VI. By the ſtatute of 22 *Car.* 2. *cap.* 5. clergy is taken away from thoſe that imbezzle or ſteal the king's ſtores *(i)*.

VII. By the ſtatute of 39 *Eliz.* *cap.* 9. clergy is taken away from offenſes committed againſt 3 *H.* 7. *cap.* 2. concerning taking away and marrying or defiling of women in all caſes, *viz.* upon attainder, conviction by verdict or confeſſion, ſtanding mute, challenging above twenty peremptorily, outlawry, not directly anſwering.

It extends to take away clergy in theſe caſes from all principals and acceſſaries before the fact in expreſs words, but not from acceſſaries after.

VIII. As to the ſtatute of 28 *H.* 8. *cap.* 15. concerning piracy, robbery, murders and manſlaughters upon the ſea, it is enacted, "That for treaſon, murder, robbery, felonies and confederacies done "upon the ſea or in any places whereto that commiſſion extended *(k)*, "the offenders ſhall not be admitted to have the benefit of clergy or "ſanctuary, but are excluded from the ſame *(l)*

Upon

grounds to the value of 10*s.* or buying or receiving the ſame, knowing it to be ſtolen is excluded from clergy with power to the court upon the circumſtances of the caſe to tranſport the offender for ſeven years.

(i) *Viz* in ſuch manner as is forbid by 31 *Eliz.* *cap.* 4. whereby it was made felony: *vide Part* I. *p.* 688.

(k) It was a doubt upon this ſtatute, whether an acceſſary at land to a felony or piracy at ſea was included within the extent of the commiſſion directed by this act, *Yelv.* 134, 135. but by 11 & 12 *W.* 3. *cap.* 7. (continued by 5 *Ann.* *cap.* 34. 1 *Geo.* 1. *cap* 25. and made perpetual by 6 *Geo.* 1. *cap.* 19.) it is provided, "That "acceſſaries to piracy before or after ſhall "be tried and adjudged according to 28 "*H.* 8. and ſhall ſuffer the ſame penalties "and in like manner as the principals.

If a mortal ſtroke be given on the high ſea, or on the ſhore at full ſea, and the party die upon the ſhore at low water, this is not within this ſtatute, nor ſhall the admiral have juriſdiction to try the offenſe, nor yet can it be tried at common law by a general commiſſion of *oyer* and *terminer*: *vide ſupra. p.* 20 & *Part* I. *p.* 426. To remedy this inconvenience it is provided by 2 *Geo.* 2. *cap.* 21. "That where any "perſon ſhall be feloniouſly ſtricken or "poiſoned upon the ſea or any place out "of *England*, and ſhall die thereof in "*England*; or ſhall be feloniouſly ſtricken "or poiſoned at any place in *England*, "and ſhall die thereof upon the ſea or any "place out of *England*, an indictment "may be found in ſuch county, where "ſuch death, ſtroke, or poiſoning ſhall "happen, againſt both principals and ac-"ceſſaries, and may be proceeded upon in "the ſame manner as if ſuch felonious "ſtroke and death, or poiſoning and "death had happened in the ſame coun-"ty, where ſuch indictment ſhall be "found.

(l) It was doubted, whether this ſtatute of 28 *H.* 8. had not taken away the trial of theſe offenſes before the admiral, or his lieutenant or commiſſary, which had occaſioned a total diſuſer of ſuch manner of trial to the encouragement of pirates, who could not be tried by this ſtatute, unleſs (at great trouble and expence) brought to *England*, and therefore the aforeſaid ſtatute of 11 & 12 *W.* 3 *cap.* 7 provides, that they may be tried by the court of admiralty according to the directions of that act, which are there particularly mentioned.

By the ſame ſtatute it is enacted, "That "if any of the King's natural born ſub-"jects ſhall commit any piracy, robbery, "or act of hoſtility againſt other the "king's ſubjects, altho it be under colour "of a commiſſion from any foreign "prince; or being a commander or maſ-"ter of a ſhip, or ſeaman ſhall feloniouſly "run away with his ſhip, &c. or volun-"tarily yield up the ſame to any pirate, "or

Upon conſideration of the ſtatute of 1 *E.* 6. *cap.* 12. which in all caſes not mentiond in that ſtatute reſtores the privilege of clergy, as it was before 1 *H.* 8. it is ſaid in *Poulter*'s caſe 11 *Co. Rep.* 31. *b.* that thereby clergy is reſtored in caſe of piracy.

But upon conſideration of both theſe ſtatutes I think as followeth, *viz.*

1. *Firſt*, That by the ſtatute of 1 *E.* 6. *cap.* 12. in all other felonies (not particularly excepted by the ſtatute of 1 *E* 6. *cap.* 12.) that the common law takes notice of, clergy is reſtored by the ſtatute of 1 *E.* 6. *cap.* 12. notwithſtanding this ſtatute of 28 *H.* 8. *cap.* 15. even for felonies within that juriſdiction or commiſſion of the admiralty ſettled by that ſtatute.

And therefore, if a man be ſlain below the bridges upon the river *Thames*, but not *ex malitiâ*, or if a larciny be committed there, that is within clergy, if committed upon the land, the party ſhall be admitted to his clergy by force of the ſtatute of 1 *E.* 6. *cap.* 12.

2. *Secondly*, if ſuch a felony were committed upon the high ſea, that were not excepted by the ſtatute of 1 *E.* 6. *cap.* 12. but ſhould have had clergy by that ſtatute were it upon the land, in ſuch caſe, [370] tho the proceeding be by the ſtatute of 28 *H.* 8. the party ſhall have his clergy, for the ſtatute of 1 *E.* 6. is general, *in all other caſes of felony clergy ſhall be allowd as it was before* 1 *H.* 8. and the exemption of clergy (*) was before that ſtatute of 28 *H.* 8. extendible to the admiral's juriſdiction, as well as to courts of common law.

3. *Thirdly*, But as to piracy or robbery upon the ſea by pirates and rovers I think clergy remains ſtill taken away by the ſtatute of

" or bring any ſeducing meſſage from any " pirate, enemy, or rebel, or endeavour " to corrupt any commander, &c. to yield " up or run away with any ſhip, &c. or " turn pirate, or go over to pirates, or if " any perſon ſhall lay violent hands on his " commander to hinder him from fighting " in defenſe of his ſhip or goods, or ſhall " confine his maſter, or endeavour to make " a revolt in his ſhip, every ſuch perſon " ſhall be adjudged a pirate, felon and " robber.

By 8 *Geo.* 1. *cap.* 24. " All perſons, who " by 11 & 12 *W.* 3. *cap.* 7. are declared " acceſſaries to any piracy there mentiond, " are declared to be principal pirates.

By the ſame ſtatute it is provided, " That " if any one ſhall trade with or furniſh " any pirate, &c. with proviſions, &c. or " ſhall fit out any ſhip or veſſel with ſuch " deſign, or ſhall conſult or correſpond " with any pirate, &c. knowing him to " be ſuch, or ſhall forceably board and " enter any merchant ſhip on the high ſeas, " or in any port, haven or creek, and " ſhall throw over-board or deſtroy any " part of the goods or merchandizes be- " longing to ſuch ſhip, ſuch offender ſhall " be adjudged guilty of piracy, and ſhall " be tried according to the ſtatutes of 28 " *H.* 8. & 11 & 12 *W.* 3. and being con- " victed ſhall ſuffer as a pirate without " benefit of clergy.

(*) *Viz.* the allowance of clergy; for our author here means by *exemption of clergy* the privilege of being exempted on account of clergy from puniſhment in the king's temporal courts.

28 *H.* 8. and is not reſtored by 1 *E.* 6. *cap.* 12. *(m)*, and the reaſons are,

1. Becauſe I take it before 1 *H.* 8. there was no clergy allowable for it at common law, for it was an act of hoſtility, and conſequently is not touched by the ſtatute of 1 *E.* 6. *cap.* 12.

2. Admitting that clergy were allowable in piracy before 1 *H.* 8. and taken away merely by the ſtatute of 28 *H.* 8. *cap.* 15. yet clergy is not reſtored by 1 *E.* 6. therein, becauſe it reſtores it only *in all other caſes of felony*, which is intended only of felony, whereof the common law takes notice, but piracy is of another nature, and the common law takes not notice of it under the name of *felony*, and therefore a pardon of all *felonies* pardons not *piracy*: *vide Co. P. C. cap.* 49. *p.* 112, 113. and accordingly the uſe hath obtained in the proceedings of the commiſſions founded upon 28 *H.* 8.

IX. As to the ſtatute of 33 *H.* 8. *cap.* 12. touching felonies in the king's houſhold and proceedings thereupon before the lord ſteward there is a clauſe, that in caſe of manſlaughter in the king's houſe tried before the lord ſteward, and alſo in all other felonies committed within the king's houſe, the offenders, the abettors, procurers, and receivers being convict ſhall ſuffer pains of death, as appertaineth to felons, without benefit of clergy.

In my opinion the ſtatute of 1 *E.* 6. *cap.* 12. hath repeald ſo much of this ſtatute, as excludes from clergy ſuch offenſes as are not exempt from clergy by 1 *E.* 6. for theſe are felonies, that the law takes notice of, and ſuch wherein clergy was allowable before 1 *H.* 8. and conſequently the general words of that act reſtore clergy in theſe caſes, tho the proceeding thereupon be before the lord ſteward by this act of 33 *H.* 8. *cap.* 12. for the words of 1 *E.* 6. *cap.* 12. are general *in all other felonies*, and they are *in materiâ favorabili*, in caſe of life, and in caſe of a privilege, which hath been ever favoured in law, and therefore ſhall be generally conſtrued and not reſtrained by conſtruction or interpretation. [371]

See the references at the end of ch. XLIV. *ante.*

(m) As to thoſe who ſhall commit any offenſe, for which they ought to be adjudged pirates, felons, and robbers by 11 & 12 *W.* 3. *cap.* 7. clergy is expreſly taken away from ſuch by 4 *Geo.* I. *cap.* 11. and as no mention is made of ſuch as were deemed pirates before that ſtatute, it is an argument, that the law was taken to be, that they were ouſted of clergy before.

CHAP. LI.

What perſons *are or are not* capable of clergy.

I HAVE gone through the conſideration of the *crimes* or offenſes, wherein clergy is, or is not allowable; I now come to conſider the *perſons* that are, or are not capable thereof, admitting the crimes themſelves within clergy.

Touching perſons to be admitted to clergy, ſucceſſion of times hath made great change in the law. Antiently *Nuns* profeſſed were admitted to the privilege of clergy, tho they could not be prieſts, yet they are within the *privilegium* or *immunitas eccleſiæ*, and had their clergy, 22 *E.* 3. *Coron.* 461. but other women had not by the common law the privilege of clergy.

But at this day poſſeſſion is aboliſhed, and no woman admitted to the privilege of clergy at this day; only by the ſtatute of 21 *Jac.* *cap.* 6. if a woman be lawfully convict by verdict or con-
[372] feſſion of ſtealing goods under the value of 10*s.* and above the value of 12*d.* being ſuch an offenſe, wherein a man might have his clergy, ſhe ſhall for the firſt offenſe be burnt in the hand, and to be farther puniſhed with whipping, ſending to the houſe of correction, impriſonment, *&c.* as the judge ſhall in diſcretion think fit, this act hath continuance to this day by the ſtatutes of 3 *Car.* 1. *cap.* 4. 16 *Car.* 1. *cap.* 4. *(a)*.

Again by the ſtatute of bigamy *cap.* 5. *(b) Bigamus* was ouſted of clergy, 40 *Aſſiz.* 17. but by the ſtatute of 1 *E.* 6. *cap.* 12. he is reſtored to the benefit of clergy, if the offenſe be within clergy, and tho *Stamf. Lib.* II. *cap.* 46. *fol.* 134. *b.* doubts whether that point of the ſtatute be not repeald by the ſtatute of 1 *&* 2 *P. & M. cap.* 8. whereby all ſtatutes againſt the authority of the Pope or See of *Rome* are repeald, yet the law hath been ſufficiently ſettled in this point, that *bigamus* hath his clergy at this day *T.* 3 *Eliz. Dy.* 201. *b. Lamb's* caſe, for by the ſtatute of 1 *Eliz. cap.* 1. all the clauſes in the ſtatute

(a) But now upon the ſtatute of 3 & 4 of *W. & M. cap.* 9. a woman convicted or outlawd for any felony, for which a man might have his clergy, ſhall upon praying the benefit of that ſtatute be ſubject only to ſuch puniſhment, as a man would be in the like caſe, *viz.* be burnt in the hand and detained in priſon at the diſcretion of the judge, not exceeding one year.

(b) 2 *Co. Inſtit. p.* 273.

of

of 1 & 2 *P. M. cap.* 8. not ſpecially excepted are repeald, and this is none of the excepted clauſes, and ſo the ſtatute of 1 *E.* 6. *cap.* 12. ſtands renewed by 1 *Eliz. cap.* 1. if at all impeached or repeald by 1 & 2 *P. & M.*

Again, at common law, if the clerk convict deliverd to the ordinary had broke the biſhop's priſon and been after taken, he had loſt the benefit of his clergy, 22 *E.* 3. *Coron.* 257. but at this day that can never come in queſtion, for by the ſtatute of 18 *Eliz. cap.* 7. clerks convict are not now to be deliverd to the ordinary, but burnt in the hand and ſo diſcharged.

Again, antiently the law was held, that if the priſoner had not *habitum & tonſuram clericalem*, he ſhould not have the benefit of clergy, 26 *Aſſiz.* 19. 20 *E.* 2. *Coron.* 233. or the ordinary might have refuſed him, tho he could read; but in proceſs of time [373] that law was altered and the court would admit him to his clergy, if the caſe were within clergy, tho he had not *habitum & tonſuram*, if he could read, and tho the ordinary refuſed him upon that account. 9 *E.* 4. 28. *b.* 34 *H.* 6. 49. *a. b.*

A man attaint (*) of hereſy, a *Jew*, or a *Turk* ſhall not have their clergy, but a perſon excommunicate ſhall have his clergy. 11 *Co. Rep.* 29. *b. Poulter's* caſe.

A *Greek* or alien, who knows not our letters, ſhall have his clergy, and ſhall read in the book of his own country. *B. Clergy* 20.

A baſtard, a man blind ſhall have his clergy *(c)*, if he can ſpeak *Latin* congruouſly. *B. Clergy* 21, 22.

By the ſtatute of 4 *H.* 7. *cap.* 13. "A man not within holy orders, "that hath once had his clergy, ſhall be burnt in the hand with "with M or T, and being after arraigned for any ſuch offenſe, *(viz.* "an offenſe within clergy,) he ſhall not be admitted to his clergy a "ſecond time. "And if any man upon a ſecond arraignment for "ſuch offenſe claim his clergy, as being a clerk in orders, if he "have not his letters of orders, or certificate of the ordinary witneſſ- "ing the ſame, the juſtices ſhall by their diſcretion give him a day "to bring them, at which day if he fail, he ſhall loſe his clergy that "ſecond time.

(*) This ſhould be *convict*, and ſo it is expreſt in the authority here cited, *viz.* 11 *Co.* 29. *b.* for hereſy wrought no attainder, altho by 2 *H.* 5. *cap.* 7. fee-ſimple lands were forfeited upon conviction.

(c) This is denied of a blind man, 11 *Co. Rep.* 29 *b.* & *Broke* in the place cited above makes a *quære* of it, becauſe he can by no diſpenſation be a clerk in orders, *aliter* of a baſtard, for he may be a prieſt by licenſe.

Note

Note no man ſhall be ouſted of his clergy a ſecond time by the bare mark in his hand, or by a parol averment without the record teſtifying it (†), and it ſeems, that if he deny he is the ſame perſon, iſſue muſt be joined upon it and tried to be the ſame perſon, before he can be ouſted of clergy.

The orders, that come under the name of holy orders, were four, *viz. a biſhop, a prieſt, a deacon*, and *a ſubdeacon*; other infe-
[374] rior orders, as *exorciſtæ, lectores, acoluthi, &c.* were not called holy orders, but were called *clerici in minoribus.*

By this and ſome other inſtances, which appear in the ſtatutes, it is evident, that the clergy in orders had a greater privilege allowd them than others.

1. A clergyman in orders in ſuch caſes, wherein clergy is ouſted by the ſtatute of 1 *E.* 6. *cap.* 12. as murder, robbery, *&c.* hath no more privilege than a layman, becauſe the ſtatute makes no exception or proviſion for him.

2. If a ſtatute be made after 1 *E.* 6. ouſting clergy generally, as the ſtatute of 4 *&* 5 *P. & M. cap.* 4. 18 *Eliz. cap.* 7. a clergyman in orders hath no more privilege than another, for the ſtatute provides not for him. *Stamf. P. C.* 135. *b.*

3. And therefore, tho the ſtatute of 23 *H.* 8. *cap.* 1. and 25 *H.* 8. *cap.* 3. excluding clergy from thoſe found guilty in petit treaſon, murder, robbery, *&c.* excepts ſuch as are in the order of ſubdeacon, or any ſuperior orders, and directs them to be delivered to the ordinary to remain in priſon without purgation, or to be degraded, and then ſent by the ordinary into the king's bench to be executed, it ſeems, that this privilege is at this day gone, 1. Becauſe by the ſtatute of 18 *Eliz. cap.* 7. all delivery of clerks convict to the ordinary is wholly taken away. 2. Becauſe in all thoſe caſes, where clergy is ouſted by the ſtatute of 23 *H.* 8. clergy is ouſted by the ſtatute of 1 *E.* 6. *cap.* 12. (except burning of houſes, and acceſſaries before the fact, which ſtand within clergy by the ſtatute of 1 *E.* 6. *cap.* 12.) and in that ſtatute there is no ſaving of any privilege for clerks in orders, as there is by 23 *H.* 8.

And then as to acceſſaries before the fact clergy is likewiſe generally taken away by the ſtatute of 4 *&* 5 *P. & M. cap.* 4. without ſaving of more privilege to clergymen than to laymen.

(†) Or a tranſcript thereof, for the manner of certifying which ſee 34 *&* 35 *H.* 8. *cap.* 14. and 3 *&* 4 *W. & M. cap.* 9.

4 But

4. But as to the privilege of a ſecond allowance of clergy, it ſhould ſeem at this day, clergymen in orders ſhall have benefit of clergy, a ſecond, third time, or oftener.

The ſtatute of 28 *H.* 8. *cap.* 1. puts clergymen in orders under the ſame pains and dangers in relation to the ſtatute of [375] 23 *H.* 8. *cap.* 1. 25 *H.* 8. *cap.* 3. as other perſons not in orders; this takes away the privilege given by 23 *H.* 8. and 25 *H.* 8.

Then by the ſtatute of 32 *H.* 8. *cap.* 3. which makes the former perpetual, it is farther enacted, "That ſuch perſons as be within "holy orders, which by the laws of this realm ought or may have "their clergy for any felonies, and ſhall be admitted to the ſame, "ſhall be burnt in the hand as lay clerks be accuſtomed in ſuch caſes, "and ſhall ſuffer and incur afterwards all ſuch pains, dangers, and "forfeitures, and be ordered and uſed for their offenſes of felony to "all intents, purpoſes and conſtructions, as lay perſons admitted to "their clergy be, or ought to be ordered or uſed by the laws and "ſtatutes of this realm, any law or ſtatute to the contrary not-"withſtanding.

This act was perpetual and ſubjected clerks in orders, notwithſtanding the ſtatute of 4 *H.* 7. *cap.* 13. to two inconveniences, *viz.* 1. To burning in the hand. 2. Excluſion of clergy a ſecond time.

But then the ſtatute of 1 *E.* 6. *cap.* 12. reſtores the privilege of clergy in all caſes, (except thoſe offenſes contained in the ſtatute of 1 *E.* 6. and expreſly excluded from clergy,) as it was before 1 *H.* 8.

And altho by this ſtatute of 1 *E.* 6. the burning of a clergyman in orders in the hand is not taken away by expreſs words, yet he is reſtored to his clergy a ſecond or other time, notwithſtanding he had formerly his clergy and was burnt in the hand.

But altho in expreſs words it reſtores not to clergymen in orders the exemption from burning in the hand given by 4 *H.* 7. *cap.* 13. yet it doth in equivalence, for it reſtores clergy in all other caſes *in like manner and form, as it was before* 1 *H.* 8. which as to clergymen in orders was without burning in the hand, and accordingly to this day their privilege in that kind continues: *vide* 2 *Co. Inſt.* 637. *Hob Rep.* 294. *Searle* & *Williams.*

And tis a miſtake to ſay, that if he challenge above twenty, [376] he ſhall loſe his clergy a ſecond time, becauſe the ſtatute of 1 *E.* 6. in letting looſe the clergy in other offenſes mentions not that caſe,

caſe, for in caſe of challenging above twenty, there follows neither penance nor judgment of death, but only his challenge is overruled (*).

But indeed the caſe of outlawry is *caſus omiſſus*, for tho' in the clauſe excluding clergy the word *attainder* is in, which extends to an outlawry, yet in the ſecond clauſe reſtoring clergy as it was before 1 *H.* 8. in other caſes *attainder* and *outlawry* are omitted.

As to clergy of noblemen.

By the ſtatute of 1 *E.* 6. *cap.* 12. "Peers of parliament commit-
" ting felonies within clergy may pray the benefit of this act, and
" ſhall not be put to read, nor be burnt in the hand for the firſt of-
" fenſe, without any attainder or corruption of blood to be incurred
" thereby, and for the firſt offenſe ſhall be deemed, taken and uſed as
" clerks convict, which make purgation, without any further privi-
" lege of clergy from henceforth at any time after for any cauſe to
" be allowd or admitted.

This privilege of peers to be diſcharged in this manner by this ſtatute, 1. Muſt be prayed by them. 2. Extends to all caſes, where a common perſon may have his clergy. 3. To all caſes excepted from clergy by that ſtatute, except murder and poiſoning of malice prepenſe.

But it extends not 1. To felony put out of clergy by any ſubſequent ſtatute. 2. Nor to felonies within this ſtatute, where he cannot make purgation, as if he abjure, confeſs the felony, or be outlawd, by the opinion of *Stamf. P. C. fol.* 130. *a.* but this latter ſeems doubtful, eſpecially at this day, when delivery to the ordinary and purgation are both taken away by 18 *Eliz. cap.* 7.

I think it was never meant, that a peer of the realm ſhould be put to read or be burnt in the hand, where a common perſon ſhould be put to his clergy, neither is it ſaid, that he ſhall be diſcharged by his
[377] praying the benefit of this ſtatute, where a common perſon ſhall have the privilege of clergy and may make his purgation, but only where he may have the benefit of his clergy in the firſt clauſe of the ſtatute, the other clauſe, *(ſhall be in caſe of a clerk convict, that may make purgation,)* is only for his ſpeedier diſcharge and farther advantage, and not to reſtrain the general clauſe.

(*) *Vide ſupra p.* 270, 345.

And

And therefore a great lawyer in the late times hath been much blamed for burning a peer of parliament in the hand, that confeſſed an indictment of manſlaughter; and it was the only error of note, that the perſon erred in to my obſervation.

CHAP. LII.

At what time *clergy is to be allowd.*

ANTIENTLY the law was very unſettled in this point, till ſettled by ſubſequent acts of parliament and reſolutions of the judges.

Before the ſtatute of *Weſtm.* 1. *cap.* 2. the ordinary would challenge clerks as ſoon as they were indicted, nay ſometimes, as ſoon as they were impriſond (*), before they were indicted, as appears by the ſtatute of *Marlbr. cap.* 28. *(a).*

By the ſtatute of *Weſtm.* 1. *cap.* 2. it is provided, *Que quant clerke eſt priſe pur rette de felonie & ſi demand per l'ordinarie, il lui ſoit liuer ſolonque le privilege de Saint Eſgliſe en tiel peril come il appent ſolonque le cuſtome avant ces heures uſe,* and a direction given thereby to the ordinary, *Que ceux que ſont endites de tiel rette per ſolemne inqueſts des probes hommes fait in le court le roy, en nul manner les deliverent ſans due purgation, iſſint que roy n'eit meſtier de metter autre remedy (b).* [378]

After this ſtatute the priſoner was not only to be indicted before clergy allowd, but many times inquiſitions *ex officio* were taken (†). 1. Whether he were a clerk or no, and if not a clerk, he was not delivered to the ordinary. 2. Whether he were guilty or not, and if not guilty, he was diſcharged. 3. If found guilty, he was then delivered to the ordinary. *vide* 2 *Co. Inſt.* 164. 8 *E.* 2. *Coron.* 417. 17 *E.* 2. *Coron.* 386. 3 *H.* 7. 12. *b.* but his goods were ſeiſed.

But this was found a great inconvenience to the priſoner, becauſe in caſe of an inqueſt of office he loſt his challenges, and beſides poſſibly he might be quit of the felony, were he put upon the jury.

(*) *Vide Bract. Lib.* III. *f.* 123. *b.*
(a) 2 *Co. Inſt.* 150.
(b) 2 *Co. Inſt.* 163.

(†) *Vide Part* I. *p.* 180. *in notis, p.* 343. *in notis, & ſupra p.* 318. *in notis.*

And

And therefore in the time of *H.* 6. the court was changed by *Priſot*, and the priſoner hath been always ſince put to plead to the indictment, and if convict, then to pray his clergy: *vide* 3 *H.* 7. 12. *b. Stamf. P. Co. fol.* 131. *a.* 11 *Co. Rep. Poulter's* caſe.

But if the priſoner will wave that advantage and will pray his clergy, he may, for no law ouſts him of it, but then, if the indictment be out of clergy, he muſt anſwer to the felony, or he ſhall have his penance.

But at this day clergy is never granted, unleſs the party confeſs the felony, or be convict by verdict.

If a man be indicted of a felony within clergy, and he plead and be convict, and it be demanded of him, what he can ſay why judgment ſhould not be given againſt him, he may pray his clergy, tho there be no ordinary to demand him, for as ſhall be ſaid in this caſe, the ordinary is but the miniſter of the court, and it is not now, as antiently, uſed for the ordinary to demand a priſoner, but he may pray his clergy himſelf.

If in that caſe the ordinary demand not the priſoner, nor the priſoner himſelf prays his clergy, yet if it appear to the court, that he is a clerk, or be ſo named in the indictment or appeal, the court may, and it ſeems ought *ex officio* to allow him his clergy, but howſoever they thought not to execute him. 22 *E.* 3. *Coron.* 254. *Abridg. Aſſiz.* 74. *(c)*.

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If by any miſtake or overſight the court ſhould give judgment againſt him, yet they may, (and as I think,) ought to allow him his clergy after his attainder.

And therefore the priſoner condemned ſhall in ſuch a caſe be allowd his clergy under the gallows, if the judge come that way, 34 *H.* 6. 49. *a. b.* This is agreed may be done by the judges of the king's bench, as juſtices of peace, becauſe their commiſſion continues, but it is doubted, how it can be done by juſtices of *oyer* and *terminer* after their ſeſſion ended. *Crompt. Juſt.* 119. *a.*

And it is true, that tho they may allow clergy during the adjournment of their commiſſion, yet they cannot do it after their ſeſſion is over, but they may reprieve him after judgment, notwithſtanding their ſeſſion determined, upon conſideration that he can read, and then may allow him his clergy as a clerk attaint at the next ſeſſion. 3 & 4 *Eliz. Dy. a.*

(c) This caſe is in 22 *Aſſiz.* 15.

A. it

A. is indicted of a felony within clergy, and hath his book delivered him but cannot read, and the ordinary returns accordingly *non legit*, and it is entered of record *non legit*, and the court reprieves him till another ſeſſions, and by that time he hath learned to read, tho the gaoler, that taught him to read in the mean time, was antiently puniſhable, yet he ſhall be admitted to his clergy and be delivered. 27 *Aſſiz.* 44. *n.* 11. *Dy.* 205. *a. b. per omnes juſticiarios*, *Dy.* 214. *b. Stone*'s caſe.

And the ſame law it is, if judgment of death were entered againſt him upon *non legit* returned, yet if he can read after, he ſhall be delivered to the ordinary and have his clergy *per omnes juſticiarios.* 34 *H.* 6. 49. *Coron.* 20 (*).

If a man abjure the kingdom, (which is an attainder in law,) and come back again, he ſhall have the privilege of his clergy, as a clerk attaint. 8 *H.* 6. *Kelw.* 186. *b. Raſt. Entr. fol.* 1. *b.*

But in antient time he was not delivered to the ordinary, but remanded to priſon till he obtained the king's pardon for returning into the kingdom without licence, and that being obtained he ſhould be delivered to the ordinary, 1 *E.* 3. 16. *b. Coron.* 155. *Stamf. P. C. Lib.* II. *cap.* 50. but this law is antiquated: *vide Raſt. Ent. fol.* 1. *b. ex T.* 15 *H.* 7. *rot.* 2. [380]

If a man indicted of a felony within clergy ſtands mute, yet he ſhall have his clergy. *Moore*'s *Rep. n.* 738. *p.* 550. *Winter*'s caſe, yea tho judgment of *peine fort & dure* were given againſt him, if the caſe, as it appears upon the indictment, be within clergy, for the court in this caſe ought to be of counſel with the priſoner *in favorem vitæ*, tho he be wilful.

If the approver diſavow his appeal, or be vanquiſhed in battle, or become recreant therein, yet he ſhall have the privilege of clergy, if the cauſe, for which he is indicted, be within clergy.

But in theſe caſes of attainder antiently they were delivered to the ordinary *abſque purgation.* 15 *H.* 7. *Raſt. Ent.* 1. *b.*

(*) Theſe points cannot now come in queſtion, for the neceſſity of reading is entirely taken away by 5 *Ann. cap.* 6.

CHAP.

CHAP. LIII.

Concerning the manner how, *and* the judge by and before whom *clergy is to be prayed or allowd.*

ANTIENTLY the ordinary took upon him, as the perſon that was to judge of the competency or incompetency of the clerk. But in truth the king's juſtices were the judges both touching the competency of the clerk to be admitted, and the ſufficiency or inſufficiency of his performance therein, and the ordinary was in truth but the miniſter to the court. 5 *Co. Rep.* 26. *b. caſe of eccleſiaſtical law (a).*

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If the ordinary had challenged one as a clerk, that the court judged not to be ſuch, the ordinary or biſhop ſhould be fined, and his temporalties ſeiſed, 7 *H.* 4. 41. *b. Stamf. P. C.* 132, 133, and the felon ſhall be hanged. 7 *E.* 4. 29. *a.* 9 *E.* 4. 28. *a.*

Again, if the ordinary refuſe one that can read, and return *non legit*, yet the court may hear him, and if they judge him to read ſufficiently, the priſoner ſhall be ſaved notwithſtanding the refuſal and return of the ordinary, and accordingly, if the ordinary be abſent, the court may give him his book. 7 *E.* 4. 29. *a.* 9 *E.* 4. 28. *a.* 7 *H.* 4. 41. *b.* 34 *H.* 6. 49. *a. b. Stamf. P. C. Lib.* II. *cap.* 45. *fol.* 132, 133.

And therefore the judge may and uſually doth appoint the verſe, that the clerk ſhall read, *Stamf. P. C. ubi ſupra*, and therefore the practice of *Bryan* and *Starkey*, 21 *E.* 4. 21. is juſtly reprovable, who when they delivered a book to the priſoner and he read well in the preſence of the juſtices, yet when the ordinary returned *non legit*, gave judgment of death againſt the priſoner, for in truth the ordinary is but the miniſter, or at moſt the aſſiſtant to the court, and not the judge. *Hob. Rep. p.* 290. *Searle & Williams (b).*

(a) Vide Kel. 98. 51.

(b) But this learning is now out of uſe, for by 5 *Ann. cap.* 6. every perſon convicted of a felony within the benefit of clergy ſhall, upon praying the benefit of that ſtatute, without any reading, be allowd to be, and be puniſhed as a clerk convict, and this ſhall be as effectual and advantageous to him, as if he had read as a clerk.

CHAP.

CHAP. LIV.

Concerning the conſequences *of* clergy *granted or prayed.*

THE conſequences or effects upon clergy granted are conſiderable in two ways, 1. What they were before the ſtatute of 18 *Eliz.* and 2. What ſince.

Touching the conſequences of clergy before the ſtatute of 18 *Eliz.* they were theſe.

I. Regularly when clergy was granted, there was an entry made by the court of king's bench, *Et tradito ei hic per curiam libro legit ut clericus,* & J. S. (the ordinary or his deputy,) *petit ipſum, ut clericum, præfato ordinario deliberari, ideo conſideratum eſt, quòd prædictus* A. B. *liberetur præfato ordinario.* And if it be without purgation, then there is this added, *ſalvo cuſtodiend' abſque aliqâ purgatione inde de cætero faciend' ſub periculo, quod incumbit.* 17 *H.* 7. *Rot.* 2. *Raſt Entries* 121. *a.* But if it be not without purgation, then that clauſe is omitted.

This is the form of the award in the king's bench, but before juſtices of gaol-delivery the entry commonly is, *Et traditur ordinario,* either generally or *abſque purgatione,* as the cauſe requires. *M.* 2 & 3 *Eliz. Dy.* 205. *b.* & *ibid.* 215. *a.*

II. When he was ſo delivered to the ordinary, he was to remain in the ordinary's priſon; *viz.* if committed generally, then he was to remain till he had made his purgation, if *abſque purgatione,* then he was to remain there during his life, unleſs the king pardon him,

And if the clerk had broke priſon, this was not a felony within the ſtatute of 1 *E.* 2. *de frangentibus priſonam* (*); but if the clerk were attaint and delivered to the ordinary and broke priſon and eſcaped, and were after taken, he ſhould have been executed upon his firſt attainder, *quod vide* 27 *Aſſiz.* 42. [383]

But by the ſtatute of 23 *H.* 8. *cap.* 11. if ſuch a clerk break the priſon of the ordinary and eſcape, this is made felony without clergy; only the clerk, if in orders, being convict was to be delivered to the ordinary without purgation, and he might, if he pleaſed, degrade him and ſend him into the king's bench with letters ſignifying his degra-

(*) Becauſe that ſtatute was conſtrued to extend only to the *king's priſon: vide Part* I. *p.* 608.

ding, and that court, have the record of the conviction before them, might give judgment and award execution, as if he had been a layman and found guilty before them.

But this among the reſt of the felonies enacted in the time of *H.* 8. was repealed by 1 *E.* 6. *cap.* 12. & 1 *Mar. cap.* 1.

III. If the clerk were committed generally, he might make his purgation (*), the form whereof is unneceſſary to recite, being it is now taken away by 18 *Eliz.* and is fully deſcribed and directed by *Stamford Lib.* II. *cap.* 48. *fol.* 138. and the ſtatutes of *Weſtm.* 1. *cap.* 2. 4 *H* 4. *cap.* 3.

And if the ordinary would not admit a clerk to his purgation, a writ might iſſue out of the chancery to command it, where by law it might be done. 15 *H.* 7. 9. *a. per Fineux.*

And when he had made his purgation, he had always reſtitution of his *lands* ſeiſed, unleſs he were attaint. 8 *E.* 2. *Forfeiture* 34.

But as touching *goods* the difference was thus:

If before conviction upon his arraignment the priſoner had his clergy, (as was uſed commonly before the time of *H.* 6.) then if he made his purgation, upon ſignification thereof to the chancery he had a writ to the ſheriff to reſtore him his goods, *niſi eâ de cauſâ fugam fecerit*, for then he had no reſtitution, *F. N. B.* 66. *a.* but if he died before purgation, his executors could not have it.

But if he had pleaded to inqueſt, and were convict, then the goods
[384] were forfeited by the conviction, and he ſhould not have reſtitution of his goods upon his purgation, and altho the law was taken antiently, that even in caſe of a conviction, unleſs there were an attainder alſo by judgment, he ſhould upon his purgation have had reſtitution. 3 *E.* 3. *Coron.* 365. 40 *E.* 3. 42 *a.* yet of latter times the law hath conſtantly obtained otherwiſe, as appeareth 8 *H* 4. 2. *a.* 20 *E.* 4. 5. *B. Coron.* 166. *Plow. Com.* 262. *b. Stamf. P. C. Lib.* III. *cap.* 23. *vide* 3 *E.* 3. *Coron.* 332.

And the ſame law ſeems to be, if he come not *in* upon the *exigent* awarded, if he fled, if he ſtood mute, or challenged above thirty-five, for in all theſe caſes he forfeited his goods, and ſhould not have reſtitution upon his purgation, *vide* 8 *E.* 2. *Coron.* 417. where, tho he prayed his clergy before conviction, yet upon an inqueſt of office find-

(*) This was a trial before the ordinary by a jury of twelve clerks, wherein if he was acquit, he was diſcharged: if found guilty, he was degraded.

ing

ing him guilty he forfeited his goods; the like *H.* 17. *E.* 2. *B. R. rot.* 87. *Heref.* in the biſhop of *Hereford*'s caſe before cited *cap.* 44. *p.* 326.

But if the clerk were delivered to the ordinary *abſque purgatione*, there he continued priſoner during his life, unleſs pardoned by the king, and the king had not only his goods, as abſolutely forfeited, but alſo the profits of his lands during his life, as appears by the books above cited.

And if the clerk were ſo delivered *abſque purgatione*, if the ordinary went about to admit him to purgation, a writ might iſſue out of the chancery to prohibit him. *Clauſ.* 22 *H.* 3. *m.* 17. *dorſo*, *Epiſcopo Exon. H.* 14. *E.* 3. *B. R. rot.* 19. *Lond'* and he ſhall for it be fined, and his temporalties ſeiſed for the contempt, and by ſome books it is an eſcape in the ordinary. 9 *E.* 4. 28. *a.*

There were certain caſes, wherein the clerk was delivered to the ordinary *abſque purgatione*. 1. Where he was outlawed of felony 23 *H.* 8. *cap.* 1. *Raſt. Entries* 121. *a.* 2. Where he confeſſed the felony either upon his arraignment, or become an approver, or confeſſed and abjured and after came into the realm again, for againſt his own confeſſion he ſhould not be admitted to purge himſelf of the crime he confeſſed. 3 *H.* 7. 12 *a.* 3. If he had judgment given againſt him, whereby he was attaint. 10 *E.* 3. *Coron.* 247. 4. If he were in orders and broke the priſon of the ordinary and made [385] his eſcape, by the ſtatute of 23 *H.* 8. *cap.* 11. 5. Where a man in orders was convict of any of the felonies ouſted of clergy by 23 *H.* 8. *cap.* 1. he was to remain during his life without purgation, and the ordinary might degrade him and ſend him into the king's bench to receive judgment. 6. If he were only convict by verdict in an appeal, he ſhould not make his purgation. 12 *R.* 2. *Coron.* 109. 10 *E.* 2. *Coron.* 247.

IV. If a felon had his clergy, regularly he was never to be arraigned again before the king's juſtices for the ſame felony, unleſs it were in caſe where he broke the priſon of the ordinary and eſcaped. 20 *E.* 2. *Coron.* 232. *(a)*.

V. If a clerk had his clergy for felony, he was not to be arraigned for any other felony by him committed before his clergy allowed, for by the ſtatute of 25 *E.* 3. *cap.* 5. *pro clero*, it is enacted, "That he

(a) For in that caſe *eccleſia itſum tueri non debet*, *vide Bracton*, *Lib.* III. *de coron*, *f.* 131. *a.*

" ſhall be arraigned of all his felonies at once *(b)*," yea altho he only prayed his clergy, tho there be no entry of record, that he read or was delivered to the ordinary, yet by force of this ſtatute he ſhall not be arraigned of any felony committed before, for the firſt felony being within clergy, and he praying his clergy, it was the fault of the court, that he had it not, which ſhall not turn to his diſadvantage. *T.* 4 *Eliz. Dy.* 214. *b. Stone*'s caſe.

Yet this hath ſome exceptions, for if he had committed treaſon againſt the king before his clergy admitted, he may after his clergy and after his purgation alſo be indicted and arraigned for that treaſon, becauſe it was an offenſe not within benefit of clergy.

VI. If he had committed a felony after he had his clergy, and was delivered to the ordinary, he ſhould be put to anſwer that felony, *vide* 4 *Eliz. Dy.* 214. *b.* and if he had killed his keeper and thereby eſcaped
[386] of the ordinary's priſon, he ſhould not for that felony have had his clergy for it, *fruſtra legis auxilium quærit, qui in legem committit.* 8 *E.* 2. *Coron.* 419. 22 *E.* 3. *Coron.* 250.

The caſe of *Stone*, 4 *Eliz. Dy.* 214. *b.* was this.

Stone committed two felonies the ſame day, one (ſuppoſe it burglary) out of clergy, the other (ſuppoſe it larceny) within clergy, he is indicted of the larceny, he pleaded and was convict, and prayed his clergy, and entered *non legit ut clericus*, and no judgment, *quòd tradatur ordinario*, but is reprieved without judgment to another ſeſſions, at which he is indicted of the other felony out of clergy, but ſuppoſed to be the ſame day when the former felony was committed, he is arraigned and pleads *non culp*, and is found guilty, *& petit librum & legit ut clericus, ſed non crematur, neque traditur ordinario.*

1. It was agreed, that this ſecond reading, notwithſtanding the *non legit* firſt entered, is a good diſcharge of the firſt felony within clergy *per omnes juſticiarios*, *Dy.* 205. *a. b.* but then, 2. The queſtion was, what ſhould be done as to the ſecond not within clergy, whereof he was indicted and convicted: by ſeven juſtices he ſhall have judgment to die, becauſe it ſhall be intended a felony committed after the firſt arraignment, but by other ſeven he ſhall be diſcharged, for it ſhall be intended a felony committed the ſame day, as it is laid, and tho there be no award, *quòd tradatur ordinario*, yet that was the act of the court

(*b*) This ſtatute was only in affirmance of the common law, for he was to be degraded by the ordinary, and this was thought a ſufficient puniſhment for all offenſes committed before degradation; *vide Bracton Lib.* III. *de coronâ, cap.* 9. *f.* 123. *b.*

and

and ſhall not prejudice him; but he ſhall be adjudged in the cuſtody of the ordinary from the firſt prayer of his clergy.

But afterwards 28 *Maii* 8 *Eliz.* he was indicted for murder committed the firſt of *April* 1 *Eliz.* and was convict and had judgment, and was executed, and yet that murder was before his clergy prayed, and before the ſtatute of 2 *Eliz. cap.* 4. therefore it ſeems the former opinion obtained, for if he had been diſcharged by his reading as to the felony, whereof he was firſt indicted, he muſt have been diſcharged of all felonies committed before his firſt arraignment. The only ſalve that I can think of is either, 1. That he ſhould have *pleaded* it, and did not; or 2. That the *legit ut clericus* muſt be intended to be applied to the ſecond felony only, and not to the firſt, [387] whereupon *non legit* was entered. *Dy.* 215. *a.*

And thus far touching the effect of clergy, as it ſtood before 8 & 18 *Eliz.*

By theſe two ſtatutes two great alterations were made in the whole buſineſs of clergy, which took away many of thoſe intricate queſtions, tedious proceedings, and great inconveniencies, that were therein before this time.

1. By the ſtatute of 3 *Eliz. cap.* 4. it is enacted, "That every "perſon, which ſhall hereafter upon his arraignment for any felony "be admitted to the benefit of clergy by the laws of this realm, and "delivered to the ordinary for the ſame, and ſhall make his due purga- "tion for the ſame offenſe or offenſes, whereupon he was ſo admitted "to his clergy, and ſhall before his admiſſion to his clergy have com- "mitted any other ſuch offenſe, whereupon clergy by the laws or "ſtatutes of this realm is not allowable, and not being thereof before "indicted and acquitted, convicted, or attainted, or pardoned ſhall "and may be indicted or appealed for the ſame, and thereupon put to "anſwer, and ordered and uſed in all things according to the laws "and ſtatutes of this realm in ſuch manner and form, as tho no ſuch "admiſſion to clergy had been.

By this ſtatute, tho all other felonies within clergy before clergy admitted ſtand diſcharged, as they were at common law, yet felonies out of clergy committed before clergy allowed may ſtill be proſecuted, notwithſtanding clergy allowed, and ſo as to ſo much it repealed the ſtatute of 25 *E.* 3. *pro clero, cap.* 5.

Then at the parliament of 18 *Eliz. cap.* 7. it is enacted, "That "every perſon, which at any time hereafter ſhall be admitted and al-

" lowed to have the privilege of clergy, ſhall not thereupon be deliver-
" ed to the ordinary, as hath been accuſtomed, but after ſuch clergy
" allowed, and burning in the hand according to the ſtatute in that
" behalf provided, ſhall forthwith be enlarged and delivered out of
" priſon by the juſtices, before whom ſuch clergy ſhall be granted,
[388] " that cauſe notwithſtanding, provided, that the juſtices may
" for farther puniſhment detain the clerk in priſon for any
" time not exceeding one year *(c)*.

" Provided that, if any one ſhall be convicted of carnal knowledge,
" and abuſing a woman child under ten years, ſuch offenſe ſhall be
" felony without clergy.

" Provided, that any perſon admitted to the benefit of clergy ſhall
" notwithſtanding the ſame be put to anſwer other felonies, whereof
" he ſhall be indicted or appealed, not being thereof before acquitted,
" convicted, attainted, or pardoned, and ſhall in ſuch manner be ar-
" raigned, tried, adjudged, and ſuffer ſuch execution for the ſame, as
" he or they ſhould have done, if as a clerk or clerks convict they had
" been delivered to the ordinary, and there had made his or their due
" purgation.

Upon this ſtatute theſe points are clear.

1. That if before his clergy admitted, he had committed any other felony within clergy, he is cleared of them as well as of that whereupon he hath his clergy, for his burning in the hand is in lieu of his delivery to the ordinary and purgation.

2. That as to former felonies out of clergy he is not diſcharged by his admiſſion to clergy, but ſhall be put to anſwer them.

3. That by his conviction he forfeits all his goods that he hath at the time of the conviction, notwithſtanding his burning in the hand.

(c) By 5 *Ann. cap.* 6. it is enacted, " That where any perſon ſhall be convict " of larceny the judges ſhall award him to " the work-houſe or houſe of correction, " there to be kept without bail at the diſ- " cretion of the judges, not leſs than ſix " months, nor more than two years from " the conviction, an entry whereof is to be " made on record, and if ſuch offender " eſcapes he ſhall be committed to ſuch " houſe there to remain not leſs than " twelve months, nor more than four " years.

By 4 *Geo.* 1. *cap.* 11. and 6 *Geo.* 1. *cap.* 23. " The court may order any perſon " convicted of larceny, or any felonious " ſtealing of money, &c. within clergy, " (except perſons convict for receiving " ſtolen goods, knowing them to be ſtolen,) " inſtead of being burnt in the hand or " whipt, to be tranſported to any of his " Majeſty's plantations in *America*, for " the ſpace of ſeven years; and perſons " convict for receiving ſtolen goods, know- " ing them to be ſtolen, or for offenſes " without clergy, but pardoned generally " upon condition of tranſportation, to be " tranſported for the term of fourteen " years; and if any ſhall reſcue or aid " ſuch offender to make his eſcape, or if " ſuch offender ſhall return or be found at " large without leave before the expiration " of his term in *Great Britain* or *Ireland*, " he or they ſhall be deemed guilty of " felony without clergy.

4. That

4. That yet by his burning in the hand he is put into a capacity of purchaſing and retaining other goods, becauſe the ſtatute taking away delivery to the ordinary and purgation, which ſhould have reſtored him to that capacity, gives him the capacity of purchaſing and retaining other goods, and is in nature of a pardon.

5. That preſently upon his burning in the hand he ought to be reſtored to the poſſeſſion of his lands, and from thenceforth to enjoy the profits thereof.

6. That altho he be not burnt in the hand, but the king pardons it, he is thereby put into the ſame condition, as if he were burnt in the hand, and rendered a perſon capable now to purchaſe and retain goods, altho the words of the ſtatute are *after clergy allowed and burning in the hand he ſhall be delivered.* Theſe are all points reſolved in 5 *Co. Rep.* 110. *a. Foxley*'s caſe, and *P.* 41 *Eliz. Heſton*'s caſe therein cited (*).

7. And conſequently after clergy and burning in the hand he ſhall not be proceeded againſt by the eccleſiaſtical judge to deprivation or other eccleſiaſtical cenſure, for it amounts to a pardon by the king. *Hob. Rep. p.* 288. *Searle* & *Williams.*

8. That notwithſtanding this ſtatute requires burning in the hand to diſcharge a clerk convict, yet a clerk in holy orders, *viz.* in the order of ſubdeacon or above ſhall not be burnt in the hand, but the privilege allowed them by the ſtatute of 4 *H.* 7. *cap.* 13. to be ſaved from burning in the hand continues to them. 2 *Co. Inſt.* 637.

9. And upon the ſame account they may have their clergy in caſes within clergy a ſecond time according to the ſtatute of 4 *H.* 7. *cap.* 13. notwithſtanding this ſtatute.

10. That altho a clergyman in orders ſhall not be burnt in the hand, yet by virtue of the ſtatute 4 *H.* 7. *cap.* 13. and of this ſtatute after his diſcharge given by the court he ſhall have the ſame privilege as if he had been burnt in the hand, and therefore ſhall not be drawn in queſtion in the eccleſiaſtical court to deprive him or inflict any eccleſiaſtical cenſure upon him. *Hob. Rep.* 288. *Searle* & *Williams.*

11. That notwithſtanding this ſtatute takes away delivery to the ordinary, and inflicts burning in the hand, yet the [390] privilege of peers of parliament exempting them from reading and burning in the hand for the firſt offenſe is not hereby at all diminiſhed or altered.

(*) *Vide ſupra* f. 278.

12. That the plea of *auterfoits convict* and had his clergy ſtands as a good bar to a new arraignment for the ſame felony, as it did before this ſtatute.

13. That if a man be indicted of murder, and upon not guilty pleaded is found guilty of manſlaughter, and prays his clergy, tho he neither be burnt in the hand, nor hath his clergy allowed, but the court will adviſe upon it, yet this ſtands as a good bar to a new indictment or appeal for the ſame felony, for the priſoner hath done what he can in praying his clergy, which prayer is recorded *petit librum*, and it is the act of the court to adviſe, and their delay in allowing him clergy, or burning him in the hand ſhall not prejudice the priſoner. 4 *Co. Rep.* 45. *b. Wigg*'s caſe and *Holcroft*'s caſe adjudged. *Co. P. C. cap.* 57. *p.* 131. *(d)*.

(d) This point was however much litigated, and at laſt ſolemnly ſettled in the caſe of *Armſtrong* and *Liſle T.* 8 *W.* 3. *B. R. rot.* 565. *Kel.* 93. that a conviction of manſlaughter, and that he was a clerk and ready to read, if the court would have allowed him, is a good bar to an appeal, altho the court had not called the defendant to judgment, but continued him over with a *curia adviſare vult*.

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[391] CHAP. LV.

Concerning judgments *in the ſeveral kinds of* capital offenſes.

HAVING now gone through the preparatories to judgment, namely indictment, pleas, trial, and clergy, I come to conſider of the judgments that are to be given in ſeveral capital offenſes, and therein, 1. I will conſider the ſeveral kinds of judgments. 2. Who are the judges, that may give them. 3. How and in [what manner.]

Firſt, for the ſeveral kinds of judgments I ſhall conſider theſe particulars.

1. What judgment is to be given in caſe of an acquittal of any capital offenſe.

2. What, when clergy is allowed.

3. What to be given againſt a perſon convicted of treaſon, as againſt the king.

4. What to be given in caſe of petit treaſon.

5. What, in caſe of felony.

6. What, in caſe of *peine fort & dure*.

I. The

I. The judgment *upon the acquittal* of the priſoner is either when he is acquitted by ſpecial plea, as of *auterfoits acquit*, or of a pardon, &c. or other matter in bar, or elſe when he is acquitted upon not guilty pleaded; and of theſe in their order.

If the priſoner pleads the king's pardon, the concluſion of his plea is ordinarily thus, *quarum quidem literarum domini regis (ac dicti brevis* if there be a writ of allowance alſo pleaded,) *prætextu prædictus* T. H. *petit quòd ipſe de præmiſſis per curiam hìc dimittatur, &c. ſuper quo viſis & per curiam hìc intellectis omnibus & ſingulis præmiſſis conſideratum eſt, quòd prædictus* T. H. *eat inde ſine die, &c.* and in the margin of the roll there is commonly entered *literæ patentes allocantur: ſine die, &c.* and no other judgment is uſually entered in ſuch caſe. *Raſt. Entries* 455. *a. b.* [392]

If the priſoner pleads *auterfoits acquit*, or *convict*, or *attaint de meſme felony*, and avers it to be the ſame, (as he muſt,) the concluſion of his plea is, *& hæc paratus eſt verificare, unde petit judicium, & quòd ipſe de præmiſſis per curiam hìc dimittatur*, and ſometimes and moſt commonly pleads over to the felony *not guilty*.

Et David Waterhouſe *armiger. coronator & attornatus domini regis in curiâ ipſius regis coràm ipſo rege, qui pro eodem domino rege in hâc parte ſequitur, pro eodem domino rege dicit & cognovit, quòd prædictus* Johannes Sayer, *qui modo comparet, & prædictus* Johannes *in inquiſitione prædictâ nominatus per nomen* Johannis Sawyer, *nuper de* W. *in com.* S. *&c. eſt una & eadem perſona*, and ſo goes along to all the averments *modo & formâ, prout prædictus* Johannes Sayer *ſuperiùs placitando allegavit, ſuper quo viſis & per cur' hìc intellectis omnibus ſingulis præmiſſis tàm in placito prædicto ipſius* Johannes Sayer *in formâ prædictâ placitat' & accordo convictionis prædict. quàm dicti domini regis attornati ejuſdem placiti cognitione, conſideratum eſt, quòd prædictus* Johannes Sayer *eat inde ſine die* H. 5 Jac. *B. R. Sayer's* caſe, where he pleaded *auterfoits convict* and had his clergy.

And judgment is in like manner entered, *H.* 6. *Jac. B. R.* in the caſe of *Francis Smith* upon *auterfoits acquit* pleaded, *Et* David Waterhouſe *armiger, qui pro domino rege in hâc parte ſequitur, viſo placito prædicti* Franciſci Smith *& diligentèr per ipſum examinat' præmiſſis, pro eo, quòd evidenter & manifeſtè apparet eidem* David Waterhouſe, *quòd placitum prædictum per præfatum* Franciſcum *ſuperiùs placitatum &c. hoc non dedicit ſed placitum illud ex parte dicti domini regis in omnibus fatetur, & cognovit ſore verum: Ideò ut ſupra eat ſine die.*

The

The like form of judgment, *viz. quòd eat ſine die* was antiently uſed in caſe of *auterfoits acquit* pleaded. 2 *E.* 4. *John Hodgſon*'s caſe.

And *note*, this judgment of *eat ſine die* is of two kinds, ſometimes it is ſpecial, ſometimes it is general.

[393] If *A.* bring an action of covenant againſt *B.* and a ſpecial verdict is found, but upon the peruſal of the declaration a fault therein appears, *Et quia videtur curiæ, quòd narratio eſt inſufficiens, conſideratum eſt quòd querens nihil capiat per billam, ſed quòd defendens eat indè ſine die*, this judgment ſhall not be a bar in another action; becauſe ſpecial, and not given upon the verdict, but upon the inſufficiency of the declaration; otherwiſe it had been, if given generally, for it ſhould have been intended upon the verdict and merits of the cauſe. *T.* 1650. *Eales* & *Lambert (a)*.

In a *quare impedit* by the king iſſue is joined and found for the defendant, at the day in bank it is alleged in arreſt of judgment, that no patron is named in the writ, the judgment ſhall be enterd generally, *quòd eat ſine die*, and not ſpecially upon the plea in abatement, but it ſeems, it ſhall not bar the king in a new action, for the *eat ſine die* ſhall be applied to the plea to the writ: *vide* 3 *H.* 4. 2 & 11. *(b.)*

But it ſeems, that if a man pleads a plea in bar of the indictment, as *autrefoits acquit*, or a pardon, yet if the indictment be inſufficient, upon the reaſon of *Vaux*'s caſe 4 *Co. Rep.* 45. *a.* the *eat ſine die* ſhall be applied for the advantage of the king to the inſufficiency of the indictment, and not to the plea in bar; *quære tamen, non obſtante Vaux*'s caſe.

It is reaſon to have the *eat ſine die* ſpecial in that caſe, *eò quòd indictamentum prædictum apparet minùs ſufficiens, ideò conſideratum eſt, quòd eat ſine die*, and then it is applicable only to the inſufficiency of the indictment.

(a) This caſe (but not this point) is reported in *Styl.* 37, 54, 73.

(b) This caſe, (which is obſcurely ſtated by our author,) appears from the year-book to have been thus. A *quare impedit* was brought by the king, and a verdict paſt for the defendant, upon which the defendant prayed judgment, but the counſel for the king deſired, that the writ might abate, becauſe it was brought againſt the incumbent only, and not againſt the patron, but this was refuſed, becauſe the king was eſtopped from abating his own writ; then they prayed, that if judgment were enterd againſt the king, the cauſe thereof ſhould likewiſe be enterd, but this alſo was refuſed by the court as needleſs, and the judgment enterd generally, *quòd defendens eat ſine die*, (the ſame judgment, that ſhould be in caſe the writ had been brought againſt the patron and incumbent, and it had been found againſt the king,) becauſe the king will receive no prejudice thereby, for if this judgment ſhould afterwards be pleaded in bar, the king might reply, that judgment was given againſt the writ, becauſe the patron was not named therein.

If

If a man plead not guilty and is acquitted, antiently the judgment was not only, *quòd eat ſine die*, but *ideò conſideratum eſt, quòd eat indè quietus*, tho it were at the king's ſuit, *quod vide Raſt. Entries* 51. *a.* 2 *E.* 4. in the caſe of *Hodgſon* before cited, and ſo in the caſe of *Smith* before cited, *viz. H.* 6 *Jac.* and accordingly *H.* 3 *Jac. B. R. Raſt. Entries* 57. *Ideò conſideratum eſt, quòd idem* T. *ſit inde quietus, & eat ſine die. Raſt. Entries, fol.* 385. *Gaol-delivery* 6, 7, 10, 11.

Yet at common law without the aid of 18 *Eliz.* he might be bound bound to his good behaviour, if it were teſtified he was of ill fame, and ſhall be committed till he find ſureties. *Raſt. Ent.* 385. *Gaol-delivery* 5.

And if the entry were ſuch, I do not think the priſoner could ever be arraigned again notwithſtanding the inſufficiency of the indictment, till that judgment of acquittal were reverſed, for *eat inde quietus* cannot go to the inſufficiency of the indictment, but muſt go to the matter of the verdict.

But indeed in *Vauxe*'s caſe, 4 *Co. Rep.* 44. *a.* who was acquit by verdict upon *not guilty* pleaded, the judgment is only *Ideò conſideratum eſt, quòd prædictus* Willielmus Vaux *de felonià & murdro prædicto in indictamento prædicto ſuperiùs ſpecificat. necnon de dictâ felonicâ venenatione prædicti* Nich. Ridley *in eodem indictamento nominat. eidem* Willielmo *impoſit. eat ſine die*, not *eat inde quietus*: he was afterwards indicted *de novo* and pleaded the former acquittal, and yet becauſe the indictment was not ſufficient, he was put to plead to the felony, and had judgment and was executed.

The truth is the beſt reaſon to maintain that judgment is that, which is given by my lord *Coke P. C.* 214. in theſe words, *In the caſe of acquittal the judgment is*, quòd eat ſine die, *which may be given as well for the inſufficiency of the indictment, as for the party's innocence or not guiltineſs of the offenſe, and the judges of the cauſe ought before judgment to look into the whole record, and upon due conſideration thereof to cauſe it to be enterd*, ideò conſideratum eſt, quòd eat ſine die.

This is the beſt reaſon to ſupport that judgment, but if the judgment had been, *quòd eat indè quietus*, as the antient form is in caſe of acquittal upon *not guilty pleaded*, that could never refer to the defect of the indictment, but to the very matter of the verdict; and if in *Vaux*'s caſe the judgment had been ſo enterd, he could never again have been indicted for the ſame offenſe, notwithſtanding [395]

the

the defect of the indictment, till that judgment reverſed by writ of error, tho, as it was, that judgment in *Vauxe*'s caſe was one of the hardeſt that ever I met with in criminal cauſes, for where the priſoner excepts to the inſufficiency of the indictment, or the court doth it *ex officio*, the judgment is ſpecial, *quòd indictamentum ob inſufficientiam caſſetur, & quòd* the priſoner *eat indè ad præſens ſine die.*

If a man be indicted of homicide *ſe defendendo*, or *per infortunium*, he muſt plead to it or confeſs it, and there is no judgment of death given againſt him, but *remittitur priſonæ*, or baild *ad expectand. gratiam regis.*

But if a man by the coroner's inqueſt be found to have kild a thief, that aſſaulted him to rob him or to commit a burglary, which is not felony, he ſhall neither be arraigned nor put to anſwer upon that indictment, but ſhall be diſmiſſed without any judgment.

But if he had been indicted of murder or manſlaughter, and upon *not guilty* pleaded the ſpecial matter is found, or the jury acquits him, the judgment ſhall be *quod eat indè quietus*, and it is a perpetual diſcharge; and if he be found guilty *ſe defendendo*, yet the judgment given thereupon, *quod expectet gratiam regis* is a perpetual bar to another indictment. *Co. P. C. cap.* 101. *p.* 213, 214.

II. The judgment in caſe of allowance of clergy is thus, *Super quo adtunc & ibidem quæſitum eſt per cur. domini regis de eodem* Johanne, *ſi quid pro ſe habeat vel dicere ſciat, quare curia domini regis hic ad judicium & executionem de eo ſuper veredictum prædictum procedere non debeat*; *idem* Johannes *dicit, quòd ipſe eſt clericus, & petit beneficium clericale ſibi in eâ parte allocari, & tradito eidem* Johanni *libro idem* Johannes *legit ut clericus, ſuper quo conſideratum eſt per curiam hic, quòd idem* Johannes *in manu ſuâ lævâ cauterizetur & deliberetur*, and the execution is accordingly enterd, *& inſtanter crematur in manu ſuâ lævâ, & deliberatur juxta formam ſtatuti.*

[396] And if he be a nobleman, and be demanded wherefore judgment ſhould not be given upon the verdict, he may aver, that he is a peer of the kingdom *habens locum & vocem in parliamento*, and pray the benefit of the ſtatute of 1 *E.* 6. *cap.* 12. and if it appear ſo in the indictment, or in caſe it do not, if the court be aſcertained thereof either by writ of *certiorari* to the clerk of parliament, or if it be confeſſed by the king's attorney, then the judgment is *ideò conſideratum eſt quòd deliberetur ſecundùm formam ſtatuti in hujuſmodi caſu edit. & proviſ.*

And

And if it be alleged, that he is a clerk in holy orders, then it ſhall be enterd after his reading, *Et quia curiæ hic conſtat per certificationem Epiſcopi, &c.* or *per literas teſtimoniales Epiſcopi, quòd ipſe eſt clericus in ſacris ordinibus conſtitutus, viz. in ordine ſubdiaconatûs, ideo conſiderat. eſt per curiam, quòd deliberetur ſecundùm formam ſtatuti in hujuſmodi caſu edit. & proviſ. ſine cauterizatione* And the like, if he plead the king's pardon of burning in the hand.

And if a layman pray his clergy, and it appear of record, that he had it before, then the entry is, *Et quia per inſpectionem recordi coram domino rege hic miſſi &c. quòd aliter idem* J. S. *indictatus exiſtit &c.* ſetting out the effect of the record, *& quòd ipſe eſt eadem perſona, & hoc idem* J. S. *non dedicit, ideò conſideratum eſt, quòd privilegium clericale eidem* J. S. *non allocetur, & quòd ſuſpendatur per collum quouſque &c.*

And ſo if he prays his clergy, [and cannot read,] *Et tradito ei per curiam libro idem* J. S. *non legit ut clericus, ideò conſiderat' eſt, quòd ſuſpendatur per collum, quouſque mortuus fuerit.*

III. The judgment in high treaſon againſt the king for conſpiring his death, or levying war, or for a prieſt upon the ſtatute of 27 *Eliz. cap.* 2. or for any new treaſon made by authority of parliament is in this manner.

Firſt the king's ſerjeant or attorney *juxta debitam legis formam petit verſus ipſum* E. D. *ſuper veredict' prædict' judicium & executionem pro dicto domino rege habend.' &c.* but this is not of abſolute neceſſity, for the court *ex officio* ought to give judgment.

Et ſuper hoc viſis & per curiam hìc plenius intellectis omnibus & ſingulis præmiſſis conſiderat' eſt, quòd prædictus E. D. [397] *ducatur per vicecomitem com'* Middleſex, or *per mareſcallum hujus curiæ*, or *per conſtabular' turris* London *uſque mareſcalciam &c.* or *uſque turrim* London, or *uſque gaolam domini regis com' prædicti* (according as the priſoner is in cuſtody,) *Et de inde per medium civitatis* London *directè uſque ad furcas de* Tiburne *trahatur, & ſuper furcas illas ibidem ſuſpendatur, & vivus ad terram proſternatur, & interiora ſua extra ventrem ſuam capiantur (c) ipſoque vivente (d) comburantur, & caput ejus amputetur, & corpus ejus in quatuor partes dividatur, & caput & quateria illa ponantur ubi dominus rex ea aſſignare voluerit.*

(c) *Secreta membra amputentur* is here ſometimes inſerted, *Show. caſes in parliament p.* 187. but it is not of neceſſity, *vide* the ſentence in lord *Derwentwater's* caſe, *Stat. Tr. Vol.* VI. *p.* 16.

(d) Theſe words *ipſoque vivente*, or others tantamount are abſolutely neceſſary, otherwiſe the judgment is erroneous. See 2 *Salk.* 632. *Show. caſes in parliament p.* 127. *Rex verſus Walcot.*

But

But if the priſoner be in the king's bench and the judgment be given in that court, the entry is *quòd prædictus* J. S. *ducatur per prædictum mareſcallum uſque priſonam mareſcalciæ domini regis coram ipſo rege, & de inde ad quendam locum executionis, vocat.* St. Thomas Watringes, *trahatur, & ſuprà furcas ibidem ſuſpendatur*, and ſo forward as in the judgment.

Thus the judgment was enterd againſt *Barkly* a ſeminary prieſt upon an indictment in *Middleſex*, *P.* 38 *Eliz.* upon the ſtatute of 27 *Eliz.* But the judgment againſt a woman in all caſes of high treaſon is to be drawn and burnt. *Co. P. C.* 211.

Upon an indictment of treaſon for counterfeiting the king's coin the judgment is only, as in petit treaſon, *viz. quòd ducatur uſque gaolam domini regis de* Newgate *per vic' com'* Middleſex, *& ab inde uſque ad furcas de* Tiburn *trahatur & ibidem ſuſpendatur, quouſque mortuus fuerit.*

And the judgment againſt a woman is alſo, as in petit treaſon, to be burnt. 25 *E.* 3. 42. *(e)*.

This is agreed of all hands, but as to clipping or impairing of coin [there hath been ſome doubt,] and likewiſe as to counterfeiting of foreign coin made current by proclamation, becauſe theſe are new created treaſons. *Co. P. C. p.* 17.

[398] But yet in caſes of clipping or waſhing made treaſon by the ſtatute of 5 *Eliz. cap.* 11. & 18 *Eliz. cap.* 1. the judgment is now ſettled to be only drawn and hanged, as in caſe of counterfeiting of the coin of the kingdom by 25 *E.* 3. *de proditionibus*, and this was agreed, and accordingly judgment given againſt two *Frenchman*, *Hill*, 25 *Car.* 2. *(f)*, according to the book of *T.* 6 *Eliz. Dy* 230. *b.*

And with this agrees the reſolution of 24 *H.* 8. in juſtice *Spilman*'s reports cited 2 *Co. Inſt. p.* 636. A prieſt drawn and hanged for clipping the king's coin, and yet clipping was not held to be treaſon within the ſtatute of 25 *E.* 3. but made ſo [by the ſtatute of 3 *H.* 5. *cap.* 6. according to the common opinion and the recital of the ſtatute of 5 *Eliz.*] *(g)*, and ſo repeald by the ſtatute of 1 *Mar. cap.* 1. yet even while that ſtatute of 3 *H.* 5. was in force, the judgment was only drawing and hanging in that caſe.

(e) N. Edit. 85. *b.*

(f) Bellew & Norman, 1 *Ven.* 254.

(g) In the original MS. the words in this place are, *By the ſtatutes of* 5 & 18 *Eliz. according to the common opinion and the recital of thoſe two ſtatutes*: but it appears by what follows, that the ſtatute of 3 *H.* 5. was intended here to be mentiond, nor is it recited in the ſtatute of 18 *Eliz.* but only in that of 5 *Eliz.*

And

And upon ſearch of precedents both in the king's bench and at the *Old Baily*, tho ſome precedents were of hanging drawing and quartering for clipping, yet the moſt uſual were only drawing and hanging *(h)*.

And upon the ſame reaſon I think, that in caſe of counterfeiting of foreign coin made current by proclamation, made treaſon by the ſtatute 1 *Mar. cap.* 6. and the clipping or waſhing thereof, likewiſe made treaſon by 5 and 18 *Eliz.* I think there ought to be no other judgment but drawing and hanging, for by the proclamation and the act of 1 *Mar.* it is now become as the coin of this realm, and it were an incongruous thing for a man to be hanged and quartered for counterfeiting foreign coin made current by proclamation by interpretation of the ſtatute of 1 *Mar.* and yet to be only drawn and hanged for counterfeiting the proper coin of the kingdom.

For counterfeiting the great or privy ſeal certainly there was antiently no other judgment but that of petit treaſon, namely drawing and hanging, as appears by the book of 2 *H.* 4. [399] 25. *a. (i)*, and the record of that caſe, tho my lord *Coke* excepts againſt it in *P. C. p.* 15. *ſed de his vide quæ ſupra dixi Part* I. *cap.* 16. *p.* 187.

IV. The judgment in petit treaſon is for a man to be drawn and hanged, for a woman to be drawn and burnt, as alſo in high treaſon, *Co. P. C. p.* 211. for the other judgment is unſeemly for that ſex. *Stamf. P. C. Lib.* III. *cap.* 19. *fol.* 182. *b.*

V. The judgment in all caſes of felony is, *quòd ſuſpendatur per collum, quouſque mortuus fuerit.*

But if a man be outlawd of treaſon or felony, tho there be no other judgment, but *utlegatus eſt per judicium coronatorum*, yet it is of itſelf an attainder and ſubjects the offender to an award thereupon to be made by the court, where he is brought, as is ſuitable to the offenſe, for which he is indicted and outlawd.

And this judgment is as well to be given againſt a nobleman as another in caſe of felony, and cannot be given otherwiſe by the court, or executed otherwiſe by the ſheriff. *Co. P. C. p.* 211 & 52. *(k)*.

VI. The judgment of *peine fort & dure* at this day in caſe of felony is only where the priſoner ſtands mute of malice upon his arraign-

(*h*) *Vide Part* I. *p.* 352.
(*i*) *Clement Peyteniu's* caſe, *vide Part* I. *p.* 181. *in notis*, & *p.* 352.
(*k*) *Vide Part* I. *p.* 501.

ment

ment or will not directly anſwer, for upon challenging above twenty his challenge ſhall be only over-ruled *(l)*, and the trial proceed.

But at common law in all caſes of felony and at this day in petit treaſon, if he challenge thirty-ſix peremptorily, he ſhould have his judgment of penance *(m)*, and this holds as well in an appeal as in an indictment, and as well in caſe of women as men. 2 *Co. Inſt.* 177. *ſuper ſtat. Weſtm.* 1. *cap.* 12.

The entry of the judgment is thus:

Et quæſitum eſt per curiam ab eo qualiter ſe velit inde acquietare, qui dicit, quòd ipſe non vult ſe ſuper aliquam juratam patriæ ponere, niſi ſolummodo in Deum; tunc inſuper dictum eſt ei per curiam hìc, quòd niſi [400] *aliter in hâc parte reſpondeat mori debet, qui dicit, quòd non vult aliter reſpondere in hâc parte niſi ut prius, ideò conſideratˇ eſt, quód idem* R. B. *ducatur ad priſonam mareſcalciæ domini regis coràm ipſo rege, & ibidem nudus præter baccas ſuas ponatur ad terram ſuper dorſum ſuum directè jacens, & foramen in terrâ ſub ejus capite fiat & caput ejus in eodem ponatur, & ſuper corpus ſuum ubi libet ponatur tantum de petris & ferro, quantum portare poteſt & plus, quamdiu vivit, & quòd habeat de pane & aquâ peſſimis & priſonæ ei proximis, & illâ die quâ comedit non bibat, neque illâ die quâ bibit non comedat, ſic vivendo quouſque mortuus fuerit (n).*

And if he ſtands wholly mute, then the entry is thus:

Et allocutus quommodo ſe velit de feloniâ prædictâ acquietare, qui quidem R. *nihil reſpondet, ſed ſe mutum tenet, & ſuper hoc captâ inquiſitione per ſacramentum* 12 *&c. ſi prædictus* R. *loqui poſſit, vel ſi prædictus* R. *prædicto die &c. loquutus fuerit necne, qui dicunt ſuper ſacramentum ſuum, quòd prædictus* R. *loquutus fuit iſto eodem die & benè loqui poteſt ſi velit, ideò idem* R. *ut ipſe qui legem recuſat, hoc eat ad pœnam &c.* ut ſupra. *Catalla ipſius nulla.*

And ſometimes alſo the jury were charged to inquire *ſi malè credatur*, but that was but rarely in caſe of an indictment *(o)*, for the indictment itſelf carries a probability, that he may be guilty when joined with his own wilful refuſing his trial, ſo that he forfeits his goods by ſuch ſtanding mute.

VII. Judgment in petit larciny is only to be whipt, or impriſoned by way of chaſtiſement *(p)*.

(*l*) *Supra p.* 270, 314.
(*m*) *Supra p.* 268, 316.
(*n*) *Vide ſupra cap.* 43. *p.* 319. *Raſt. Entr. fol.* 385. *pl.* 2.
(*o*) *Vide* the caſe of *Thomas de la Hethe ſupra p.* 322. *in notis.*
(*p*) But by ſubſequent ſtatutes the offender may be tranſported. See 4 *Geo.* 1. *cap.* 11. and 6 *Geo.* 1. *cap.* 23. *vide ſupra p.* 388. *in notis.*

VIII. Judg-

VIII. Judgment in miſpriſion of treaſon is forfeiture of all his goods, forfeiture of the profits of his land during his life, and impriſonment during his life *(q)*.

IX. Judgment in theftbote is fine and impriſonment.

4 Blackſ. Com. ch. 29. per tot. 2 Hawk. P. C. ch. 48.

(q) Part I. *p.* 374.

CHAP. LVI. [401]

Concerning giving of judgment, by whom, *and* when.

WHAT courts have juriſdictions in cauſes criminal and capital have been handled before in the beginning of this Part; I am now to conſider when one judge may give judgment upon a conviction before another judge, and how.

The king's bench is the center of all ſubordinate juriſdictions, eſpecially in matters capital.

If *A.* be indicted of felony before juſtices of peace, *oyer* and *terminer*, or gaol-delivery, and be convict by verdict or confeſſion, if the record of the conviction be removed into the king's bench by *certiorari*, and the priſoner alſo be removed thither by *habeas corpus*, that court may give judgment upon that conviction, but there muſt be firſt a filing of the record in the king's bench, and a commitment of the priſoner to the cuſtody of the marſhal, and he muſt be called to ſay what he can, why judgment ſhould not be given againſt him, and thereupon judgment may be given: *vide* 23 *H.* 8. *cap.* 1 & 11. 10 *H.* 4. 9. *a. Coron.* 467.

And indeed there was no other remedy before the ſtatutes of 11 *H.* 6. *cap* 6. & 1 *E.* 6. *cap.* 7. for judgment to be given upon perſons reprieved before judgment, for the former commiſſions are determined by new ones at common law.

But if the conviction were not before the judge of the king's bench, ſo that the offender continued not always in cuſtody of the marſhal or of thoſe that are his bail, but be removed by *habeas corpus* or brought in by proceſs, the party ſo removed may plead he is not the ſame perſon and give ſome diverſity of name, and if the king's attorney

confeſs it, he ſhall be diſcharged and proceſs made out againſt the other perſon, thus it was done in the caſe of *John Apare*, *Lib. placitor' Coron. n.* 7. who was taken upon a *capias utlegat'* and pleaded he was not the ſame perſon.

Or the king's attorney may take iſſue upon it and aver him to be the ſame perſon, and known by one name or the other. 21 *E.* 4. *Surry. Lib. placitor' Coron. placito* 31. *Nicholas Browne*'s caſe.

Or if he anſwers nothing but ſtands mute, it ſhall be inquired whether he be the ſame perſon by inqueſt, before judgment be given againſt him, for he ſhall not be concluded by the return of the ſheriff either upon a *cepi corpus* or *habeas corpus*, if he was not always in cuſtody of the ſame court from the time of his firſt arraignment, *vide accords* 10 *E.* 4. 19. *b.* but if he had been always in cuſtody of the court of king's bench from the time of his arraignment, or had been bailed by the court, and came in and rendered himſelf upon his bail, then no ſuch inquiry ſhall be made upon his ſtanding mute. 10 *E.* 4. 19. *b.*

And that I may ſay it once for all, the ſame law is where a party is outlawd or abjured, and comes by *capias utlegat'* or other proceſs into the king's bench, he ſhall be demanded what he can ſay why execution ſhould not be awarded againſt him upon the record removed, which 7 *H.* 6. 25. *a. B. Coron.* 44. is called an arraignment; if he confeſs himſelf to be the ſame perſon, execution ſhall be awarded; if he deny himſelf to be the ſame perſon and the king's attorney confeſs it, he ſhall be diſcharged; if the king's attorney take iſſue upon it, it ſhall be tried; if the priſoner ſay nothing, it ſhall be inquired by an inqueſt of office whether he be the ſame perſon: *vide* 8 *H.* 4. 3 & 18. *B. Coron.* 22, 23. 10 *E.* 4. 19. *b. M.* 5 *Car. Croke, p.* 176. *Coxe*'s caſe.

If an iſſue be joined in the court of king's bench in an appeal of felony, or in an indictment of treaſon or felony either upon a record originally begun in that court, or removed thither by *certiorari*, the uſual courſe now is to try it at the bar, or if it were removed by *certiorari* out of another county, to remit the record according to the ſtatute of 6 *H.* 3. *cap.* 6. to the juſtices, before whom ſuch [403] indictment was originally taken, with a writ to command them to proceed therein, whether the record was ſo remitted before or after iſſue joined in the king's bench.

But

But many times that court antiently did, and at this day may ſend down the tranſcript to be tried by *niſi prius*, as well in an indictment as an appeal, and upon the return thereof the court may give judgment of death or acquittal, according to the verdict returned: *quod vide ſæpius L.*

But whether they might inquire of abettors there hath been diverſity of opinions, *vide* 2 & 3 *P. & M. Dy.* 120, 121, 131. *b.* but by the better opinion they cannot, 10 *E.* 4. 14. *b.* 4 *Co. Inſt.* 160. nor can they arraign the felon at the ſuit of the king, if the plaintiff be nonſuit in his appeal 22 *E.* 4. 19. *a.* (*).

It hath been held by ſome, that juſtices of aſſiſe and *niſi prius* may by virtue of the ſtatute of 27 *E.* 1. *de finibus cap.* 3. without any other commiſſion deliver the gaol and give judgment of felons, *vide Stamf. P. C. Lib.* II. *cap.* 45. *fol.* 57. *b.* but yet that hath not been uſed, neither is it ſafe to be practiſed without a commiſſion of gaol-delivery: *vide ſtat.* 3 *H.* 5. *ſtat.* 2. *cap.* 7.

But certainly at common law juſtices of *niſi prius* could not give judgment upon an appeal or indictment ſent to them out of the king's bench by *niſi prius* to be tried, no more than in other ordinary civil cauſes, for they have but the tranſcript of the record before them, and their commiſſion is only *ad triandum exitum*, and to remit the tranſcript with the verdict indorſed upon the *poſtea* (†).

But by the ſtatute of 14 *H.* 6. *cap.* 1. juſtices of *niſi prius* have power in all caſes of felony and treaſon to give judgment of acquittal or attainder at the day and place where their inquiſitions, inqueſts, and juries are taken, and then and there to award execution to be made by force of the ſame judgments.

But yet it ſeems this ſtatute gave them not power to inquire of abetters in an appeal, nor to arraign the priſoner upon a nonſuit before them at the king's ſuit, 10 *E.* 4. 14. *b.* 22 [404] *E.* 4. 19. *a.* but this was to be done in the king's bench upon the return of the *poſtea*.

But upon this ſtatute theſe things are to be obſerved.

1. That they might return the *poſtea* into the king's bench, and there, judgment may be given as at common law, for tho the ſtatute gives them power to give judgment and award execution, yet it leaves them power to return the *poſtea*, and takes not away the power of the

(*) *Vide ſupra p.* 41. (†) *Vide ſupra p.* 40.

king's bench to give judgment and award execution upon the *poſtea* returned, as they might have done at common law.

2. That as the priſoner cannot be arraigned nor plead to iſſue in the king's bench, unleſs the record and alſo the priſoner be there, ſo the record itſelf ſtill remains in the king's bench, and only the tranſcript delivered to the judges of *niſi prius* and not the record itſelf, as upon the ſtatute of 6 *H.* 8. yet upon that tranſcript the judges of *niſi prius* may give judgment and award execution by virtue of the ſtatute of 14 *H.* 6. *cap.* 1.

But then the priſoner muſt either be ſent down by *habeas corpus* to the ſheriff of the county, where the *niſi prius* is, in cuſtody, or elſe bailed to appear there, for no inqueſt can be taken by default, or in the abſence of the priſoner in caſes capital.

And if the priſoner be bailed by the king's bench to appear at the *niſi prius*, (as he may,) yet if he appear not, the inqueſt cannot be taken, but only the priſoner called upon his bail, and the default recorded, and ſo upon the return of the *poſtea* new proceſs againſt the priſoner, and alſo againſt his bail.

At common law by granting a new commiſſion of the peace all proceedings before former commiſſioners of the peace were diſcontinued, and if an iſſue were joined, or a perſon convicted, or had judgment, the new commiſſioners could not proceed to trial, judgment, or execution, but all that could be done was to remove the record by *certiorari* and the priſoner by *habeas corpus* into the king's bench, and there to proceed where the juſtices left off.

[405] And to remedy this the ſtatute of 11 *H.* 6. *cap.* 6. was made, whereby it is enacted, "That ſuch proceedings ſhall "not be diſcontinued by ſuch new commiſſion, but the new juſtices "after they have the records before them ſhall have power to con- "tinue the ſame pleas and proceſſes, and the ſame pleas and pro- "ceſſes and all that depend upon them to hear and finally determine, "as the other juſtices might have done, if no new commiſſion had "iſſued.

By virtue of this ſtatute new commiſſioners might not only give judgment upon conviction before former juſtices of peace, but might award execution upon judgments given by the former juſtices, as ſhall be farther ſhewn.

But this ſtatute extended not to commiſſions of *oyer* and *terminer* and gaol-delivery, but only to commiſſions of the peace.

And

And therefore the ſtatute of 1 *E.* 6. *cap.* 7. was made, which among other things enacts, "That where any perſon ſhall be found guilty of "treaſon or any felony, for which judgment of death ſhould be given, "and be reprieved before judgment, new commiſſioners of gaol-deli-"very may give judgment upon ſuch conviction, as the juſtices of "gaol-delivery, before whom he was convicted, might have done.

"And that no manner of proceſs or ſuit made, ſued, or had before "any juſtices of aſſiſe, gaol-delivery, *oyer* and *terminer*, of the peace, "or other the king's commiſſioners ſhall in any wiſe be diſcontinued "by the making and publiſhing any new commiſſion or aſſociation, "or by altering the names of ſuch juſtices or commiſſioners, but that "the new juſtices of aſſiſe, gaol-delivery, and other commiſſioners "may proceed in *every behalf*, as if the old commiſſion and juſtices "and commiſſioners had ſtill remained and continued not altered.

Tho this ſtatute in the firſt part thereof mentions giving of *judgment* upon a perſon convict, yet I take it very clear they may award *execution* upon a party reprieved after judgment by former commiſſioners, for by the ſecond clauſe they may proceed in *every behalf* as the former commiſſioners might have done, and therefore there is little cauſe for the *quære* made touching that point in *Dyer (g)*, [406] yet I have generally obſerved this one rule, that I would never give judgment, or award execution upon a perſon reprieved by any other judge but myſelf, becauſe I could not know upon what ground or reaſon he reprieved him *(h)*

See the references at the end of the ch. next ſupra.

(g) Dyer fol. 165. *a.*

(h) The uſefulneſs of this caution may be ſeen from what is obſerved by Sir *John Hawles* in his remarks on *Corniſh*'s trial, *State Tr. Vol.* IV. *p.* 203. where he relates the caſe of ſome perſons, "Who had been "convicted of the murder of a perſon "abſent barely by inferences from fooliſh "words and actions; but the judge before "whom it was tried was ſo unſatisfied in "the matter, becauſe the body of the "perſon ſuppoſed to be murdered was "not to be found, that he reprieved the "perſons condemned; yet in a circuit "afterwards a certain unwary judge, with-"out inquiring into the reaſons of the "reprieve, ordered execution and the "perſons to be hanged in chains, which "was done accordingly; and afterwards "to his reproach the perſon ſuppoſed to "be murdered appeared alive.

CHAP. LVII.

Concerning executions.

MUCH of what concerns this matter hath fallen in under the former chapter, and therefore I ſhall be brief in it. I ſhall conſider.

1. Who may award execution.
2. In what manner it is to be awarded.
3. By what warrant to be made.
4. By whom it is to be done.
5. In what manner.
6. Concerning reprieves or reſpite of judgment or execution.

I. As to the firſt of theſe it hath been diſpatched in the former chapter, they that may give judgment may award execution.

And therefore the court of king's bench upon on *habeas corpus* and a *certiorari* to remove the body of a priſoner and the record of his out-
[407] lawry or attainder before them may award execution upon him. *M.* 5 *Car. B. R. Croke p.* 176. *Coxe*'s caſe, *vide quæ dicta ſunt ſupra cap.* 56.

II. Touching the manner of it there be certain caſes, wherein tho the priſoner be attainted, yet he is not to have execution awarded againſt him, till he be demanded what he can ſay why execution ſhould not be awarded againſt him, *viz.*

1 Where a woman is convicted and attaint by judgment, tho ſhe remains always in cuſtody, ſo that *conſtat de perſonâ*, yet execution is not to be awarded againſt her till ſhe be demanded what ſhe can ſay why execution ſhould not be awarded, for ſhe may allege pregnancy, which, tho it be no cauſe to reſpite judgment, is a good cauſe to reſpite execution.

2. Where the judgment was given at a former ſeſſion, for in that interval between this and the former ſeſſion he may have a pardon to plead.

3 Where the priſoner hath not always remained in the cuſtody of the court, where he firſt had judgment, for in that caſe, if he be brought in by a *capias* by the ſheriff, he ſhall not be concluded, but that

that he may ſay he is another perſon, and iſſue may be taken upon it, and that iſſue ſhall be tried before he ſhall have execution awarded againſt him, and if he ſtands mute, it ſhall be inquired whether it be of malice. 10 *E.* 4. 19. *b.* Again,

4. If judgment were given in another court, or by other juſtices, as in caſe where a record of an attainder comes from another court by *certiorari* into the king's bench, or if a man be outlawed for felony, and the outlawry either removed or returned into the king's bench, and the felon brought in by *habeas corpus* or *capias utlegat'* he ſhall be demanded what he can ſay why execution ſhould not be awarded againſt him, which 7 *H.* 6. 25. *a.* is called an arraignment, for in theſe caſes, 1. He ſhall not be concluded by the return of the ſheriff from ſaying he is not the ſame perſon that was outlawed, and upon that, iſſue may be joined, and it ſhall be entered of record and tried (*), unleſs the king's attorney confeſſeth it: *vide ſupra cap.* 56. 2. He may have the king's pardon to plead. 3. In caſe of an outlawry he may aſſign error in the outlawry, and pray reſ- [408] pite to purchaſe a writ of error, and the court uſually in ſuch a caſe prefixeth him a day, and gives him reſpite to purchaſe a writ of error, and in the mean time remits him to the marſhal and reſpites his execution.

Thus it was done in the caſe of *David Dene*, *H.* 16. *E.* 4. *Placit. cor. n.* 57. who was taken by a *capias utlegat'* returnable in the king's bench, *Et ſtatim quæſitum eſt ab eo, ſi quid pro ſe habeat vel dicere ſciat, quare ad executionem de eo ſuper utlegariâ prædictâ procedi non debet.*

He alleged, that at the time of the outlawry pronounced he was in priſon in the tower of *London*, *Et ſtatim quæſitum eſt ab eo per cur' ſi habeat aliquid breve de errore necnè, qui dicit quòd non; ideò injunctum eſt eidem* David *ex gratiâ per curiam, quòd ipſe breve de errore in hâc parte habeat coràm domino rege in octabis* Hillarii, and upon his failure a ſecond and a third peremptory day was aſſigned him, at which day he ſhewed to the court a writ of error and aſſigned the ſame error in fact, and iſſue was taken upon it, and a *venire facias* returnable in *Mich.* term, the priſoner ſtill remaining in cuſtody, and execution reſpited till the iſſue tried.

But it is to be noted, that he that will delay his execution by alleging error in the outlawry and praying liberty to purchaſe a writ of error, muſt allege error in fact, or error in law upon the outlawry to obtain

(*) *Kel.* 13. The caſe *Barkſtead*, *Okey* and *Corbet*.

that reſpite of execution before his writ of error be brought, for if the court be ſatisfied, that it is merely a pretenſe, they may chuſe, whether they will allow him a day to ſue forth a writ of error, but may award execution preſently. 1 *H.* 7. 13. *b. John Collin's* caſe, *vide Co. P. C. p.* 212.

If either the priſoner himſelf, or any as *amicus curiæ*, inform the court of any error in the outlawry, the court *ex officio* muſt prefix him a day to purchaſe his writ of error, and in the mean time reſpite execution, but if he purchaſe not his in convenient time, execution ſhall be awarded.

III. By what warrant the execution is to be made.

[409] In the king's bench there is no other writ nor warrant but an award of the court upon the judgment, *viz. Et dictum eſt mareſcallo, quòd faciat executionem periculo incumbente*, for in the king's bench the marſhal is the immediate officer of the court to make execution in theſe caſes, for that court never gives judgment againſt any, that is not *in cuſtodiâ mareſcalli* in caſes capital, and ſo are all the antient and modern precedents, *vide* 3 *H.* 7. 7. *a. M.* 5 *Car. B. R. Cro. p.* 176. *Coxe's* caſe, and ſo was directed by the court upon view of the precedents themſelves mentiond in my lord *Coke's* book of *Entries*, *Tit. Indictment per totum*, *P.* 25 *Car. B. R.* in *Brown's* caſe *(a)*.

When an attainder of felony or treaſon is againſt a nobleman, the judgment is pronounced by the lord high ſteward, and the warrant for execution is under his precept and ſeal in his own name. *Co. P. C. p.* 31.

When judgment is given by commiſſioners of *oyer* and *terminer*, regularly the precept for execution ſhould iſſue to the ſheriff in the names and under the hands and ſeals of three of the commiſſioners, whereof one to be of the *quorum*, before whom judgment was given, *Co. P. C. p.* 31. but by uſage (as far as I can learn of late times,) it is now done only by leaving a calendar with the ſheriff declaring their judgments (*).

When a man hath judgment of death before juſtices of gaol-delivery, the regular way is, either to iſſue a precept to the ſheriff, in the names of the commiſſioners, reciting the judgment, and commanding execution to be done, or otherwiſe by an award upon the record, *Et dictum eſt per curiam hìc vicecomiti comitatûs prædicti, quòd faciat executionem periculo incumbente.*

(*a*) 3 *Keb.* 193. 1 *Vent.* 243. (*) *Supra p.* 31.

But

But of latter time there is no more done, but after judgment entered the judge ſubſcribes a calendar in paper, directing the ſeveral judgments of deliverance of the parties acquitted, or the execution of the parties condemned.

Only *Rolle* would never ſubſcribe any ſuch calendar (*), but would command the ſheriff openly in court to take notice [410] of the judgments and orders of what kind ſoever, and command the ſheriff to execute them at his peril.

The reaſon of the difference between juſtices of gaol-delivery and of *oyer* and *terminer* is this; all the precepts, that iſſue at a ſeſſions of *oyer* and *terminer*, as for a *venire facias tales*, &c. ought in true order of law to be by precept in the names and under the ſeals of the juſtices, but the precepts by juſtices of gaol-delivery need not be otherwiſe than by a ſimple award upon the roll: *Ideò præceptum eſt vicecomiti, quòd venire faciat hìc &c.*

IV. By what officer execution is to be made

Regularly the officer, that is to make the execution, is that officer in whoſe cuſtody by law the priſoner is at the time of the judgment given, for into his cuſtody he is to be remanded after judgment pronounced, and there to ſtay till judgment executed.

Therefore, where judgment is given at the ſeſſions of gaol-delivery, the execution is to be made by the ſheriff, or his under-ſheriff or deputy, for regularly he is in his cuſtody ordinarily, but if the priſoner be in the *Tower* of *London*, (which is oftentimes the caſe of perſons indicted for great treaſons,) and he be arraigned before juſtices of *oyer* and *terminer*, he is commonly brought before them by a precept to the conſtable of the *Tower*, (which is an exempt priſon from that of the ſheriff,) and if he be convict and attaint, he is commonly remitted thither, and the precept or warrant for execution muſt go to the lieutenant or conſtable of the *Tower*, for it is purſuant to the judgment, *viz. quòd prædictus* E. *ducatur per præfatum locumtenent' turris* London *uſque ad dictum turrim, & deinde per medium civitatis* Lond. *directè trahatur uſque furcas de* Diburn &c. And thus it was done in the caſes of the traitors at the powder-treaſon 3 *Jac.* But uſually a command or precept is made to the ſheriffs of *London* and *Middleſex* to be aſſiſting to the lieutenant.

If the priſoner be arraigned in the king's bench either for treaſon or felony, he is or ought to be always firſt committed [411]

(*) *Vide Part* I, *p.* 501.

to the marſhal, and by him is to be brought to the bar upon his trial and judgment, and to him he is to be remitted after judgment till execution, and whereſoever the felony or treaſon was committed, yet the marſhal is to make execution, for he is in this caſe the immediate officer to the court, and the priſoner is not in the cuſtody of any ſheriff, but of the marſhal.

And therefore the entry in this caſe of felony is, *Et dictum eſt mareſcallo, Quòd faciat executionem periculo incumbente.*

But in caſe of high treaſon the marſhal is mentioned in the very judgment, *viz. quòd ducatur per præfatum mareſeallum uſque priſonam mareſcalli mareſcalliæ domini regis, & deinde uſque ad furcas ſancti* Thomas Watrings *trahatur & ibidem ſuſpendatur &c.* thus is the entry of the judgment, *P.* 44 *Eliz.* againſt *Patrick Dalph B. R. T.* 43 *Eliz. B. R.* againſt *John Tipping, T.* 39 *Eliz. B. R.* againſt *John Jones.*

And in the caſe of *Brown P.* 25 *Car.* 2. that had judgment in the king's bench for felony upon the ſtatute of 3 *H.* 7. for an offenſe committed in *Middleſex*, and there preſented and convicted, the execution was made by the marſhal in the uſual place of execution in the county of *Surrey (b).*

Only in theſe and the like caſes the court gives order to the ſheriff of the county, where the execution is made, to be aſſiſting to the marſhal.

V. As to the manner of the execution, as it is to be done by the proper officer; ſo it is to be done purſuant to the judgment.

The judgment in caſe of felony is, *ſuſpendatur per collum, quouſque fuerit mortuus.*

The ſheriff may not alter the execution, if he doth, it is felony, and ſome ſay murder. *Co. P. C. p.* 211, 217. *(c).*

[412] If the party be hanged and cut down and revive again, yet he muſt be hanged again, for the judgment is to be hanged by the neck *till he be dead (d).*

The judgment in high treaſon is complicated, *viz.* hanging, beheading imbowelling, *&c.*

The king may pardon all but the beheading, for this is part of the judgment, the judgment is not altered, but part of it remitted. *Co. P. C. p.* 52.

But this muſt be under the great ſeal. *Co. P. C. p.* 31.

2 Hawk. P. C. ch. 51. 4. Black. Com. ch. 32.

(b) The like was done in *Althoe's* caſe *T.* 9 *Geo. I. B. R. vide ſupra in notis Part I.* 404.

(c) Vide Part I. cap. 42. *p.* 501. *in notis.*

(d) V. de Choron. 335.

CHAP.

CHAP. LVIII.

Concerning reprieves *before or after judgment.*

REPRIEVES, or ſtays of judgment or execution are of three kinds, *viz.*

1. *Ex mandato regis*, thus we find it done in 3 *H.* 7. 7. *a.* tho *ore tenus*, or by ſome meſſage, or by ſending his ring, but at this day it is ordinarily ſignified by the privy ſignet, or by the maſter of requeſts.

II. *Ex arbitrio judicis.* Sometimes the judge reprieves before judgment, as where he is not ſatisfied with the verdict, or the evidence is uncertain, or the indictment inſufficient, or doubtful whether within clergy; and ſometimes after judgment, if it be a ſmall felony, tho out of clergy, or in order to a pardon or tranſportation. *Crompt. Juſt.* 22. *b.* and theſe arbitrary reprieves may be granted or taken off by the juſtices of gaol-delivery, altho their ſeſſions be adjourned or finiſhed, and this by reaſon of common uſage. *Dy.* 205. *a.*

III. *Ex neceſſitate legis*, which is in caſe of pregnancy *(e)*, [413] where a woman is convict of felony or treaſon. *Co. P. C.* 17. *Stamf. P. C. Lib.* III. *cap. ult.*

1. *Enſeinture* is no ground to ſtay judgment, and therefore if a woman convict be aſked what ſhe can ſay why judgment ſhould not be given, *enſeinture* is no cauſe of ſtay; but when judgment is given, ſhe ought again to be demanded why execution ſhould not be made, and there ſhe may allege *enſeinture in retardationem executionis.* 22 *Aſſiz.* 17. *Coron.* 180.

2. *Enſeinture* is no cauſe to ſtay execution, unleſs ſhe be *enſeint* with a *quick* child, or which is all of one intendment, if ſhe be *quick* with child. 22 *Aſſiz.* 71. *Coron.* 180.

3. When this is objected in delay of execution, it ought to be inquired of by a jury of twelve diſcreet women, and their verdict is to be recorded, and according as they give it the execution is to proceed or ſtay. *Ibid.*

4. This privilege is to be allowd but once, for if ſhe be a ſecond time with child, ſhe ſhall not thereby delay execution, but the gaoler

(e) Thus it was by the civil law. *Dig. Lib.* XLVIII. *tit.* 19. *de pœnis l.* 3. and alſo by the laws of *William* the conqueror *l.* 35. *vide Bract. de Coron. cap.* 32. §. 11. *Fleta Lib.* I. *cap.* 38. §. 15. *vide Part* I. *p.* 368.

ſhall

ſhall be puniſhed for not looking better to her. 12 *Aſſiz.* 11. *Coron.* 168. 23 *Aſſiz.* 2. *Coron.* 188.

If ſhe be *priviment enſeint* and not *quick* with *child*, and only ſo found by the jury of women, that is no cauſe of reſpite; but I have rarely found but the compaſſion of their ſex is gentle to them in their verdict, if there be any colour to ſupport a ſparing verdict.

6. This reprieve is or ought to be a matter of record, and therefore I have always taken it, that altho ſhe be delivered before the next ſeſſions, yet the ſheriff ought not to make execution after her delivery, neither ought the judge to give ſuch direction upon the reprieve granted, but at the next ſeſſion the woman muſt again be called to ſhew what ſhe can ſay why execution ſhould not now
[414] be made, and ſhe is to be heard 12 *Aſſiz.* 11. *Coron.* 168. *ameſne al barre*, for it may be the *tempus præſtitutum* for her delivery ſince the laſt ſeſſions is not yet paſt, and ſhe muſt ſtay till then, or it may be ſhe hath ſince had the king's pardon, which the ſheriff cannot allow nor judge of.

And therefore the books tell us, that after her delivery ſhe was brought to the bar again to ſhew what ſhe could ſay why execution ſhould not be made; this bringing to the bar muſt needs be at a ſecond or following ſeſſions. 12 *Aſſiz.* 11. *Coron.* 168. 22 *E.* 3. *Coron.* 253.

The End of the Second Volume.

A

TABLE

OF

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In the firſt *Part* (through miſtake) after page 146 follows a repetition of the pages 143*, 144*, 145*, 146*, which are diſtinguiſhed by aſteriſms both in the book at large, and in the Table; ſo in the ſecond *Part* after page 156 enſues an iteration of page 149*, and of the ſucceſſive numbers to 157 excluſive, which iteration or repitition is alſo pointed out by aſteriſms, as well in the Table, as in the book.

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If one expoſe an infant in the cold to deſtroy it, or charge pariſh, conſtable may take him and put him in the ſtocks. ib.
If aſſaulted, tho in his own caſe, may impriſon party and carry him to gaol. ib.
But for opprobrious words, or a general hindrance of him to ſummon trained bands to attend mayor of *London* on his precept, held he could not juſtify impriſoning, but ought to have brought party to a juſtice. ib.
What may be done by conſtable, may be done by his deputy; for by law he may make a deputy, who within 7 *Jac.* may plead general iſſue. ib.
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If a felony done, *A.* ſuſpects *B.* on probable grounds, and acquaints conſtable, and requires his aid, conſtable may apprehend *B.* tho ſuſpicion ariſe in *A.* firſt. ib.

But *A.* ought to be preſent. ib.

He ought alſo to inquire and examine circumſtances and cauſes of ſuſpicion of *A.* which tho he cannot do on oath, yet ſuch information may make it conſtable's ſuſpicion. ii. 91, 92

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Sometimes recognizance ſimple, with a condition added for his appearance, and ſometimes condition contained in body of recognizance. ib

When any is bailed for any miſdemeanor by *B. R.* either on return of *habeas corpus*, or otherwiſe, the return or record ought to be firſt filed, and a *committitur mareſcallo* entered, and then bail taken. *Page* ii. 126, 127

All bailed in *B. R.* are *de facto*, or ſuppoſed in law to be *in cuſtodiâ mareſcaili*. ii. 127

Such bail not only a recognizance in a ſum certain, but alſo real bail, and they are his keepers, and, if cauſe, are puniſhable by fine beyond the ſum mentioned, and may reſeiſe priſoner, if they fear his eſcape, or render him in their own diſcharge. ii. 126, 127

Regularly, in all offenſes againſt common law or ſtatutes, that are below felony, offender bailable, except after judgment, or bail be ouſted by ſtatute ii. 127

What ſtatutes relate to bailing offenders ii. 127

Who antiently were principally concerned in bailing them. ii. 127, 128, 136

Who bailable by common law, or not. ii. 128, 129

Expoſition on 3 *E.* 1. ii. 127 *to* 136

B. R. may bail in any caſe whatſoever, either in treaſon or murder, but this diſcretionary, not *de jure*. ii. 129, 148

Whereon bail may be taken by *B. R. viz.* on original indictment, *&c.* ii. 129

One found guilty of homicide *ſe defendendo*, juſtices of *gaol-delivery* may certify it into chancery, that he may ſue his pardon on courſe, and may bail him till next ſeſſions. ib.

They on inquiſition before coroner finding it *ſe defendendo* ſpecially, may bail party till next ſeſſions to procure ſuch pardon. ii. 130

They may in the interval of the ſeſſion bail a convict of manſlaughter having a pardon to plead, to another ſeſſions ib.

But if one be convict on trial againſt opinion of the judge, judge cannot bail him to ſue his pardon. ii. 130

While court adviſeth, whether convict within clergy, he is not bailable. ii. 130, 131, 132

One

One indicted of murder at a ſeſſions of *gaol-delivery* prays his trial, but proſecutor for *king* is not ready: on cauſe ſhewn, juſtice of *gaol-delivery* may bail. ii. *Page* 131

One arreſted by *king*'s perſonal command, not bailable on writ *de homine replegiando*, yet by *B. R.* on chancery on an *habeas corpus*. ib

Such a mandate under the great ſeal, void ib

Common writs *de homine replegiando*, or *de manucaptione* directed to ſheriff ii. 132

Some crimes not bailable for the heinouſneſs, other for the notoriety of them ib

Perſons outlawed not bailable by 3 *E.* 1. ib

If an outlaw of felony be taken on a *capias utlegatum*, and plead in avoidance of outlawry, or bring error to avoid it, *B. R.* may bail, whether outlawry on appeal or indictment ii. 132, 133

If one be indicted or appealed for a bailable offenſe, indictment or appeal hinders not his bailment; *vide* where not allowed till he had pleaded to the indictment ii. 133

If one be indicted before juſtices of a higher juriſdiction; as before juſtices of *oyer* and *terminer*, he cannot be bailed by juſtices of peace ib

Perſons having abjured for felony, not bailable ib

Taken in the *mainouvre* not bailable, but that is intended of thief himſelf ib

Felons breaking priſon, not bailable ib

Nor notorious thieves; herein common fame may be oppoſed againſt their bailing, unleſs they ſhew reaſonable evidence to prove their innocence ib

Nor perſons approved, except approver be dead, or hath waved his appeal, or perſon accuſed be of good fame ib

Nor perſons arreſted for *arſon* ii. *Page* 133, 134

Nor for falſifying king's coin ii. 134

Nor for counterfeiting *king*'s great or privy ſeal ib

Nor one excommunicate, unleſs for a temporal cauſe, and then on a prohibition granted, he may not only be bailed, but delivered, or on an appeal, and a ſpecial writ *de cautione admittendâ*, which if not obeyed by the ordinary, a ſpecial writ may iſſue for his enlargement ii. 134

Nor one impriſoned for ſome open miſdeed; as if *A.* dangerouſly wound *B.* he may be impriſoned till it be known, whether party will die or live, and regularly, not bailable till danger appear to be over ib

Nor priſoner for treaſon, that toucheth the *king*, whether indicted or not ib

But all theſe crimes are bailable by *B. R.* ib

Who bailable by ſheriff by 3 *E.* 1. ii. 134, 135

Perſons indicted before him of larceny, if of good fame ii. 134

Or impriſoned for a light ſuſpicion ib

Or indicted for petit larceny ib

Or accuſed of receiving felons ib

Or of commandment, force, or aid to felony done ib

Regularly in all felonies, even murder, acceſſary bailable, till principal attaint ii. 135

But principal once attaint, and then acceſſary taken, he ſhall not be bailable till he hath pleaded to indictment, but after plea pleaded he ſhall ib

One indicted for offenſe, wherefore he ought not to loſe life or member, bailable, ſave for offenſes againſt *acts* outling bail ib

One appealed by an approver ſince dead, bailable ib

If tenor of *mittimus* be to detain one without bail or mainprize; yet