and *Clerk.*

(*c*) See *Challenge* 128.

and a *diſtringas* with a *tales* iſſue, and the jurors appear, ruled 1. The king ſhall not challenge any of the eleven ſworn, unleſs it be for a cauſe happened ſince their ſwearing; if it happen before, tho not known till after, it ſhall not be allowd. 2. That the eleven, that were laſt ſworn, ſhall not be now firſt ſworn, but they ſhall be called, as they happen in the pannel. *M.* 43 & 44 *Eliz. B. R. Wharton's* caſe, *Yelv.* 23.

And the ſame law is for the challenge of the priſoner for cauſe, but he may challenge them peremptorily notwithſtanding they were formerly ſworn, as before is ſhewn, *p.* 270.

Touching the trial of a challenge for cauſe made to the poll, *vide* *Co. Lit. p.* 158. *a.* If a juror be challenged before any jury [275] ſworn, two triers ſhall be appointed by the court, and if he be found indifferent and ſworn, he and the two triers ſhall try the next challenge, and if he be tried indifferent, then the two firſt triers ſhall be diſcharged, and the two jurors tried indifferent ſhall try the reſt.

If the plaintiff challenge ten and the priſoner one, then he that remains ſhall have added to him one choſen by the plaintiff, and another by the priſoner, and they three ſhall try the challenge. If ſix be ſworn, and the reſt challenged the court may aſſign any two of the ſix ſworn to try the challenges.

If the array be challenged, it lies in the diſcretion of the court how it ſhall be tried, ſometimes it is done by two attornies, ſometimes by the two coroners, and ſometimes by two of the jury with this difference, that if the challenge be for kindred in the ſheriff, it is moſt fit to be tried by two of the jurors returned; if the challenge found in favour of partiality, then by any other two aſſigned thereunto by the court. 29 *Eliz. C. B. Leſter's* caſe, *Trin.* 21 *Jac. B. R. Loyd* and *Williams (e).*

But all this learning touching challenges to the poll, whether peremptory or for cauſe, is intended of trials by ordinary juries, not of trial by peers, for there no challenges is allowable, for they are not only triers of the fact but in ſome reſpects judges. *P.* 7 *Car.* 1. *Caſus comitis* Caſtle-haven *(ff)*, but of this more hereafter.

2 Hawk. P. C. ch. 43. 4 Blackſ. Com. ch. 27. Burn. Tit. Jurors. Index to Foſter. Tit. Challenge.

(e) 2 *Rol. Rep.* 363. *(ff)* *State Tr. Vol.* I. *p.* 366.

CHAP.

CHAP. XXXVII.

Concerning evidence *and witneſſes.*

HAVING gone through thoſe things, that are previous and preparatory to the trial, I come now to conſider the trial itſelf by jury, and the things concomitant with it, and firſt concerning the evidence to be given to prove the priſoner guilty.

To give a full account of evidence of this kind there will be theſe things examinable. 1. The quality and qualifications of witneſſes. 2. The manner of their teſtimony, what upon oath, and what without oath. 3. Thoſe evidences and examinations, that are in writing, what, and when allowable, and what not. 4. The things teſtified, and therein of preſumptions and preſumptive evidences by the common law, and by acts of parliament. 5. What variance between the evidence and indictment maintains the indictment.

I. Concerning the quality and competency of witneſſes to be produced.

It is to be obſerved, that there be many circumſtances that diſable a juror or are ſufficient cauſes of exceptions or challenges of him, that are not allowable exceptions againſt a witneſs.

The exception of kindred is a good cauſe of challenge againſt a juror, but not againſt a witneſs, therefore the father may be a competent witneſs for or againſt his ſon, or *è converſo*, the maſter for his ſervant or *è converſo*. Theſe and the like exceptions may be to the credit or credibility of a witneſs, but are not exceptions againſt his competency.

For that I may obſerve it once for all, the exceptions to a witneſs are of two kinds. 1. Exceptions to the credit of the witneſs, which do not at all diſable him from being ſworn, but yet may blemiſh the credibility of his teſtimony, and in ſuch caſe the wineſs is to be allowd, but the credit of his teſtimony is left to the jury, [277] who are judges of the fact, and likewiſe of the probability or improbability, credibility or incredibility of the witneſs and his teſtmony, and theſe exceptions are of that great variety and multiplicity, that they cannot eaſily be reduced under rules or inſtances. 2. Exceptions to the competency of the witneſs, which do exclude him from giving

his teſtimony, and of theſe exceptions the court is the judge, and of theſe latter kind of exceptions I am here to treat.

If a perſon be outlawd in a perſonal action, it is a good cauſe of challenge againſt him as a juror, but yet he ſhall be ſworn as a witneſs notwithſtanding his outlawry. *Coke ſuper Lit.* §. 1. *fol.* 6. *b.*

The common incapacities or incompetencies of witneſſes are reckoned up by my lord *Coke ubi ſupra, viz.* 1. If he be attaint of giving a falſe verdict. 2. Or attaint of a conſpiracy at the king's ſuit, for then he is to have a villainous judgment and *amittere liberam legem*, otherwiſe it is if he be only attaint at the ſuit of the party: *vide* 24 *E.* 3. 73. *b.* 43 *E.* 3. 33. *b.* 4 *H.* 5. *Judgment* 220. 46 *Aſſiz.* 11. 27 *Aſſiz.* 59. 3. If he be convict of perjury. 4. Convict of a *præmunire*. 5. Convict of forgery upon the ſtatute of 5 *Eliz. cap.* 14. but [not] a conviction upon the ſtatute of 1 *H.* 5. *cap.* 3. 6. If he be convict of felony *(a)*. And therefore it ſhould ſeem, that an approver ſhall not be ſworn as a witneſs, if the appellee plead to the country, but only his general oath, that he taketh at the time of his becoming an approver, ſhall be taken, *quod tamen quære*, for this caſe differs from the teſtimony of a perſon convict, for the approver accuſeth himſelf as well as the appellee. 7. If by judgment he hath loſt his ears. 8. Or by judgment ſtood upon the pillory. 9. Or tumbrel. *Co. P. C.* 219. for they are thereby infamous. 10. Or been branded, *ſtigmaticus*. 11. Or being a champion in a writ of right becomes recreant or coward, for theſe render a perſon infamous, ſo that he loſeth *liberam legem*.

[278]

But yet in theſe exceptions theſe things are to be obſerved. 1. That he that allegeth this exception ought to ſhew forth a copy of the record atteſted or vouch the roll in court. 2. That if the king pardon theſe offenders, they are thereby reſtored competent witneſſes, tho their credit is to be ſtill left to the jury, for the king's pardon takes away *pœnam & culpam in foro humano*, *M.* 12 *Jac. B. R. Cuddington & Wilkins (b)*: but yet it makes not the man always an honeſt man, and therefore he ſhall not be a juryman 11 *H.* 4. 41. but yet may be a witneſs againſt the opinion of my lord *Coke* in *Craſhaw's* caſe, *M.* 11 *Jac. B. R. Bulſtrode* 154. *quod vide*.

If a man be convict of felony, and prays his clergy, and is burnt in the hand, he is now a competent witneſs, for by the ſtatute of

(*a*) See *Dangerfield's* caſe in the trial of lord *Caſtlemain*, *Stat. Tr. Vol.* III. *p.* 42. *Reym.* 379. and the trial of *Eliz. Cellier*, *Stat. Tr. Vol.* III. *p.* 35. *Reym.* 369.

(*b*) *Hob.* 67 & 89.

18 *Eliz. cap.* 7. it countervails a purgation and a pardon, and he is thereby enabled afterwards to acquire goods. *Hob.* 288. *Searle* and *Williams.*

And ſo it is if he be in orders, whereby burning in the hand is diſcharged by the ſtatute of 4 *H.* 7. *cap.* 13. *Hob. ubi ſupra.*

And ſo it is if the burning in the hand be pardoned, *Hob. ibid.* or if he prays his clergy, tho the court do reſpit his reading, *quære, vide Holcroft's* caſe, 4 *Co. Rep.* 46. *a.*

There are certain other matters, that render a man incompetent to be a witneſs, tho they are not ſuch as render him infamous by judgment or award in any of the king's courts.

1. Some are diſabled in regard of defect of intellectuals: A perſon of *non ſane memory* cannot be a witneſs, while he is under that inſanity, but if he have *lucida intervalla*, then during the time he hath underſtanding he may be a witneſs. *Co. Lit. ubi ſupra.* But it is a difficulty ſcarcely to be cleared, what is the *minimum, quod ſic* diſables the party.

If an infant be of the age of fourteen years, he is as to this purpoſe of the age of diſcretion to be ſworn as a witneſs, but if under that age, yet if it appear that he hath a competent diſcretion, he may be ſworn.

But in many caſes an infant of tender years may be examined without oath, where the exigence of the caſe requires it, as in caſe of rape, buggery, witchcraft, *de quibus vide quæ ſupra, Part* I. *cap.* 24. *p.* 302. *& cap.* 58. *p.* 634. *& infra, p.* 283. [279]

2. It is ſaid by my lord *Coke ubi ſupra*, that an infidel is not to be admitted as a witneſs, the conſequence whereof would alſo be, that a *Jew*, (who only owns the old teſtament) could not be a witneſs.

But I take it, that altho the regular oath, as it is allowd by the laws of *England*, is *tactis ſacroſanctis Dei evangeliis*, which ſuppoſeth a man to be a chriſtian, yet in caſes of neceſſity, as in foreign contracts between merchant and merchant, which are many times tranſacted by *Jewiſh* brokers, the teſtimony of a *Jew tactâ libro legis Moſaicæ* is not to be rejected, and is uſed, as I have been informed, among all nations.

Yea, the oaths of idolatrous infidels have been admitted in the municipal laws of many kingdoms, eſpecially *ſi juraverit per verum Deum creatorem*, and ſpecial laws are inſtituted in *Spain* touching the form

form of the oaths of infidels. *Vide Covarruviam, Tom.* I. *part* 1. *de juramenti forma (c).*

And it were a very hard caſe, if a murder committed here in *England* in preſence only of a *Turk* or a *Jew*, that owns not the chriſtian religion, ſhould be diſpuniſhable, becauſe ſuch an oath ſhould not be taken, which the witneſs holds binding, and cannot ſwear otherwiſe, and poſſibly might think himſelf under no obligation, if ſworn according to the uſual ſtyle of the courts of *England*.

But then it muſt be agreed, that the credit of ſuch a teſtimony muſt be left to the jury.

3. Some regularly are diſabled in reſpect of the civil unity of their perſons, as the huſband regularly is not allowed to be a witneſs for or againſt the wife, or *è converſo*; but *vide* touching this alſo at large *Part* I. *cap.* 24. *in fine & ibid. cap.* 64. *p.* 693. *ſuper ſtatut.* 1. *Jac. cap.* 11.

4. Some are diſabled to be witneſſes in reſpect, that they are concerned in intereſt.

[280] And therefore a party to an uſurious contract, if the money be unpaid, ſhall not be received as a witneſs to prove the uſury, becauſe he avoids thereby his own ſecurity, but otherwiſe it is, if the money be already paid, and the ſecurity taken up, for then he is allowable to be a witneſs for the king *(d)*.

A. wounds *B.* for which he is indicted, yet *B.* may be a witneſs for the king: but this ſhall be no evidence in an action brought by *B.* for the aſſault, tho *A.* be convict at the king's ſuit.

If a reward be promiſed to a perſon for giving his evidence before he gives it, this, if proved, diſables his teſtimony.

And ſo for my own part I have always thought, that if a perſon have a promiſe of a pardon, if he gives evidence againſt one of his own confederates, this diſables his teſtimony, if it be proved upon him *(e)*.

Yet in ſome caſes a conſequential benefit to the witneſs doth not diſable his teſtimony, tho it may abate the credit of his teſtimony.

A. B. and *C.* are ſeverally indicted for perjury in proving a bond, *A.* traverſeth the indictment, *B.* and *C.* tho indicted for the ſame

(c) *P.* 249. *Edit. Antwerp.* 1614.

(d) *Co. Lit.* 6. *b.*

(e) However the contrary opinion hath prevailed, ſee *Tong's* caſe, *Kel.* 18. and *Layer's* caſe *Stat. Tr. Vol.* 6. *p.* 257. but moſt certainly it is a great objection to the credibility, if not to the competency of the witneſs, *vide ſupra, Part* 1. *p.* 304.

offenſe,

offenſe, yet not being convicted may be witneſſes for *A.* to prove the bond ſealed. *P.* 19 *Car* 1. *B. R. Rot.* 2. adjudged in the caſe of *Billmore*, *Gray*, and *Harbin*, and accordingly ruled *P.* 40 *Eliz. C. B. Gunſton* and *Downs* (*f*) in three actions ſeverally brought againſt three perſons for perjury in *Chancery* in one and the ſame point, for the other two are not immediately concerned in this trial, tho conſequentially they are concerned, the point being the ſame.

If *A.* bring an action upon the ſtatute of *Winton* againſt the hundred, none that live or have land in the hundred ſhall be admitted to give evidence for the hundred. *M.* 1650. *Bennet* verſus *Hundred de Hertford* (*g*).

Yet if a perſon be taken and indicted for the robbery, they of the hundred may be admitted to prove the defendant guilty of the robbery, and that he was taken upon their purſuit, tho this doth conſequentially diſcharge the hundred upon the *ſtatute* of *Winton*, & 27 *Eliz. cap.* 13. [281]

A. brings an action againſt *B.* wherein *C.* is produced as a witneſs for *A.* and *A.* recovers upon his teſtimony, *C.* is thereupon indicted of perjury *contra formam ſtatuti* (*) *ad grave dampnum ipſius B. C.* pleads *not guilty*, ruled that *B.* ſhall not be received to give evidence againſt *C.* becauſe he is the party grieved, and ſhall recover 20*l.* *M.* 1650. *B. R. Bacon*'s caſe, 2 *Rol. Abr.* 685. *pl.* 4. and yet it ſeems he ſhall not recover the 20*l.* upon the indictment, but muſt bring his action upon the ſtatute; and yet conſtant experience, and the very ſtatute of 21 *H.* 8. *cap.* 11. that gives reſtitution of goods to the party proſecuting an indictment of felony makes it evident, that he may be, and indeed ought to be the witneſs to convict the felon, tho thereupon he is to have reſtitution of the goods ſtolen.

If the tenant robs his lord, or the teſtee for life the reverſioner, or a reſiant the lord of the franchiſe that hath *bona felonûm*, theſe may be witneſſes upon an indictment or trial of the felon, notwithſtanding the conſequential advantage that accrueth by the attainder or conviction of the party, yet the credibility of their teſtimony is to be left to the jury. But if *A.* hath a promiſe or grant of the goods of *B.* arreſted of felony in caſe he be convict, I ſhould never allow *A.* to be a witneſs

(*f*) 2 *R. A.* 685. *pl.* 3.

(*g*) 2 *R. A.* 685. *pl.* 6. *Styl.* 233. but this is now alterd by 8 *Geo* 2. *cap.* 16. for by that ſtatute, "Any perſon inhabiting "within the hundred or any franchiſe "thereof ſhall be admitted as a witneſs on "behalf of the hundred in the ſame man-"ner, as if he were not an inhabitant of "that hundred, but reſided in any other "hundred whatſoever.

(*) *Vin.* 5 *Eliz. cap.* 9.

to

to convict *B.* for he by his own act after the felony committed acquires the intereſt, and ſo acts and ſwears for his own advantage.

A. brings an appeal againſt *B.* for the death of *C.* his father or her huſband, *A.* cannot be a witneſs againſt *B.* upon *not guilty* pleaded, becauſe it is his or her own ſuit.

[282] But if *A.* be nonſuit upon the appeal, and ſo the priſoner is arraigned upon the appeal at the king's ſuit, now *A.* may be a witneſs, becauſe now the proſecution is merely for the king.

If a man be indicted of high treaſon, the king cannot by his great ſeal or *ore tenus* give evidence, that he is guilty, for then he ſhould give evidence in his own cauſe; *vide ſupra, cap.* 28. *p.* 217. & *Part* I. *cap.* 26. *p.* 344. the caſe of the earl of *Lancaſter.*

Nay, altho he may in perſon ſit on the king's bench, yet he cannot pronounce judgment in caſe of treaſon, but it is performed by the *ſenior* judge, for as he cannot be a witneſs, ſo he cannot be a judge *in propriâ cauſâ.*

And the ſame law is for felony for the ſame reaſon, yet in ſome caſes the king's teſtimony under his great ſeal is allowable, as in an eſſoin *de ſervitio regis*, the warrant under the great ſeal *(h)* is a good teſtimonial of it. *F. N. B.* 17. *Stat. Glouc. cap.* 8.

Now as touching the compulſory means to bring in witneſſes they are of two kinds. 1. By proceſs of *ſubpœna* iſſued in the king's name by the juſtices of peace, *oyer* and *terminer*, gaol-delivery, or king's bench, where the plea of *not guilty* is to be tried. 2. Which is the more ordinary and more effectual means, the juſtices or coroner that take the examination of the perſon accuſed, and the information of the witneſſes, may at that time, or at any time after, and before the trial bind over the witneſſes to appear at the ſeſſions, and in caſe of their refuſal either to come or to be bound over, may commit them for their contempt in ſuch refuſal, and this is virtually included within their commiſſion and by neceſſary conſequences upon the ſtatute of 1 & 2 *P. & M. cap.* 13. whereof before, *p.* 52.

But that which is a great defect in this part of judicial adminiſtration, is, that there is no power to allow witneſſes their charges, whereby many times poor perſons grow weary of attendance, or bear their own charges therein to their great hindrance and loſs. (*)

II. As

(h) But not under the privy ſeal, 2 *Co. Inſt.* 314. *ſuper ſtat. Glouceſter.*

(*) On conviction, in general, for any felony, the reaſonable expences of proſecution

II. As to the ſecond matter in what manner the evidence is to be given.

Regularly the evidence for the priſoner in caſes capital is given without oath, tho the reaſon thereof is not manifeſt, *(i)* but [otherwiſe it is] in all caſes not capital, tho it be miſpriſion of treaſon: neither is counſel allowed him *(k)* to give evidence to the fact, nor in any caſe, unleſs matter of law doth ariſe. 1 *H.* 7. 23. *Co. P. C. p.* 137.

But in ſome ſpecial felonies by act of parliament the priſoner's witneſſes in caſes capital ſhall be examined upon oath at his trial, namely the ſtatute of 31 *Eliz. cap.* 4. againſt imbezzelling of the king's ordnance, giving liberty to the priſoner to make lawful proof by witneſs or otherwiſe, ſeems virtually to allow the priſoner's teſtimony upon oath. *Co. P. C. cap.* 22. *p.* 79.

And the ſtatute of 4 *Jac. cap.* 1. touching felonies upon the borders, *&c.* gives examination of the priſoner's witneſſes upon oath.

If a witneſs be produced and ſworn for the king, yet if that witneſs alledge any matter in his evidence, that is for the priſoner's advantage, (as many times they do,) that ſtands as a teſtimony upon oath for the priſoner, as well as for the king.

Regularly the king's evidence is given upon oath againſt the priſoner, and ought not to be admitted otherwiſe than upon oath; nay, inſtances have been given of very young witneſſes ſworn upon evidence in capital cauſes, *viz.* one of nine years old. *Dalton's Juſtice, cap.* 111. *p.* 297. *(l)* [284]

Yet ſuch very young people under twelve years old I have not known examined upon oath, but ſometimes the court for their infor-

cution are by *ſtat.* 25 *Geo.* 2. *c.* 36. to be allowed to the proſecutor out of the county ſtock, if he petitions the judge for that purpoſe; and by *ſtat* 27 *Geo.* 2. *c.* 3. poor perſons, bound over to give evidence, are likewiſe intitled to be paid their charges, as well without conviction as with it.

(i) Nay, it is manifeſtly againſt all reaſon, that the priſoner ſhould not be allow'd the ſame liberty to make out his innocence, as is allowed to prove his guilt, and tho it has been an uſual practice not to ſuffer witneſſes for the priſoner in capital caſes to be examined upon oath, yet as lord *Coke* obſerves *P. C. p.* 79. there is not ſo much as *ſcintilla juris* for it, it being unſupported by any act of parliament, antient author, book caſe, or record: See Sir *John Hawles's* remarks on *College's* trial. *State Tr. Vol.* IV. *p.* 178. To remedy this inconvenience it was provided by 7 *W. cap.* 3. "That every perſon indicted for high treaſon, "whereby corruption of blood may be "made, ſhall be admitted to make his de"fenſe by witneſſes on oath," but this ſtatute being defective it is further provided by 1 *Ann cap.* 9. "That the witneſſes for "the priſoner in any trial for treaſon or fe"lony ſhall give their evidence upon oath "in like manner, as the witneſſes for the "crown, and if convicted of perjury ſhall "be ſubject to the ſame penalties, forfei"tures, *&c.*

(k) Upon an indictment, but it is otherwiſe in an appeal. *Corone* 31. 9 *E.* 4. 2. *a.* 1 *H.* 7. 26. *a.*

(l) N. Edit. cap. 164. *p.* 541.

mation

mation have heard their teſtimony without oath, which poſſibly being fortified with concurrent evidences may be of ſome weight, as in caſes of rape, buggery, witchcraft, and ſuch crimes, which are practiſed upon children: *vide ſupra, Part* I. *cap.* 24. *p.* 302 *& cap.* 58. *p.* 634. *& ſupra, p.* 279.

2 Hawk. P. C. ch. XLVI. of evidence per tot. Burn. tit. evidence. 4. Blacks. Com. ch. 27. pa. 356, 360. See Index to Foſter. tit. Evidence. Overt-acts. Witneſſes. 2. Wilſon: 28. ſeems Contra'. 1. Wilſon. 84. 1. Atk. 21.

CHAP. XXXVIII.

Concerning evidence in writing.

BY the ſtatute of 1 *&* 2 *P. & M. cap.* 13. and 2 *&* 3 *P. & M. cap.* 10. Juſtices of peace and coroners have power to take examinations of the party accuſed, and informations of the accuſers and witneſſes, (the examinations to be without oath, the informations to be upon oath,) and are to put the ſame in writing, and are to certify the ſame to the next gaol-delivery.

Theſe examinations and informations thus taken and returned may be read in evidence againſt the priſoner, if the informer be dead, or ſo ſick, that he is not able to travel, and oath thereof made; otherwiſe not.

But then, 1. Oath muſt be made either by the juſtice or coroner, that took them, or the clerk that wrote them, that they are the true ſubſtance of what the informer gave in upon oath, and what the priſoner confeſſed upon his examination. 2. As to the examination of the priſoner, it muſt be teſtified, that he did it freely without any menace, or undue terror impoſed upon him; for I have often known the priſoner diſown his confeſſion upon his examination, and hath ſometimes been acquitted againſt ſuch his confeſſion; and the reaſon why theſe examinations and informations are allowable in evidence (under the cautions above premiſed,) is, becauſe they are judges of record, and the informations before them upon oath are authoriſed and required by act of parliament, and they are judges of the crimes upon which the informations are taken.

[285]

Welſh forceably took away Mrs. *Puckring* and married her, and thereupon a temporary act of parliament was obtained, enabling commiſſioners

miſſioners therein named to hear and determine that marriage, and to diſſolve it, if there were cauſe: In that cauſe Mrs. *Puckring* herſelf was examined touching the manner of the marriage, as a ſupplemental proof, and died hanging the ſuit, *Welſh* was after indicted upon the ſtatute of 3 *H.* 7. for this fact for felony, and it was moved, that this examination of Mrs. *Puckring* might be read in evidence againſt the priſoner, but it was denied. 1. Becauſe it was a proceeding according to the civil law in a civil cauſe. 2. Becauſe that ſuit was originally at the inſtance of Mrs. *Puckring* and her own cauſe, and tho ſhe be according to the civil law examinable, as a ſupplemental proof, yet it was a cauſe for her own intereſt, and therefore at common law not allowable, tho the commiſſioners that took the examination were judges conſtituted by that which then was allowed to be an act of parliament. *M.* 1652. *B. R.*

A. commits a felony in the county of *B.* and flies into the county of *C.* and there is taken and brought before a juſtice of peace of the county of *C.* where *A.* is examined, and informations upon oath taken by that juſtice, tho the juſtice of peace of the county of *C.* had not an original cogniſance of a felony committed in the county of *B.* yet theſe examinations and informations being tranſmitted into the county of *B.* where *A.* is indicted, may be read in evidence againſt him. *Dalt. Juſt. cap.* 111. *p.* 299. for tho he hath not an original juriſdiction of the cauſe, yet he hath a conſequential juriſdiction thereof, having the party before him, and it is in order to the preſervation of the peace.

If a juſtice of peace takes information in a caſe of high treaſon, it ſeems theſe cannot be read in evidence upon an indictment of treaſon, becauſe high treaſon is not within that commiſſion, but it is of uſe only, as an information upon oath, which they may take, tho they cannot proceed upon it, for all treaſon is a breach of the peace; *quære tamen*, if it be not allowable to be given in evidence. [286]

See Burn. Tit. Evidence, Sect. II. of written evidence.

CHAP.

CHAP. XXXIX.

Concerning evidences *requiſite, or allowed* by acts of parliament, *and* preſumptive evidence.

BY the ſtatutes of 1 *E.* 6. *cap.* 12. 5 *E.* 6. *cap.* 12. there ought to be two witneſſes to an indictment of high treaſon, and theſe witneſſes are to be ſworn before the jury alſo upon his trial, unleſs he willingly without violence confeſs the ſame.

Theſe two witneſſes are ſtill required upon his indictment, and it is not altered by the ſtatute of 1 & 2 *P.* & *M. cap.* 10. which reſtores the common law trial, but extends not to the indictment. *Co. P. C. cap.* 2. *p.* 25. *vide ſupra, Part* I. *p.* 298.

A confeſſion upon examination before a competent judge before indictment is ſuch a confeſſion, as the ſtatute allows. *Co. P. C. ubi ſupra*, and ſo it was agreed in the caſe of *Tonge* and others, 14 *Car.* 2. *(a)*

If one witneſs be poſitive, and the other witneſs is only by hearſay, theſe are not two lawful accuſers within the ſtatute, agreed by all the [287] juſtices in the lord *Lumley*'s caſe *Hill.* 14 *Eliz.* cited *Co. P. C. ubi ſupra* againſt the opinion in *Dy.* 99. *b. Thomas*'s caſe, but two witneſſes are not requiſite either upon the indictment or trial of treaſons for counterfeiting money by the expreſs proviſion of the ſtatute of 1 & 2 *P.* & *M. cap.* 11. which directs, that in all treaſons for counterfeiting or impairing of coin the offenders ſhall be indicted, arraigned, tried, convicted and attaint by ſuch evidence, and in ſuch manner as was uſed before. 1 *E.* 6.

The words of the ſtatute 5 & 6 *E.* 6. *cap.* 11. are, "That no "perſon ſhall be indicted, convicted, or attaint for any the treaſons "aforeſaid, or for any other treaſons, that now be, *or hereafter ſhall "be*, which ſhall hereafter be perpetrated, committed or done, unleſs "the ſame offender be thereof accuſed by two lawful accuſers, *&c.*" It may be conſiderable, whether this act extends to treaſons *de novo* made by act of parliament after 5 & 6 *E.* 6. *(b)*

If ſuch new treaſons be enacted after, as that of 5 *Eliz. cap.* 11. and 18 *Eliz. cap.* 1. concerning clipping and waſhing of coin, and alſo 1 *Mar. cap.* 6. which have this expreſſion *(being thereof lawfully con-*

(a) Kel. 18. *vide Part* I. *p.* 304. *(b)* See *Kel.* 9, 10, 49. *vide Part* I. *p.* 297.

vict

vict or attaint, according to the due order and courſe of the laws of this realm ſhall ſuffer death, &c.) there ſeems to be no neceſſity of two witneſſes upon the indictment or trial. 1. Becauſe, *according to the due order and courſe of the laws* ſeems to intend common law *(c)*. 2. But if there were doubt of that, yet in theſe acts concerning coin the ſtatute of 1 & 2 *P. & M. cap.* 11. enacts, "That all offenſes con-"cerning counterfeiting, forging, or impairing any coin current "within the realm, ſhall be indicted, arraigned, tried, convict and "attaint by ſuch evidence, and in ſuch manner,, as hath been uſed "before the firſt year of *E.* 6." therefore, if the ſtatute of *E.* 6. ſhould be conſtrued to refer to any future ſtatute making treaſon, there will be the ſame reaſon to carry over the ſtatute of 1 & 2 *P. & M. cap.* 11. to the treaſons enacted againſt impairing of coin by 5 & 18 *Eliz.*

But yet, as to other treaſons, it may be very queſtionable, whether 5 & 6 *E.* 6. doth as to this point extend to treaſons [288] newly enacted after, 1. Becauſe tho a former act may direct the proceedings upon a new offenſe made after, (as the ſtatutes of 18 *Eliz. cap.* 5. 31 *Eliz. cap.* 5. concerning informers, 21 *Jac. cap.* 4. concerning ſuing informations in the proper county, and pleading the general iſſue,) yet this doth not *in terminis* extend to offenſes to be committed againſt ſtatutes to be made, but only in all other treaſons hereafter to be committed *(d)*. 2. Becauſe moſt commonly in the acts, that after 5 & 6 *E.* 6. enacted new treaſons, if the parliament intended two lawful witneſſes, it moſt commonly expreſſeth it accordingly; *quære*, for 1 & 2 *P. & M. cap.* 11. ſeems to import, that in new treaſons concerning counterfeiting foreign coin made current by proclamation, there would have been a neceſſity of two witneſſes by the ſtatute of 5 & 6 *E.* 6. and therefore provides againſt it.

By the ſtatute of 21 *Jac. cap.* 27. the mother of a baſtard child concealing it's death ſhall ſuffer as in murder, unleſs ſhe prove by one witneſs, that the child was born dead; this ſtatute ſtands yet continued

(*c*) I cannot ſee why theſe general words ſhould be confined only to the *common law*, ſince *the laws* in the plural number do as fully expreſs, and ſeem moſt naturally to include all the laws of the land, whether *common* or *ſtatute*.

(*d*) The ſtatute of 5 & 6 *E.* 6. ſeems *expreſly & in terminis* to extend to treaſons, which ſhould be afterwards enacted; what elſe can be the meaning of the words, *any other treaſons, that now be, or hereafter ſhall be?* for theſe words cannot reaſonably be intended only of offenſes hereafter to be committed, becauſe that is provided for by the other words immediately following, *which ſhall hereafter be perpetrated, committed or done*; but to obviate all doubts, it is ſince provided by 7 *W.* 3 *cap.* 3. "That "in all caſes of high treaſon, whereby any "corruption of blood ſhall enſue, no per-"ſon ſhall be indicted, tried or attainted, "but upon the oaths of two lawful wit-"neſſes.

among many others by a clauſe in the latter end of the act for relief of the northern army. 16 *Car.* 1. *cap.* 4. (*) until by parliament it be otherwiſe enacted.

The indictment to put the priſoner to this proof by one witneſs, that the child was dead born, muſt contain this ſpecial matter, that the priſoner was delivered of a child, which by the laws of the kingdom was a baſtard, and that it was born alive, and ſhew how ſhe killed it.

[289] But the indictment need not allege, that ſhe concealed it, but it muſt be proved upon evidence, *(d)* if advantage be taken of this ſtatute againſt her.

The indictment doth not conclude *contra formam ſtatuti*, for the ſtatute only directs the evidence, where the caſe is within it, but created not a new crime. *(e)*

If there be no concealment proved, yet it is left to the jury to inquire, whether ſhe murdered it or not, by thoſe circumſtances that occur in the caſe, as if it be wounded or hurt, *&c.* but it doth not put her upon an abſolute neceſſity of proving it born alive by one witneſs, and ſo the evidence ſtands but as at common law.

If upon the view of the child it be teſtified by one witneſs by apparent probabilities, that the child was not come to it's *debitum partûs tempus*, as if it have no hair or nails, or other circumſtances, this I have always taken to be a proof by one witneſs, that the child was born dead, ſo as to leave it nevertheleſs to the jury, as upon a common law evidence, whether ſhe were guilty of the death of it or not.

In ſome caſes preſumptive evidences go far to prove a perſon guilty, tho there be no expreſs proof of the fact to be committed by him, but then it muſt be very warily preſſed, for it is better five guilty perſons ſhould eſcape unpuniſhed, than one innocent perſon ſhould die.

If a horſe be ſtolen from *A.* and the ſame day *B.* be found upon him, it is a ſtrong preſumption that *B.* ſtole him, yet I do remember before a very learned and wary judge in ſuch an inſtance *B.* was condemned and executed at Oxford aſſiſes, and yet within two aſſiſes after *C.* being apprehended for another robbery and convicted, upon his judgment and execution, confeſſed he was the man that ſtole the horſe, and being cloſely purſued deſired B. a ſtranger to walk his horſe for him, while he turned aſide upon a neceſſary occaſion and eſcaped; and *B.* was apprehended with the horſe, and died innocently.

(*) *Vide* 3 *Car.* 1. *cap.* 5. §. 22. *in fine.*

(*d*) If no intent to conceal, it is not murder within the ſtatute, tho no body were preſent at the time of the delivery. *Kele* 33.

(*e*) See *Ann Davis*'s caſe, *Kel.* 32.

I would

I would never convict any perſon for ſtealing the goods *cujuſdam ignoti* merely becauſe he would not give an account how he came by them, unleſs there were due proof made, that a felony was committed of theſe goods.

I would never convict any perſon of murder or manſlaughter, unleſs the fact were proved to be done, or at leaſt the body found dead *(f)*, for the ſake of two caſes, one mentioned in my lord *Coke*'s *P. C. cap.* 104. *p.* 232. a *Warwickſhire* caſe *(g)*.

Another that happened in my remembrance in *Staffordſhire*, where *A.* was long miſſing, and upon ſtrong preſumptions *B.* was ſuppoſed to have murdered him, and to have conſumed him to aſhes in an oven, that he ſhould not be found, whereupon *B.* was indicted of murder, and convict and executed, and within one year after *A.* returned, being indeed ſent beyond ſea by *B.* againſt his will, and ſo, tho *B.* juſtly deſerved death, yet he was really not guilty of that offenſe, for which he ſuffered.

But of all difficulties in evidence there are two ſorts of crimes, that give the greateſt difficulty, namely rapes and witchcraft, wherein many times perſons are really guily, yet ſuch an evidence, as is ſatisfactory to prove it, can hardly be found; and on the other ſide perſons really innocent may be entangled under ſuch preſumptions, that many times carry great probabilities of guilt. *Tutius ſemper eſt errare in acquietando quàm in puniendo, ex parte miſericordiæ, quàm ex parte juſtitiæ.*

See 2 Hawk. P. C. ch. 46. ſect. 42 & 43.

(f) This was alſo a rule in the civil law. *Dig. Lib.* XXIX. *Tit.* 5. §. 24.

(g) That caſe was thus, An uncle, who had the bringing up of his niece, to whom he was heir at law, correcting her for ſome offence, ſhe was heard to ſay, *Good uncle do not kill me*; after which time the child could not be found; whereupon the uncle was committed upon ſuſpicion of murder, and admoniſhed by the juſtices of aſſiſe to find out the child by the next aſſiſes, againſt which time he could not find her, but brought another child as like her in perſon and years as he could find and apparelled her like the true child, but on examination ſhe was found not to be the true child; upon theſe preſumptions he was found guilty and executed; but the truth was, the child being beaten ran away, and was received by a ſtranger, and afterwards, when ſhe came of age to have her land, came and demanded it, and was directly proved to be the true child.

CHAP. XL.

Concerning variance *between the* indictment *and* evidence, *and where the* evidence proves the indictment, *and where not.*

IF *A.* be indicted, that the firſt of *July* 21 *Car.* 2. he robbed or murderd *B.* and upon evidence it appears, that it was committed another day, or another year, either after or before the time laid in the indictment, yet this proves the iſſue for the king; only it is requiſite, if there be an eſcheat in the caſe, and that the felony were committed after the day laid in the indictment, for the jury to find the day, becauſe the relation of the eſcheat to avoid meſne grants and incumbrances relates to the time of the felony committed 32 *Eliz. per omnes juſtic' Co. P. C. cap.* 104. *p.* 230.

If *A.* be indicted for a robbery or murder *apud* A. *in com'* B. if it were committed in another county, regularly he ought to be found *not guilty*, becauſe regularly an offenſe of that nature in one county is not preſentable out of the county where it was done, but tho it were done in another vill in the county of *B.* yet he is to be found guilty, for the vill is not material.

If the evidence in murder differ from the indictment *in ſpecie mortis*, as if the indictment were for killing by poiſon, and the evidence be of killing by ſtabbing, it doth not maintain the indictment. 9 *Co. Rep.* 67. *a. Mackally*'s caſe.

But if the indictment were for poiſoning with one kind of poiſon, and the proof be of another kind of poiſon, or the indictment be for killing with a ſword, and the evidence be of killing with a ſtaff, or with a gun, it maintains the indictment, for the common effectual word in both is *percuſſit: vide* 9 *Co. Rep.* 67. *a. Mackally*'s caſe, *Co. P. C. cap.* 62. *p.* 135. Sir *Thomas Overbury*'s caſe. *(a)*

[292] And the ſame law holds in relation to the acceſſaries to ſuch principals, and with the ſame difference.

If *A. B.* and *C.* be indicted for the murder of *D.* and it is laid in the indictment, that *A.* gave him the ſtroke, whereof he died, and that *B.* and *C.* were *præſentes, auxiliantes & abettantes*, tho upon the evidence it appears, that *B.* alone gave the ſtroke, whereof he died,

(a) *Stat. Tr. Vol.* I. *p.* 118.

and

and *A.* and *C.* were *præſentes, auxiliantes & abettantes*, it maintains the indictment, for they are all principals, *Mackally*'s caſe, *ubi ſupra. (b)*

If *A.* and *B.* be indicted of the murder of *C.* and upon the evidence it appears, that *A.* committed the fact, and *B.* was not preſent, but was acceſſary before the fact by commanding it, *B.* ſhall be diſcharged. 26 *H.* 8. 5.

If *A.* and *B.* be indicted as principal, and *C.* is indicted as acceſſary to both after the fact done, *A.* and *B.* are convicted, or only *A.* is convicted, and upon the evidence againſt *C.* it appears he was acceſſary only to *A.* it maintains the indictment. 9 *Co. Rep.* 119. *a.* lord *Sanchar*'s caſe *per curiam. (c)*

A. is indicted for murdering *B. ex malitiâ præcogitatâ*, evidence of malice in law, as killing an officer or watchman in the execution of his office, or killing a man without any provocation maintains the indictment, becauſe the law interprets it malice. 4 *Co. Rep.* 67. *b.*

A. is ſpecially indicted upon the ſtatute of 1 *Jac. cap.* 8. for ſtabbing *B.* not having a weapon drawn, nor ſtricken firſt, *contra formam ſtatuti*, upon the evidence it appears, that the perſon kild ſtruck firſt, yet it is good evidence to convict *A.* for manſlaughter. *H.* 23 *Car.* 1. *Harwood*'s caſe. *(d)*

So if *A.* be indicted for petit treaſon for killing his maſter *felonicè, proditoriè, & ex malitiâ ſuâ præcogitatâ*, tho he were not his maſter, he may be found guilty of murder, *(e)* and tho it were not *ex malitiâ præcogitatâ*, he may be found guilty of manſlaughter, and not guilty as to the petit treaſon; and ſo I have known it ruled oftentimes.

So if a man be indicted of burglary, and *quòd felonicè & burglariter cepit bona, &c.* he may be acquit of the burglary, [293] and found guilty of ſimple felony, if the evidence riſeth no higher.

So if a man be indicted of murder *ex malitiâ præcogitatâ*, an evidence proving the killing upon a ſudden falling out is a good evidence to prove him guilty of manſlaughter, and the jury ought accordingly to find it. *Plow. Com.* 101. *a. Co. Lit.* 282. *a.* And ſo in an appeal.

2 Hawk. P. C. ch. 46. ſect. 36, 37, 38, &c. &c.

(b) See 1 *Salk.* 334. *Wallis*'s caſe.
(c) Vide Part I. *p.* 624.
(d) Style 86.
(e) Vide Part I. *p.* 378. *& poſtea, cap.* 46. *ſub fine.*

CHAP. XLI.

Concerning the demeanor of the jury, *and* how their verdict *is to be given.*

AFTER the arraignment of the priſoners, and their pleas of *not guilty* received and recorded, the ſheriff returns the pannel of the jury, the priſoners are again called to the bar, and the jury being called, and appearing the priſoners are told by the clerk, that theſe good men now called and appearing are to paſs upon their lives and deaths; therefore, if they will challenge any of them, they are to do it before they are ſworn.

If no challenge hinder, the jury are commanded to look on the priſoners, and then ſeverally twelve of them, neither more nor leſs, are ſworn, *You ſhall well and truly try, and true deliverance make between our ſovereign lord the king and the priſoners at the bar, whom you ſhall have in charge,* [*and true verdict give*] *according to your evidence. So help you God.*

After the jury ſworn proclamation is to be made, "That if any "can inform for our lord the king againſt the priſoners at the bar, "let them come forth and they ſhall be heard;" then the priſoners
[294] are called ſucceſſively to the bar, firſt *A.* and he is commanded to hold up his hand, the indictment is repeated, "To this he hath pleaded *not guilty*, the iſſue is to try, whether he "be guilty or not guilty; if you find him *guilty*, you ſhall ſay ſo, "and inquire what goods or chattels, lands or tenements he had at "the time of the felony or treaſon committed, or at any time after. "And if you find him *not guilty*, you ſhall inquire whether he did "fly for it, and if you find, that he fled for it, you ſhall inquire of "his goods and chattels, and if you find him *not guilty*, and that he "did not fly for it, you ſhall ſo and no more. Hear your evidence."

I have ſet down the clerk's charge to the jury, becauſe it contains the effect of their inquiry.

Tho there be twenty priſoners at the bar for ſeveral felonies, and the oath is general to try between the king and the priſoners at the bar, yet the jury is to inquire of no more than what they are particularly charged with, as before; and therefore, tho twenty have pleaded,

ed, and ſtand at the bar when the jury is ſworn, yet the court may ſay at any number of the priſoners, and ſo the jury ſtand charged with no more than what are thus particularly charged upon them.

And when they go from the bar, and have brought in their verdict touching theſe particulars thus charged upon them, then, if the ſame jury paſs upon the remaining priſoners, yet they are to be called over again, the priſoners reminded of their challenges, and the jury ſworn *de novo* upon the trial of the reſt of the priſoners.

For in law the jury is charged with no more than thoſe, that have their indictments and plea of *not guilty*, and evidence concluded againſt and for them before the jury, tho poſſibly all the priſoners, that have pleaded, ſtood at the bar, when the jury was firſt ſworn; and this is the conſtant courſe at *Newgate*.

By the antient law, if the jury ſworn had been once particularly charged with a priſoner, as before is ſhewed, it was commonly held they muſt give up their verdict, and they could not be diſcharged before their verdict given up, and ſo is my lord *Coke*, *P. C. cap.* 47. *p.* 110. and this is the reaſon given 22 *E.* 3. *Coron.* [295] 449. why after the plea of *not guilty*, and the inqueſt charged, the priſoner cannot become an approver, becauſe the inqueſt ſhall not be diſcharged; but the book at large, *viz.* 21 *E.* 3. 18. *a.* mentions not the charging of the inqueſt, but the plea of *not guilty* and the jury at the bar. *Co. Lit.* 227. *b.* But yet the contrary courſe hath for a long time obtained at *Newgate*, and nothing is more ordinary than after the jury ſworn, and charged with a priſoner, and evidence given, yet if it appear to the court, that ſome of the evidence is kept back, or taken off, or that there may be a fuller diſcovery, and the offenſe notorious, as murder or burglary, and that the evidence, tho not ſufficient to convict the priſoner, yet gives the court a great and ſtrong ſuſpicion of his guilt, the court may diſcharge the jury of the priſoner, and remit him to the gaol for farther evidence, and accordingly it hath been practiſed in moſt circuits of *England*, (*a*) for otherwiſe many

(*a*) And ſo it was practiſed in *Whitehead*'s caſe in treaſon, ſee *State Tr. Vol.* II. *p.* 710, 827. See alſo *Kel.* 47, 52. But the reaſon given for this practiſe, if it were law, (which yet without the priſoner's conſent is unwarranted by antient uſage; *vide* 3 *Co. Inſt.* 110. *Co. Lit.* 227. *b.* 1 *And.* 103. *Raym.* 84. *State Tr. Vol.* II. *p.* 951.) ſeems to hold as ſtrongly in behalf of the priſoner as of the king. *State Tr. Vol.* IV. *p.* 190. and yet I do not find any inſtance, where a jury once ſworn was ever diſcharged, becauſe the *priſoner*'s evidence was not ready; on the contrary in lord *Ruſſel*'s caſe, the court refuſed to put off the trial only till the afternoon of the ſame day, pretending they could not do it without the conſent of the attorney general, altho

many notorious murders or burglaries may paſs unpuniſhed by the acquittal of a perſon probably guilty, where the full evidence is not ſearched out or given.

If after the jury ſworn and departed from the bar, one of them, *viz. A.* wilfully goes out of town, whereby only eleven remain, theſe eleven cannot give any verdict without the twelfth, but the twelfth ſhall be fined for his contempt, and that jury may be diſ-
[296] charged, and a new jury ſworn, and new evidence given, and the verdict taken of the new jury, and thus it was done by good advice at the gaol-delivery at *Hertford Aug.* 15. *Car.* 1. in the caſe of *Hanſcom* the departing juryman.

And ſo it is uſual at the gaol-delivery at *Newgate*, if a jury be charged with ſeveral priſoners, and the court finds by probable circumſtances, that the jury is partial to one of the priſoners, the court may diſcharge the jury of that priſoner, and put him upon his trial by another jury, and this is uſed alſo in other circuits. (*)

Upon *not guilty* pleaded twelve are ſworn to try the iſſue, after their departure *A.* one of the twelve leaves his companions, which being diſcoverd to the court, by conſent of all parties *B.* another of the pannel is ſworn in the place of *A.* and afterwards *A.* returns to his company, which being made known to the court, *A.* is called and examined why he departed, he anſwered to drink, and being examined, whether he had ſpoken with the defendant, denied it upon his oath, whereupon *B.* was diſcharged from giving any verdict, and the verdict taken of *A.* and the other eleven, and *A.* fined for his contempt, 34 *E.* 3. *Office de Court* 12. in treſpaſs.

If thirteen are by miſtake ſworn, the ſwearing of the laſt of the thirteen is void, and the other twelve ſhall ſerve.

If only eleven be ſworn by miſtake, no verdict can be taken of the eleven, and if it be, it is error; and ſo in a preſentment, but if twelve be recorded ſworn, no averment lies, that one was unſworn, *Lamb's Juſtice* 395.

altho in that caſe the jury were not ſworn, and the priſoner urged, that he had witneſſes, who could not be in town till night, in which caſe it was certainly in the diſcretion of the court to put it off or not. *State Tr. Vol.* III. *p.* 630, 631. It hath however been ſince holden for law, that a jury once charged in a capital caſe cannot be diſcharged, till they have given their verdict, and the caſe of *Whitebread* was thought a very extraordinary one. See lord *Delamere's* caſe, *State Tr. Vol.* V. *p.* 232. and *Rookwood's* caſe, *State Tr. Vol.* IV. *p.* 659, 661. and *Cook's* caſe, *State Tr. Vol.* IV. *p.* 751. *Foſter* 16, 39, 70, 328.

(*) *Quære de hoc.*

The

The juſtices at common law may upon a juſt cauſe remove a juror after he is ſworn. 20 *H.* 6. 5. *a.*

When the jurors depart from the bar, a bailiff ought to be ſworn to keep them together, and not to ſuffer any to ſpeak with them.

After their departure they may deſire to hear one of the witneſſes again, and it ſhall be granted, ſo he deliver his teſtimony in open court, and alſo they may deſire to propound queſtions to the court for their ſatisfaction, and it ſhall be granted, ſo it be in open court.

The jury muſt be kept together without meat, drink, fire, or candle, till they are agreed. 24 *E.* 3. 75. *(b) Co. Lit.* 227. *b.* [297]

If they agree not before the departure of the juſtices of gaol-delivery into another county, the ſheriff muſt ſend them along in carts, and the judge may take and record their verdict in a foreign county; *quære*, whether in ſuch caſes the ſeſſion may be adjourned before the verdict taken. 19 *Aſſiz.* 6. *per Scot.* 41 *Aſſiz.* 11.

If there be eleven agreed, and but one diſſenting, who ſays he will rather die in priſon, yet the verdict ſhall not be taken by eleven, no nor yet the refuſer fined or impriſond, and therefore where ſuch a verdict was taken by eleven and the twelfth fined and impriſond, it was upon great advice ruled the verdict was void, and the twelfth man deliverd, and a new *venire* awarded. 41 *Aſſiz.* 11. for men are not to be forced to give their verdict againſt their judgment *(c)*; *vide P.* 20 *E.* 1. *Rot.* 43. *Norf. coram rege.*

In

(b) N. Edit. of year books 24. *a.*

(c) But is it not a force, when any of the jurors are obliged to comply under the peril of being ſtarved to death, for how can it be expected, that twelve conſidering men ſhould in all caſes happen to be of the ſame ſentiments? and therefore antiently it was not neceſſary, (at leaſt in civil cauſes,) that the twelve ſhould agree, but if there was a difference among the jury, the method was to ſeparate one part from the other, and then to examine each of them as to the reaſons of their differing in opinion, and if after ſuch examination both ſides perſiſted in their former opinions, the court cauſed both verdicts to be fully and diſtinctly recorded, and then judgment was given *ex dicto majoris partis juratorum*; thus in a great aſſiſe upon a writ of right between the abbot of *Kirkſtede* and *Edmund de Eyncourt* eleven of the jury found for the abbot, and one for *Edmund de Eyncourt*, in this caſe the verdict of the eleven was firſt recorded, Robertus *de* Harblinge & *omnes alii præter* Radulphum *filium* Simonis *dicunt ſuper ſacramentum ſuum, &c.* and then follows the *dictum* of the twelfth *Et prædictus* Radulphus *filius* Simonis *dicit ſuper ſacramentum ſuum, &c.* then follows the judgment, *Sed quia prædicti undecim concorditer & preciè dicunt, quòd prædictus abbas & eccleſia ſua prædicta majus jus habeant tenendi &c. ideo conſideratum eſt, quòd prædictus abbas & ſucceſſores ſui teneant prædicta tenementa de cætero in perpetuum, &c.* Placita coram juſtic' itinerant' in com' *Lincoln* anno 56 *Hen.* 3. *Rot.* 29. in dorſo.

In an aſſiſe of novel diſſeiſin between *William Triſtram* plaintiff, and *John Simenel* and others defendants, where the whole jury conſiſted of only eleven, ten found for *Triſtram*, and one for *Simenel*, and both verdicts are recorded in this manner, *Decem jurati dicunt, quòd, &c. & undecimus juratorum, ſcilicet* Johannes Kineth *dicit, &c. Et quia dicto majoris partis juratorum ſtandum*

In capital cauſes, whether upon indictment or appeal, no verdict can be given by default in the abſence of the party. 16 *Aſſiz.* 13.

But if the priſoner hath pleaded to the country, and when [299] he is to be tried will ſay nothing, yet no penance ſhall be inflicted, but the jury ſhall be taken. 15 *E.* 4. 33. *b.*

Now touching the giving up of their verdict, if the jury ſay they are agreed, the court may examine them by poll, and if in truth they are not agreed, they are fineable. 29 *Aſſiz.* 27. 40 *Aſſiz.* 10.

If the jurors by miſtake or partiality give their verdict in court, yet they may rectify their verdict before it is recorded, or by advice of the court

dum eſt, quòd prædictus Willielmus *recuperet ſeiſinam ſuam de prædictis tenementis verſus prædictos* Johannem *& alios per viſum recognitorum & dampna quæ taxantur per jur' ad duas marcas &* Johannes *& alii in miſericordia.* Paſ. 14 E. 1. Rot. 10. coram Rege.

The like practice is ſuppoſed in the caſe here quoted by the author. *Paſ.* 20 *E.* 1. *Rot.* 43. *coram rege,* which was thus, *Martin Fitz-Oſbert* recovered ſeiſin of certain lands, *&c.* in *Weſt-Somerton* againſt the prior of *Buttelye* before *John de Lovetot* and *William de Pageham,* judges of aſſiſe in *Norfolk anno* 16 *E.* 1. The prior afterwards complained greatly, that injuſtice had been done him by *Lovetot* at the ſaid aſſiſe, and thereupon the biſhop of *Winchester* and others were ordered to hear the matter and do juſtice to the prior. Upon this *Lovetot* and *Pageham* were called before the ſaid biſhop, *&c.* and the prior objected to *Lovetot,* "Quòd fieri fecit falſam irrotulationem in rotulis ſuis, & contrariam veredicto juratorum aſſiſæ prædictæ, &c. & hoc paratus eſt verificare per prædictos juratores, qui omnes ſunt ſuperſtites, &c." To which *Lovetot* and *Pageham* replied by juſtifying themſelves, and inſiſting, "Quòd benè, & rité proceſſerunt ad captionem illius aſſiſæ, unde vocant recordum rotulorum ſuorum, &c." in which the judgment pronounced by *Lovetot* was entered in the following manner, "Et quia per prædictum aſſiſam convictum [compertum] fuit, quòd *Edricus,* de quo prædictus *Martinus* exivit, fuit liber homo & liberæ conditionis; & quamvis ipſe *Edricus,* & exitus de ipſo proveniens tenuiſſent de prædicto Priore & de prædeceſſoribus ſuis, tenementa ſua in villenagio, & per villana ſervitia, hoc eis non præjudicat, quò minus corpora ſua ſint libera; eò quòd nulla præſcriptio temporis poteſt liberum ſanguinem in ſervitutem reducere, ideo conſideratum eſt, quòd prædictus *Martinus* recuperet inde ſeiſinam ſuam, &c. Et *Johannes* de *Pykering* unus recognitorum præfatæ aſſiſæ, pro eo quòd in veredicto præfatæ aſſiſæ, narrando illud veredictum, contrarius fuit omnibus aliis recognitoribus, narrando aliud quàm inter illos fuit proviſum, ſicut per examinationem eorum convictum [compertum] fuit, & manucaptus eſt per, &c. ideò ipſe & manucaptores ſui in miſericordiâ. Et præceptum eſt vic', quòd capiat prædictum *J.* de *Pykering,* & ſalvo, &c. ita quod habeat corpus ejus apud *Kenteford,* &c. ad faciendam redemptionem ſuam pro tranſgreſſione prædicta." The biſhop of *Wynton* and his fellows then proceeded to examine *Lovetot* and *Pageham* touching the ſaid judgment. "Et quia in conſideratione ſuper veredicto primæ aſſiſæ compertum eſt, quod *J.* de *Pykering* unus recognitorum prædictæ aſſiſæ, narrando illud veredictum, contrarius fuit omnibus aliis recognitoribus, narrando aliud quàm inter eos fuit proviſum; & nichil de illo contrario in recordo prædicto ſpecificatur ſive declaratur; immo quod veredictum captum fuit & receptum, ac ſi omnes de uno & de eodem aſſenſu fuiſſent in veredicto prædicto; nec etiam veredictum ipſorum undecim declaratur ſive ſpecificatur, &c. nec duodecimus ab undecim fuit ſeparatus, nec examinatus ſe; nec undecim à duodecimo fuerunt ſeparati, nec per ſe examinati &c. *prout moris eſt in tali caſu*; & ſic ex contrario effectu dicto ſubſecutum fuit judicium non legi ſive conſuetudini regni conſonum, videtur manifeſtè, quòd recordum illud non eſt plenum, ſeu perfectum, in hoc caſu, &c. Concordatum eſt quòd aſſiſa prædicta re-examinatur, &c." Upon this the ſheriff was orderd, quòd venire faciat hic &c. recognitores aſſiſæ prædictæ, & quòd ſcire faciat *Martin* to appear at the ſame day ad audiendum, &c. "Poſtea ad prædictum diem venerunt recognitores aſ-

"ſiſæ

court go together again and conſider better of it, and alter what they have delivered. *Plow. Com.* 211. *b. Saunder*'s caſe.

But if the verdict be recorded, they cannot retract nor alter it. *Co. Lit.* 227. 7 *R.* 2. *Coron.* 108. 20 *Aſſiz.* 12. 5. *H.* 7. 22. *b.*

In a caſe of felony or treaſon the verdict muſt be given in open court, and no privy verdict can be given. *Co. Lit.* 227. *b. Co. P. C.* 110.

If a man be arraigned upon an inqueſt of murder or manſlaughter taken by the coroner, and be found *not guilty*, the jury that acquits him ought to inquire, who committed the fact, and that ſhall ſerve as an indictment againſt that perſon, that the jury find did the fact.

" ſiſæ prædictæ. Et quia prædicti *Johannes* & *Willielmus* aliud recordati fuerunt, quàm compertum fuit per recordum rotulorum ipſius *Johannis*; & etiam quia juratores prædicti minùs ſufficienter fuerunt examinati ſuper articulis prædictis, ſicut patet in recordo prædicto, iteratò fuerunt juratores jurati, & examinati; qui dicunt ſuper ſacramentum ſuum, quòd prædictus *Martinus* fuit villanus ipſius Prioris die quo ejectus fuit de prædictis tenementis, &c. Et quia compertum eſt, &c. & quòd Prior ad prædictam aſſiſam coram præfatis *J.* & *W.* reſpondebat per ballivum ſuum, qui quidem ballivus non potuit deducere in judicium jus ſanguinis nativi domini ſui abſque præſentiâ domini ſui, &c. ac etiam in ſupradicto recordo quòd nulla præſcriptio longi temporis poteſt liberum ſanguinem in ſervitutem reducere, quòd omninò falſum eſt, &c. videtur, quòd judicium *J.* de *Lovetot* erroneum eſt; ideò conſideratum eſt, quòd prædictus Prior rehabeat prædicta tenementa, ita quòd omnia ſint in eodem ſtatu, in quo fuerunt ante captionem prædictæ aſſiſæ." Afterwards by writ of error the record coram epiſcopo *Wynton* and ſociis ſuis auditoribus querelarum was brought coram rege, and *Martin Fitz-Oſbert* aſſigned for error, that he had recovered ſeiſin againſt the ſaid Prior in groſſo veredicto ſuper diſſeiſinam ſuam contra legem communem; " auditores ſine brevi regis inde eis directo, & ſine aliquâ præmunitione ipſo *Martino* ritè factâ, contra legem communem ipſum à prædicto tenemento abjudicaverunt, & contra tenorem Magnæ Cartæ domini regis: Dicit inſuper, quòd prædicti auditores venire fecerunt coràm eis juratores præfatæ aſſiſæ in formâ certificationis, & ipſos juratores per ſacramentum ſuum recxaminaverunt & admiſerunt veredictum eorum contrarium veredicto per ipſos priùs pronuntiato; unde dicit, quòd in hiis & aliis erratum eſt, &c." To this the prior replied, that the ſaid *Martin* had been " Præmunitus per " breve, quod vocatus *ſcire facias*; & quòd " prædicti auditores habuerunt plenam poteſtatem, tàm per breve domini regis, " quàm per ſpeciale præceptum domini " regis, ad corrigenda recorda juſticiariorum vitioſa & erronea inventa & hoc " ſatis conſtat domino regi & ipſus conſilio, & quòd prædictus *Martinus* non recuperavit per groſſum veredictum; quia " non fuit ibi veredictum niſi tale, quale " imperfectum, quia per xi juratores captum; & quòd prædicti auditores non admiſerunt contrarium veredictum priori " veredicto, quia veredictum priùs captum " coram *J.* de *Lovetot* fuit tale, quale imperfectum, & contra legem terræ captum " per xi juratores, de ſtatu ſanguinis ultra " tempus limitatum; ſecundum veredictum magis deberet dici ſuppletio prioris " veredicti defectivi, quàm eidem contrariari." To which *Martin* rejoined, and inſiſted, " Quòd prædicta aſſiſa fuit plena " & perfecta coram *J.* de *Lovetot* & ſociis " ſuis juſtic' capta, & hoc liquat expreſsè " in eodem recordo, ubi dicit *Jurati dicunt*, &c. Et quòd ipſe recuperavit prædicta tenementa per groſſum veredictum " præfatæ aſſiſæ, petit judicium, ſi prædictum groſſum veredictum ſuper diſſeiſinâ præcisè factâ aliquo modo ſecundùm legem & conſuetudinem regni *Angliæ* debet adpichillari, abſque brevi de " attinctâ, &c.

The judgment in this caſe does not appear, but it ſhould ſeem, that the reaſon why the record of the verdict is ſaid to be imperfect was not, becauſe all the twelve did not agree, but becauſe the *dicta utriuſque partis* were not diſtinctly ſpecified and recorded, which is declared to be the uſage in ſuch caſe, *prout moris eſt in tali caſu.*

But

But it is held, that if a man be arraigned upon an indictment found by the grand inqueſt, and be acquitted, the jury ſhall not make ſuch further inquiry. 14 *H.* 7. 2. *b.* 13 *E.* 4. 3. *b.* 37. *H.* 8. *B. Coron.* 117. 11 *H.* 4. 93. *a. B. Coron.* 32. 21 *E.* 3. 17. *b. B. Coror.* 39.

But ſurely the antient law was otherwiſe, and that the jury that acquits, whether upon a preſentment, or upon an indictment of homicide, ſhall be chaced to ſay, who did the fact. 37 *Aſſiz.* 13.

So if a man be indicted *de morte cujuſdum ignoti*, the inqueſt ſhall be charged to tell the name, if they can. 2 *E.* 3. *Coron.* 159.

A man is indicted of robbery and acquitted, but it appeared to the court, that a robbery was done, but the priſoner *not guilty*, and therefore upon the ſtatute of *Wincheſter* the court compelled the jury to preſent who did it, for the hundred is to anſwer for the bodies of the offenders, and the book concludes generally, *Et tiel courſe tiendra, ou home eſt indite de mort de home & acquit* 3 *E.* 3. *Iter North. Coron.* 307. ſo that they made no difference, where the [indictment was by the grand inqueſt, or by the coroner's inqueſt.]

The ſame law in a appeal 22 *Aſſiz.* 39. *Coron.* 178. 4 *H.* 7. *Rot.* 21. *Raſtal's Entries* 57. *a.*

[301] But at this day the law and practice hath obtained, that only upon an arraignment upon the coroner's inqueſt the jury, if they acquit the priſoner, ſhall inquire who did the murder or manſlaughter, and commonly it is a buſineſs of form, for they uſually ſay, if it be not known, that *John a-Nokes* did it. 37 *H.* 8. *B. Coron.* 32. 21 *E.* 3. 17. *b. B. Coron.* 39. *Dy.* 238. *b.*

And as to indictments of robbery, if the petit jury acquit the priſoner, they do not inquire who did it, and the reaſon of the difference is, that for the moſt part in *Eyre* the petit jury were all of the ſame hundred, where the offenſe was committed, and then upon the ſtatute of *Winton* the hundred were to anſwer *de corporibus malefactorum*, and therefore it was reaſon to put them upon the jury, who committed the robbery, if it appears to the court, that a robbery was committed, and the caſe of 3 *E.* 3. *Coron.* 307. was in *Eyre*, but now the jury, that tries, as well as inquires, is for the moſt part of the reſt of the county, and therefore they anſwer only the point of *guilty* or *not guilty*: *vide Stamf. P. C.* 181. *a.*

The jurors of the petit inqueſt are charged to inquire if the party fled, and ſo of his goods and chattels, this is but an inqueſt of office, and traverſable; *vide ſupra Part* I. *cap.* 27. *p.* 362. But is hath been held, that

that a preſentment of flight before the coroner *ſuper viſum corporis* is concluſive to the party, and not traverſable: *vide quæ ſupra dixi, Part* I. *cap.* 31. *p.* 416, 417.

And therefore it is, that if the coroner's inqueſt *ſuper viſum corporis* preſent a *fugam fecit*, and the party be taken and arraigned, and pleads to that indictment, the jury ſhall not be charged to inquire of the *fugam fecit*, becauſe found before by the coroner's inqueſt, and if they be charged therewith and acquit the priſoner, and likewiſe ſay, that he did not fly, yet the record of the inquiſition before the coroner finding the flight ſhall take place to intitle the king. 3 *E.* 3. *Forfeiture* 35. *P.* 7 *Eliz. Dy.* 238. *b.*

The jury may find a ſpecial verdict, or may find the defendant guilty of part, and not guilty of the reſt, or may find the defendant guilty of the fact, but vary in the manner. [302]

If a man be indicted of burglary, *quòd felonicè & burglariter cepit & aſportavit*, the jury may find him guilty of the ſimple felony, and acquit him of the burglary and the *burglariter*.

So if a man be indicted of robbery with putting the party in fear, the jury may find him guilty of the felony, but not guilty of the robbery.

The like where the indictment is *clàm & ſecretè à perſonâ*.

So if a man be indicted upon the ſtatute of 1 *Jac.* of ſtabbing *contra formam ſtatuti*, the jury may acquit him upon the ſtatute, and find him guilty of manſlaughter at common law. 23 *Car.* 1. *Harwood*'s caſe *(d)*.

So if a man be indicted of ſtealing of goods of the value of 10*s.* the jury may find him guilty only of goods to the value of 6*d.* and ſo guilty only of petit larceny. 41 *E.* 3. *Coron.* 451. *Stamf. P. C. L.* III. *cap.* 9. *fol.* 165. *a.*

So if a man be indicted of murder *ex malitiâ præcogitatâ*, the jury may find him guilty of manſlaughter. *Co. Lit.* 282. *a.* or that he killed him *ſe defendendo*, or *per infortunium*; but *nota* in theſe caſes it is not ſufficient generally to find it done *ſe defendendo*, or *per infortunium*, but the ſpecial matter muſt be ſet down how it was done, and if upon the ſpecial matter ſhewn it ſhall appear to be murder or manſlaughter, the court will accordingly judge of it, tho the jury conclude, *Et ſic per infortunium*, or *ſic ſe defendendo*. 3 *E.* 3. *Coron.* 284, 286, 287, & 43. *Aſſiz.* 31. *Coron.* 226.

(*d*) *Style* 80.

And