Historia Placitorum Coronæ.

THE

HISTORY

OF THE

Pleas of the Crown.

By SIR MATTHEW HALE,

LORD CHIEF JUSTICE OF THE COURT OF KING'S BENCH.

PUBLISHED FROM THE ORIGINAL MANUSCRIPT

By SOLLOM EMLYN, of Lincoln's-Inn, Esq.

FOR THE

WITH

ADDITIONAL NOTES AND REFERENCES TO MODERN CASES CONCERNING THE PLEAS OF THE CROWN.

By GEORGE WILSON, SERJEANT AT LAW.

A NEW EDITION.

AND

AN ABRIDGMENT OF THE STATUTES RELATING TO FELONIES CONTINUED TO THE PRESENT TIME, WITH NOTES AND REFERENCES,

By THOMAS DOGHERTY, *Esq.*

OF CLIFFORD'S-INN.

In Two Volumes.

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1800.

ADVERTISEMENT.

THE former Edition of this truly valuable Work, by Mr. SERJEANT WILSON, *having been long out of print, induced the Publiſhers to ſend it again to the preſs. The additional notes and references to modern caſes concerning the* PLEAS OF THE CROWN, *which were inſerted in the margin of the former Edition, are placed at the end of each Chapter in the preſent; and an Abridgment of thoſe Statutes relating to Felonies, which have been enacted ſince the firſt publication of the Work, to the preſent time, is introduced after the* Addenda in Notis, *at the end of the firſt volume, in order to prevent any derangement of the original paging.*

TO THE RIGHT HONOURABLE

SIR JOSEPH JEKYLL, KNT.

MASTER OF THE ROLLS,

And One of His Majeſty's Moſt Honourable Privy-Council.

SIR,

AS it is to you that the Public are indebted for reſcuing this valuable work from the obſcurity wherein it hath long lain, the preparing of which for the preſs you were pleaſed to commit to my care, I thought it became me to inſcribe your name on that, to which you are ſo juſtly entitled: nor know I any to whom it could with greater propriety be addreſſed, than to one who bears ſo near a reſemblance to the Author, in thoſe great and good qualities for which he was ſo deſervedly eſteemed.

An unblemiſhed integrity and upright conduct in every character of life, whether as a private perſon, a ſenator, or judge; a generous frankneſs and open ſincerity in converſation; an unalterable adherence in all ſtations to the principles of civil and religious liberty, accompanied with a ſerious regard to true piety and virtue; a firm attachment to our conſtitution in times of the greateſt difficulty and danger; a diſintereſted zeal for the welfare of mankind, manifeſted by

unwearied labours for the public good, uninfluenced by the ſpirit of a party, or any ſiniſter motive, are excellencies which no leſs eminently diſtinguiſh you than they did the author of this treatiſe; and as they procured him ſuch a laſting veneration and eſteem, ſo while the ſame cauſes are productive of the ſame effects, they will in like manner tranſmit your memory to after-times with honour and renown.

To enlarge upon this ſubject, how agreeable ſoever to others, would, I know, be offenſive to you, who are more regardful of the approbation of your own mind, than any outward applauſes, and while you are intent upon really being and doing good, are no leſs ſtudious to avoid all oſtentatious ſhews of it. I ſhall, therefore, only add, that I am,

SIR,

With great reſpect,

Your Honour's,

Moſt obedient,

Humble Servant,

SOLLOM EMLYN.

THE

PREFACE.

THE following treatiſe being the genuine offspring of that truly learned and worthy judge Sir *Matthew Hale (a)*, ſtands in need of no other recommendation, than what that great and good name will always carry along with it.

Whoever is in the leaſt acquainted with the extenſive learning, the ſolid judgment, the indefatigable labours, and above all the unſhaken integrity of the author, cannot but highly eſteem whatever comes from ſo valuable an hand.

Being brought up to the profeſſion of the law, he ſoon grew eminent in it, diſcharging his duty therein with great courage and faithfulneſs; and tho he lived in critical times, when diſputes ran ſo high between king and parliament, as at laſt broke out into a civil war, yet he engaged in no party, but carried himſelf with ſuch moderation and evenneſs of temper, as made him loved and courted by all.

It was this great and univerſal eſteem he was then in, that made *Cromwel* ſo deſirous to have him for one of his judges; which offer he would willingly have declined. Being preſt by *Cromwel* to give his reaſon, he at laſt plainly told him, that he was not ſatisfied with the lawfulneſs of his authority, and therefore ſcrupled the accepting any commiſſion under it; to which *Cromwel* replied, that ſince he had got the poſſeſſion of the government, he was reſolved to keep it, and would not be argued out of it; that however it was his deſire to rule according to the laws of the land, for which purpoſe he had pitched upon him as a perſon proper to be employed in the adminiſtration of juſtice; yet

(a) He was born at *Alderley*, in *Glouceſterſhire*, *Nov.* 1, 1609.

Was entered at *Magdalen-Hall*, in *Oxford*, in the 17th year of his age.

Admitted of *Lincoln's-Inn*, *Nov.* 8, 1629.

Made a judge of the court of *Common Pleas*, 1653.

Lord Chief Baron of the Court of *Exchequer*, *Nov.* 7, 1660.

And at laſt Lord Chief Juſtice of the court of *King's Bench*, *May* 18, 1671.

Which place he reſigned *Feb.* 20, 1675-6.

And died the *Chriſtmas* following, *Dec.* 25, 1676.

if they would not permit him to govern by red gowns, he was reſolved to govern by red coats.

Upon this conſideration, as alſo of the neceſſity there at all times is, that juſtice and property ſhould be preſerved, he was prevailed with to accept of a judge's place in the court of common-pleas, wherein he behaved with great impartiality, conſtantly avoiding the being concerned in any ſtate-affairs; and tho for the firſt two or three circuits he ſat indifferently on the plea-ſide, or the crown-ſide, yet afterwards he abſolutely refuſed to ſit on the crown-ſide, thinking it the ſafer courſe in ſo dubious a caſe.

But notwithſtanding his diſlike to *Cromwel*'s government, yet this did not drive him, as it did ſome others, into the extremes of the contrary party; for upon the reſtoration, of which he was no inconſiderable promoter, he was not for making a ſurrender of all, and receiving the king without any reſtrictions; on the contrary, he thought this an opportunity not to be loſt for limiting the prerogative, and cutting off ſome uſeleſs branches, that ſerved only as inſtruments of oppreſſion; for which purpoſe he moved, as biſhop *Burnet* relates *(b)*, "That a committee might "be appointed to look into the propoſitions that had been made, and "the conceſſions that had been offered by the late king, and from "thence to digeſt ſuch propoſitions, as they ſhould think fit to be ſent "over to the king."

This motion was ſeconded, and tho through general *Monk*'s means it failed of ſucceſs, yet it ſhewed our author's tender regard for the liberties of the ſubject, and that he was far from being of a mind with thoſe, who looked on every branch of the prerogative as *jure divino* and indefenſible.

But notwithſtanding this attempt, which ſhewed he was not cut out for ſuch compliances, as uſually render a man acceptable to a court, yet ſuch was his unblemiſhed character, that it was thought an honour to his majeſty's government to advance him firſt to the ſtation of Lord Chief Baron, and afterwards to that of Lord Chief Juſtice of the king's bench; nor indeed could ſo great a truſt be lodged in better hands.

When he was firſt promoted, the Lord Chancellor *Clarendon*, upon delivering to him his commiſſion, told him, among other things, "That "if the king could have found out an honeſter or fitter man for that "employment, he had not advanced him to it, and that he had "therefore preferred him, becauſe he knew none that deſerved ſo "well *(c)*."

(b) *Burnet*'s hiſt. of own times, *Vol.* I. p. 68.

(c) *Burnet*'s life of *Hale*, *Edit.* 1682, p. 53.

He

He behaved in each of theſe places with ſuch uncorrupt integrity, ſuch impartial juſtice, ſuch diligence, candor, and affability, as juſtly drew the chief practice after him, whitherſoever he went; he conſtantly ſhunned not only the being corrupt, but every thing which had any appearance, or might afford the leaſt ſuſpicion of it; he was ſincerely bent on diſcovering the truth and merits of a cauſe, and would therefore bear with the meaneſt counſel, ſupply the defects of the pleader, and never take it amiſs, when ſumming up the evidence, to be reminded of any circumſtance he had omitted; for being in a high degree poſſeſſed of that qualification ſo peculiarly neceſſary to a judge, I mean patience (without which the moſt excellent talents may become inſignificant), no conſiderations of his own convenience could prevail with him to hurry over a cauſe, or diſpatch it without a thorough examination; for which reaſon he made it a rule, eſpecially upon the circuits, to be ſhort and ſparing at meals, that he might not either by a full ſtomach unfit himſelf for the due diſcharge of his office, or by a profuſe waſte of time, be obliged to put off, or precipitate the buſineſs that came before him.

He was a great lamenter of the diviſions and animoſities which raged ſo fiercely at that time among us, eſpecially about the ſmaller matters of external ceremonies, which he feared might in the end ſubvert the fundamentals of all religion: and tho he thought the principles of the non-conformiſts too narrow and ſtrait-laced, yet he could by no means approve the penal laws which were then made againſt them; he knew many of them to be ſober, peaceable men, who were well affected to the government, and had ſhewn as much diſlike as any to the late uſurpation, and therefore he thought they deſerved a better treatment; beſides, he looked on it as an infringement on the rights of conſcience, which ought always to be held ſacred and inviolable, and therefore uſed to ſay, that the only way to heal our breaches was *a new act of uniformity*; for which purpoſe he concurred with Lord Keeper *Bridgman* and Biſhop *Wilkins*, in ſetting on foot a ſcheme for the comprehenſion of the more moderate diſſenters, and an indulgence towards others, and drew the ſame up into the form of a bill, altho by a vote of the houſe of commons it was prevented from being laid before the parliament.

Tho by this means he was hindered from obtaining a repeal of thoſe laws, yet could he never be brought to give any countenance to the execution of them. I have heard it credibly related, that once when he was upon the circuit, there happened to be a grand jury, who thought to make a merit of preſenting a worthy peaceable non-conformiſt, that lived in their neighbourhood: upon this occaſion our

judge

judge could not avoid reprimanding them for their ill-placed zeal, which vented itſelf this way, while no notice was taken of the prophaneneſs, drunkenneſs, and other immoralities, which abounded daily amongſt them; in ſhort, he told them, that if they were reſolved to perſiſt, he would remove the affair to *Weſtminſter-Hall*, and if he could not then prevail to have a ſtop put to it, he would reſign his place; for he had told the king, when he firſt accepted it, that if any thing was preſſed upon him, which was againſt his judgment, he would quit his poſt.

He always retained a ſerious impreſſion of religion, and in particular was a punctual obſerver of any vow or engagement he had laid himſelf under. Having in his younger days on a particular occaſion made a vow never to drink an health again, he could never be prevailed on upon any conſideration to diſpenſe with it, altho drinking healths was then grown to be the faſhionable loyalty of the times.

And thus in every character of life he was a pattern well worthy of imitation: in ſhort, he was a public bleſſing to the age he lived in, and not to that only, but by his bright and amiable example to ſucceeding generations; for as a pattern of virtue and goodneſs will always be a ſilent, tho ſharp reproof to thoſe who deviate from it, ſo to noble and generous minds it will not fail of being a mighty ſpur and incentive to the imitation of it, and by that means leave a real and laſting, tho ſecret, influence, behind it.

As he juſtly merited the eſteem of all, ſo in particular he has well deſerved of the profeſſion of the law, to which he was ſo ſhining an ornament; he contributed more by his example to the removal of the vulgar prejudices againſt them, than any argument whatever could do.

The great Archbiſhop *Uſher* had entertained ſome prejudices of that kind, but by converſation with our author and the learned *Selden*, he was convinced of his miſtake; our author declaring, "That by his "acquaintance with them, he believed there were as many honeſt "men among the lawyers proportionably, as among any profeſſion of "men in *England*."

Never was the old monkiſh maxim, *Bonus Juriſta malus Chriſta*, more thoroughly confuted, than by his example. He demonſtrated by a living argument, how practicable it was to be both an able lawyer and a good chriſtian; indeed he ſaw nothing in the one that was any way incompatible with the other, nor did he think, that an unaffected piety ſat with an ill grace on any, be his ſtation never ſo high, or his learning never ſo great; for tho he diligently applied himſelf to the buſineſs of his profeſſion, yet would he never ſuffer it ſo to engroſs his time as to leave no room for matters of a more ſerious concernment, as

may

may appear from the many tracts he has wrote on moral and religious ſubjects.

For this reaſon, when he found the decays of nature gaining ground upon him, he could no longer be prevailed with to ſuſpend the reſolution he had taken to reſign his place; that after the example of that great emperor *Charles* V. he might have an interſtice between the buſineſs of life and the hour of death *(d)*.

No wonder then that one ſo great, ſo good, ſhould be loved and eſteemed while living, ſhould be revered and admired when dead; no wonder the king ſhould be loth to part with him, who had been ſuch a credit to his government; tho had he held his place ſome few years longer, ſuch a ſcene of affairs did then open, as in all likelihood would have greatly diſtreſſed him how to behave, as well as the court how to get rid of one, who could not have been removed without great reproach, nor continued without great obſtruction to the violent meaſures that were then purſued.

But it is time to ſtop, for I mean not to write the hiſtory of his life; this would require a volume of itſelf, and is long ago performed by an able hand *(e)*; I ſhall therefore only ſubjoin his character, as drawn by that learned prelate, and other eminent cotemporaries, by which it will appear, that future times cannot outgo his own in the veneration and eſteem they bore him.

The Biſhop expreſſes it in ſhort thus: "That he was one of the "greateſt patterns this age has afforded, whether in his private de- "portment as a chriſtian, or in his public employments, either at the "bar or on the bench *(f)*;" having given it more at large *(g)* in the words of a noble perſon, whom he ſtyles one of the greateſt men of the profeſſion of the law *(h)*: "he would never be brought to diſ- "courſe of public matters in private converſation; but in queſtions of "law, when any young lawyer put a caſe to him, he was very com- "municative, eſpecially while he was at the bar: but when he came "to the bench, he grew more reſerved, and would never ſuffer his "opinion in any caſe to be known, till he was obliged to declare it "judicially; and he concealed his opinion in great caſes ſo careſully, "that the reſt of the judges in the ſame court could never perceive it: "his reaſon was, *becauſe every judge ought to give ſentence according to "his own perſuaſion and conſcience, and not to be ſwayed by any reſpect or "deference to another man's opinion*: and by this means it happened

(d) Inter vitæ negotia & mortis diem oportere ſpatium intercedere. Strada de bello Belgico, Vol. I. *ſub anno* 1555.
(e) Bp. *Burnet.*
(f) p. 218.
(g) p. 172.
(h) Suppoſed to be the then earl of *Nottingham.*

"ſometimes,

" ſometimes, that when all the barons of the Exchequer had delivered " their opinions, and agreed in their reaſons and arguments, yet he " coming to ſpeak laſt, and differing in judgment from them, hath ex- " preſſed himſelf with ſo much weight and ſolidity, that the barons have " immediately retracted their votes, and concurred with him. He " hath ſat as a judge in all the courts of law, and in two of them as " chief; but ſtill wherever he ſat, all buſineſs of conſequence followed " him, and no man was content to ſit down by the judgment of any " court, till the caſe was brought before him, to ſee whether he were " of the ſame mind; and his opinion being once known, men did " readily acquieſce in it; and it was very rarely ſeen, that any man " attempted to bring it about again; and he that did ſo, did it upon " great diſadvantages, and was always looked upon as a very con- " tentious perſon; ſo that what *Cicero* ſays of *Brutus*, did very often " happen to him, *Etiam quos contra ſtatuit, æquos placatoſque dimiſit.*

" Nor did men reverence his judgment and opinion in courts of law " only; but his authority was as great in courts of equity, and the " ſame reſpect and ſubmiſſion was paid him there too; and this ap- " peared not only in his own court of equity in the Exchequer-chamber, " but in the Chancery too, for thither he was often called to adviſe and " aſſiſt the lord chancellor, or lord keeper for the time being; and if " the cauſe were of difficult examination, or intricated and entangled " with variety of ſettlements, no man ever ſhewed a more clear and " diſcerning judgment: if it were of great value, and great perſons " intereſted in it, no man ſhewed greater courage and integrity in " laying aſide all reſpect of perſons. When he came to deliver his " opinion, he always put his diſcourſe into ſuch a method, that one " part of it gave light to the other; and where the proceedings of " Chancery might prove inconvenient to the ſubject, he never ſpared " to obſerve and reprove them: And from his obſervations and diſ- " courſes, the Chancery hath taken occaſion to eſtabliſh many of thoſe " rules by which it governs itſelf at this day.

" He did look upon equity as a part of the common law, and one of " the grounds of it; and therefore, as near as he could, he did always " reduce it to certain rules and principles, that men might ſtudy it as " a ſcience, and not think the adminiſtration of it had any thing arbi- " trary in it. Thus eminent was this man in every ſtation, and into " what courſe ſoever he was called, he quickly made it appear, that " he deſerved the chief ſeat there.

" As great a lawyer as he was, he would never ſuffer the ſtrictneſs " of law to prevail againſt conſcience; as great a chancellor as he was, " he would make uſe of all the niceties and ſubtilties in law, when it

" tended

" tended to ſupport right and equity. But nothing was more admirable " in him, than his patience: he did not affect the reputation of quick- " neſs and diſpatch, by a haſty and captious hearing of the counſel: he " would bear with the meaneſt, and gave every man his full ſcope, " thinking it much better to loſe time than patience: in ſumming up " of an evidence to a jury, he would always require the bar to inter- " rupt him if he did miſtake, and to put him in mind of it, if he did for- " get the leaſt circumſtance: ſome judges have been diſturbed at this as " a rudeneſs, which he always looked upon as a ſervice and reſpect " done to him.

" His whole life was nothing elſe but a continual courſe of labour and " induſtry and when he could borrow any time from the public ſervice, " it was wholly employed either in philoſophical or divine meditations: " and even that was a public ſervice too, as it hath proved; for they " have occaſioned his writing of ſuch treatiſes as are become the choiceſt " entertainment of wiſe and good men, and the world hath reaſon to " wiſh that more of them were printed. He that conſiders the active " part of his life, and with what unwearied diligence and application of " mind he diſpatched all mens buſineſs which came under his care, " will wonder how he could find any time for contemplation: he that " conſiders again the various ſtudies he paſt thro, and the many col- " lections and obſervations he hath made, may as juſtly wonder how he " could find any time for action: but no man can wonder at the exemp- " lary piety and innocence of ſuch a life ſo ſpent as this was, wherein as " he was careful to avoid every idle word, ſo it was manifeſt he never " ſpent an idle day. They who came far ſhort of this great man, will " be apt enough to think that this is a panegyric, which indeed is a " hiſtory, and but a little part of that hiſtory which was with great truth " to be related of him. Men who deſpair of attaining ſuch perfection, " are not willing to believe that any man elſe did ever arrive at ſuch a " height.

" He was the greateſt lawyer of the age, and might have had what " practice he pleaſed; but tho he did moſt conſcientiouſly affect the " labours of his profeſſion, yet at the ſame time he deſpiſed the gain of " it; and of thoſe profits which he would allow himſelf to receive, he " always ſet apart a tenth penny for the poor, which he ever diſpenſed " with that ſecreſy, that they who were relieved, ſeldom or never knew " their benefactor. He took more pains to avoid the honours and pre- " ferments of the gown, than others do to compaſs them. His modeſty " was beyond all example; for where ſome men who never attained to " half his knowledge, have been puffed up with a high conceit of them- " ſelves, and have affected all occaſions of raiſing their own eſteem by-

" depreciating

" depreciating other men, he on the contrary was the moſt obliging man " that ever practiſed. If a young gentleman happened to be retained " to argue a point in law, where he was on the contrary ſide, he would " very often mend the objections when he came to repeat them, and " always commend the gentleman, if there were room for it; and one " good word of his was of more advantage to a young man, than all the " favour of the court could be."

Upon the promotion of lord chief juſtice *Rainsford*, who ſucceeded him in that office, the then lord chancellor expreſt himſelf thus: *(i)* " The " vacancy of the ſeat of the chief juſtice of this court, and that by a way " and means ſo unuſual, as the reſignation of him, that lately held it, " and this too proceeding from ſo deplorable a cauſe as the infirmity " of that body, which began to forſake the ableſt mind that ever pre- " ſided here, hath filled the kingdom with lamentations, and given the " king many and penſive thoughts how to ſupply that vacancy again." And then addreſſing himſelf to his ſucceſſor: " The very labours of the " place, and that weight and fatigue of buſineſs, which attends it, are " no ſmall diſcouragements; for what ſhoulders may not juſtly fear that " burden, which made him ſtoop, that went before you? Yet I confeſs " you have a greater diſcouragement than the mere burden of your " place, and that is the unimitable example of your predeceſſor. *One-* " *roſum eſt ſuccedere bono principi* was the ſaying of him in the panegyric, " and you will find it ſo too, that are to ſucceed ſuch a chief juſtice, of " ſo indefatigable an induſtry, ſo invincible a patience, ſo exemplary " an integrity, and ſo magnanimous a contempt of worldly things, with- " out which no man can be truly great; and to all this a man that was " ſo abſolute a maſter of the ſcience of the law, and even of the moſt " abſtruſe and hidden parts of it, that one may truly ſay of his know- " ledge of the law, what St. *Auſtin* ſaid of St. *Hierom*'s knowledge in " divinity. *Quod Hieronymus neſcivit, nullus mortalium unquam ſcivit.* " And therefore the king would not ſuffer himſelf to part with ſo great a " man, till he had placed upon him all the marks of bounty and eſteem, " which his retired and weak condition was capable of."

To this the new chief juſtice, ſpeaking of his predeceſſor, anſwered in the following words.

" ——— A perſon in whom his eminent virtues and deep learning " have long managed a conteſt for the ſuperiority, which is not decided " to this day, nor will it ever be determined, I ſuppoſe, which ſhall " get the upper hand: A perſon that has ſat in this court many years, " of whoſe actions there I have been an eye and ear witneſs; that by the

(i) Burnet, p. 213, 217.

" greatneſs

" greatneſs of his learning always charmed his auditors to reverence and " attention: A perſon of whom I think I may boldly ſay, that as for- " mer times cannot ſhew any ſuperior to him, ſo I am confident ſucceed- " ing and future time will never ſhew any equal. Theſe conſiderations, " heightened by what I have heard from your lordſhip concerning him, " made me anxious and doubtful, and put me to a ſtand how I ſhould " ſucceed ſo able, ſo good, and ſo great a man. It doth very much " trouble me, that I, who, in compariſon of him, am but like a candle " lighted in the ſun-ſhine, or like a glow-worm at mid-day, ſhould " ſucceed ſo great a perſon, that is and will be ſo eminently famous to " all poſterity; and I muſt ever wear this motto in my breaſt to comfort " me, and in my actions to excuſe me,

" *Sequitur, quamvis non paſſibus æquis.*"

Mr. *Baxter*, with whom our author was very intimate towards the latter part of his life, deſcribes him in theſe words *(k)*, " Sir *Matthew* " *Hale*, that unwearied ſtudent, that prudent man, that ſolid philoſo- " pher, that famous lawyer, that pillar and baſis of juſtice, who would " not have done an unjuſt act for any worldly price or motive, the orna- " ment of his majeſty's government, and honour of *England*, the higheſt " faculty of the ſoul of *Weſtminſter-Hall*, and pattern to all the rever- " end and honourable judges; that godly ſerious practical chriſtian, the " lover of goodneſs and all good men, a lamenter of the clergies ſelfiſh- " neſs and unfaithfulneſs and diſcord, and of the ſad diviſions following " hereupon; an earneſt deſirer of their reformation, concord, and the " church's peace, and of a reformed act of uniformity, as the beſt and " neceſſary means thereto; that great contemner of the riches, pomp " and vanity of the world; that pattern of honeſt plainneſs and humility, " who while he fled from the honour that purſued him, was yet lord " chief juſtice of the king's-bench, after being long lord chief baron of " the Exchequer; living and dying, entring on, uſing, and voluntarily " ſurrendering his place of judicature with the moſt univerſal love, " honour and praiſe, that ever did *Engliſh* ſubject in this age, or any " that juſt hiſtory doth acquaint us with, *&c. &c. &c.*

Thus far for the author.

As to the work itſelf, if any of our author's performances might challenge the precedence of the reſt, this ſeems to have the juſteſt claim to it, as being a favourite work, which he often reviewed, and was at vaſt pains and charge in furniſhing himſelf with proper materials for

(k) Baxter's notes on Lord *Hale's* life, *p.* 43.

His compaſſionate concern for the lives and liberties of mankind on the one hand, and for preſerving the public peace and tranquility on the other, had poſſeſſed him with an opinion of the high importance, that the pleas of the crown, eſpecially thoſe relating to capital offenſes, ſhould be reduced to certain rules, and thoſe rules clearly and plainly underſtood, that ſo there might be as little room left as poſſible either for erring in, or perverting of judgment.

It was this led him to make the crown law his principal ſtudy, to which he applied himſelf with great aſſiduity; for as biſhop *Burnet* ſpeaking of this treatiſe informs us *(l)*, "It was by much ſearch and "long obſervation he compoſed that great work concerning it." The ſame author acquaints us *(m)*, that he had begun his collections relating hereto in the reign of King *Charles* I. "But after the king was mur- "dered he laid them by; and that they might not fall into ill hands, he "hid them behind the wainſcotting of his ſtudy, for he ſaid, *there was* "*no more occaſion to uſe them, till the king ſhould be again reſtored to his* "*right*; and ſo upon his majeſty's reſtoration he took them out, and "went on in his deſign to perfect that great work."

Hence it appears highly probable, that he intended this work for the public, altho the buſineſs of his ſtation did not afford him leiſure to publiſh it during his life; however, about four years after his death, the houſe of Commons took ſingular notice of it, and thought it a work of ſuch conſequence, as to paſs a vote *(n)*, deſiring his executors to print it; and appointed a committee to take care thereof: but that parliament being ſoon after diſſolved *(o)*, this deſign dropt.

Some years ſince there was publiſhed a treatiſe, intitled, *Pleas of the Crown by Sir* Matthew Hale; but this was only a plan of this work, containing little more than the heads or diviſions thereof, concerning which the editor in his preface expreſſes himſelf thus, "He [our author] "hath written a large work upon this ſubject, intitled, *An Hiſtory of the* "*Pleas of the Crown*, wherein he ſhews what the law anciently was in "theſe matters, what alterations have from time to time been made in "it, and what it is at this day. He wrote it *on purpoſe to be printed*, "finiſhed it, had it all tranſcribed *for the preſs* in his life-time, and had "reviſed part of it after it was tranſcribed."

It is therefore to be hoped, the publication hereof will not be thought any way to interfere with the direction of his will, *That none of his MSS. ſhould be printed after his death, except ſuch as he ſhould give order for during his life*, his intention for printing it being ſo apparent, as may well amount to an order for ſo doing.

(l) p. 90. *(m)* p. 39. *(n)* *Nov.* 29, 1680. *(o)* *Jan.* 18, 1680.

Beſides,

Beſides, as biſhop *Burnet* obſerves (*p*), this prohibitory clauſe in the will ſeems in ſome meaſure to be revoked by his codicil, wherein he orders, *that if any book of his writing ſhould be printed, then what ſhould be given as a conſideration for the copy ſhould be divided*, &c. a kind of implication, that he had left the printing thereof to the diſcretion of his executors.

The above-mentioned writer further obſerves (*q*), that his unwillingneſs to have any of his works printed after his death, proceeded from an apprehenſion, leſt they ſhould undergo any expurgations or interpolations in the licenſing them; for *this*, he ſaid, *might in matters of law prove to be of ſuch miſchievous conſequence, that he was reſolved none of his writings ſhould be at the mercy of the licenſers.*

But as there is no ſuch thing required by the laws now in being, that reaſon is at an end, and the reader may be aſſured, that the edition here offered to the public is printed faithfully from the author's original manuſcript.

This manuſcript conſiſts of one thick folio volume, all in our author's own hand-writing, from whence it was tranſcribed in his life-time, and the tranſcript has ſince been bound up in ſeven ſmall volumes in folio.

It had been by him reviſed as far as *Chap.* 27. in the firſt part, *viz.* about the middle of the third volume, as appears from many interlineations and additions in his own hand; the corrections in the remaining part are in another (very modern) hand, and in ſome places not very agreeable to the ſcope of the argument.

This tranſcript, therefore, ſo far as reviſed and corrected by our author (and no farther), may be deemed the original finiſhed and perfected; but ſince even in this part there are in ſome places leaves taken out, and others inſerted in their room in a different hand, unauthenticated by our author, and ſometimes quite diſturbing the coherence and connexion of the diſcourſe, it was not thought warrantable to conſider ſuch interpolations as a part of this treatiſe; for as it cannot be doubted but great regard will be always paid to the performance of ſo eſteemed an author, it is a piece of juſtice due both to the author and the public, that nothing ſhould be herein inſerted, but what is undeniably his, and carries evident marks of being by him intended as part of this work.

The title hereof was named by our author himſelf *Hiſtoria Placitorum Coronæ*; for he intended, as appears from the *Proemium*, to have taken in the whole body of the crown-law, as well in relation to matters civil, as matters criminal; for which purpoſe he once deſigned to have added two more books upon this ſubject, the one concerning offenſes not

(*p*) *p.* 185. (*q*) *p.* 186.

capital, the other touching franchiſes and liberties; but to the great detriment of the public, neither of theſe appears ever to have been compoſed by him; ſo that, as it now ſtands, it treats only of offenſes capital, which is indeed the moſt important branch of the crown-law, being what moſt nearly affects the life and liberty of the ſubject; beſides, in treating hereof, he has unavoidably explained many incidental matters equally applicable to offenſes not capital."

The *firſt* part of this work relates to the nature of the offenſes, *viz.* the ſeveral kinds of *treaſon*, *hereſy* and *felony*, the ſecond of theſe, hereſy, being an offenſe of a ſpiritual nature, of which it was not our author's purpoſe to treat, was at firſt wholly omitted by him; but afterwards conſidering, as I ſuppoſe, that by its being circumſcribed by act of parliament, *viz.* 1 *Eliz.* it became an offenſe of temporal cognizance, he thought proper to inſert a chapter upon that head.

The *ſecond* part relates to the manner of proceeding againſt offenders; wherein are conſidered the juriſdiction of the ſeveral courts; the manner of apprehending, committing, bailing, and arraigning offenders; their ſeveral pleas, bringing them to trial, judgment, and execution.

Having thus given ſome general account of the author and the work, it will be proper, in the next place, to acquaint the reader with the part I have had in this edition, which has been to ſuperviſe the printing thereof, that it be agreeable to our author's manuſcript, which being written in a very obſcure hand, might, by one wholly unacquainted with the law, have been frequently miſtaken.

To make this work the more authentic, the ſeveral references herein made to the records have been compared with the originals at the reſpective offices in the *Tower* and *Weſtminſter*.

I have alſo carefully examined the ſeveral quotations from the year-books, reports, *&c.* many of which being quoted without folio or page, or elſe miſ-quoted, have with no ſmall trouble been ſupplied and rectified; for our author, not having always had leiſure to conſult the books themſelves, has frequently copied from the miſ-printed quotations in the margin of lord *Coke*'s third volume of his Inſtitutes.

As it cannot be expected, but in the writing ſo large a manuſcript, ſome words muſt, *currente calamo*, have been omitted or wrong written, I have in ſome few places taken the liberty to add or alter a word or two to preſerve the ſenſe; but have been particularly careful to diſtinguiſh ſuch addition or alteration within crotchets, that I might not impoſe my judgment on the reader, but leave him to judge for himſelf, whether the drift of our author's reaſoning do not require it.

I have likewiſe ſubjoined a few notes, containing ſome obſervations from the records; as alſo remarking, where the law hath been ſince explained

explained by later reſolutions, or altered by ſubſequent acts of parliament; but as theſe acts are ſometimes very long, conſiſting of many clauſes, the reader is deſired to uſe the ſame caution here, which is recommended by our author *(r)* with regard to thoſe recited in the work itſelf, *viz.* "that he rely not barely upon the abſtracts thereof here "given, but peruſe the ſtatutes themſelves in the books at large."

I am ſenſible many ſlips and omiſſions muſt needs have happened in the ſuperviſing ſo large a work of ſo critical a nature, but hope that will plead my excuſe, at leaſt to thoſe, who conſider the wide difference between peruſing it in a fair print and in a difficult manuſcript.

(r) Part I. *p.* 261.

March 30, 1736.

S. EMLYN.

A

TABLE

OF

THE SEVERAL CHAPTERS

CONTAINED IN THE

FIRST PART.

Chap. XXX.

Chap. LIII.

THE

PROEMIUM.

The METHOD *of the* WORK *intended.*

HAVING an intention to make a full collection of the *Pleas of the Crown*, I ſhall divide thoſe Pleas into two general Tracts.

The *firſt*, concerning pleas of the crown in matters *criminal*.

The *ſecond*, concerning pleas of the crown in matters *civil*; namely, concerning franchiſes and liberties.

The former will be the ſubject of the firſt and ſecond books, the latter of the third book.

Firſt, therefore, I ſhall begin with the ſeveral kinds of *crimes*, that make up the ſubject matter of my firſt and ſecond book.

Crimes that are puniſhable by the laws of *England*, are for their matter of two kinds,

1. *Eccleſiaſtical.*
2. *Temporal.*

The *former* of theſe, namely, ſuch crimes as I call *Eccleſiaſtical*, are of eccleſiaſtical cognizance; and though all external juriſdiction, as well eccleſiaſtical as temporal, is derived from the Crown of *England*, and all criminal proceedings in the eccleſiaſtical courts, are in ſome kind *Placita Coronæ* ſuits for the king, and ſuch as he may pardon or diſcharge, as being his own ſuits, yet theſe I ſhall not meddle with at this time.

The

The *ſecond* ſort, *viz. Temporal* crimes, which are offenſes againſt the laws of this realm, whether the common law or acts of parliament, are divided into two general ranks or diſtributions in reſpect of the puniſhments that are by law appointed for them, or in reſpect of their nature or degree: and thus they may be divided into capital offenſes, or offenſes only criminal; or rather, and more properly, into

Felonies and

Miſdemeanors,

becauſe there is no capital offenſe but hath in it the crime of felony: and yet there be ſome felonies, that are not in their nature capital, whereof hereafter.

Crimen capitale, or felony, in this acceptation is of two kinds, namely,

That which is complicated, and hath a greater offenſe joined with it, namely *Treaſon*, and

That which is ſimple *Felony*.

Touching the former of theſe, namely *Treaſon*, it is that capital offenſe, which is committed againſt ſome ſpecial civil obligation, of ſubjection and faith more than is found in other capital offenſes, and therefore it hath the denomination of *proditio*, and the offenſe is laid to be done *proditorie*.

This offenſe of *Treaſon* is of two kinds, namely,

That which is againſt the higheſt civil obligation, namely, againſt the king, his crown and dignity, which is called *High-treaſon*.

Or againſt ſome other, to whom a civil obligation of faith is made or implied, which is called *Petit-treaſon*.

The offenſes of high-treaſon are of two kinds, *viz.*

Such as were treaſons by the *common law*, or,

Such as were made ſo by ſpecial *acts of parliament*.

The offenſes of ſimple felony are likewiſe of the ſame diſtribution, namely,

Such as were felonies at *common law*, and,

Such as are by *act of parliament* put into the degree, or under the puniſhment of felony.

And the ſame diſtribution is to be made touching *miſdemeanors*, namely they are,

Such as are ſo by the *common law*, or

Such as are ſpecially made puniſhable as miſdemeanors by *acts of parliament*.

This

HISTORIA PLACITORUM CORONÆ.

This is the general order and diſtribution of the firſt and ſecond book of this tractate, namely, concerning the matters of the Pleas of the Crown in criminals; or thoſe crimes, which come under the cognizance of the laws of this kingdom, wherein the proſecution is *pro rege*, or in his name or right, as the common *vindex* of public injuries or crimes.

The particular enumeration of theſe ſeveral offenſes is much of the buſineſs of thoſe charges, that are given to the grand jury by the juſtices in their ſeveral ſeſſions; and they were for the moſt part heretofore contained in certain articles or heads of inquiry delivered out in writing to the ſeveral inqueſts, and were often ſtiled *Capitula Placitorum Coronæ*; ſuch were thoſe of *R.* 1. mentioned by *Hoveden*, *p.* 744, 783. which were delivered to the inquiſitors in every wappentach or hundred, and to the juſtices itenerant to make inquiry upon, and by them to the grand inqueſts; and ſuch were thoſe *Articuli itineris* declared by *Bracton*, *Lib.* III. *de coronâ*, *cap.* 1. and printed in the old *Magna Charta* for the juſtices in *eyre* to make inquiry upon, which I ſhall not here repeat at large, but ſhall take them up as I ſhall have occaſion to uſe them.

The order which I ſhall obſerve in theſe *Pleas of the Crown* will be this:

I. In the firſt book I will conſider* of *capital* offenſes, *Treaſon* and *Felonies*; which book will be divided into two parts:
   1. The *enumeration of the kinds* of treaſons and felonies as well by common law, as by acts of parliament.
   2. The whole *method of proceedings* in or upon them.

II. The ſecond book will treat of matters criminal, that are *not capital*; and,

III. The third book will be touching *franchiſes* and *liberties* (*).

* That which is here offered to the public, is only the firſt of theſe books, conſiſting of two parts; the other two books having, as I have been credibly informed, never been compoſed by our author.

HISTORIA

PLACITORUM CORONÆ.

PART I.

CHAP. I.

Concerning Capital Puniſhments.

BEING to treat concerning capital offences, it will not be amiſs to premiſe ſomething touching capital puniſhments.

Laws, that are introduced by cuſtom, or inſtituted by the legiſlative authority for the good of civil ſocieties, would be of little effect, unleſs they had alſo their ſanctions, impoſing penalties upon the offenders of thoſe laws.

Theſe penalties are various according to the ſeveral natures of the offenſes, or the detriment that comes thereby to civil ſocieties; ſome are only pecuniary; ſome corporal, but not capital, ſuch as impriſonment, ſtigmatizing, baniſhment, ſervitude, and the like; others are capital, *ultimum ſupplicium*, or death; and that death ſometimes accompanied with greater, ſometimes with leſs degrees of ſeverity.

So that, altho offenſes againſt the good of human ſociety be many of them prohibited by the laws of God and nature, yet the puniſhments of all ſuch offenſes are not determined by the law of nature to this or that particular kind, but are for the moſt part, if not altogether left to the poſitive laws and conſtitutions of ſeveral kingdoms and ſtates.

And therefore, altho moſt certainly the penalties inflicted by God himſelf among his antient people upon the breach of their laws were

with the higheſt wiſdom fitted to that ſtate, and all laws and inſtituted puniſhments ſhould come up as near to that pattern, as may be; yet as to the degrees and kinds of puniſhments of offenſes *in foro civili vel judiciario* they are not obliging to all other kingdoms or ſtates, but all ſtates, as well chriſtian as heathen, have varied from them.

And therefore it will not be amiſs to inſtance in the various kinds of puniſhments inflicted by the ſeveral laws of ſeveral countries, eſpecially in thoſe two offenſes of *homicide* and *theft*, which are the moſt common and obvious offenſes in all countries.

By the antienteſt divine law, that we read, the puniſhment of homicide was with death. *Gen.* ix. 6. *Whoſoever ſheds man's blood, by man ſhall his blood be ſhed (a).*

And the judicial law given by *Moſes* was purſuant to it, with ſome temperaments and explanations. *Exod.* xxi. 12, 13, 14. *He, that ſmiteth a man, ſo that he die, ſhall ſurely be put to death. And if a man lie not in wait, but God deliver him into his hand; then I will appoint thee a place, whither he ſhall flee. But if a man come preſumptuouſly upon his neighbour to ſlay him with guile; thou ſhalt take him away from mine altar, that he may die.* And *v.* 18, 19. *And if men ſtrive together, and one ſmite another with a ſtone, or with his fiſt, and he die not, but keepeth his bed; if he riſe again, and walk abroad upon his ſtaff, then ſhall he that ſmote him, be quit; only he ſhall pay for the loſs of his time, and for his cure.*

And what this delivery by God of a man into his neighbour's hand is, is beſt expounded *Deut.* xix. 4, 5, 6, 11, 12. *Whoſo killeth his neighbour ignorantly, whom he hated not in time paſt, As where a man cleaveth wood, and the ax ſlieth from the helve, and killeth a man,*

[3] *he ſhall fly to the city of refuge (b), leſt the avenger (c) of blood purſue, and ſlay him while his heart is hot; whereas he was not worthy of death, in that he hated him not in time paſt: But if any man hate his neighbour, and lie in wait for him, and riſe up againſt him, and*

(a) This law being given to *Noah*, from whom all men are derived, is not peculiar to the *Iſraelites*; but, as our author obſerves below, is binding on all mankind.

(b) Concerning theſe cities of refuge, ſee *Exod.* xxi. 13. *Numb.* xxxv. *Deut.* iv. 41. *& ſeq.* [illegible] xx. xxi. *Selden: de jure naturali, &c.* [illegible] *cap.* 2.

(c) Who the avenger of blood was, is no where expreſſed, it is generally ſuppoſed that he was the next heir to the perſon ſlain. See *Selden: de jur. nat. Lib.* IV. *cap.* 1. *& de ſucceſſionibus in bona defuncti:* but the truth is, the Hebrew words *Goel ha dam*, here rendered *the avenger of blood*, ſhould be rendered *the next of blood*, for *Goel* properly ſignifies one of *the ſame kindred*; it is ſo rendered *Ruth* ii. 20. and iii. 9, 12. and is uſually expreſſed in the Septuagint by ἀγχιστεύων, which denotes *one near of kin.*

ſmite

ſmite him mortally, that he die, and he fleeth to one of thoſe cities, the elders of his city ſhall ſend and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die (d).

Again; *Exod.* xxii. 2. *If a thief be found breaking-up, and be ſmitten, that he die, there ſhall no blood be ſhed for him; if the ſun be riſen upon him, there ſhall blood be ſhed for him; for he ſhould make full reſtitution; if he have nothing, then he ſhall be ſold for his theft.*

Upon theſe judicial laws, theſe things are obſervable; 1. That by theſe laws the killing of a man by malice forethought, or upon a ſudden falling out, were both under the ſame puniſhment of death *(e)*. 2. That the killing of a man by misfortune was not liable to the puniſhment of death, by the ſentence of the judge; but yet [4] the avenger of blood might kill him, before he got to the city of refuge *(f)* 3. The killing of a thief in the night was not liable to puniſhment of death; but if it were in the day-time, it was puniſhable with death. 4. Tho there is no expreſs law touching killing a man in his own defenſe *(g)*, yet it ſeems the cuſtom of the *Jews*, and the

(d) If there was no avenger of blood, or if he would not or could not kill the ſlayer, the ſlayer was capitally puniſhed by a judicial ſentence; and no ranſom or recompence was admitted. *Numb.* xxxv. 31. *Selden: de jur. nat. Lib.* IV. *cap.* 1. *in fine*; even tho the perſon ſlain ſhould before his death deſire that the ſlayer ſhould be forgiven. *Maimonides More Nevochim, Pars* III. *c.* 41. for all voluntary homicide was inexpiable, as appears from *Numb* xv. 27. 31. and the caſe of *David* in the matter of *Uriah, Pſ.* li. 16. There was one caſe indeed of capital homicide, wherein a ranſom was allowed, *viz.* If an ox were wont to puſh with his horn, and it had been teſtified to his owner, and he had not kept him in, ſo that he had killed a man or a woman, the owner was to be put to death, he being looked on as the author of the murder, who would not prevent it, when he had warning, and might have done it; however, this being a caſe of groſs negligence, rather than wilful malice, he was permitted to redeem his life by paying the ranſom, which was laid upon him. *Exod.* xxi. 29, 30. the price of a ſervant was thirty ſhekels of ſilver. *Ibid. v.* 32 and that of a freeman was generally double, *viz.* ſixty ſhekels. *Maimon. More Nevochim, Pars* III. *cap.* 40.

This was alſo felony by the common law of *England*, for by ſuch ſufferance the owner ſeemed to have a will to kill. *Sadler.* P. C. 17. *Fitz. Cor.* 311.

(e) The law was general, *That whoever ſmiteth a man, ſo that he die, ſhall ſurely be put to death, Exod.* xxi. 12. There were indeed ſome exceptions from this general law, but, ſetting aſide the caſe of an houſe-breaker in the night, they all related to caſual involuntary homicides; there is not one exception of a voluntary deſigned killing, whether ſudden or premeditated, whatever interpretations might be afterwards made by the *Jewiſh Rabbi*'s, who made the commandments of God of none effect thro' their traditions, *Matt.* xv. 6.) ſo that there is nothing in the *Jewiſh* law to countenance the diſtinction made by the laws of *England* between murder and manſlaughter; a diſtinction, which ſerves to ſhew, that tho the laws of *England* be much ſeverer than the other in the caſe of *theft*, yet they are much milder in the caſe of *homicide*

(f) Unleſs he fled to the altar, which was alſo looked on as a place of refuge, it being probable from *Exod.* xxi. 13, 14. that the altar was the place of refuge before the cities of refuge were appointed. See *Selden: de jur. nat. Lib.* IV. *cap.* 2. If he did eſcape to the city of refuge, he was obliged to remain there till the death of the high prieſt, for the avenger of blood might kill him, wherever he found him out of the borders of the city. *Numb.* xxxv. 25—32. *Selden: ubi ſupra & de Synedriis, Lib.* II. *cap.* 7. But after the death of the high-prieſt, he was at liberty to go where he would; for the reaſon hereof ſee *Maimonides More Nevochim, Pars* III. *cap.* 40. and *Ainſworth* on *Numbers* xxxv. 25.

(g) This was alſo plainly juſtifiable by the law of nature, that it needed no poſitive law; however, the permiſſion to kill

interpretation of the *Jewiſh* doctors, excuſed that fact from the puniſhment of death *(h)*. 5. That the uſual manner of the execution of the ſentence of death was ſtoning, and ſometimes ſtrangulation *(i)*.

Now I will conſider ſome of the laws of other nations in reference to *homicide*; wherein tho there is a great analogy in many things between the laws of the *Jews*, and the laws of other countries; ſo that a man may reaſonably collect, that theſe judicial laws of the *Jews* were take up by other nations, as the grand exemplar of their judicial laws; yet in ſome things they departed from them in the particular conſtitutions and cuſtoms of other countries.

Among the *leges Atticæ* collected by Mr. *Petit*, *Lib.* VII. *tit.* 1. theſe were many of the laws concerning homicide.

[5] *Senatus Areopagiticus jus dicito de cæde, aut vulnere, non caſu, ſed voluntate inflicto; de incendio item, & malo veneno hominis necandi cauſa dato.*

Theſmothetæ in homicidas animadvertunto.

Si quis hominem ſciens morti duit, capital eſto.

Qui alium caſu fortuito necâſſit, in annum deportator, donec aliquem è cognatis occiſi placârit; revertitor vere peractis ſacris & luſtrationibus.

Si quis imprudens in certaminibus alium necâſſit, aut inſidiantem aut ignotum in prælio, aut in uxore, vel matre, vel ſorore, vel filiâ, vel concubinâ, vel eâ, quam in ſuis liberis, habet deprehenſum, cædis ergo nè exulato.

Si quis alium injuſte vim inferentem incontinenti necâſſit, jure cæſus eſto.

Si quis homicidam foro, urbis territorio, publicis certaminibus & ſacris Amphictyonicis abſtinentem occiderit, aut mortis cauſam prebuerit, perinde ac ſi Athenienſem civem necâſſit, capital eſto, & Ephetæ jus dicunto. So that by this law a man conſcious to himſelf of homicide might, before he was apprehended, undertake a voluntary exile, and during ſuch an exile was privileged from the penalty of homicide *(k)*.

kill a thief, who ſhould be found breaking up in the night, ſeems to be an expreſs allowance of killing in one's own defence; for the reaſon of that law is manifeſtly founded on the principle of ſelf-preſervation. *Na[illegible]adverſus periculum naturalis ratio permittit [illegible] defendere. Digeſt. Lib.* 9. *Tit.* 2. *l.* 4.

(*b*) When [illegible] defence of life or chaſtity; becau[illegible] loſt, they are irreparable. See *Selden. [illegible]r. natur. Lib.* IV. *cap.* 3. *Maimon. More Nevochim, Pars* III. *cap.* 40.

(*i*) Sometimes the execution was by burning; as in the caſe of a prieſt's daughter, who had played the whore. *Levit.* xxi. 9. Sometimes by *decollation*, which was the uſual way for murder. *Selden. de Synedriis, Lib.* II. *cap.* 13. *De jur natur. Lib.* IV. *cap.* 1.

(*k*) This was the caſe of *Theoclymenus* ... *Homer Odyſſ.* o. *v.* 224, 270. ϕ. *v.* 117.

Homicidas

Homicidas morte multanto in patria occisi terra, et abducunto, ut lege cautum eſt; in eos ne ſæviunto, neve pecuniam (l) exigunto.

Before judgment the kindred of the party ſlain that proſecuted the manſlayer might compound the offenſe, and releaſe the offender, but after judgment once given, neither the judge nor proſecutor could remit it *(m)*.

Cædis ne poſtulator unquam is qui homicidam exulantem & redeuntem quo non licet, in jus ad magiſtratum rapuerit aut detulerit.

And *eodem libro tit.* 5. *ſi nox furtum faxit, ſi im aliquis occiſit, jure cæſus eſto*, according to the *Moſaical* law, and from thence [6] tranſcribed into the *Attic* laws, and from thence by the *Decemviri* into the *Roman* laws of the twelve tables *in totidem verbis.*

Among the *Romans* the laws concerning homicide differed in ſome things both from the *Jews* and *Greeks*, as appears *Digeſt. Lib.* XLVIII. *tit.* 8. *Ad legem Corneliam de ſicariis & veneficiis.*

Qui hominem occiderit punitor non habitâ differentiâ cujus conditionis hominem (n) interemit.

Qui hominis occidendi furtive faciendi causâ cum telo ambulaverit (o) qui hominem non occidit ſed vulneravit ut occidat, ut homicida damnandus, nam ſi gladium ſtrinxerit & cum eo percuſſerit, indubitatè occidendi animo admiſſit, ſed ſi clavi aut cuccuma in rixa, quamvis ferro, percuſſerit, tamen non occidendi animo lenienda pœna ejus, qui in rixa caſu magis, quam voluntate, homicidium admiſit (p).

But if it were merely by misfortune, it was not puniſhed *(q)*.

Qui ſtuprum ſibi vel ſuis per vim inferentem occidit, dimittendus eſt, (r), ſed is, qui uxorem in adulterio deprehenſam occidit, humiliore loco poſitus in exilium perpetuum dandus, in aliqua dignitate poſitus ad tempus relegandus (ſ).

(*l*) The *Greek* word ἀποίνων here rendered *pecuniam*, properly ſignifies a ranſom. *Hom. Iliad. α. v.* 18, 20, 23, 95. for by the antient law of *Greece* the puniſhment of homicide was redeemable by the payment of a ſum of money to the relations of the ſlain, which recompence was term'd ἄποινα or ποινή. *Homer. Iliad. 1. v.* 628. *σ. v.* 498.

(*m*) That this was the meaning of the foregoing law, ſee *Petit in leges Atticas, Lib.* VII. *tit.* 1. *p.* 509. See alſo the Oration of *Demoſthenes* againſt *Ariſtocrates*, wherein moſt of the *Athenian* laws relating to homicide are explained.

(*n*) *l.* 1. §. 2.

(*o*) *l.* 1. *pr. & Cod. eod. tit. Lib.* IX. *tit.* 16. *l.* 7.

(*p*) *l.* 1. §. 3.

(*q*) *l.* 1. §. 3. *e. g.* If a man, who was cutting a tree, ſhould without calling out throw down a great branch of it upon one who was paſſing by, and kill him, he was to be acquitted, that is to ſay, he was not to be proceeded againſt criminally by the *lex Cornelia de ſicariis*; for ſo is the expreſſion in *l.* 7 *ad hujus legis coercitionem non pertinet*; but ſtill he was liable by the *lex Aquilia* to make a pecuniary ſatisfaction for the damage. *Inſtit. Lib.* IV. *tit.* 3. §. 5. And tho' that law mentions only the caſe of killing a ſlave, yet there lay an *utilis actio* in the caſe of killing a freeman. See *Noodt ad Leg. Aquil. c.* 2.

(*r*) *l.* 1. §. 4.

(*ſ*) *l.* 1. §. 5.

Furem noctu num qui occiderit, impune feret, ſi parcere ei ſine periculo ſuo non potuit (t); which law, tho' like to that of the *Jews* and *Greeks*, the *Roman* lawyers have conſtrued *(u)*, that it is law-
[7] ful to kill *furem nocturnum recedentem & fugientem cum rebus, licet ſe non defendat telo, ſed non diurnum, niſi ſe defendat telo.*

The puniſhment of homicide, unleſs it were merely caſual, among the *Romans* was *deportatio in inſulas & omnium bonorum ademptio, ſed ſolent hodie capite puniri, niſi honeſtiore loco poſiti fuerint, ut pœnam legis ſuſtineant; humiliores enim ſolent beſtiis ſubjici (x); altiores vero deportantur in inſulas (y).*

Some temperaments they added in other caſes of homicide, as baniſhment for five years (z), deportation, *&c.* but regularly the puniſhment of homicide, unleſs in caſe of ſimple misfortune (*a*), or defenſe of life (*b*), was death *viz. beſtiis ſubjiciantur.*

Among the *Saxons* (*c*) the puniſhment of homicide was not always, nor for the moſt part capital; for it might be redeemed by a recompenſe which went under the name of *Wera* and *Weregild (d)*, which

(*t*) *l.* 9.

(*u*) This was not a meer conſtruction of the *Roman* lawyers, but is expreſsly provided by the law of the twelve tables, as appears from *Digeſt. Lib.* IX. *tit.* 6. *ad leg. Aquil. l.* 4. §. 1. *Cic. pro Milone, cap.* 3. *A. Gell. Lib.* 18. *cap. Macrob. Saturnal. Lib.* I. *cap.* 4. The reaſon of this diſtinction between a night-thief and a day-thief, ſee in *Grot. de jur. bel. ac. pac. Lib.* II. *cap.* 1. §. 12.

(*x*) *Dig. Lib.* XLVIII. *tit.* 19. *de pœnis. l.* 28. § 15.

(*y*) *Dig. ad leg. Cornel. de ſicariis l.* 16.

(*z*) *l.* 4. §. 1.

(*a*) *Cod. eod. tit. l.* 1.

(*b*) *Cod. eod. tit. l.* 2. & 3.

(*c*) It ſeems to have been the general practice of moſt of the northern nations to commute the puniſhment of the moſt heinous crimes for a pecuniary mulct. *Lindenbrogii Codex Leg. Antiq. Lib.* IV. *cap.* 36. *Tacitus* ſpeaking of the antient *Germans* ſays, it was cuſtomary among them to puniſh homicide with a certain number of ſheep and oxen, out of which the relations of him that was ſlain received ſatisfaction. *Tac. de mor. Germ. cap.* 21. From hence probably our *Saxon* anceſtors brought the cuſtom into *Britain*.

(*d*) This *Weregild* or *capitis æſtimatio*, according to the laws of *Ethelbert*, was uſually 100*s. Leg. Ethelbert, l.* 21. tho' in ſome particular caſes it was more, *l.* 5. 6. 22. If the ſlayer eſcaped, the relations were to pay half the ordinary *Weregild*, *l.* 23.

By the laws of *Ina* the *Weregild* was different according to the rank and degree of the perſon killed, of a man worth 200*s.* was 30*s.* of a man worth 600*s.* was 80*s.* of a man worth 1200*s.* was 120*s. Leg. Inæ. l.* 70. This rule admitted of ſome exceptions, *l.* 34. *l.* 74.

By the laws of *Alfred*, the bare attempt on the king's life was puniſhed with death, unleſs the offender redeemed it by the payment of the king's *weregild*: the ſame law was in caſe a ſlave attempted the life of his lord, unleſs he redeemed it by paying his lord's *weregild. Leg. Alfred. l.* 4. the *weregilds* were of the ſame value, as under *Ina. Leg. Alfred. l.* 9. *l.* 26.

By the league between *Alfred* and *Guthrun, l.* 2. the value of a common perſon was 200*s.* the ſame by the league between *Edward* and *Guthrun in fine.*

By the laws of *Athelſtan*, whoever ſhould attempt his lord's life, was to be put to death, and there is no mention made of any ranſom. *Leg. Athelſtan, l.* 4. but at the end of his laws, and of the *Judicia Civitatis Lundoniæ*, there is a particular account of the *weregilds* of all orders and degrees, from the king to the peaſant, for which ſee *Wilkin's Leg. Anglo-Sax. p.* 64. *p.* 71.

By the laws of *Ethelred, l.* 5. the *weregild* of a common perſon was increaſed to 25 pounds. By *l.* 8. *Gul. Conq. apud Wilkins's, p.* 221. it was twenty pounds.

By

which was a rate ſet down upon the head of perſons of ſeveral ranks; and if any of them were killed, the offender was to make good that rate, or *Weregild* or *capitis æſtimatio*, to the kindred of the party ſlain; or, as ſome think, part to the king, part to the lord of the fee and part to the relations of the party ſlain; which if he could not do, he was to ſuffer death (*e*). *Vide Spelm. in Gloſſ. ad verba Wera & Weregild.*

This cuſtom continued long, even to the time of *Hen.* I. here in *England*, as appears by his laws *in libro rubro, ſect.* 11. (*f*) but ſhortly after grew obſolete, as being too much contradictory to the divine law (*g*). *Vide Covarr. Tomo* 2 *Lib.* 11. *cap.* 9. *ſect.* 2.

But although the cuſtom of *Weregild* is abrogated here in *England*, and by the laws of this kingdom the puniſhment of homicide is regularly death (*h*), as ſhall hereafter be ſhewn; yet [9] ſince there are in *England* two kinds of proceedings in puniſhing of homicide, the one at the ſuit of the heir or wife by appeal, the other at the ſuit of the king by indictment, the capital puniſhment of the offender may be diſcharged by all parties intereſted, namely by the appellant by releaſe, and by the king by his pardon.

By the laws of *Cnute*, whoever ſhould lie in wait for the life of the king, or of his lord, was to ſuffer death, and forfeit all he had. *Leges Cnuti, l.* 54. Whoever committed a public notorious murder, was likewiſe to ſuffer death, without redemption: for in *l.* 61. *Cedes publica & domini proditio* are reckoned amongſt the *ſcelera inexpiabilia*; but it ſhould ſeem that common homicide was redeemable; for in *l.* 6. it is ſaid, *Homicidæ inclinent, vel emendent, vel ſcienter in peccatis moriantur.*

(*e*) The *weregild* was uſually divided into three parts: the firſt, which was called *Frith bote*, was paid to the king for the loſs of his ſubject; the lord had another for the loſs of his man, which was called *Man-bote* and the kin of the ſlain for their loſs had the third part, which was called *Mag-bote*. See *Spelm.* life of *Alfred*, *Book* II. §. 11. In the caſe of killing the king, beſides the *weregild*, which was to be paid to the king's relations, there was alſo another payment called *cynebot* or *cyngild*, to be made to the public for the loſs of their king.

(*f*) And § 12. ſee *Wilkin's leges Anglo Sax. p.* 244. But it appears from the ſame laws, *l.* 71. *ibid. p.* 267. that a malicious murder, by poiſon or the like, was *factum mortiferum nullo modo redimendum*: The gentlemen of theſe laws is juſtly queſtioned, for that they not only are in the nature of commentaries rather than laws; but alſo in *l.* 5. *Gregory's* decretals are cited, which were not compiled till fifteen years after the death of *Henry* I. however, they are allowed to be very antient, and to contain the uſages of the *Anglo-Saxons*. See *Hickeſii Diſſert. Epiſt. p.* 96.

(*g*) It cannot but ſeem ſtrange to us at this time of day, that the wilful murder of any one, much more of the king, ſhould be puniſhed only with a pecuniary mulct; to ſolve this difficulty. Mr. *Rapin* ſuppoſes that this commutation was allow'd only in the caſe of ſimple homicide; or at moſt what is now known by the name of manſlaughter, but not in the caſe of a premeditated murder: See *Rapin's Hiſtoire d'Angleterre, Vol.* I. *p.* 520. This notion is in itſelf reaſonable, and ſeems to be favoured by *l.* 4. of *Athelſtan*, and *l.* 54. of *Cnute*, which makes it capital barely *infidiari regi vel domino*, much more to take away the life of the king or his lord; but on the other hand it ſeems ſomewhat hard to ſuppoſe, that among ſo many laws againſt homicide, they ſhould all be levell'd againſt caſual or ſudden killing only, and ſcarce any againſt wilful murder.

(*h*) The offender is to be hanged by the neck till he be dead; and in caſe he was convicted on an appeal, the antient uſage was, that all the relations of the ſlain ſhould drag him with a long rope to the place of execution. 3 *Inſt.* 131. *Plowd.* 306, *b.* 11 *Hen.* 4. 11. *a.*

And thus far touching the puniſhment of homicide.

Now I ſhall conſider ſomewhat alſo of the puniſhment of *theft*, and the various laws and uſages concerning the ſame in ſeveral kingdoms and ſtates, and at different times in the ſame ſtate or kingdom.

By the *Jewiſh* law, Exod. xxii. 1, 4. *If a man ſteal an ox or a ſheep, and ſell or kill it, he ſhall reſtore five oxen for an ox, and four ſheep for a ſheep: If the theft be found in his hands alive, whether ox, aſs, or ſheep, he ſhall reſtore double*; and the like for other goods *(i)*; ſo that there was no capital puniſhment in caſe of theft, though it were accompanied with *burglary*, as breaking a houſe, (but men-ſtealers were puniſhed with death *(k)*; but it ſeems by the civil conſtitutions of that ſtate the puniſhment thereof was ſometimes enhanſed, at leaſt in ſome circumſtances, ſometimes to a ſeven-fold reſtitution, *Prov.* vi. 31, and alſo to death, 2 *Sam.* xii. 5. *(l)*

Now as to the *Attic* laws: *Samuel Petit de Legibus Atticis, Lib.* VII. *tit.* 5. gives us an account of their laws concerning theft, in ſome things differing, in ſome things agreeing with the *Jewiſh* laws, *furem*

[10] *cujuſcunque modi furti ſupplicio capitis punito.* This was *Draco's* law: but it was thought too ſevere, and therefore *Solon* corrected it *(m) Si furtum factum ſit, & quod furto perierat receperit dominus, duplione luito furtum qui fecit & quorum ope conſiiloque fecit; decuplione vindicator, ni dominus rem furtivam receperit, in nervo quoque habetor dies ipſos quinque totidemque noctes, ſi heliaſtæ pronunciárint; pronuncianto autem, cum de pœna illius agitur.*

Si lucri furtum cujus æſtimatio ſit ſupra 50 *drachmas faxit, ad undecim viros rapitor; ſi nox furtum faxit, ſi im aliquis occiſit, jure cæſus eſto:—Manifeſtum hujuſmodi furtum qui faxit, etiamſi vades dederit, non noxæ factæ ſarcitione, ſed morte luito. Si quis item ex aliquo gymnaſio veſtis aut lecythi aut alicujus vel mynimæ rei, aut ſupellectilis è gymnaſio, aut ex balineo, aut è portubus, quod excedat* 10 *drachmarum æſtimationem, furtum faxit, morte luito.*

Manifeſti ſacculatii (n) morte luunto.

(i) Exod. xxii. 7, 9. The reaſon why the reſtitution of an ox was more than of a ſheep is ſuppoſed by *Maimonides more Nevochim, Par.* III. *cap.* 41. to be becauſe ſheep are more eaſily guarded againſt thieves than oxen, who feed at a greater diſtance one from another.

(k) Exod. xxi. 16.

(l) This paſſage from the book of *Samuel* does by no means prove what it is brought for, *viz.* that theft was puniſhable with death by the *Jewiſh* law; for the caſe there put of taking away a poor man's lamb, was attended with violence and other aggravating circumſtances, which provoked king *David* to ſay, *The man that hath done this ſhall ſurely die*; and ſome render the words, *Does deſerve to die*; but at moſt it only proves the vehemence of *David's* anger at the man, and not what was the law of the *Iſraelites*.

(m) See *A. Gellium, Lib.* XI. *cap.* 18. & *Plutarch. in Vitâ Solonis.*

(n) Βαλαντιοτομων, A cut-purſe.

Nicticularii

Vecticularii (o) manifeſti morte luunto.

Plagiarii (p) manifeſti morte luunto.

In hortos irrumpere ficoſque deligere capital eſto (q): So that the quantity of the thing ſtolen, the place, the ſeaſon, the manner and other circumſtances heightened theft into a capital puniſhment, that otherwiſe by *Solon's* laws was only pecuniary and impriſonment *(r)*.

Now as to the *Roman* laws: For a theft that was not *furtum manifeſtum*, there is given *actio in duplum*; but if it were [11] *furtum manifeſtum, actio in quadruplum (ſ)*; *furtum autem manifeſtum eſt, cum fur deprehenditur in furto (t)*.

But now as to puniſhments among the *Romans*, there were theſe degrees or orders: I. Capital puniſhments, *(viz ultimum ſupplicium) (u)* which were 1. *Damnatio ad furcam.* 2. *Vivi crematio.* 3. *Capitis amputatio.* 4. *Damnatio ad feras.* II. Others, that were in the next degree, were 1. *Coercitio ad metalla.* 2. *Deportatio ad inſulas.* III. Others again of a lower allay were, 1. *Relegatio ad tempus vel in perpetuum.* 2. *Datio in publicum opus.* 3. *Fuſtigatio (x)*.

I find not among the *Romans* any greater puniſhment of theft, than four-fold reſtitution *(y)* unleſs in theſe caſes:

1. *Si quis ex metallo principis vel ex monetâ ſacrâ furatus eſt, pœna metalli & exilii punitor (z)*.

(o) Τοιχωρυχων, A houſe-breaker.

(p) Ἀνδραποδιστοματος, *Sive Plagiarius, is eſt, qui ſine vi, dolo malo ſciens abducit homines liberos & ingenuos, vendituque pro ſervis, aut ſuppremit: vel is eſt, qui alienos ſervos abducit ſine vi, & plerumque ſine furto, & fugam perſuadet, aut fugitivos celat.* Petit. Comment. ad Lib. VII. tit. 5. de furtis.

(q) But this was a temporary law, made in a time of dearth, when it was thought neceſſary to prohibit the exportation of Figs. However, proſecutions of offenders againſt this law ſoon grew odious: from hence all malicious informers were called *Sycophants*. Vide *Athenæi Deipnoſophiſt.* Lib. III. *& Scholiaſt. in Ariſtophanis Plutum ad v.* 31. *&* 874.

(r) Among the *Lacedæmonians* all manner of theft was permitted, as a practice which tended to inſtruct their youth in the ſtratagems of war. *A. Gel. Lib.* XI. *cap.* 18. It was alſo unpuniſhed among the antient *Egyptians*. *A. Gel. ubi ſupra.* But we learn from *Diodor. Sic. Lib.* I. that it was allow'd only on certain conditions, for it was provided by a law, that whoever was minded to follow the trade of thieving, ſhould firſt enter his name with the captain of the gang, and ſhould bring in all his booty to him, that ſo the right owner might know where to apply for the recovery of his goods, which were reſtored to him on paying the quarter of the value.

(ſ) *Inſt. Lib.* IV. *tit.* 6. §. 5. *Digeſt. Lib.* XLVII. *tit.* 2. *de furtis, l.* 46. §. 2. Herein the *Roman* law greatly reſembled the *Jewiſh*, with this difference that by the *Jewiſh* law the puniſhment of four-fold was to be inſtead of reſtitution; whereas by the *Roman* law the thing ſtolen was recoverable over and above the *pœna quadrupli. Dig. eod tit. l.* 54. §. 3.

(t) *Dig. eod. tit. l.* 2. *l.* 3. *pr.* By this was meant not only if he was taken in the fact, but alſo if he was apprehended with the goods upon him before he had carried them to the place, where they were to remain that night, and anſwers to the expreſſion in our law, of being taken in the *mainouvre*.

(u) *Dig. Lib.* XLVIII. *tit.* 19. *de pœnis. l.* 21.

(x) *Dig. eod. tit. l.* 28. *pr.* §. 1. *l.* 11. §. 3.

(y) So far were the *Romans* from inflicting capital puniſhments for theft, that on the contrary it was expreſsly forbidden by *Juſtinian*, that any perſon ſhould be put to death, or ſuffer the loſs of member for theft. Novel CXXXIV. *cap. ult.*

(z) *Dig. Lib.* XLVIII. *tit.* 13. *ad leg. Jul. peculatus, l.* 6. §. 2. *Lib.* XLVIII. *tit.* 19. *de pœnis l.* 38.

2 *Graſſatores*

2. *Graſſatores qui cum ferro aggredi & ſpoliare inſtituunt, capite puniuntor (a).*

3. *Famoſi latrones ad beſtias vel furcas damnantor. Digeſt. de pœnis (b).*

If we come to the laws and cuſtoms of our own kingdom, we ſhall find the puniſhment of theft in ſeveral ages to vary according as the offence grew and prevailed more or leſs *(c)*.

[12] Among the laws of king *Athelſtan*, mentioned by *Brampton*, *p.* 849, 852, 854. *Non parcatur alicui latroni ſupra* 12 *annos & ſupra* 12*d. quin occidatur (d). Edmund* his ſucceſſor *, *præcepit nè infra* 15 *annos, vel pro latrocinio infra* 12*d. occidatur, niſi fugerit, vel ſe defenderit: Malmſbury* tells us, that in the time of *William* I. theft was puniſhed with caſtration, and loſs of eyes *(e)*; but in the time of *Henry* I. the antient law, which continues to this day, was *ut ſiquis in furto vel latrocinio deprehenſus fuerit ſuſpenderetur (f)*.

(*a*) *Dig. eod. tit. l.* 28. §. 10.

(*b*) *Dig. eod. tit. l.* 28. §. 15.

(*c*) By the laws of *Ethelbert*, if one man ſtole any thing from another, he was to reſtore three-fold, beſides a fine to the king, *l.* 9. If he ſtole any thing from the king, he was to reſtore nine-fold, *l.* 4.

By the laws of *Ina* a thief was puniſhed with death, unleſs he redeemed his life *capitis eſtimatione l.* 12. which was 60*s. l.* 7. but if a villain, who had been often accuſed, ſhould be taken in a theft, he was to have a hand or foot cut off, *l.* 18.

By the laws of *Alfred* whoever ſtole a mare with the foal, or a cow with the calf, was to pay 40*s.* beſides the price of the mare or cow, *l.* 16. Whoever ſtole any thing out of a church, was to pay the value, and a fine according to the value; and alſo was to have that hand cut off, which committed the fact, *l.* 6. If any perſon committed a theft *die Dominico*, or any other great feſtival, he was to pay double *l*, 5.

(*d*) By the firſt law of *Athelſtan* it was but 8*d. Wilkins leges Anglo-Sax. p.* 56. but afterwards by the laws of the ſame king, enacted at *London*, and thence called *judicia civitatis Lundoniæ*, no one was to be put to death for a theft under 12*d. Ibid. p.* 65. But in caſe the thief fled, or made reſiſtance, then he might be put to death, tho' it were under that value, *Ibid. p.* 70. By the law of *Cnute* theft was puniſhed with death, *Ibid. p.* 134. *l.* 4. and *p.* 143. *l.* 61.

(*) This is a miſtake, for no ſuch law is found among the laws of that king, but it is among the later laws of king *Athelſtan*, *Vide Judicia Civ. Lond. Wilk. leg. Anglo. Sax. p.* 70.

(*e*) By the laws of *William* I. it was expreſſly prohibited, that any ſhould be hanged or put to death for any offence, but that his eyes ſhould be pull'd out, his teſticles, hands or feet cut off, according to the degree of his crime, *l.* 67. *apud Wilkins Leg. Anglo-Sax. p.* 229. *p.* 218.

(*f*) In former times, tho' the puniſhment of death was capital, yet the criminal was permitted to redeem his life by a pecuniary ranſom; but in the 9th year of Hen. I. it was enacted, that whoever was convicted of theft (or any other felony, 3 *Co. Inſtit.* 53.) ſhould be hanged, and the liberty of redemption was entirely taken away. *Wilk. leg. Anglo-Sax. p.* 304. This law ſtill remains at this day; but conſidering the alteration in the value of money, the ſeverity of it is much greater now than then, for 12*d.* would then purchaſe as much as 40*s.* will now; and yet a theft above the value of 12*d.* is ſtill liable to the ſame puniſhment; upon which Sir *Hen. Spelman* juſtly obſerves, that while all things elſe have roſe in their value and grown dearer, the life of man is become much cheaper. *Spelm. in verbo laricinium*; from hence that learned author takes occaſion to wiſh, that the antient tenderneſs of life were again reſtored *Juſtum certè eſt, ut collapſa legis æquitas reſtauretur, & ut divinæ imaginis vehiculum, quod ſuperiores pridem ætates ob graviſſima crimina nequaquam tollerent, levioribus bodie ex delictis non perderetur.*

And

And altho many of the ſchoolmen and cannoniſts are of opinion that death ought not to be inflicted for theft (*g*), yet the neceſſity of the peace and well ordering of the kingdom hath in all [13] ages and almoſt all countries prevailed againſt that opinion, and annexed death as the puniſhment of theft, when the offenſe hath grown very common and accompanied with enormous circumſtances, tho in ſome places more is left herein to the *Arbitrium Judicis* to give the ſame or a more gentle ſentence according to the quality of the offenſe and offender, than is uſed in *England*, where the laws are more determinate, and leave as little as may be to the *Arbitrium Judicis*. See the caſe diſputed learnedly by *Covarruvias Tomo* 2. *Lib.* II. *cap.* 9. §. 7.

This I have therefore mentioned, that it may appear, that capital puniſhments are variouſly appointed for ſeveral offenſes in all kingdoms and ſtates: and there is a neceſſity it ſhould be ſo; for regularly the true, or at leaſt, the principal end of puniſhments is to deter men from the breach of laws, ſo that they may not offend, and ſo not ſuffer at all; and the inflicting of puniſhments in moſt caſes is more for example and to prevent evils, than to puniſh. When offenſes grow enormous, frequent and dangerous to a kingdom or ſtate, deſtructive or highly pernicious to civil ſocieties, and to the great inſecurity and danger of the kingdom and its inhabitants, ſevere puniſhments, even death itſelf, is neceſſary to be annexed to laws in many caſes by the prudence of law-givers, tho poſſibly beyond the ſingle demerit of the offence itſelf ſimply conſider'd.

Penalties therefore regularly ſeem to be *juris poſitivi*, & *non naturalis*, as to their degrees and applications, and therefore in different ages and ſtates have been ſet higher or lower according to the exigence of the ſtate and wiſdom of the law-giver. Only in the caſe of *murder* there ſeems to be a juſtice of retaliation, if not *ex lege naturali*, yet at leaſt by a general divine law given to all mankind, *Gen.* ix. 6. [14] And altho I do not deny but the ſupreme king of the world may remit the ſeverity of the puniſhment, as he did to *Cain*, yea and his ſubſtitutes

(*g*) *Scotus Sentent.* 4. *diſtinct* 154 *quæſt.* 3. *Sylveſter in Verbo furtum* 3. Not only the ſchoolmen and cannoniſts were of this opinion, but by what has been above ſaid, it appears likewiſe to have been the ſenſe both of the *Jewiſh* and *Roman* laws, and the, as our author ſays, the principal end of puniſhment is to deter men from offending, yet it will not follow from thence, that it is lawful to deter them at any rate, and by any means; for even obedience to juſt laws may be inforced by unlawful methods. *Cic. Epiſt.* 15. *ad Brutum. Eſt pœnæ modus, ſicut rerum reliquarum*; and again, *Lib.* I *de officiis. Eſt enim ulciſcendi & puniendi modus.* Beſides, experience might teach us, that capital puniſhments do not always beſt anſwer that end. See *Grot. de jur. bel. &c. Lib.* II. *cap.* 20. §. 12. *n.* 3.

ſovereign

ſovereign princes may alſo defer or remit that puniſhment, or make a commutation of it upon great and weighty circumſtances, yet ſuch inſtances ought to be very rare, and upon great occaſions.

In other caſes the *lex talionis* in point of puniſhments ſeems to be purely *juris poſitivi*; and altho among the *Jewiſh* laws we find it inſtituted *Exod.* xxi. 24, 25 *Eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, ſtripe for ſtripe*; yet in as much as the party injur'd is living and capable of another ſatisfaction of his damage, (which he is not in caſe of murder) I have heard men greatly read in the *Jewiſh* lawyers and laws affirm, that theſe *taliones* among the *Jews* were converted into pecuniary rates and eſtimates to the party injured, ſo that in penal proceedings the rate or eſtimate of the loſs of an eye, tooth, hand or foot was allowed to the perſon injur'd, *viz.* the price of an eye for an eye, and the price of an hand for an hand, *&c.* *(h)*.

[1 See 4 Blackſ. Com. ch. i. Of the nature of crimes and puniſhments.]

(h) Maimonides More Nevochim, Part III. *cap.* 41.

CHAP II.

Concerning the ſeveral incapacities of perſons, and their exemptions from penalties by reaſon thereof.

MAN is naturally endowed with theſe two great faculties, underſtanding and liberty of will, and therefore is a ſubject properly capable of a law properly ſo called, and conſequently obnoxious to guilt and puniſhment for the violation of that law, which in reſpect of theſe two great faculties he hath a capacity to obey: The conſent of
[15] the will is that, which renders human actions either commendable or culpable; as where there is no law, there is no tranſgreſſion, ſo regularly where there is no will to commit an offenſe, there can be no tranſgreſſion, or juſt reaſon to incur the penalty or ſanction of that law inſtituted for the puniſhment of crimes or offenſes. And becauſe the liberty or choice of the will preſuppoſeth an act of the underſtanding to know the thing or action choſen by the will, it follows that, where there is a total defect of the underſtanding, there is no free act of the will in the choice of things or actions. But general notions or rules are too extravagant and undeterminate, and cannot

cannot be ſafely in their latitude applied to all civil actions; and therefore it hath been always the wiſdom of ſtates and law-givers to preſcribe limits and bounds to theſe general notions, and to define what perſons and actions are exempt from the ſeverity of the general puniſhments of penal laws in reſpect of their incapacity or defect of will.

Thoſe incapacities or defects, that the laws, eſpecially the laws of *England*, take notice of to this purpoſe, are of three kinds:

I. Natural.
II. Accidental.
III. Civil incapacities or defects.

The natural is that of *Infancy*.

The accidental defects are,
1. *Dementia*.
2. *Caſualty*, or *Chance*.
3. *Ignorance*.

The civil defects are.
1. *Civil Subjection*.
2. *Compulſion*.
3. *Neceſſity*.
4. *Fear*.

Ordinarily none of theſe do excuſe thoſe perſons, that are under them, from civil actions to have a pecuniary recompenſe for injuries done, as *treſpaſſes*, *batteries*, *woundings*; becauſe ſuch a recompenſe is not by way of penalty, but a ſatisfaction for damage done to the party: but in caſes of crimes and miſdemeanors, where the proceedings againſt them is *ad pœnam*, the law in ſome caſes, and under certain temperaments takes notice of theſe defects, and in reſpect of them relaxeth or abateth the ſeverity of their puniſhments. [16]

[See 4. Blackſ. Com. ch. ii.]

CHAP.

CHAP. III.

Touching the defect of infancy and nonage.

THE laws of *England* have no dependence upon the civil law, nor are governed by it, but are binding by their own authority; yet muſt it be confeſſed, the civil laws are very wiſe and well compoſed laws, and ſuch as have been found out and ſettled by wiſe princes and law-givers, and obtain much in many other kingdoms ſo far as they are not altered, abrogated, or corrected by the ſpecial laws or cuſtoms of thoſe kingdoms, and therefore may be of great uſe to be known, tho they are not to be made the rules of our *Engliſh* laws; and therefore tho I ſhall in ſome places of this book, and here particularly mention them, yet neither I, nor any elſe may lay any weigh or ſtreſs upon them, either for diſcovery or expoſition of the laws of *England*, farther than by the cuſtoms of *England* or Acts of Parliament they are here admitted.

As to this buſineſs touching infancy, and how far they are capable of the guilt or puniſhment for crimes, I will conſider, 1. What the civil laws tell us concerning the ſame. 2. What the common laws of *England* have ordained touching it, and wherein theſe agree, and wherein they differ touching this matter.

[17] The Civil law diſtinguiſhes the ages into ſeveral periods as to ſeveral purpoſes.

Firſt, The complete full age as to matters of contract is according to their law twenty-five years *(a)*, but according to the law of *England* twenty-one years *(b)*.

Secondly, But yet before that age, *viz.* at ſeventeen years, a man is ſaid to be of full age, to be a procurator *(c)*, or an executor *(d)*; and with that alſo our law agrees. 5 *Co. Rep. Pigot's* caſe *(e)*.

Thirdly. As to matrimonial contracts, the full age of conſent in males is fourteen years, and of females twelve *(f)*; till that age

(*a*) *Inſtitut. Lib.* I. *tit.* 23. *De Curatoribus. Dig. Lib.* IV. *tit.* 4. *de Minoribus, l.* 1. &c.

(*b*) *Lit.* §. 104. *Co. Lit* §. 103.

(*c*) *Inſtitut. Lib.* I. *tit.* 6. *Quibus ex cauſis manumittere non licet*, §. 5. & 7. *Dig. Lib.* III. *tit.* 1. *De Poſtulando*, b. i. §. 3. At this age it was the cuſtom among the *Romans* to lay aſide the habits of children, and put on the garments of men. *Val Max. Lib.* V. *cap.* 4. §. 4. *Sueton. Auguſt. cap.* 8.

(*d*) See *Swinb.* of Wills, *par.* V. §. 1. *n.* 6.

(*e*) It is quoted in *Prince's* caſe, 5 *Co. Rep.* 29. *b.* Office of Executors, *p.* 307.

(*f*) *Inſtit. Lib.* 1. *tit.* 10. *de nuptiis pr. Dig. Lib.* XXIII. *tit.* 2. *de ritu nuptiarum, l.* 4.

they

they are ſaid to be *impuberes (g)*, and are not bound by matrimonial contracts; and with this alſo our law agrees *(h)*.

Fourthly. As to matter of crimes and criminal puniſhments, eſpecially that of death, they diſtinguiſh the ages into theſe four ranks.

1. *Ætas pubertatis plena.*
2. *Ætas pubertatis.*
3. *Ætas pubertati proxima.*
4. *Infantia.*

1. *Pubertas plena* is eighteen years *(i)*.

2 *Pubertas* generally, in relation to crimes and puniſhments, is the age of fourteen years and not before *(k)*; and it ſeems as to this purpoſe there is no difference between the male and female ſex; at this age they are ſuppoſed to be *doli capaces*, and therefore for crimes altho' capital, committed after this age they ſhall ſuffer as perſons of full age *(l)*; only by the conſtitutions of ſome kingdoms, in favour of their age, the ordinary puniſhments were not inflicted upon ſuch young offenders; as in *Spain*, not unleſs he were of the age of ſeventeen years. *Vide Covar. de Matrimonio, cap.* 5. §. 8. *(m). In Relectione ad Clement. cap. Si Furioſus (n).* By the antient law among the *Jews*, he that was but a day above thirteen years, was, as to criminals adjudged *in virili ſtatu*, but not if under that age *(†)*. [18]

3. *Ætas pubertati proxima*, herein there is great difference among the *Roman* lawyers; and tho they make a diſparity herein between males and females, yet I think as to point of crimes the meaſure is the ſame for both: Some aſſign this *Ætas pubertati proxima* to ten

(g) *Inſtitut. Lib.* I. *tit.* 22. *Quibus modis tutela finitur. pr. Dig. Lib.* XXVIII. *tit.* 6. *de vulg. & pupil. ſubſtitut. l.* 2. *Macrob. Saturn. Lib.* VII. *cap.* 7.

(b) *Co. Lit.* §. 104. At the ſame age they were permitted by the civil law to make a Teſtament. *Digeſt. Lib.* XXVIII. *tit.* 1. *Qui teſtamenta facere poſſunt, l.* 5. *Inſtitut. Lib.* II. *tit.* 12. *Quibus non eſt permiſſum facere teſtamentum*, §. 1. *Cod. Lib.* VI. *tit.* 22. *Qui teſtamenta facere poſſint, vel. nol, l.* 4. The common law ſeems not to have determined preciſely at what age one may make a teſtament of a perſonal eſtate, it is generally allowed that it may be made at the age of eighteen. *Office of Executors, p.* 305. *Co. Lit.* 89. *b.* and ſome ſay under, for the common law will not prohibit the ſpiritual court in ſuch caſes. Sir *Thos. Jones, Rep.* 210. 1 *Vern.* 255. 2 *Vern.* 469.

(i) *Dig. Lib.* I. *tit.* 7. *de adoption. l.* 40. §. 1. *Inſtit. eod. tit.* §. 4. *Dig. Lib.* XLII. *tit.* 1. *de re judicat. l.* 57. *Lib.* XXXIV. *tit.* 1. *De alimentis, l.* 14. §. 1.

(k) *Dig. Lib.* XXIX. *tit.* 5. *de Senatuſconſulto Silaniano, &c. l.* 1. §. 32.

(l) *Dig. Lib.* IV. *tit.* 4. *de minoribus, l.* 37. §. 1. *Lib.* XLVIII. *tit.* 5. *ad leg. Jul. de adult. l.* 36. *Cod. Lib.* 2. *tit.* 35. *Si adverſus delictum. l.* 1.

(m) *Tom.* 1. *p.* 157.

(n) *Par.* III. §. 5. *Tom.* 1. *p.* 558.

(†) *Seld. de Synedriis, Lib.* II. *cap.* 13. §. 132.

years

years and an half; others to eleven years (o): If they be under the age which they call *Ætas pubertati proxima*, they are presumed *incapaces doli* (p), and therefore regularly not liable to a capital punishment for a capital offense: but this holds not always true; for according to the opinion of very learned civilians, before ten years and a half they may be *doli capaces*, and therefore it must be left *ad arbitrium judicis* upon the circumstances of the case; yet with this caution, *Judex, qui ante illam ætatem arbitrari debet puerum esse proximum pubertati, maximis adducendus est conjecturis, & cautissime id aget, ac tandem raro. Covarr. ubi supra* (q). And with this agrees our law, as shall be shewed. But if the offender be in *ætate pubertati proximâ, viz.* according to some ten years and an half according to others eleven years old, he is more easily presumed to be *doli capax*, and therefore may suffer as another man, unless by great circumstances it appear, that he is *incapax doli*. But this hath also its temperaments,

[19]

1. By express provision of the constitution *in Codice de falsâ Monetâ*: "*Impuberes, si conscii fuerint, nullum sustineant detrimentum, quia* "*ætas eorum, quid videat ignorat*;" but a penalty is laid upon the tutor (r).

2. Tho' *ætas pubertati proxima* is regularly presumed *Capax doli*, and so may be guilty of a capital offense.—*Digest. De regulis juris* (s). *Pupillum, qui proximus est pubertati, capacem esse furandi*, yet as it is *in arbitrio judicis* to judge an infant within ten years and an half *capax doli*, as before; so it is in *arbitrio judicis* upon consideration of circumstance to judge one above ten years and a half, nay of twelve, thirteen years, or but a day within fourteen years, to be *incapax doli*, and so privileged from punishment, as appearing upon the circumstances of the fact not yet *constitutus in ætate proximâ pubertati*, or at least not *doli capax*; and with this our law doth in a great measure agree.

3. That if he be above ten years and a half, and appears *doli capax*, yet if under fourteen years, he is not to be punished *pœnâ ordinariâ*, but it may have some relaxation *ex arbitrio judicis* (t). But

(o) The prevailing opinion is, that the males are *pubertati proximi* at ten and an half, and the females at nine and an half, because when they had passed the middle distance between infancy and puberty, they might then be properly said to be *ætatis pubertati proximiæ*.

(p) *Dig. Lib.* XLVII. *tit.* 12. *de sepulchro violato, l.* 3. §. 1.

(q) *Tom.* 1. *p.* 157.

(r) *Lib.* IX. *tit.* 24. *l.* 4.

(s) *Lib.* L. *tit.* 17. *l.* 111, *Lib.* XXIX. *tit.* 5. *de Senatusconsulto Silaniano, l.* 14. *Lib.* XLIV. *tit.* 4. *de doli mali exceptione, l.* 4. §. 26. *Instit. Lib.* IV. *tit.* 1. *de obligat. quæ ex delicto,* § 18. *Dig. Lib.* XLVIII. *tit.* 2. *de furtis, l.* 23.

(t) *Dig. Lib.* IV. *tit.* 4. *de minoribus, l.* 37. §. *In delictis.*

altho

altho our law indulges a power to the judge to reprieve before or after judgment an infant convict of a capital offenſe in order to the King's pardon, yet it allows no arbitrary power to the judge to change the puniſhment that the law inflicts; and thus far for the third age or period, *Ætas pubertati proxima.*

4. The fourth age or period is *infantia*, which laſts till ſeven years; within this age there can be no guilt of a capital offenſe; the infant may be chaſtiſed by his parents or tutors, but cannot be capitally puniſhed, becauſe he cannot be guilty *(u)*; and if indicted for ſuch an offenſe as is in its nature capital, he muſt be acquitted; and therefore the ſeverity of the gloſs upon the decretal *De delictis puerorum, cap.* 1. *(x)* is juſtly rejected in this caſe *(y)*; and with this agrees the law of *England*. [20]

But now let us conſider the laws of *England* more particularly touching the privilege of infancy in relation to crimes and their puniſhments, and that in relation to two kinds of crimes, 1. Such as are not capital. 2. Such as are capital.

Firſt, As to miſdemeanors and offenſes that are not capital: in ſome caſes an infant is privileged by his non-age, and herein the privilege is all one, whether he be above the age of fourteen years or under, if he be under one and twenty years; but yet with theſe differences:

If an infant under the age of twenty-one years be indicted of any miſdemeanor, as a *riot* or *battery*, he ſhall not be privileged barely by reaſon that he is under twenty-one years, but if he be convicted thereof by due trial, he ſhall be fined and impriſoned; and the reaſon is, becauſe upon his trial the court *ex officio* ought to conſider and examine the circumſtances of the fact, whether he was *doli capax*, and had diſcretion to do the act wherewith he is charged; and the ſame law is of a *femme covert*. 2. But if the offenſe charged by the indictment be a mere non-feaſance, (unleſs it be of ſuch a thing as he is bound to by reaſon of tenure, or the like as to repair a bridge, *&c.*) *(z)* there in ſome caſes he ſhall be privileged by his nonage, if under twenty-one, tho above fourteen years, becauſe *Laches* in ſuch a caſe ſhall not be imputed to him *(a)*.

(u) *Dig. Lib.* XLVII. *tit.* 2. *de furtis, l.* 23. *Lib.* XLVIII. *tit.* 8. *ad leg. Cornel. de ſicariis l.* 12.
(x) *Decretal. Lib.* V. *tit.* 23.
(y) *Tom.* 1. *p.* 157.
(z) 2 *Co. Inſt.* 703.
(a) *B. Sawer default,* 50. *Cro. Jac.* 465, 466. *Pl. Com.* 364. a *Co. Lit.* 246. *b.*

36 *E.* 3. *Aſſiſ.* 443. 4 *H.* 7. 11. *b.* If an infant in *Aſſiſe* vouch a record, and fail at the day he ſhall not be impriſoned *(b)* nor it ſeems a *feme covert*. 13 *Aſſiſ.* 1. *(c)* and yet the ſtatute of *Weſtminſt.* 2. *cap.* 25. that gives impriſonment in ſuch a caſe, is general.

[21] 8 *E.* 2. *Corone* 395. If *A.* kills *B.* and *C.* & *D* are preſent, and do not attach *(d)* the offender, they ſhall be fined or impriſoned; yet if *C.* were within the age of twenty-one years, he ſhall not be fined nor impriſoned.

3. Where the corporal puniſhment is but collateral, and not the direct intention of the proceedings againſt the infant for his miſdemeanor, there, in many caſes, the infant under the age of twenty-one ſhall be ſpared, tho poſſibly the puniſhment be enacted by parliament. 14 *Aſſ.* 17. *(e)* If an infant of the age of eighteen be convict of a diſſeiſin with force, yet he ſhall not be impriſoned. *Vide* 26 *Aſſ.* 9. 43 *E.* 3. *Impriſonment* 16. 40 *E.* 3. 44. *a.* *(f)* and yet a *feme covert* ſhall be impriſoned in ſuch caſe. 16 *Aſſ.* 7.

If an infant be convict in an action of treſpaſs *vi & armis*, the entry muſt be *nihil de fine, ſed pardonatur, quia infans*; for if a *capiatur* be entred againſt him, it is error, for it appears judicially to the court, that he was within age when he appears by guardian. *P.* 8. *Jac. B. R. Holbrooke* v. *Dogley, Croke, n* 3. *(g)*; the like law is that he ſhall not be *in miſericordia pro falſo clamore (h)*.

B. Coverture 68. General ſtatutes that give corporal puniſhment are not to extend to infants, and therefore *Pl. Com.* 364, *a per Walſh*, if an infant be convict in raviſhment of ward, he ſhall not be impriſoned, tho the ſtatute of *Merton cap.* 6. be general in that caſe *(i)*: but this muſt be underſtood where it is, as before ſaid, a puniſhment as it were collateral to the offenſe, as in the caſes before-mentioned: but where a fact is made felony or treaſon, it extends as well to in-

(*b*) 2 *Co. Inſtit.* 414.
(*c*) *B. Coverture* 35. *Reſceit* 87.
(*d*) The words of the book are *ne leve le main d'attach.*
(*e*) *F. Impriſonment* 8.
(*f*) "Et le cauſe eſt, pur ceo que la ley "entend', que un enfant ne poit my co-"nuſtr' bien & mal' ne le quel ſoit ad-"vantage pour luy, ou nemy; ne nul foly "ſera adjudge en un enfant." *Mes.* 12. *H.* 4. 22. *b.* *Blank.* dit. que enfant d'age de 18 ans poit eſtre diſſeiſor ove-force & eſtre empriſon per ceila.
(*g*) *Cro. Jac.* 274.
(*h*) *Co. Lit.* 127. *a.* yet this was not a ſettled point, for 2 *E.* 3. 5. the court doubted of it; and in 17 *E.* 3, 75. *b.* and 41 *Aſſiſ.* 14. the plaintiffs, tho' infants were amerced *pro falſo clamore*; but tho they were amerced, yet it appears from the ſame caſes that they were entitled on account of their infancy to a pardon of courſe. See 1 *R. A.* 214.
(*i*) Another like caſe is there put, if an infant be a receiver and account before auditors, and be found in arrears, the auditors cannot commit him to priſon notwithſtanding the general words of the ſtatute of *W.* 2. *cap.* 11.

infants

fants, if above fourteen years *(k)*, as to others, as ſhall be ſaid. And this appears by ſeveral acts of parliament, and particularly by 1 *Jac. cap.* 11. *of felony for marrying two wives*, &c. where there is a ſpecial exception of marriages within the age of conſent, which in females is twelve, in males fourteen years; ſo that if the marriage were above the age of conſent, tho within the age of twenty-one years, it is not exempted from the penalty.

So by the ſtatute of 21 *H.* 8. *cap.* 7. *concerning felony by ſervants that imbezil their maſters goods delivered to them*, there is a ſpecial *proviſo*, that it ſhall not extend to ſervants under the age of eighteen years, who certainly had been within the penalty, if above the age of diſcretion, *viz.* fourteen years, tho under eighteen years, unleſs a ſpecial proviſion had been to exclude them *(l)*.

I come therefore to conſider the privilege of infancy in caſes of capital offenſes and puniſhments according to the laws of *England*, wherein I ſhall examine, 1 How the antient law ſtood. 2. How it ſtands at this day in relation to infants.

I. As to the antient law:

1. By what has been before ſaid it appears that the Civil law was very uncertain in defining what was that *ætas pubertati proxima*, and conſequently ſuch as might ſubject the offender to capital guilt or puniſhment; ſome taking it to be ten years and an half, ſome eleven years, others more, others leſs. The laws of *England* therefore, that always affect certainty, determined antiently the *ætas pubertati proxima* to be twelve years for both ſexes; under that age none could be regularly guilty of a capital offenſe, and above that age and under fourteen years, he might or might not be guilty according to the circumſtances of the fact that might induce the court and jury to judge him *doli capax*, *vel incapax (m)*.

This appears by the laws of king *Athelſtan* mentioned in the firſt chapter, "*Non parcatur alicui latroni ſuper* 12 *annos & ſupra* 12 *d. quin occidatur.*" And altho' his ſucceſſor *Edmund (u)* reduced [23]

(*k*) *Co. Lit.* 247. *b.*

(*l*) The like exception there is in the 12 *Ann. cap.* 7. where apprentices under the age of *fifteen* years, who ſhall rob their maſters, are excepted out of the act.

(*m*) By the laws of *Ina*, *l.* 7. an infant of ten years of age might be guilty of being acceſſary to a theft, and was puniſhed accordingly with ſervitude. *Wilk. Leg. Anglo-Sax. p* 16.

(*n*) This is a miſtake, for it was not *Edmund* but king *Athelſtan* himſelf, who thinking it a pitiable caſe that a youth but twelve years old ſhould be put to death, as was permitted by the former law, changed the time from twelve years to fifteen, and ordered that none who was but fifteen years of age ſhould be put to death, unleſs he reſiſted or fled; if he ſurrendered himſelf, he was only to be impriſoned until ſome of his relations or friends

(n) reduced it to fifteen years, unleſs he fled, yet it will appear that the ſtandard of twelve years obtained in after ages *(o)*.

2. It appears that an infant of twelve years was compelible to take the oath of allegiance in the leet, and under that age none were to take the oath, or to do ſuit to the leet. *Bract. Lib.* III. *(p). cap.* 1. *(q) Britton, cap.* 29. *in fine, Calvin's* caſe, 7 *Co. Rep.* 6. *b.* So that at that age, and not before, he was taken notice of by the law to be under the obligation of an oath, and conſequently capable of diſcretion.

3. The ordinary proceſs againſt capital offenders was and is by *Capias* and *Exigent*, and *Utlary* thereupon; but againſt an infant under twelve, proceſs of utlary in caſes of indictment was not awardable, and if awarded, it was error; but if above that age, that proceſs was awardable; and *Bract. Lib.* III. *(r) cap.* 11. *ſect.* 4 & 5. gives the reaſon, "*Minor vero, qui infra ætatem* 12 *annorum fuerit utlegari non debet, quia ante talem ætatem non eſt ſub lege aliquâ nec in decenna*;" and *ibidem cap.* 10 *ſect.* 1. he mentions an old law of king *Edward (ſ)*, "*Omnis, qui ætatis* 12 *annorum fuerit, facere debet ſacra*

[24] "*mentum inviſu franciplegii, quod nec latro vult eſſe, nec latroni*
"*conſentire*;" and *Stamf. Lib.* I. *cap.* 19. cites out of a book of *Bracton, De Viſu Franci plegii*, "*Quod quilibet duodecim annorum po-*
"*teſt feloniæ judicium ſuſtinere*," which implies alſo that within that age, regularly at leaſt, he could not be a felon.

4. Again, *T.* 32. *E.* 1. *Rot.* 32. *Eboracum, coram rege. Adam*
"*filius Adæ de Arnhale captus noctanter in domo Johannis Somere co-*
"*ram rege ductus cognovit, quod furtive cepit, &c.* 9*s. per preceptum*
"*& miſſionem Richardi Short:*" *Richard Short* had his clergy, "*Et*

would become ſecurity for him *juxta plenam capitis æſtimationem, ut ſemper ab omni malo abſtineat*: if he could not get any ſuch ſecurity, then he was to take an oath to the ſame purpoſe in ſuch manner as the biſhop ſhould direct him, and was to remain *in ſervitute pro capitis ſui æſtimatione*; but if after this he ſhould be again guilty then he was to be put to death without any regard to his age. See *Wilk. leges Anglo-Sax. p.* 70.

(o) In the time of king *Henry* I. the old law of king *Athelſtan* took place, *viz.* twelve years of age, and 8*d.* value. *Ibid. p.* 259.

(p) *De Corona.*

(q) This ſeems to be a miſtake, for *cap.* 11. *ſect.* 4. for the oath mentioned in *cap.* 1. was to be taken by knights and others of the age of fifteen years and upwards.

(r) *De Corona.*

(ſ) There is no ſuch law extant among thoſe of king *Edward*, but the law here quoted is a law of *Cnute, Leg. Cnuti, l.* 19. which is in theſe words, *Volumus ut quilibet homo* 12 *annos natus juſſurandum præſtet ſe nolle furem eſſe neque furi conſentaneum*, which oath is to the ſame purpoſe with that mentioned by *Bracton, Lib.* iii. *de corona, cap.* 1. to be taken at the age of fifteen; and tho there be a difference as to the age, yet probably it is the ſame oath, for it is very eaſy and natural to miſtake xii for xv. See the ſtatute of *Marlbridge, cap.* 10 & 25. and lord *Coke's* comment thereon, 2 *Inſt.* 147. where he takes notice that the old books are miſprinted. See alſo 2 *Inſtit.* 72. *Mirror, cap.* 1. §. 3. *Britton, cap.* 12.

"*prædictus*

" *prædictus Adam commissus fuit custodiæ marischalli custodiendi, quia* " *infra ætatem; postea habito respectu ad imprisonamentum, quod præ-* " *dictus Adam habuit, & etiam ad teneram ætatem ejusdem Adæ, eo* " *quod non est nisi ætatis* 12 *annorum, qui talis ætatis judicium ferre* " *non potest, ideo de gratiâ regis deliberetur, &c.*" Upon this record these things are observeable, *viz.* 1. The court recorded his confession; but regularly that ought not to be, for if an infant under the age of twenty-one shall confess an indictment, the court in justice ought not to record the confession, but put him to plead *not guilty*, or at least ought also to have enquired by an inquest of office of the truth and circumstances of the fact. 2. That here he was twelve years old, and yet judgment spared, and the reason given, *Qui talis ætatis judicium ferre non potest.* Yet 3. There is somewhat still of *gratia regis* interposed, as it seems, in respect he was past the old standard of twelve years.

II. But now let us come to the Common law as it stood in after-times; for in process of time, especially in and after the reign of king *Edward* III. the Common law received a greater perfection, not by the change of the Common law, as some have thought, for that could not be but by act of parliament; but men grew to greater learning, judgment and experience, and rectified the mistakes of former ages and judgments, and the law in relation to infants and [25] their punishments for capital offenses was and to this day is as followeth.

1. It is clear that an infant above fourteen and under twenty-one is equally subject to capital punishments, as well as others of full age; for it is *præsumptio juris*, that after fourteen years they are *doli capaces*, and can discern between good and evil; and if the law should not animadvert upon such offenders by reason of their nonage, the kingdom would come to confusion. Experience makes us know that every day murders, bloodsheds, burglaries, larcenies, burning of houses, rapes, clipping and counterfeiting of money, are committed by youths above fourteen and under twenty-one; and if they should have impunity by the privilege of such their minority, no man's life or estate could be safe (*t*). In my remembrance at *Thetford* a young

(*t*) Our author's argument concludes very strongly against their escaping with *impunity*, but loses much of its force when urged in behalf of *capital* punishments, for there is no necessity that if they be not capitally punished they must therefore go unpunished; so that whatever severity may be needful in cases of murders and acts of violence, yet in the common instances of larceny and stealing, some other punishment might be found, which might leave room for the reformation of young offenders.

lad of ſixteen years old was convict for ſucceſſive wilful burning of three dwelling houſes, and in the laſt of them burning a child to death, and yet had carried the matter ſo ſubtilly, that by a falſe accuſation of another perſon for burning the firſt houſe an innocent perſon was brought in danger, if it had not been ſtrangely diſcovered: he had judgment to die, and was accordingly executed *(u)*.

Fourteen years of age therefore is the common ſtandard, at which age both males and females are by the law obnoxious to capital puniſhments for offenſes committed by them at any time after that age; and with this agrees *Fitz. N. B.* 202. *b.* *(x)* *Co. Littl.* §. 405 *(y)*. *Vide* Mr. *Dalton's Juſtice of Peace*, *cap.* 95. and 104 *(z)*.

[26] 2. An infant under the age of fourteen years and above the age of twelve years is *primâ facie* preſumed to be *doli capax*, and therefore regularly for a capital offenſe committed under fourteen years he is not to be convicted or have judgment as a felon, but may be found not guilty.

But tho *primâ facie* and in common preſumption this be true, yet if it appear to the court and jury that he was *doli capax*, and could diſcern between good and evil at the time of the offenſe committed, he may be convicted and undergo judgment and execution of death, tho he hath not attained *annum pubertatis*, *viz.* fourteen years; tho according to the nature of the offenſe and circumſtances of the caſe the judge may or may not in diſcretion reprieve him before or after judgment, in order to the obtaining the king's pardon. 12 *Aſſ.* 30. *Corone* 118 & 170. *Alice de Waldborough* of the age of thirteen years was burnt by judgment for killing her miſtreſs; and it is there ſaid, that by the antient law none ſhall be hanged within age which is intended the age of diſcretion, *viz.* fourteen years; but before *Spigurnel* an infant within age *(a)* that had kild his companion, and hid himſelf *(ſe mucha)* was preſently hanged; for it appeared by his *muching* he could diſcern between good and evil, and *malitia ſupplet ætatem*.

25 *E.* 3. 85. *Corone* 129. One within age was found guilty of larceny, and by reaſon of his nonage judgment was reſpited, but

(u) At *Abingdon* aſſizes, *Feb.* 23, 1629, before *Whitlock* juſtice, one *John Dean*, an infant between eight and nine years, was indicted, arraigned, and found guilty of burning two barns in the town of *Windſor*; and it appearing upon examination that he had malice, revenge, craft, and cunning, he had judgment to be hanged, and was hanged accordingly. *MS. Report.*

(x) *N. Edit. p.* 450.

(y) *p.* 247. *b.*

(z) The firſt edition, but in the laſt edition, *cap.* 147 and 157.

(a) Ten years old, according to *Fitzherbert's Report Corone* 118.

afterwards

afterwards he was brought to the bar and had his judgment; tho this book be generally *one within age*, it muſt be intended within the age of diſcretion, *viz.* fourteen years, for it was never made a doubt, whether if above that age he might not have judgment.

3. But yet farther, if an infant be above ſeven years old, and under twelve years, (which according to the ancient law was *Ætas pubertati proxima)* and commit a felony, in this caſe *primâ facie* he is to be judged not guilty, and to be found ſo, becauſe he is ſuppoſed not of diſcretion to judge between good and evil *(b)*; yet even in that caſe if it appear by ſtrong and pregnant evidence and circumſtances, that he had diſcretion to judge between good and evil, judgment of death may be given againſt him. 3 *H.* 7. 1. *b.* & 12. *b.* An infant of the age of nine years kild an infant of the like age; he confeſſed the felony, and upon examination it was found he hid the blood and the body; the juſtices held he ought to be hanged *(c)*. [27]

But in caſes of this nature, 1. It is neceſſary that very ſtrong and pregnant evidence ought to be to convict one of that age, and to make it appear he underſtood what he did; for if the law require ſuch an evidence where the offender is above twelve, and under fourteen, much more if he were under twelve at the time of the fact committed. 2. The circumſtances muſt be inquired of by the jury, and the infant is not to be convict upon his confeſſion. 3. It is prudence in ſuch a caſe even after conviction to reſpite judgment, or at leaſt execution *(d)*; but yet I do not ſee how the judge can diſcharge him if he be convict, but only reprieve him from judgment, and leave him in cuſtody till the king's pleaſure be known.

And therefore the book of 35 *H.* 6. 11. & 12. *per Moyle & Billing*, "*That tho a jury ſhould find ſuch an infant guilty, the court* ex officio *muſt diſcharge him*," muſt be underſtood either *firſt* only of a reprieve before judgment, or *ſecondly* at leaſt, that the jury find the fact, and that he was either within the age of infancy, *viz.* ſeven years old, or that he did the fact, but was under fourteen, and not of diſcretion to judge between good and evil; in which caſe the court *ex officio* ought to diſcharge him, becauſe it is not felony.

(b) B. Corone 153.

(c) But however they reſpited the execution that he might get a pardon. F. *Corone* 57. *B. Corone* 133. *Dalton* ſays that an infant of eight years of age may commit homicide, and ſhall be hanged for it. See *Dalton's Juſtice, cap.* 147.

(d) Dalt. Juſtice, p. 505.

4. And laſtly, If an infant within age be *infra ætatem infantiæ, viz.* ſeven years old, he cannot be guilty of felony *(e)*, whatever circumſtances proving diſcretion may appear; for *ex preſumptione juris* he cannot have diſcretion *(f)*, and no averment ſhall be received againſt that preſumption: and altho the laws of *England*, as well as the Civil and Canon law, aſſign a difference between males and females as to their age of conſent to marriage, *viz.* fourteen to the male, twelve to the female; yet it ſeems to me, that as to matters of crimes, eſpecially in relation to capital puniſhments, the females have the ſame privilege of nonage as the males; and therefore the regular *Ætas pubertatis* in reference to capital crimes and puniſhments of both is fourteen years, with thoſe various temperaments and exceptions above aſſigned.

[28]

And it is to be obſerved, that in all caſes of infancy, inſanity, *&c.* if a perſon uncapable to commit a felony be indicted by the grand inqueſt, and thereupon arraigned, the petit jury may either find him generally *not guilty*, or they may find the matter ſpecially, that he committed the fact, but that he was *non compos*, or that he was under the age of fourteen, *ſcilicet ætatis* 13 *annorum*, and had not diſcretion to diſcern between good and evil, *& non per feloniam*; and thereupon the court gives judgment of acquittal. 21 *H.* 7. 31. *(g)*. But if a man be arraigned in ſuch a caſe upon an indictment of murder or manſlaughter by the coroner's inqueſt, there if the party committed the fact, regularly the matter ought to be ſpecially found, becauſe if the jury find the party not guilty, they muſt inquire how he came by his death, *viz.* "*Et juratores prædicti quæſiti per curiam, quomodo is* "*ad mortem ſuam devenit, dicunt ſuper ſacramentum ſuum, quod præ-*" *dictus A. B. die——anno——apud D. dum non fuit compos mentis,* "or *dum fuit infra ætatem diſcretionis, ſcilicet* 9 *annorum, nec ſcivit* "*diſcernere inter bonum & malum, prædictum J. S. cum gladio, &c.* "*percuſſit & ipſum ad tunc & ibidem occidit, ſed non ex malitiâ* "*precogitatâ, neque per feloniam, vel felleo animo; & ſic idem J.* "*S. ad mortem ſuam devenit.*" But if he be firſt arraigned, and acquitted upon the indictment by the grand inqueſt, and found not guilty, he may plead that acquittal upon his arraignment upon the coroner's inqueſt, and that will diſcharge

[29]

(e) And yet there is a precedent in the regiſter, *fol.* 309. *b.* of a pardon granted to an infant within the age of ſeven years, who was indicted for homicide; in this caſe the Jury found, that he did the fact before he was ſeven years old.

(f) *Plowd.* 19. *a.*

(g) *B. Corone* 61.

him;

him; and the petit jury ſhall inquire farther how the party came by his death.

[4. Blakſ. Com. ch. ii. page 22,]

CHAP IV.

Concerning the defect of ideocy, madneſs *and* lunacy, *in reference to criminal offenſes and puniſhments.*

AND thus far touching that natural defect of *infancy*. Now concerning another ſort of defect or incapacity, namely *ideocy*, *madneſs* and *lunacy*: For tho by the law of *England* no man ſhall avoid his own act by reaſon of theſe defects *(a)*, tho his heir or executor may, yet as to capital offenſes theſe have in ſome caſes the advantage of this defect or incapacity *(b)*; and this defect comes under the general name of *Dementia*, which is thus diſtinguiſhed.

I. *Ideocy*, or *fatuity à nativitate vel dementia naturalis*; ſuch a one is deſcribed by *Fitzherbert*, who knows not to tell 20*s*. nor knows who is his father or mother, nor knows his own age; but if he knows letters, or can read by the inſtruction of another, then he is no ideot. *F. N. B.* 233. *b.* Theſe, tho they may be evidences, yet they are too narrow, and conclude not always; for *ideocy or not* is a queſtion of fact triable by jury, and ſometimes by inſpection.

II. *Dementia accidentalis, vel adventitia*, which proceeds from ſeveral cauſes; ſometimes from the diſtemper of the [30] humours of the body, as deep melancholy or aduſt choler; ſometimes from the violence of a diſeaſe, as a fever or palſy; ſometimes from a concuſſion or hurt of the brain, or its membranes or organs; and as it comes from ſeveral cauſes, ſo it is of ſeveral kinds or degrees; which as to the purpoſe in hand may be thus diſtributed: 1. There is a partial inſanity of mind; and 2. a total inſanity.

The former is either in reſpect to things *quoad hoc vel illud inſanire*; ſome perſons, that have a competent uſe of reaſon in reſpect of ſome ſubjects, are yet under a particular *dementia* in reſpect of ſome particular diſcourſes, ſubjects or applications; or elſe it is partial in

(a) For it is ſaid to be a maxim in law, that no man of full age ſhall be permitted to ſtultify himſelf. 4 *Co. Rep.* 123. *b. Beverly's* caſe, *Co Lit.* 247. *a.* The reaſon hereof is, becauſe a man cannot know or remember what acts he did when he was of *non ſane memory*. 35 *Aſſiſ. pl.* 10. See *contra F. N. B. p.* 449. *Show. Ca. Parl.* 153. 2 *Salk.* 576.

(b) Co. Lit. 247. *b. Plowd.* 19. *a.*

reſpect

reſpect of degrees; and this is the condition of very many, eſpecially melancholy perſons, who for the moſt part diſcover their defect in exceſſive fears and griefs, and yet are not wholly deſtitute of the uſe of reaſon; and their partial inſanity ſeems not to excuſe them in the committing of any offenſe for its matter capital; for doubtleſs moſt perſons that are felons of themſelves, and others are under a degree of partial inſanity, when they commit theſe offenſes: it is very difficult to define the indiviſible line that divides perfect and partial inſanity; but it muſt reſt upon circumſtances duly to be weighed and conſidered both by the judge and jury, leſt on the one ſide there be a kind of inhumanity towards the defects of human nature, or on the other ſide too great an indulgence given to great crimes: the beſt meaſure that I can think of is this; ſuch a perſon as labouring under melancholy diſtempers hath yet ordinarily as great underſtanding, as ordinarily a child of fourteen years hath, is ſuch a perſon as may be guilty of treaſon or felony.

Again, a total alienation of the mind, or perfect madneſs; this excuſeth from the guilt of felony and treaſon *(d)*; *de quibus infra*. This is that, which in my lord *Coke's Pleas of the Crown*, *p.* 6. is call'd by him abſolute madneſs, and total deprivation of memory.

[31] Again, this accidental *dementia*, whether total or partial, is diſtinguiſhed into that which is permanent or fixed, and that which is interpolated, and by certain periods and viciſſitudes: the former is *phreneſis* or madneſs; the latter is that, which is uſually call'd *lunacy*, for the moon hath a great influence in all diſeaſes of the brain, eſpecially in this kind of *dementia*; ſuch perſons commonly in the full and change of the moon, eſpecially about the Equinoxes and ſummer ſolſtice, are uſually in the height of their diſtemper; and therefore crimes committed by them in ſuch their diſtempers are under the ſame judgment as thoſe whereof we have before ſpoken, namely, according to the meaſure or degree of their diſtemper; the perſon that is abſolutely mad for a day, killing a man in that diſtemper, is equally not guilty, as if he were mad without intermiſſion. But ſuch perſons as have their lucid intervals, (which ordinarily happens between the full and change of the moon) in ſuch intervals have certainly at leaſt a competent uſe of reaſon, and crimes committed by them in theſe intervals are of the ſame nature, and ſubject to the ſame puniſhment, as if they had no ſuch deficiency *(e)*; nay, the

(d) 21 H. 7. 31. *b.* *(e)* F. Corone 324.

alienations

alienations and contracts made by them in ſuch intervals are obliging to their heirs and executors *(f)*.

Again, this accidental *dementia*, whether temporary or permanent, is either the more dangerous and pernicious, commonly call'd *furor*, *rabies*, *mania*, which commonly ariſeth from adust choler, or the violent inflammation of the blood and ſpirits, which doth not only take away the uſe of reaſon, but alſo ſuperadds to the unhappy ſtate of the patient rage, fury, and tempeſtuous violence; or elſe it is ſuch as only takes away the uſe and exerciſe of reaſon, leaving the perſon otherwiſe rarely noxious, ſuch as is a deep *delirium*, *ſtupor*, memory quite loſt, the phantaſy quite broken, or extremely diſordered. And as to criminals theſe *dementes* are both in the ſame rank; if they are totally depriv'd of the uſe of reaſon, they cannot be guilty ordinarily of capital offenſes, for they have not the uſe of underſtanding, and act not as reaſonable creatures, but their actions are in effect in the condition of brutes *(g)*. [32]

III. The third ſort of *dementia* is that, which is *dementia affectata*, namely *drunkenneſs*. This vice doth deprive men of the uſe of reaſon, and puts many men into a perfect, but temporary phrenzy; and therefore, according to ſome Civilians *(h)*, ſuch a perſon committing *homicide* ſhall not be puniſhed ſimply for the crime of homicide, but ſhall ſuffer for his drunkenneſs anſwerable to the nature of the crime occaſioned thereby; ſo that yet the formal cauſe of his puniſhment is rather the drunkenneſs, than the crime committed in it: but by the laws of *England* ſuch a perſon *(i)* ſhall have no privilege by this voluntary contracted madneſs, but ſhall have the ſame judgment as if he were in his right ſenſes. *Plowd.* 19. *a. Crompt. Juſt.* 29. *a.*

But yet there ſeems to be two allays to be allow'd in this caſe.

1. That if a perſon by the unſkilfulneſs of his phyſician, or by the contrivance of his enemies, eat or drink ſuch a thing as cauſeth ſuch a temporary or permanent phrenzy, as *aconitum* or *nux vomica*, this puts him into the ſame condition, in reference to crimes, as any other phrenzy, and equally excuſeth him.

2. That altho the *ſimplex* phrenzy occaſion'd *immediately* by drunkenneſs excuſe not in criminals, yet if by one or more ſuch practices, an *habitual* or fixed phrenzy be caus'd, tho this madneſs was

(f) 4 *Co.* 125. *a.*
(g) *Bract.* 420. *b. F. Corone* 193, 351.
(h) *Bartholinus* and others. See *Covarruvias*, *Tom.* 1. *p.* 557. *in relect. ad Clem. Si furioſus. Par.* iii. §. 3. & 4.
(i) 4 *Co.* 125. *a.*

contracted

contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caus'd puts the man into the ſame condition in relation to crimes, as if the ſame were contracted involuntarily at firſt.

Now touching the trial of this incapacity, and who ſhall be adjudged in ſuch a degree thereof to excuſe from the guilt of capital offenſes, this is a matter of great difficulty, partly from the eaſineſs of counterfeiting this diſability, when it is to excuſe a nocent, and partly from the variety of the degrees of this infirmity, whereof ſome
[33] are ſufficient, and ſome are inſufficient to excuſe perſons in capital offenſes.

Yet the law of *England* hath afforded the beſt method of trial, that is poſſible, of this and all other matters of fact, namely by a jury of twelve men all concurring in the ſame judgment, by the teſtimony of witneſſes *vivâ voce* in the preſence of the judge and jury, and by the inſpection and direction of the judge.

There are two ſorts of trials of ideocy, madneſs, or lunacy; the firſt, in order to the commitment or cuſtody of the perſon and his eſtate, which belongs to the king, either to his own uſe and benefit, as in caſe of *ideocy*; or to the uſe of the party, in caſe of accidental madneſs or *lunacy*; and in order hereunto there iſſues a writ (*k*) or commiſſion to the ſheriff or eſcheator, or particular commiſſioners, both by their own inſpection and by inquiſition to inquire, and return their inquiſition into the Chancery; and thereupon a grant or commitment of the party and his eſtate enſues; and in caſe the party or his friends find themſelves injured by the finding him a lunatick or ideot, a ſpecial writ may iſſue to bring the party before the chancellor, or before the king to be inſpected. *Vide Fitz. N. B.* 233 (*l*).

But this concerns not the purpoſe in hand; for whether the party that is ſuppoſed to commit a capital offenſe be thus found an ideot, madman or lunatick, or not, yet if really he be ſuch, he ſhall have the privilege of his ideocy, lunacy, or madneſs, to excuſe him in capitals.

Secondly therefore, the trial of the incapacity of a party indicted or appealed of a capital offenſe is, upon his plea of *not guilty*, by the jury upon his arraignment, who are to inquire thereupon touching ſuch incapacity of the priſoner, and whether it be to ſuch a degree, as may excuſe him from the guilt of a capital offenſe (*m*).

(*k*) See *Stanf. Prerog.* 33. *b.* (*l*) *N. Edit.* 517. (*m*) *Savil.* 50. 1. *And.* 107.

In

In preſumption of law every perſon of the age of diſcretion is preſumed of *ſane memory*, unleſs the contrary be proved; and this holds as well in caſes civil as criminal.

Again, if a man be a lunatick, and hath his *lucida intervalla*, and this be ſufficiently proved, yet the law preſumes [34] the acts or offenſes of ſuch a perſon to be committed in thoſe intervals, wherein he hath the uſe of reaſon, unleſs by circumſtances or evidences it appears they were committed in the time of his diſtemper; and this alſo holds in civils as well as in criminals.

And altho in civil caſes, he that goes about to allege an act done in the time of lunacy, muſt ſtrictly prove it ſo done, yet in criminal caſes (where the court is to be thus far of counſel with the priſoner, as to aſſiſt him in matters of law and the true ſtating of the fact) if a lunatick be indicted of a capital crime, and this appears to the court, the witneſſes to prove the fact may and muſt alſo be examined, whether the priſoner were under actual lunacy at the time of the offenſe committed.

A man that is *ſurdus & mutus a nativitate*, is in preſumption of law an ideot, and the rather, becauſe he hath no poſſibility to underſtand what is forbidden by law to be done, or under what penalties *(n)*: but if it can appear, that he hath the uſe of underſtanding, which many of that condition diſcover by ſigns to a very great meaſure, then he may be tried, and ſuffer judgment and execution, tho great caution is to be uſed therein *(o)*.

I come now to apply what has been ſaid to the various natures of capital crimes.

If a man in his ſound memory commits a capital offenſe, and before his arraignment he becomes abſolutely mad, he ought not by law to be arraigned during ſuch his phrenzy, but be remitted to priſon until that incapacity be removed; the reaſon is, becauſe he cannot adviſedly plead to the indictment; and this holds as well in caſes of treaſon, as felony, even tho the delinquent in his ſound mind were examined, and confeſſed the offenſe before his [35] arraignment: and this appears by the ſtatute of 33 *H.* 8. *cap.* 20.

(n) Vide *Leg. Alfredi, l.* 14. *B. Coronæ* 201 & 217.

(o) According to 43 *Aſſiſ. pl.* 30. and 8 *H.* 4. 2. if a priſoner ſtands mute, it ſhall be inquired, whether it be wilful or by the act of God; from whence *Crompton* infers, that if it be by the act of God he ſhall not ſuffer. *Crompt. Juſt.* 29. But if one who is both deaf and dumb, may diſcover by ſigns that he hath the uſe of underſtanding, much more may one, who is only dumb, and conſequently may be guilty of felony, *ſed quære*, how he ſhall be arraigned.

which

which enacted a trial in caſe of treaſon after examination in the abſence of the party; but this ſtatute ſtands repeal'd by the ſtatute of 1 & 2 *Phil. & Mar. cap.* 10. *Co. P. C. p.* 6. And if ſuch perſon after his plea, and before his trial, become of *non ſane memory*, he ſhall not be tried; nor, if after his trial he becomes of *non ſane memory* he ſhall not receive judgment; or, if after judgment he becomes of *non ſane memory*, his execution ſhall be ſpared; for were he of ſound memory, he might allege ſomewhat in ſtay of judgment or execution. *Co. P. C.* 4 *(p)*.

But becauſe there may be great fraud in this matter, yet if the crime be notorious, as *treaſon* or *murder*, the judge before ſuch reſpite of trial or judgment may do well to impanel a jury to enquire *ex officio* touching ſuch inſanity, and whether it be real or counterfeit.

If a perſon of *non ſane memory* commit *homicide* during ſuch his inſanity, and continue ſo till the time of his arraignment, ſuch perſon ſhall neither be arraigned nor tried, but remitted to gaol, there to remain in expectation of the King's grace to pardon him. 26 *Aſſ.* 27. 3 *E.* 3. *Corone* 351.

But it ſeems in ſuch a caſe it is prudence to ſwear an inqueſt *ex officio*, to enquire touching his madneſs, whether it was feign'd; and thus it was done in the caſe of 3 *E.* 3. and in *Somervil*'s caſe, *Anderſon*'s *Rep. par.* 1. *n.* 154. But in caſe a man in a phrenzy happens by ſome overſight, or by means of the gaoler to plead to his indictment, and is put upon his trial, and it appears to the court upon his trial, that he is mad, the judge in diſcretion may diſcharge the jury of him, and remit him to gaol to be tried after the recovery of his underſtanding, eſpecially in caſe any doubt appear upon the evidence touching the guilt of the fact, and this *in favorem vitæ*; and if there be no colour of evidence to prove him guilty, or if there be a pregnant evidence to prove his inſanity at the time of the fact committed, then upon the ſame favour of life and liberty it is fit it ſhould be pro-

[36] ceeded in the trial, in order to his acquittal and enlargement. If a perſon during his inſanity commit *homicide* or *petit treaſon*, and recover his underſtanding, and being indicted and arraigned for the ſame, pleads *not guilty*, he ought to be acquitted; for by reaſon of his incapacity he cannot act *felleo animo*. 12 *H.* 3. *Dower* 183. Forfeiture 33. 21. *H.* 7. 31. *b. il alera quite*, that is, ſhall be found not guilty.

(p) See Sir *John Hawles*'s Remarks on *Bateman*'s trial. *State Trials, Vol.* 4. *p.* 205.

And

And it is all one, whether the phrenzy be fix'd and permanent, or whether it were temporary by force of any diſeaſe, if the fact were committed while the party was under that diſtemper.

In the year 1668, at *Ayleſbury*, a married woman of good reputation being deliver'd of a child, and having not ſlept many nights fell into a temporary phrenzy, and kill'd her infant in the abſence of any company; but, company coming in, ſhe told them ſhe had kill'd her infant, and there it lay; ſhe was brought to gaol preſently, and after ſome ſleep ſhe recovered her underſtanding, but marvelled how or why ſhe came thither; ſhe was indicted for murder, and upon her trial the whole matter appearing, it was left to the jury with this direction, that if it did appear, that ſhe had any uſe of reaſon when ſhe did it, they were to find her guilty; but if they found her under a phrenzy, tho' by reaſon of her late delivery and want of ſleep, they ſhould acquit her; that had there been any occaſion to move her to this fact, as to hide her ſhame, which is ordinarily the caſe with ſuch as are delivered of baſtard children and deſtroy them; or if there had been jealouſy in her huſband, that the child had been none of his; or if ſhe had hid the infant, or denied the fact, theſe had been evidences that the phrenzy was counterfeit; but none of theſe appearing, and the honeſty and virtuous deportment of the woman in her health being known to the jury, and many circumſtances of inſanity appearing the jury found her not guilty, to the ſatisfaction of all that heard it.

Touching the great crime of *treaſon* regularly the ſame is to be ſaid, as in caſe of *homicide*, ſuch a phrenzy or inſanity as excuſeth from the guilt of the one, excuſeth from the guilt of the other: the reaſon is the ſame; he that cannot act *felonicè* or *animo felonico* cannot act *proditoriè*, for being under a full alienation of mind, he acts not *per electionem* or *intentionem*. This appears by the [37] ſtatute of 33 *H.* 8. *cap.* 20. which, tho it enact, that a *non compos mentis* ſhall be tried for treaſon, yet it expreſsly declareth, "That if any "commit high treaſon, while they are in good, whole, and perfect "memory, and after examination become *non compos mentis*, and that it "be certified by four of the council, that at the time of the treaſon "they were of good, ſound, and perfect memory, and then not "nor lunatic, and afterwards became mad; then they ſhall proceed "to trial:" which ſtrongly enforceth, that a treaſon cannot be committed by a madman, or lunatic, during his lunacy.

And

And with this agrees my lord *Coke*, *P. C. p.* 6. in theſe words, *He that is* non compos mentis, *and totally deprived of all compaſſings and imaginations, cannot commit high treaſon by compaſſing or imagining the death of the king; for* furioſus ſolo furore puniter; *but it muſt be an abſolute madneſs, and a total deprivation of memory.*

This, tho it be general, yet the ſame author tells us, 4 *Rep.* 124. *b. Beverly's* caſe, in theſe words, *Mes in aſcun caſes non compos mentis poit committe hault treaſon, come ſi il tua, ou offer a tuer le roy.* This is a ſafe exception, and I ſhall not queſtion it, becauſe it tends ſo much to the ſafety of the king's perſon: but yet the ſame author, *P. C. p.* 6. tells us, that tho this was anciently thought to be law, yet it is not ſo now; for ſuch a perſon as cannot compaſs the death of the king by reaſon of his inſanity, cannot be guilty of treaſon within the ſtatute of 25 *E.* 3. And thus far concerning the incapacity of ideocy, madneſs, and lunacy.

[4. Blackſ. Com. ch. ii. p. 25.]

CHAP. V.

Concerning caſualty *and* misfortune, *how far it excuſeth in criminals.*

[38] I COME to the ſecond kind of accidental defects, *viz. caſualty* and *misfortune*, and to conſider how far it excuſeth: and firſt we are to obſerve in this, and likewiſe in ſome other of the defects before and hereafter mentioned, a difference between civil ſuits, that are terminated *in compenſationem damni illati*, and criminal ſuits or proſecutions, that are *in vindictam criminis commiſſi.*

If a man be ſhooting in the fields at rovers, and his arrow hurts a perſon ſtanding near the mark, the party hurt ſhall have his action of treſpaſs, and recover his damages, tho the hurt were caſual *(a)*; for the party is damnified by him, and the damages are but his reparation; but if the party had been kill'd, it had been *per infortunium*, and the archer ſhould not ſuffer death for it, tho yet he goes not

(a) Heb. 134.

altogether

not altogether free from all puniſhment *(b)* 6 *E.* 4. 7. *per Cateſby (c)*.

As to criminal proceedings, if the act, that is committed be ſimply caſual, and *per infortunium*, regularly that act, which, were it done *ex animi intentione*, were puniſhable with death, is not by the laws of *England* to undergo that puniſhment; for it is the will and intention, that regularly is required, as well as the act and event, to make the offence capital.

Now, what ſhall be ſaid thus ſimply caſual, and what the puniſhment, will be at large conſider'd, when we come to homicide *per infortunium*; only ſomething will be neceſſary to be ſaid thereof here. [39]

If a man do *ex intentione* and voluntarily an unlawful act tending to bodily hurt of any perſon, as by ſtriking or beating him, tho he he did not intend to kill him, but the death of the party ſtruck doth follow thereby within the year and day *(d)*; or if he ſtrike at one, and miſſing him kills another, whom he did not intend, this is felony *(e)* and homicide, and not caſualty or *per infortunium*.

So it is if he be doing an unlawful act, tho not intending bodily harm of any perſon, as throwing a ſtone at another's horſe, if it hit a perſon and kill him; this is felony and homicide, and not *per infortunium (f)*; for the act was voluntary, tho the event not intended; and therefore the act itſelf being unlawful, he is criminally guilty of the conſequence, that follows:

But if a man be doing a lawful act without intention of any bodily harm to any perſon, and the death of any perſon thereby enſues, as if he be cleaving wood, and the axe flies from the helve, and kills another, this indeed is manſlaughter, but *per infortunium*; and the party is not to ſuffer death, but is to be pardoned of courſe; for it

(a) Hob. 134.

(b) For he forfeits all his goods and chattels. 2 *H.* 3. 18. *F. Corone.* 302. 2 *Co. Inſt.* 14. 3 *Co. Inſtit.* 220. By the antient law he was liable to make the ſame recompenſe or *were-gild*, as in any other caſe of homicide; *e. g.* if one ſhooting at a mark ſhould accidentally wound and kill another, he was nevertheleſs to pay his weregild. *Leg. H.* 2. *l.* 88. *l.* 90. *Legis enim eſt placitum, qui inſcienter peccat, ſcienter emendet*; but by the ſame law, if one, who was ſtanding on a tree or any other place, where he was at work, ſhould chance to fall on another paſſing by, he was not to pay any thing, but was deem'd intirely innocent. See *Wilk. Leg. Anglo-Sax. p.* 277, 279.

(c) B. Corone 148. *Treſpaſs* 310. *F. Corone* 354.

(d) The reaſon of this is, becauſe the law doth preſume, that after the year and day it cannot then be diſcerned, whether he died of the ſtroke, or a natural death. 3 *Co. Inſtit.* 53.

(e) The like in the caſe of maihe..., if a man ſtrike at one, and miſſing him maihem another, 13 *H.* 7. 14. *a.*

(f) 11 *H.* 7. 23. *a. per Fineux* Ch. Juſt. *B. Corone* 229. *Proclamation* 13. 22. *Aſſiſe pl.* 71.

appears by the ſtatute of *Marlbridge*, *cap.* 26. that it was not done [40] *per felonium (g)*: yet the laws of *England* are ſo tender of the life of man, and to make men very cautious in all their actions that the party, tho his life be ſpared, yet forfeits his goods, and muſt expect the king's grace to reſtore them.

There happpen'd this caſe at *Peterborough*: Deer broke into the corn of *A.* and ſpoiled it in the night-time; *A.* ſets his ſervant to watch in the night with a charged gun at the corner of the field, commanding him, that, when he heard any thing rush into the ſtanding corn, he ſhould ſhoot at that place, for it was the deer: the maſter was in another corner of the field, ruſhed into the ſtanding corn; the ſervant according to his maſter's direction ſhot, and killed his maſter; it was agreed on all hands, this was neither petit treaſon, nor murder, but whether it were ſimple homicide, or *per infortunium*, was a great difficulty: Firſt, the ſhooting was lawful, when the deer came into the corn, it being no *purlieu*, nor proclaimed, or chaced deer; again, the error of the ſervant was cauſed by the maſter's direction, and his own act; but if it had been a ſtranger that had been killed it had been homicide, and not miſadventure; on the other ſide, the ſervant was to have taken more care, and not to have ſhot upon ſuch a token as might have befallen a man as well as a deer; and therefore for the omiſſion of due diligence, and better inſpection, before he adventured to ſhoot, it might amount to manſlaughter, and ſo be capital; and this ſeems to be the truer opinion.

But in the caſe of Sir *William Hawkſworth*, related by *Baker* in his chronicle of the time of *Edward* IV. *p.* 223 *(h)* he being weary of his life, and willing to be rid of it by another's hand, blamed his parker for ſuffering his deer to be deſtroyed, and commanded him, that he ſhould ſhoot the next man that he met in his park, that would not ſtand or ſpeak; the knight himſelf came in the night into the park, and being met by the keeper refuſed to ſtand or ſpeak; the

(g) Here our author rightly ſays *it appears* by the ſtatute of *Marlbridge*, that it was not felony, for that ſtatute only ſuppoſes it not to be felony, but does not make that not to be felony which was ſo before, as ſome have imagined. 2 *Co. Inſt.* 148, 315. for it appears by *Magna Charta cap.* 26. which was before the ſtatute of *Marlbridge*, that he who kill'd another *per infortunium*, was in no danger of death. *Kel.* 123. nor indeed could it be felony, it not being done *felleo animo*, 4 *Co.* 124 *b.* The deſign of that ſtatute was quite of another nature, *viz.* that the country ſhould not be amerced where a man was kill'd *per infortunium*, for at that time *murdrum* peculiarly ſignified the ſecret private killing of a man; as if he was found kill'd, but it was not known by whom; and thus it is defined by *Bracton*, *Lib.* III. *de corona*, *cap.* 1. to be *occulta occiſio*; and in the laws of *Henry* 1. *l.* 92. *murdritus homo dicebatur, cujus interfector neſciebatur*; and *in Dialogo de Scaccario*, *Lib.* I. *cap.* 10. 10. *murdrum idem eſt, quod abſconditum.*

(h) Sub anno 1471.

keeper

keeper ſhot and killed him, not knowing him to be his maſter; this ſeems to be no felony, but excuſeable by the ſtatute of *Malefactores in parcis (i)* for the keeper was in no fault, but his maſter; but, had he known him, it had been murder. [41]

As to matter of high treaſon, where the life of the king is concern'd, it is not ſafe too eaſily to admit an excuſe by chance or misfortune; tho ſuch fact cannot be treaſon, that was purely caſual and involuntary, for there muſt be a *compaſſing or imagining* to make treaſon; yet a treaſonable intention may be diſguis'd under the colour of chance, and the ſafety of the king's life is of higheſt concernment.

And therefore when *Walter Tyrrel*, with a glance of an arrow from a tree involuntarily, as *Matthew Paris (k)* tells us, kill'd *William Rufus*, it could not be treaſon, *(l)* becauſe there was no purpoſe of any miſchief, and he ſhot at the deer by the king's command; yet the fact was of ſuch a conſequence, that he fled for it, which was a circumſtance that might probably infer, that there was ſome ill-intention, which might make him guilty of treaſon, and not barely accident. *Co. P. C. p.* 6.

Hiſtory tells us, that upon a ſolemn juſt, or turnament appointed by *Henry* II. king of *France*, upon the marriage of his daughter, the king himſelf would needs run, and commanded the earl of *Montgomery* to run againſt him; the earl's lance breaking upon the king's cuiraſſe, a ſplinter flew into the king's eye, and hit it, whereof he died: this was not treaſon, becauſe purely accidental.

[See Foſter. Diſcourſe the 2d, ch. i. page 258, &c.]

CHAP. VI. [42]

Concerning ignorance, *and how far it prevails, to excuſe in capital crimes.*

IGNORANCE of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuſe any, that is of the age of diſcretion and *compos mentis*, from the penalty of the

(i) This ſtatute was made the 21 *E.* 1. and doth expreſly enact, "That if any "parker find a treſpaſſer wandering with- "in his liberty, intending to do damage "therein, and upon cry made to him to "ſtand he will not yield, but fleeth or de- "fendeth himſelf with force; if ſuch par- "ker kill ſuch offender in endeavouring "to take him, he ſhall not be arraigned for "the ſame, nor ſuffer any puniſhment." *S. P. C. 13. b.*

(k) p. 54.

(l) Cuſtumier de Normand. cap. 14.

breach of it; becauſe every perſon of the age of diſcretion and *compos mentis* is bound to know the law, and preſumed ſo to do: *Ignorantia eorum, quæ quis ſcire tenetur, non excuſat (a).*

But in ſome caſes *ignorantia facti* doth excuſe, for ſuch an ignorance many times makes the act itſelf morally involuntary; and indeed many of the caſes of misfortune and caſualty mention'd in the former chapter are inſtances that fall in with this of ignorance: I ſhall add but one or two more.

It is known in war, that it is the greateſt offenſe for a ſoldier to kill, or ſo much as to aſſault his general: ſuppoſe then the inferior officer ſets his watch, or ſentinels, and the general to try the vigilance or courage of his ſentinels comes upon them in the night in the poſture of an enemy, (as ſome commanders have too raſhly done) the ſentinel ſtrikes, or ſhoots him, taking him to be an enemy; his ignorance of the perſon excuſeth his offenſe.

In the caſe of *Levet* indicted for the death of *Frances Freeman*, the caſe was, that *William Levet* being in bed and aſleep in the night, his ſervant hired *Frances Freeman* to help her to do her work, and about twelve of the clock in the night the ſervant going to let out *Frances* thought ſhe heard thieves breaking open the door; ſhe therefore ran up ſpeedily to her maſter, and informed him, that ſhe thought thieves were breaking open the door; the maſter riſing ſuddenly, and taking a rapier, ran down ſuddenly; *Frances* hid herſelf in [43] the buttery; leſt ſhe ſhould be diſcovered; *Levet's* wife ſpying *Frances* in the buttery, cried out to her huſband, "*Here they be, that "would undo us.*" *Levet* runs into the buttery in the dark, not knowing *Frances*, but thinking her to be a thief, and thruſting with his rapier before him hit *Frances* in the breaſt mortally, whereof ſhe inſtantly died. This was reſolved to be neither murder, nor manſlaughter, nor felony. *Vide* this caſe cited by juſtice *Jones*, *P. 15 Car. 1. B. R. Cro. Car.* 538. *Cook's* caſe.

[Forſter 299.]

(a) *Plowd.* 343. a.

CHAP.

CHAP. VII.

Touching incapacities, or excuſes by reaſon of civil ſubjection.

I COME now to thoſe incapacities, which I have ſtyled civil, and to conſider how far they indemnify and excuſe in criminals, and criminal puniſhments.

And firſt concerning that, which ariſeth by reaſon of civil ſubjection.

And this civil ſubjection is principally of the ſubject to his prince, the ſervant to his maſter, the child to his parent, and the wife to her huſband. Somewhat I ſhall ſay of each of theſe.

I. As to the *firſt* of theſe ſubjections, the *ſubject* to his *prince*; it is regularly true, that the law preſumes, the king will do no wrong; neither indeed can do any wrong *(a)*; and therefore, if the king command an unlawful act to be done, the offenſe of the inſtrument is not thereby indemnified *(b)*; for though the king is not under the coercive power of the law, yet in many caſes his commands are under the directive power of the law, which conſequently makes the act itſelf invalid, if unlawful, and ſo renders the inſtrument of the execution thereof obnoxious to the puniſhment of the law. Vide *Stamf. P. C.* 102. *b.* *(c)*; yet in the time of peace, if two men combat together at barriers, or for trial of ſkill, if one kill the other it is homicide; but if it be by the command of the king, it is ſaid *(d)* it is no felony. 11 *H.* 7. 23. *a.* [44]

II. As touching the civil ſubjection of the *child*, or *ſervant*; if either of them commit an act, which in itſelf is treaſon, or felony, it is neither excuſed nor extenuated as to the point of puniſhment by the command of his maſter, or parent; for the command is void and againſt law, and doth not protect either the commander or the inſtrument, that executes it by ſuch command *(e)*.

(a) *Co. Lit.* 19. *b.* 4.

(b) As if one man arreſt another merely by the king's commandment, that ſhall be no excuſe to him, but he is nevertheleſs liable to an action of falſe impriſonment. 16 *H.* 6. *F. Monſtrauns de faits* 182. 1 *H.* 7. 4. *B. Prerogative* 139.

(c) *Vide Bracton Lib.* III. *De actionibus, cap.* 9.

(d) *Per Fineux* Ch. Juſt. but *Broke* in his abridgement of this caſe, *Corone* 229, ſays, that other juſtices in the time of *Henry* VIII. denied this opinion of *Fineux*, and held, that it was felony to kill a man in juſting and the like, notwithſtanding the commandment of the king; for that the commandment is againſt law. 3 *Co. Inſt.* 56, 160.

(e) *Dalt. Juſt. Cap.* 157. *N. Edit.*

III. As to the civil ſubjection of the *wife* to the *huſband*: tho in *many* caſes the command, or authority of the huſband, either expreſs or implied, doth not privilege the wife from capital puniſhment for capital offenſes; yet in *ſome* caſes the indulgence of the law doth privilege her from capital puniſhment for ſuch offenſes, as are in themſelves of a capital nature; wherein theſe enſuing differences are obſervable.

1. If a *feme covert* alone without her huſband, and without the coercion of her huſband, commit treaſon or felony, tho it be but larciny, ſhe ſhall ſuffer the like judgment and execution, as if ſhe were *ſole*; this is agreed on all hands. *Stamf. P. C. Lib.* 1. *cap.* 19. 15 *E.* 2. *Corone* 383.

[45] 2. But if ſhe commit larciny by the coercion of the huſband, ſhe is not guilty. 27 *Aſſ.* 40. *(f)*; and according to ſome, if it be by the command of her huſband. *Ibid. (g)* which ſeems to be law, if her huſband be preſent *(h)*; but not if her huſband be abſent at the time and place of the felony committed.

3. But this command or coercion of the huſband doth not excuſe in caſe of treaſon, nor of murder, in regard of the heinouſneſs of thoſe crimes. Mr. *Dalton*'s *Juſt. Ca.* 104 *(i)*. And hence it was that in the caſes of the treaſons committed by *Arden* and *Somerville (k)* againſt Queen *Elizabeth*, both their wives were attaint of high treaſon, tho their execution was ſpared; and yet they were only aſſenters to their huſband's treaſons, and not immediately actors in it, and ſo were principals in the ſecond degree; and upon the ſame account the earl of *Somerſet* and his wife were both attaint, as acceſſaries before, in the murder and poiſoning of Sir *Thomas Overbury (l)*.

4. If the huſband and wife together commit larciny or burglary, by the opinion of *Bracton*, *Lib.* III. *cap.* 32. §. 10 *(m)*. both are guilty; and ſo it hath been practiſed by ſome judges. *Vide Dalt. ubi ſupra*, *cap.* 104. and poſſibly in ſtrictneſs of law, unleſs the actual coercion of the huſband appear, ſhe may be guilty in ſuch a caſe; for it may many times fall out, that the huſband doth commit larciny by the *inſtigation*, tho' he cannot in law do it by the *coercion* of his

(f) E. Corone, 199. *Bracton de Corone. cap.* 32. § 9.

(g) Quoniam ipſa ſuperiori ſuo obedire debet. Leg. Inæ, l. 57. *E. Corone* 108.

(h) Becauſe the law ſuppoſes her to be then under the coercion of her huſband, *Kel.* 31.

(i) N. Edit. cap. 157.

(k) 1 *And. p.* 104.

(l) Stat. Trials, Vol. I. Tr 28 & 29.

(m) And *Sect.* 9. and *Fleta*, *Lib.* I. *cap.* 38. § 12, 13, 14. eſpecially, *Si furtum inveniatur ſub Clavibus Uxoris. Vide Bracton & Fleta, ibid.* and *LL. Cnuti, l.* 74.

wife;

wiſe; but the latter practice hath obtain'd, that if the huſband and wife commit burglary and larciny together, the wife ſhall be acquitted, and the huſband only convicted; and with this agrees the old book, 2 *E.* 3. *Corone* 160. And this being the modern practice and *in favorem vitæ* is fitteſt to be followed: and the rather, becauſe otherwiſe for the ſame felony the huſband may be ſaved by the benefit of his clergy, and the wife hanged, where the caſe is within clergy *(n)*; tho I confeſs this reaſon is but of ſmall value, for [46] in manſlaughter committed jointly by huſband and wife the huſband may have his clergy, and yet the wife is not on that account to be privileged by her coverture.

And accordingly in the modern practice, where the huſband and wife, by the name of his wife, have been indicted for a larciny, or burglary jointly, and have pleaded to the indictment, and the wife convicted, and the huſband acquitted; merciful judges have uſed to reprieve the wife before judgment, becauſe they have thought, or at leaſt doubted, that the indictment was void againſt the wife, ſhe appearing by the indictment to be a wife, and yet charged with felony jointly with her huſband.

But this is not agreeable to law, for the indictment ſtands good againſt the wife, in as much as every indictment is as well ſeveral as joint; and as upon ſuch an indictment the wife may be acquitted, and the huſband found guilty, ſo *è converſo* the wife may be convicted, and the huſband acquitted; for the indictment is in law joint, or ſeveral, as the fact happens; as ſo is the book of 15 *E.* 2. *Corone* 383. and accordingly has been the frequent practice *Vide Dalt. ubi ſup. cap.* 104. where there are ſeveral inſtances of the arraigning of huſband and wife upon a joint indictment of felony; which, if by law ſhe could not be any way guilty, had been erroneous, for the indictment itſelf had been inſufficient: therefore, tho the former practice be merciful, and cautious, it is not agreeable to law; for, tho ordinarily according to the modern practice the wife cannot be guilty, if the huſband be guilty of the ſame larciny or burglary; yet if the huſband upon ſuch an indictment be acquitted, and the wife convict, judgment ought to be given againſt her upon that indictment;

(n) The reaſon of this is, becauſe a woman cannot by law have the benefit of the clergy. 11 *Co.* 29. *b.* yet in *Fitz. Corone* 461. it was admitted, that a woman might claim clergy; however, as the law now ſtands, ſhe may in all caſes have the ſame benefit by the ſtatute of 3 & 4 *W.* & *M. cap.* 9. §. 7. as a man may by his clergy.

for every indictment of that nature is joint or ſeveral, as the matter falls out upon the evidence. *Vide* 22 *E.* 4. 7 *(o)*.

[47] 5. But if the huſband and wife together commit a treaſon, murder, or homicide, tho ſhe only aſſented to the treaſon, they ſhall be both found guilty, and the wife ſhall not be acquitted upon the preſumption, that it was by the coercion of her huſband, for the odiouſneſs, and dangerous conſequence of the crime; the ſame law it is, if ſhe be acceſſary to murder before the fact.

6. If the huſband commit a felony or treaſon, and the wife knowingly receive him, ſhe ſhall neither be acceſſary after as to the felony, nor principal as to the treaſon, for ſuch bare reception of her huſband; for ſhe is *ſub poteſtate viri*, and ſhe is bound to receive her huſband; but otherwiſe it is, of the huſband's receiving the wife knowingly after an offenſe of this nature committed by her *(p)*.

" *M.* 37. *E.* 3. *Rot.* 34. *Linc. coram Rege.* Ricardus Dey & Mar-
" geria *Uxor ejus indictati, pro receptamento felonum*; Margeria *dicit,*
" *quod indictamentum predict' ſuper predictam* Margeriam *factum*
" *minus ſufficiens eſt, eo quod præd'* Margeria *tempore quo ipſa dictos*
" *felones receptâſſe, ſeu eis conſentire debuiſſet, fuit cooperta præd.*
" Ricardo *viro ſuo, & adhuc eſt, & omninò ſub poteſtate ſua, cui ipſa*
" *in nullo contradicere potuit*; *& ex quo non inferitur in indictamento*
" *prædicto, quod ipſa aliquod malum fecit, nec eis conſentivit, ſeu ipſos*
" *felones receptavit, ignorante viro ſuo, petit judicium, ſi ipſa, vivente*
" *viro ſuo, de aliquo receptamento in præſentia viri ſui occaſionari poſſit.*
" —*Poſtea viſo & diligenter examinato indictamento prædicto ſuper*
" *præfatam* Margeriam *facto, videtur curiæ, quod indictamentum illud*
" *minus ſufficiens eſt ad ipſam inde ponere reſponſuram: Ideo ceſſet pro-*
" *ceſſus verſus eam omninò, &c.*"

Upon which record theſe things are obſervable:

1. That the wife, if alone and without her huſband, may be acceſſary to a felony *poſt factum*. 2. But ſhe cannot together with her huſband be acceſſary to a felony *poſt factum*; for it ſhall be intirely adjudged the act of the huſband; and this is partly the reaſon, why ſhe cannot be acceſſary in receipt of her huſband being a felon, becauſe ſhe is *ſub poteſtate viri*. 3. That in this caſe ſhe was not put to plead to

[48] the indictment *not guilty*, but took her exception upon the indictment itſelf; and ſo *note* the diverſity between an indictment of felony, as principal, and the indictment of her, as acceſſary

(o) B. Chartre de pardon 51. *(p) Co. P. C.* 101.

after

after; for in the former caſe ſhe ſhall be put to plead *not guilty* to the indictment, tho it appear in the body thereof, that ſhe is *covert*. 4. That yet the indictment ſtood good, as to the huſband; and upon this conſideration, tho it is true the huſband and wife may be guilty of a treaſon, as is before ſhewn, yet it ſeems, ſhe ſhall never be adjudged a traitor barely for receiving her huſband, that is a traitor, or for receiving jointly with her huſband any other perſon that is a traitor, unleſs ſhe were alſo conſenting to the treaſon, for it ſhall be intirely adjudged the act of her huſband.

It is certain a *feme covert* may be guilty of miſpriſion of treaſon committed by another man than her huſband: but whether ſhe can be guilty of miſpriſion of treaſon, if ſhe knows her huſband's treaſon, and reveal it not, is a caſe of ſome difficulty: on the one ſide the great obligation of duty ſhe owes to the ſafety of the king and kingdom, the horridneſs of the offenſe of treaſon, and the great danger that may enſue by concealing it, ſeems to render her guilty of miſpriſion of treaſon, if ſhe ſhould not detect it; on the other ſide, it may be ſaid, ſhe is *ſub poteſtate viri*, ſhe cannot by law be a witneſs againſt her huſband, and therefore cannot accuſe him: *Ideo quære*. But, certainly, if ſhe conſented to the treaſon of her huſband, tho he were the only actor in it, ſhe is guilty as a principal, and hath no privilege herein by her coverture, as is before ſhewn.

[Blackſ. Com. ch. ii. page 33.—28. 1 Hawk. P. C. 2.]

CHAP VIII. [49]

Concerning the civil incapacities by compulſion *and* ear.

I JOIN theſe two incapacities together, becauſe they are much of the ſame nature, as to many purpoſes; and how far theſe give a privilege, exemption, or mitigation in capital puniſhments, is now to be conſidered.

Firſt, There is to be obſerved a difference between the times of war, or public inſurrection, or rebellion, and the times of peace; for in the times of war, and public rebellion, when a perſon is under ſo great a power, that he cannot reſiſt or avoid, the law in ſome caſes allows an impunity for parties compell'd, or drawn by fear of death, to do ſome acts in themſelves capital, which admit no excuſe in the time of peace.

M. 21 *E.* 3. *coram Rege. Rot.* 101. *Line'.* "*Walter de Alyngton*, " and divers of his confederates at St. *Botolph's Regiam poteſtatem* " *aſſumentis, & ut de Guerrâ inſurgentes' quendam Thomam de Okeham* " *ſutorem in capitaneum, & majorem ſuum eligerunt,*" ſeized on two ſhips, and took away the corn *(a)*; appointed a bell to be rung *(b)*; and commanded, that at the ringing thereof *ipſi & eorum quilibet eſſent parati, &c.* " *Et plures homines villæ prædictæ, qui ad maleficia ſua* " *conſentire noluerunt, ceperunt, & eos ſibi jurare fecerunt ad impriſas* " *ſuas manutenendas.*" They were arraigned upon the indictment, and committed: " *Illi, qui coacti fuerunt jurare, dimittuntur per manu-* " *captionem*; *& illi, qui receperunt denarios, petunt quod, ex quo patet* " *per indictamentum prædictum, quod ipſi coacti fuerunt recipere dena-* " *rios contra voluntatem ſuam, petunt, quod poſſint quieti recedere*; *&* [50] " *conſideratum eſt per curiam, quod nihil mali in his reperitur*; " *ſed quia curia nondum adviſatur, dies datus eſt per manucap-* " *tionem, ideo venit jurata.*" I find no further proceeding againſt them.

M. 7 *H.* 5. *coram Rege. Rot.* 20. *Heref.* cited *Co. P. C. p.* 10. Thoſe, that ſupplied with victuals Sir *John Oldcaſtle*, and his accomplices then in rebellion, as is ſaid, were acquitted by judgment of the court; becauſe it was found to be done *pro timore mortis, & quod receſſerunt, quàm cito potuerunt:* note, it was only furniſhing of victuals, and *pro timore mortis*, which excuſed them: for after the battle of *Eveſham* in 49 *H.* 3. when that prudent act was made for the ſettling of the kingdom, called *Dictum de Kenilworth*, thoſe, that were drawn to aſſiſt the barons againſt the king, tho they were not put into the rank of thoſe that paid five years value of their lands for their aſſiſtance, *viz.* thoſe, that *gratis, & voluntarie, & non coacti miſerunt ſervitia ſua contra regem, & ejus filium (c)*; yet, it ſeems, they were put to a ſmaller mulct; for by the 12th, 13th, 14th, and 15th articles: " *Coacti, vel metu ducti, qui venerunt ad bella, nec pugnaverunt,* " *nec male fecerunt*; *impotentes, qui vi vel metu coacti miſerunt ſervitia* " *ſua contra regem, vel ejus filium*; *coacti, vel metu ducti, qui fuerunt* " *depræda tores, & cum principalibus prædonibus prædationes fecerunt,*

(*a*) One hundred and twenty quarters of corn, value 36*l.*

(*b*) *Quandam communem campanam ordinaverunt pulſari.*

(*c*) Nor into the rank of thoſe, who by lies and falſhood had drawn off others to the earl of *Leiceſter*'s party, and were puniſhed with a mulct of two years value, as by *Artic.* 11. " Laici manifeſte, procu- " rantes negotia comitis Leyceſtriæ & " complicium ſuorum, attrahendo ho- " mines per mendacia & falſitates, inſti- " gando parti comitis & ſuorum, detra- " hendo parti regis & filii ſui, puniantur " per quantum valet terra eorum per duos " annos."

" *& quonda*

" & *quanda commodè potuerunt, receſſerunt, & ad domos redierunt;*
" [*emptores ſcienter rerum alienarum valorem bonorum, quæ emerunt,*
" *reſtituant, & in miſericordia domini regis ſint, quia contra juſtitiam*
" *fecerunt, quia rex inhibuit, jam dimidio anno elapſo;*] *illi, qui ad*
" *mandatum comitis Leyceſtriæ ingreſſi ſunt Northampton, nec pugna-*
" *verunt, nec malum fecerunt, ſed ad Eccleſiam fugerunt, quando regem*
" *venientem viderunt, & hoc ſit attinctum per bonos, ſolvant, quantum*
" *valet terra eorum per dimidium annum; illi, qui ex feodo comitis tene-*
" *bant, ſint ſolum in miſericordia domini regis: impotentes, & alii*
" *homines, qui nihil mali fecerunt, ſtatim rehabeant terras* [51]
" *ſuas, & damna recuperent in curia domini regis.*"

But even in ſuch caſes, if the whole circumſtances of the caſe be ſuch, that he can ſufficiently reſiſt, or avoid the power of ſuch rebels, he is inexcuſable, if upon a pretence of fear, or doubt of compulſion, he aſſiſt them.

Now as to times and places of peace.

If a man be menaced with death, unleſs he will commit an act of treaſon, murder, or robbery, the fear of death does not excuſe him, if he commit the fact; for the law hath provided a ſufficient remedy againſt ſuch fears by applying himſelf to the courts and officers of juſtice for a writ or precept *de ſecuritate pacis (d)*.

Again, if a man be deſperately aſſaulted, and in peril of death, and cannot otherwiſe eſcape, unleſs to ſatisfy his aſſailant's fury he will kill an innocent perſon then preſent, the fear and actual force will not acquit him of the crime and puniſhment of murder, if he commit the fact; for he ought rather to die himſelf, than kill an innocent: but if he cannot otherwiſe ſave his own life, the law permits him in his own defenſe to kill the aſſailant; for by the violence of the aſſault, and the offenſe committed upon him by the aſſailant himſelf, the law of nature, and neceſſity, hath made him his own *protector cum debito moderamine inculpatæ tutelæ*, as ſhall be farther ſhewed, when we come to the chapter of homicide *ſe defendendo* (*).

But yet farther, it is true in caſes of war between ſovereign princes the law of nations allows a prince to begin hoſtility with ſuch a prince that deſigns a war againſt him; and if the fear be real, and upon juſt ground, *non tantùm de potentiâ ſed & de animo.—Grot de jure belli & pacis, Lib.* II. *cap.* 22. §. 5. he may prevent the other's actual aggreſſion, and need not expect, till the other actually invade him, when

(*d*) See this writ in the *Regiſter, fol.* 88. *b. F. N. B. Vet. Edit.* 79. *N. Edit.* 177.
(*) *Poſtea cap.* 33.

poſſibly

poſſibly it may be too late to make a ſafe defenſe; and the reaſon is,
[52] becauſe they are not under any ſuperior, that may by his proceſs or interpoſition ſecure the prince againſt ſuch a juſt fear; and therefore in ſuch caſe the law of nations allows a prince to provide for his own ſafety.

But it is otherwiſe between ſubjects of the ſame prince: If *A.* fears upon juſt grounds, that *B.* intends to kill him, and is aſſured, that he provides weapons, and lies in wait ſo to do; yet without an actual aſſault by *B.* upon *A.* or upon his houſe, to commit that fact, *A.* may not kill *B.* by way of prevention; but he muſt avoid the danger by flight, or other means; for a bare fear, tho upon a juſt cauſe, and tho it be upon a fear of life, gives not a man power to take away the life of another, but it muſt be an actual and inevitable danger of his own life; for the law hath provided a ſecurity for him by flight, and recourſe to the civil magiſtrate for protection by a writ or precept *de ſecuritate pacis*, and thus far touching the privilege by reaſon of compulſion or fear.

[4. Black. Com. ch. i. p. 30.]

CHAP. IX.

Concerning the privilege by reaſon of neceſſity.

ALTHO all compulſion carry with it ſomewhat of neceſſity, and abates ſomewhat of the voluntarineſs of the act that is done, yet there are ſome kinds of neceſſities, that are not by any external compulſion or force.

Touching the neceſſity of ſelf-preſervation againſt an injurious aſſault ſomewhat hath been ſaid in the laſt chapter, and more will be ſaid hereafter in its due place: I ſhall proceed therefore to other inſtances.

[53] The neceſſity of the preſervation of the peace of the kingdom by the apprehending notorious malefactors excuſeth ſome acts from being felony, which in the matter of them without ſuch neceſſity were felony.

If a thief reſiſt, and will not ſuffer himſelf to be taken upon hue and cry or purſuit, *juſticiari ſe nolit permittere*, if he be killed by the purſuants, it is no felony *(a)*; *de quo vide latius infra.*

(*a*) See *Leg. Inæ*, *l.* 35.

By

By the ſtatutes of 3 & 4 *E.* 6. *cap.* 5. and 1 *Mar. cap.* 12. If there be a riotous aſſembly to the number of twelve aſſembled to commit the diſorders mentioned in thoſe acts, the juſtices of peace, the ſheriff, mayor, or other officer of any corporation, *&c.* may raiſe a power to ſuppreſs and apprehend them; and, if they diſperſe not upon proclamation, if any of the rioters be kill'd, or maimed, or hurt by the juſtices, *&c.* or thoſe aſſembled by them to ſuppreſs the riot, it is by this act diſpuniſhable.

It is true, this act *(b)* continued only during queen *Elizabeth*'s life, and is now expired *(c)*; but altho, perchance, as to the killing of ſuch perſons, as do not preſently return upon proclamation to their homes, it needs the aid of an act of parliament to indemnify them; yet if they attempt any riotous act, and cannot be otherwiſe ſuppreſt, the ſheriff, or juſtice of peace may make uſe of ſuch a force upon them for preſervation of the peace, as well by the Common law, as by the ſtatute; *quod vide in Anderſon*'s *Rep. part* 2. *n.* 49. *p.* 67. *Burton*'s caſe *in fine*; and the ſtatute of 13 *H.* 4. *cap.* 7. *in principio*, and 2 *H.* 5. *cap.* 8. whereby all men are bound, upon warning, to be aſſiſtant to the ſheriff and juſtice for the ſuppreſſing of riots even by force, if it cannot be otherwiſe effected; ſo that the clauſes touching this matter in the temporary ſtatutes of 3 & 4 *E.* 6. and 1 *Mar.* are but purſuant to the law and former ſtatutes for neceſſity of preſerving the peace.

Some of the caſuiſts, and particularly *Covarruvias*, *Tom* I. *De furti & rapinæ reſtitutione*, §. 3. 4. *p.* 473. and *Grotius de jure belli ac pacis*, *Lib.* II. *cap.* 2 §. 6. *(d)* tell us, that in caſe of extreme neceſſity, either of hunger, or clothing, the civil diſtributions of property ceaſe, and by a kind of tacit condition the firſt community doth return, and upon this, thoſe common aſſertions are grounded; "*Quicquid neceſſitas cogit, defendit.*" "*Neceſſitas eſt lex* "*temporis & loci.*" "*In caſu extremæ neceſſitatis omnia ſunt communia:*" and therefore in ſuch caſe theft is no theft, or at leaſt not puniſhable, as theft; and ſome even of our own lawyers *(e)* have aſſerted the ſame; and very bad uſe hath been made of this conceſſion [54]

(b) viz. 1 *Mar. cap.* 12. for 3 & 4 *Ed.* 6. *cap.* 5. was repeal'd by 1 *Mar. cap.* 12.

(c) It was at firſt made to continue only till the end of the next ſeſſion, but was afterwards by ſeveral new acts continued during the life of queen *Mary*; and by 1 *Eliz. cap.* 16. was continued during her life alſo, and has never ſince been revived; but in 1 *Geo.* 1. *cap.* 5. a new act was made to much the ſame purpoſe, which is perpetual.

(d) See *Puff. de jure naturæ*, *Lib.* II. *cap.* 6. § 6.

(e) Britton, *cap.* 10. *Crompt.* 33. *a. Plowd.* 18. *b.* 19. *a. Dalt. Juſt. cap.* 99.

by

by ſome of the Jeſuitical caſuiſts in *France*, who have thereupon adviſed apprentices and ſervants to rob their maſters, when they have judged themſelves in want of neceſſaries, of clothes, or victuals; whereof, they tell them, they themſelves are the competent judges; and by this means let looſe, as much as they can, by their doctrine of probability, all the ligaments of property and civil ſociety.

I do therefore take it, that, where perſons live under the ſame civil government, as here in *England*, that rule, at leaſt by the laws of *England*, is falſe; and therefore, if a perſon, being under neceſſity for want of victuals, or clothes, ſhall upon that account clandeſtinely, and *animo furandi* ſteal another man's goods, it is felony *(f)* and a crime by the laws of *England* puniſhable with death; altho the judge, before whom the trial is, in this caſe (as in other caſes of extremity) be by the laws of *England* intruſted with a power to reprieve the offender before or after judgment, in order to the obtaining the king's mercy.

For 1. Men's properties would be under a ſtrange inſecurity, being laid open to other mens neceſſities, whereof no man can poſſibly judge, but the party himſelf.

2. Becauſe by the laws of this kingdom *(g)* ſufficient proviſion is made for the ſupply of ſuch neceſſities by collections for the poor, and by the power of the civil magiſtrate; and conſonant hereunto ſeems to be the law even among the *Jews*, if we may believe the wiſeſt of kings. *Proverbs* vi. 30, 31, "*Men do not de-*
[55] "*ſpiſe a thief, if he ſteal to ſatisfy his ſoul, when he is hungry; but if*
"*he be found, he ſhall reſtore ſeven-fold, and ſhall give all the ſub-*
"*ſtance of his houſe:*" It is true, death was not among them the penalty of theft, yet his neceſſity gave him no exemption from the ordinary puniſhment inflicted by their law upon that offenſe *(h)*.

Indeed this rule, "*in caſu extremæ neceſſitatis omnia ſunt commu-*
"*nia*," does hold in ſome meaſure in ſome particular caſes, where by the tacit conſent of nations, or of ſome particular countries or ſocieties, it hath obtain'd.

1. Among the *Jews* it was lawful in caſe of hunger to pull ears of ſtanding corn, and eat, *Matth.* xii. 1. *&c. (i)* and for one, that

(*f*) See *Dalton ubi ſupra.*

(*g*) 43 *Eliz. cap.* 2. *&c.*

(*h*) But their ordinary puniſhment being only pecuniary could affect him only when he was in a condition to anſwer it; and therefore the ſame reaſons, which would juſtify that, can by no means be extended to a corporal, much leſs to a capital puniſhment.

(*i*) For the *Phariſees* objected againſt it only on account of its being done on the *ſabbath day*, *Mark* xi. 23. *&c. Luke* vi. 1, *&c.*

paſſed