

A Treatise of Bail and Mainprise (No date)

Sir Edward Coke

Transcript

British Library, Additional MS 22591, ff. 181r–186v

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A Treatise of Bayle: and Mainpryse writ:ten at [th]e
request of S[i]r Will: haydoc k[nigh]t, By Sir Ed: Cooke

[*Right margin:*(Cap: 1:) whereof Bayle or mainprise is deryved] This Worde Bayle / is as I take it / deryved of the Frenche word / Bayller / w[hi]ch signifyeth to deliver / Because he that is Bayled, is as it were delyvered into the handes and Custodye of those that are his Pledges / and Suertyes /

This word Mainprise / is deryved of two Frenche wordes / that is to saye maine / w[hi]ch signifieth an hande / and of the word Pryse, w[hi]ch signifyeth taken; Because he that is taken to Mainprise / is as it were taken into their handes / and Custodye / to be his suertyes /

[*Right margin:*The Description of Bayle and mainprise (Chapter: 2:)] Bayle and Mainprise is / when A man detayned in Prison for anye Offence / For which he is bayleable / or Mainpriseable by Lawe / is by A Compleate Iudge / or Iudges of that Offence vpo[n] sufficient Suertye found for his Appearance / and yeilding of his Bodye / delivered out of Prison /

This description doth as well belong to the one worde / as the oth[e]r and yett I finde some difference / betweene them in our Bookes / And therefore / For the more further and Speciall vnderstanding of [th]e same / I thinke it Convenient For to make such differences as Appeare in our Bookes / to be betwixt them /

[*Right margin:*(Chap: 3:) The difference betweene Bayle, and mainprise /] (1) First he that findes Bayle / doth not finde suertie onelye to answeere that speciall matter or Cause / whereof hee is imp[ri]soned But generallye to all other matters : But he that findeth mainprise findeth suertie to appeare / and Answere to that Cause onelye / whereof he {is} was ymp[ri]soned / & touching all other matte[r]s & Causes he beinge out of Prison /

(:2: Secondlye the Pledges / and Suerties of him that is delivered / to Bayle / maye impryson him whose Suerties they are / For Cheife Iustice / Shard / in the xxxiii Ed: 3: said that they were [th]e Gaolers or keepers / And yf they suffer him to escape / they shall Au[n]swere for the same Escape /

3: Thirdlye the verye Etimologie of either of them / doth shewe / and manifest the difference betwixt them; For in the One [th]e p[ri]son[er] is delivered by the Iudge / Iudge / Iudges / or Cou[r]te into [th]e handes / and as it were into Suertyes / for [th]e wordes be / Traditur in Balliu[m]

But in the other Case / the wordes be / that suche / and such A man / Cescerunt / w[i]thout any such deliu[r]ye made by [th]e Cou[r]te /as in th[e] other Case/

Nowe For as much as before it is said / that Bayle / or mainprise / is when A man detayned in prison For anye offence for w[hi]ch hee is Bayleable / or mainpriseable by Lawe Etc. /

I thinke it expedient to shew w[ha]t Persons detayned in pryson / were Bayleable / or mainpriseable by the Com[m]o[n] Lawes of this Realme / For I meane not to seet downe the Recognizances for Bayle / and Mainprise / as well / because they are como[n] / As all so

because

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because my desire is to treate of such matters as are most materiall / as shortelye / and as Compendiouslye / as I could

[*Left margin:*(Cap: 4:) what Persons were Bayleable or Mainpri seable by the Comon Lawe] It appeareth by A Statute made in A Parlyam[en]t houlde[n] at Westminster in the 3: Ed: 1: Como[n]lye Called Westminster Cap: 13 that it was greatlye doubted at the Com[m]o[n] Lawe / what Persons were Bayleable / or Mainprizeable

In the p[re]amble of the said Statute it is said / Pur ceo que auant ceux heures mie fuit my determine Certermient que aux gent {}? fueront Replenisheable et queux non etc That is to saye / Because be fore this tyme / it was not Certainelye determined whoe was Replenishable / or to be delivered out of Prison / and whoe not / soe as it seemeth thereby / that at the Comon Lawe / att that tyme greate diversitye of opynions were touching the same yett doe I find a Certaine Rule sett downe before that tyme / touching lettinge of Prisoners to Bayle / For / Bracton / whoe wrott in the Ende of [th]e Raigne of Hen: 3:6: For soe it appeareth in his Third Booke / & last Chapter / saithe as Followeth

In omni uero Iuniria / et transgressione contra Pacem Regis mimo cum Adiectione Felonia solet quilibet Appellatus / ues Rectatus per Plegeos demitti preterquam de morte hominis quocunque tempore / donec Imprisonatus doceat se else immunient etc.

That is to saye in everye wronge and trespasse against [th]e peace of the kinge / yea though the offence reache to Fellonye / every one that is Appealed / or / Indicted / is wont to be bayled / except only in Case of the deathe of A Man / att anye tyme / vntill he that is ymprisoned shall p[er]ceyve him selfe guiltie by Inquest etc

[*Left margin:*F: N: 166:a] A man in Execuc[i]on vppo[n] Iudgement given vpo[n] A falce verdicte / yf he will bringe an Attainte / Or A man in Executio[n] of [*Left margin:*F N:] an Erronyous Iudgm[en]t / yf he will bringe A writte of Errour [*Left margin:*F N: 129:] Or if A Man Accomptant / haueing Audito[r]s Assigned vnto him in Land / or in such Corporac[i]on will allowe his Tallye / Or if a man be taken in Execuc[i]on vpon A Statute / and will sue an Audita Querela / The {Partye Plt} shall haue A Spetiall writte to lett him to Bayler vpon sufficient Suerties taken / as [th]e Case requireth/

But of these and such like Baylem[en]ts my purpose is not to discourse / But onelye and Principalleye of such Baylem[en]ts as doe conserne matters of the Crowne

It appeareth by the Rule of Bracton that A ma[n] appealed and indicted of any manner of Fellonye / The death of a man onelye Excepted / ought to bee sett to Bayle / w[hi]ch Rule as it is generall / soo hath it manye limitac[i]ons / and exceptions / w[hi]ch should the better appeare yf wee consider w[ha]t p[er]sons are Bayleable or mainpriseable by the Laws /

[*Left margin:*(Cap: 5:) what Persons are not Bayleable or mainpri seable by the Lawe] First A man Indicted or ymprysoned / For Treason / is not Bayleable / or Mainpriseable / The same

as I take it of Pettye Treason / As where the wiffe killeth the Husband / The Servaunt his
m[aste]r / or m[istr]ess or suche like /

A Man Indicted / Appealed / or ymprisoned / For the death of A man / is in some Case
Bayleable / and in some Case not / and verry requisite it is / to haue the lawe knowne in these
cases

Therefore yf A man be indicted as Principall of the death of A man / he is not to be bayled;
But if he be Indicted as Accessarye / before or after / he is Bayleable / For Bracton/

in

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in his Second Treatise / in the third Booke / Chap: 12: saith // *vbi ille de Facto / non est
Replegiabilis/ illa de Fortia per Plenia{?} / vel Balliu[m] dimittitur donec ille de facto se
defenderit / vel non defenderit quia / vbi Factu[m] / ibi poterit else Fortia quandoque / sed
numquam Fortia / sine facto /*

And yett it appeareth in A Booke Case / 28: Ed: 3: fol: 94: That if two be indicted / the one
is Principall / The other as accesarye to the deathe of A man / After the Principall be Act
tainted / that is to saye / haue Iudgem[en]t of deathe / or be outlawed the Accessarye shall
not be Bayleable / w[hi]ch agrees w[i]th [th]e same opynion of Bracton / videl[icet] / Donec
ille defenderit se de Facto vel non defenderit) But all this is to be vnderstood in Case of
Iudgement / at the Suite of the Kinge / For in an appeale of mu[r]th[e]r or deathe of A man /
The lawe altereth in some Cases / And there fore in an Appeale of Murther / the defend[en]te
hath some tymes been lett to Bayle / allthough he hath bine appealed as Princy pall / And
sometymes Bayle hath bine denyed him / As appeareth by our Bookes / And therefore it
seemeth to rest much in [th]e good discretion of the Courte / And vpo[n] due Considerac[i]on
had / of the manner and Circu[m]stances of the offence / whether in that Case he is to be
Bayled or not / except you will saye w[i]th the opynio[n] of the Booke in the xxi Ed: 4:
That the Appellee in that Case / being neither indicted before the Commoner / nor other
wise / maye bee Bayled / whereby it Appeareth that if the Appealee in [tha]t Case haue been
Indicted thereof / they would not in that Case haue bayled him / w[hi]ch seemeth vnto mee /
(Sine Praeiuicio melioris Sententiae) To be A verry Reasonable and discreete opynio[n] and
worthy to be followed / And thereby maye all our form[er] Bookes / w[hi]ch seemed to be
repugnante the one vnto the other / Be reconciled / and stand well together

[*Right margin:*43: Ed: 3: 17: Princypall and Accessarye] In an Appeale of the deathe of A
man / against two/ the one is principall / the other is Accessarye / Albeit the p[ri]ncipall
be Attaintted / the Accessarye maye be lett to bayle / But other wise it is in the Case of
Iudgement / as is before saide

[*Right margin:*manslaughter] A man Indicted / or Appealed of manslaughter maye bee Bayled

[*Right margin:*Rape / 44: Ed: 2 38:] A man Indicted or Appealed of Rape / he amye bee
Bayled / yett was that noe Felloyne at the Como[n] Lawe / vntill the Statute of Westminster /
1: Cap: {-}34 :

A man Indicted for Burglarye / maye be bayled / as is Appeareth by the Booke in the 29:
{Ass?}: 40: 44

A man Indicted / or Appealed of Robberye may be Bayled

A man Outlawed and imprisoned ought not to be Bayled / Westm[inste]r / Cap: 14:

A man Indicted as Accessarye for the Receipte of anye person outlawed / or otherwise
attainted of Murther / or Fellonye is not Bayleable

He that is Aduired the Realme / ought not too bee Bayled

If A man bee Indicted / and doth become an Approuer / he ought not to be Bayled

If A man / Comitte Fellonye / and be taken w[i]th the manner / He ought not to bee Bayled /

yf

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yf A man be Indicted or ymprisoned for anye offence where of he is Bayleable / yett if he
breake the Prison / and after be take[n] againe / he ought not to be Bayled

If A Man be Indicted of manslaughter / Rape / Burglarie / Fellonye / or anye other offence /
wherefore he is Bayleable / yett if he be an infamous / and Notorious Thiefe / and soe openlye
and Comonlye Esteemed & take[n] / Bayle maye be denied him by the law /

A man Indicted of Conspiracye / that is to saye / that hee with others Conspired falcelye
to indicte another of Murther / or Fel lonie / by meanes whereof he was Indicted / and
afterwardes lawfullye Acquited / shall not be Bayled

And this was the Resolution of all the Iudges / vpo[n][th]e questio[n] demanded by K: Ed:
3: himselfe / as it appeareth himselfe in the Booke Case 27: {Ass?}: P: 11: For it appeareth
by our Bookes / that A man Attainted of Conspiracye / at the Suite of the Kinge / A {venel}
le vellony per Iudgementi / And that is / that the Bodye of [th]e p[ar]tie soe offending shall
be taken / his landes / Tenements and goodes & Chattles Seiged into the Kings handes / his
wiffe / and Children to be throwne out of their houses / That his House be raysed downe
His meadowes plowed vpp / His woodes subuerted & extirpred / That he shall for ever be
disabled / to give anye testemonye / or beare anye wittnes / And as the Book Case is / in 24:
Ed: 3: 34: That hee never p[re]sume to appeare neere the Kings Courte etc

Such A pretious regard the lawe hath / For the liffe & safety of the Inocent / And such is
the Iudgm[en]t of the Comon lawe against those that vnjustlye seeke after the Blood of the
guiltlesse / A matter in my opinion / though not directlye p[er]tinent to our purpose / yett not
vnworthie of knowledge / and Memorye / w[hi]ch maye put as well the Iudges / as Iuro[r]s
in reme[m]brance / howe deare in the Eye of the Lawe / the liffe of A man is / And by their
punishm[en]te howe deeplye haue the offenders / that seeke to condempe the guiltlesse All
thoughe their purpose doe not take Effecte /

But to turne to our Purpose /yf A man bee Appealed by an Approuer / and be of good and
honest Fame / hee may be Bayled / But if such A one be Appealed / and be not of honest
Fame / hee shall not be Bayled / during the liffe of the App[r]ouer

If A man be Indicted of anye offence / whereof he may be Bayled / yett if after he be Founde
guiltie of the same / or oth[er]wise be thereof Convicted / he shall not bee bayled / And that
appear[e]th by Bracton / in his 2: Booke Cap: 5: where he saithe / Nec Sunt ille qui culpabiles
inueinuntur per Plegeos dimittendi / That is to saye / Neither are those that are found guiltie /
to be lett to Bayle /

A man Indicted for Fellonious Burning of Houses / oughte not to be lett to Bayle /
Westminster 1: Cap: 15:

A man Indicted For putting out of Eyes / or Cuttinge out Of Tongues / may be Bayled

A man taken by Cirtifficate of the Bishopp by writte or Excomunicat[o] Capient[o] / ought
not to be Bayled

A man indicted / and Found guiltie of the death of A man by Misadventure / or by Casting of
A Stone over A house / or by Chau[n]ce killing A man / Woman / or Child / is not Bayleable
3: Ed: 3: Tit Corona 3344:

Like haue it is / yf A man Indicted bee founde guiltie of

the

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the deathe of A Man; Se deffendendo / hee is not by Lawe to be Bayled / Both w[hi]ch doe
agree / w[i]th the Rule of Bracton / For Inveniunter Culpabiles

A Man Indicted vpon A Penall Statute / w[hi]ch inflicteth anye losse of liffe / or Member / as
in the Case of Fellonye / or other wise / anye Corporall Punishm[en]t or losse of goodes / or
ymprysonm[en]t maye be Bayled vpo[n] sufficient Suerties Found / except itt bee espetiallye
p[ro]vided that the offenders in such Cases shall not be lett to Bayle / or Mainpryse / As For
example / yf A Man be Indicted For anye Fellonious publishinge of anye Seditious Bookes
etc Contrarye to the Forme of An Acte made / etc in the xxiii yeare of Her Ma[jes]t[y]s
raigne / hee maye be Bayled / For the offence is made Fellonye / And Bayle / and Mainprise
not prohibited

But on the other Syde / the Stat of 3: Ed: 3: Cap 14: of Forestall[e]rs doth For [th]e First
offence inflifte two Monthes Imprisonem[en]t w[i]thout Bayle or Mainprise etc/ In w[hi]ch
Case the Partie soe offended to not be Bayled

Soe that as where A Statute maketh any offence Fellonye / or setteth downe A Corporall / or
Pecuniarye punishment for any offence / and doth not expresslye forbidde [th]e p[ar]tie to be
Bayled / in everye such Case / The Case before putt for example / The Partie soe offending /
and beinge thereof Indicted / maye be Bayled

But for as much as all hath bine sayd / doth extend to such only as be Indicted of Record /or
Appealed of the saide offences / It is necessarye to be vnderstood / what Persons Committed
to Pryso[n] For anye offence for suspition of the same / maye before they be Indicted / or
Appealed thereof be lett to bayle and w[ha]t not

[*Right margin:*(Cap: 6) what Persons imprisoned for any offence / or for Suspition of the
Same / maye Either by the Comon Lawe / or any other Statute before Indictm[en]t or
Appeale brought / be lett to Bayle or Mainprise] It may be collected / by that w[hi]ch hath
bine said out of Bracto[n] that A Man comitted to Prisonne / For anye offence / or suspitio[n]
of Fellonye / could not by the Como[n] Lawe be lett to Bayle / before indictm[en]t or Appeale
brought / For his Wordes bee (In omni vera Iniuria et Transgressione contra Pacem Regis /
imocu[m] adiectiore Felonia / solet quilibet Appellatus / vel Rectatus per Plegios / dimitti Soe
as it seemes by Him [tha]t Hee [tha]t is to be lett to Bayle / must eithe[r] be Appellatus or
Rectatus

Therefore it seemeth by the Como[n] Lawe / that A man ymprisoned for Fellonye before Indictm[en]t or Appeale / except it were by writt could not bee bayled / And w[i]th that oppynio[n] seemeth to concurr that w[hi]ch is declared by the Stat[ute] of Westminster 2: Ca: 15: where it is declared / that by the Como[n] Lawe A man ymprisoned by the Comau[n]dm[en]t of the Kinge / or His Iustices / cannot be releived or Bay led / And accordinglye is the lawe taken in the Booke Case 24: Ed: 3: 33: where A Man for going secretlye Armed in Westminst[e]r hall vnder his Apparell / was committed to Warde / by the Iustices / and was denyed Bayle / and Mainprise / and Forfeyled his Armo[u]r And that Personn Imprisoned could not be bayled

As all soe is p[ro]ved by the Stat[ute] of / Rich: 3: Chap: 3: where it is saide / pur ceo que {dui?s} Persous delour in sont a restes / et imprison pur suspic[i]on deffelonie / ascun foitz de malice etc et en si gardes imprison pur sans Bayle / or mainprise al lour grande vexation et trouble etc whereby it is / [tha]t w[hi]ch was before collected out of [th]e wordes of Bracton

But heere it maye be demaunded / w[ha]t was the Reason For (Lux plus laudatur quando Ratione probatur) That Iustices of [th]e Peace might by the Comon Lawe bayle A Man Indicted For Fellonye

Heerevnto

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herevnto might be Answered / that Iustices of the Peace could not Bayle A Suspected person for Fellonye before Iudgem[en]t or Appeale / For two Causes

[*Left margin:(1)*] First that noe Iustice of the Peace (For w[i]th Him I will medle in this Treatie / is A Iudge or any such person before Indictm[en]t or Appeale brought / And therefore could not lett him to Bayle or Mainprise; For it were Absurd to saye / And directlye contrary to the Etimologie of the worde / that he should deliver anye Person to Bayle/ that were not Iudge of [th]e person of him / [tha]t were to be Bayled

[*Left margin:(2:)*] The Second Reason is / for that Iustices of the Peace are before Appeale brought / or Indictm[en]t noe Iustices of the Cause wherefore he is ymprisoned / And therefore doth it followe [tha]t by the Como[n] Laws they could nott lett such persons to Bayle

But heere rises A Second Question / as doubtfull / as the First whie Iustices of the Peace / are neith[e]r Iudges of the Person / nor the Cause / in [th]e Case aforesaid / before Indictment / or Appeale brought

This doubte is fullye resolved by the opynion of the whole Court in the xiiij H: 4: 16: where it is said / that A Iustice of [th]e Peace / is A Iudge of Recorde / and therefore ought to p[ro]ceed vpon that thing w[hi]ch is Iudiciallye before him of Recorde

But in this Case before indictm[en]t or Appeale brought / neither the Person / nor the Causies of Recorde / and therefore he could not befor[e] Indictm[en]t p[ro]ceed either w[i]th the Person/ or w[i]th the Cause / And for [tha]t very Reason it is likewise Agreed by the whole Courte in [tha]t Case / That a Iustice of peace cannot make out A Warrant to Arrest anye Man for suspition of Fellonye / before hee bee thereof Indicted / And / yet it is agreed / he maye make a warrant against one / before any Record thereof / And this doth Nothings impayre / that w[hi]ch hath bine saide/ (Exceptio probat Regulam) yf the Iustice of Peace should

staye the Arresting of such Persons as would breake the Peace / before they were certified thereof by waye^{matter} of recorde / The breach of the Peace {o} shall never be p[re]vented / For before it is broken / there ca[n]not anye Record be made thereof / by matter of Recorde / And therefore in that Case For that Cause / the Iustice of the Peace / maye lawfullye make his Warrant / as Como[n]lye is vsed / Allthoughe there bee thereof noe Recorde/

But then seeing by the Order of the Como[n] Lawe / Iustices of the Peace could not Bayle A Person suspected / or ymprisoned before indictment or Appeale brought / It is verye requisite to vnder stand / what Person comitted to Prison / maye before Indictm[en]t on Appeale / be lett to Bayle / by Iustices of the Peace / by anye Statute nowe in Force

[*Left margin:*(Cap: 7:) what Persons co[m]mitted to Priso[n] before Indictm[en]t or Appeale be Bayleable by the Iustices of [th]e Peace / by any Statute nowe in force] [*Right margin:*(1: Et 2: P: Et Ma: Cap: 13)] And First I take it / that the Statute w[hi]ch is Principallye in force For this Matter is the Stat of 1 Et 2: Phillip: Et Marye Ca[p] 13: w[hi]ch Statute being longe / I will not recite / But will shortelye showe / what Persons ymprisoned / maye before Indictment or Applele be lett to Bayle / by Iustices of the Peace / and what not / by Force of that Statute / or of anye other not Repealed

[*Left margin:*Treason /] A Man Comitted to Prison / For Treason / or For Suspition of Treason / cannot be Bayled by [th]e Iustices of the Peace

[*Left margin:*Pettye Treason /] The same lawe is of Pettye Treason/

[*Left margin:*Murther /] yf A man be suspected of Murther / and thervpon comitted to Prison / he cannot be Bayled by A Iustice of Peace But A Question maye be made / whether in that Case / A man Comitted to Prison vpon suspition / to be Accessarye to a murther

whether

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whether he before Indictm[en]t maye be lett to Bayle by the Iustices of the Peace / and I thinke (Sine Preiudico Meliortis Sententia) [tha]t hee cannot be bayled by them / by Force of the said Statute / For albeit after Indictm[en]t he maye be bayled / as is aforesaid yett mee seemeth/ that the saide Statute / doth not extend / to make him Bayleable / by the Iustices of the Peace before Indictment. For the wordes of the Statute be / anye Person / or Persons / Arrested For Manslaughter / or Fellonye/ vnder w[hi]ch wordes / as I take it / the Meaning of the Makers of [th]e Stat[ute] was not to include / either Murther / or Accessarye to the same /

[*Right margin:*manslaughter /] It appeareth / by [th]e Espresse Letter of [th]e Stat[ute][tha]t A Man Committed to Prison for manslaughter or for Suspition of [th]e same / maye be Bayled/

[*Right margin:*Doubt] But the Next doubt is / what offences bee included in the word Felo[n]y within the Meaning of the said Stat[ute] / And therefore it is necessarye to vnderstand / what is Comp[re]hended vnder the same/

[*Right margin:*Burning of Houses/] Yf A Man be committed to Prison For the Fellonyous Burninge of houses / or for [th]e Suspition of the same / yet he ought not to be Bayled w[i]thin[tha]t Stat[ute]

[*Right margin:*Burglarye] But A Man Comitted for Burglarye / or for Suspiti[n] of [th]e same / may as well before as after the Indictm[en]t be lett to Bayle w[i]thin the meaning of that Statut[e]

[*Right margin:*Breaking of Prison /] A Man ymprisoned For Fellonye / or for suspition of the same / doth breake Prison / and afterwarde is App[re]hended is therefore Comitted to Prison / he ought not to be Bayled / neither before nor after Indictm[en]t

[*Right margin:*Robberye /] But A Man Comitted to Prison for Robberye or for suspition of [th]e same / maye be lett to Bayle / as well before as after Indictm[en]t

[*Right margin:*A notorious Theife/] And yett he that is A notorious Theife / and soe como[n]lye Esteem[e]d if hee bee ymprisoned / For any offence touching the Crowne / or for anye manner of Fellonye / he is not Bayleable / w[i]thin the meaninge of the Statute

[*Right margin:*Rape/] A Man ymprisoned of Rape / or for Suspition of the same of the same / is Bayleable as well before the Indictm[en]t as after / as I take it

[*Right margin:*Appeale by an Approver /] A Man that is Appealed by an Approver / except he bee of good and honest Fame /ought not to be Bayled during [th]e life of the Approver

[*Right margin:*Accessary to a Fellon Attainted /] A man being ymprisoned for being Accessarye to the Rescuinge / or Abetting of any person outlawed / or otherwise attainted for Murther / or Fellonie is not Bayleable / either before or after Indict[men]t

[*Right margin:*Put out of Eyes etc /] A man ymprisoned for putting out of Eyes / or Cutting out of Toungues / or of suspition of the same / is Bayleable (as I take it as well before as aft[e]r Indictm[en]t by [th]e Iustices of the Peace / by force of [th]e said Stat[ute]

If A man Comitt anye offence /whereof he is Bayleable / yett if he be taken w[i]th the manner / the Iustices of the Peace maye deny him Bayle / as well before as after Indictm[en]t For he is not bayleable Contrarielye A man ymprisoned for anye offence / w[hi]ch by any sp[ec]i[al]l Statute is made Fellonye / maye be Bayled by the Iustices of the Peace / except Bayle be expreslye prohibited For the same / as well before / as after Indictm[en]t

As For Example it is propounded by the Statute / of ³ H: 7: Cap 2: that if anye Mayde or Widdowe / having handed Goodes or Tenem[en]ts or being heyre Apparent to their Au[n]testors / be taken away co[n]trary to their will / and after Married to such Misdoer etc or defyled etc That such offence is Fellonie / Nowe if A man be ymprisoned for such an offence / or suspition of the same / hee is bayleable by the Iustice of the Peace / as well before as after Indictm[en]t / Sunt falia plura / qua[m] omnia enumerare per Longam est sed ista sufficient Exempt Causa /

A question maye be heere demaunded / whether the said Statute of 1: Et 2 : Phil: and mary / doe extend to Fellonies made by the Stat[ute] since the said Acte / And I thinke w[i]thout anye greate doubt it doth

For

For as I take it / that anye Person suspected / and ymprisoned for anye Fellonye / made by an Acte of Parlyament / either before / or since the saide Acte / of 1 et 2: Phil: and marye / be

lett to Bayle by the Iustices of the Peace / vnlesse Bayle or mainprize be expresl[ye] therein prohibited/

But seeing that such Persons as are Bayleable / by the said Stat[ute] of 1: et 2: Phil: and marye / as are to be lett to Bayle by Iustices of the Peace / vpo[n] sufficient suerties Found / {-} As is necessarye to bee vnderstood / howe manye / and what Iustices of the Peace / are requisyte and howe manye suerties / or Pledges / are Required by the Lawe vpo[n] the lettinge of such Persons to Bayle

[Left margin:(Cap: 8:) How many and what Iustices of the Peace ar[e] Requisite / & how many Suertyes / or Pledges are Required by the Lawe] The Iustices of the Peace / in open Sessions of the Peace / or Two of the Peace / wereof the one to be of the Cour[t] Both being p[re]sent together / maye out of the Sessions lett anye prysoner ymp[ri]soned Bayleable by the lawe / w[hi]ch Baylem[en]t in writtinge / subscribed / and Signed in their owne handes / they ought to Certifie to the nexte generall Gaole deliuerye etc Hee maye be lett to Bayle / by one Iustice of the Peace / by the Comon Lawe /

It Appareth by Bractons Treatice of his 3: Booke Cap: 8 That at that Tyme / he that was to be Bayled , ought to haue founde / (xii Probos Et Legales homines de comitase etc) and soe it appareth by an au[n]cient Booke / called the deuersitye of Courtes Fol: 116 : 8 That in au[n]cient tyme he [tha]t could wage this Lawe / should haue xii men with him; For as it seemeth / that at that Tyme / as well {gap in line} wagers of Lawe / As in Case of Bayle / The law is charged since that tyme/ I take it / there ought to be two Pledges / or mainprisses at the least / For it seemeth that the wordes bee (et Licet Frequentur avtulerit Sufficient manucaple erunt qui eum manucap le-eunt etc Soe as there must be sufficient manucapsors and that cannot be vnlesse there be two at the least / And as me seemeth / it maye allsoe be collected by the Booke / in 33: Ed: 3: etc 36: Ed: 3 For there it is said / (As fouc led gardens / et old rendere / doe escape / and agayne / one such manicap tor / But heere A question maye arise / howe often For one offence / A ma[n] maye be lett to Bayle /

[Left margin:(Cap: 9) How often for one offence A man may be Let to Bayle /] Yf A man be Imprisoned / Indicted or Appealed / For anye offence / For the w[hi]ch he is bayleable / and is accordinglye let to Bayle and afterwarde makes defaulte / and doth not appeare / According to the Condit[i]on of the Baile / and mainprise & Recognizaunce / and afterwarde is Arrested / or App[re]hended againe / in this Case [th]e Iust[ice] of the Peace / maye denye him anye more to be lett to Bayle / or maine *[Left margin:Tit[le]: manu[script]:] prise /* And that the lawe should bee soe /it is p[ro]ved by the Booke Case Cap: 2 Hen: 4: Fol: 24: By the opynion of all the Iudges / where it is saide in the like Case (que il ne fera my per mainprise Apres

[Left margin:(Cap: 10:) what Remedye a man in prison / and Bayleable by [th]e Lawe hath to be let to Bayle /] Hee that is ymp[ri]soned For anye offence / whereof his is Bayle able by the Lawe / maye haue A writte of manucaptione / diverted to the Shereiffe of the same Countie that he shall take Suerties of him to appeare / and to sett him at Lardge / w[hi]ch writte / in divers Forme/ and divers speciall Cases / Appareth in the Register

If A man bee wrongfullye detayned in Pryson / hee maye haue A writte / de homine Replegiands / w[hi]ch doth allsoe appeare in the Register/

It appeareth by Bracton / that in his tyme / there was A writt In vse for this Purpose / w[hi]ch was called A writt (de odio Et Acia) Touching w[hi]ch / the wordes bee these / sed cum iniqu[od] est quod Inocenter

Sicut

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Sicut illi qui criminosi non sunt din inclusi detineantur in c[h]ancery ideo ad Lacrimo sum querelam parentu[m] et Inicorum de gratia Din Regis fieri Solet Inquisitio vteru[m] huiusmodi in prisonati de morte hominis ca{ }vabilis essent / de morte / illa / vell de huiusmodi Inquisicone nulli debet denegari / and there setteth downe the words of [th]e writt

Nowe it is to be vnderstood / that at that tyme / when Bracton wrote soe longe tyme after / the shreiffe by Writt / or Dormission to Him directeD vsed to take inquiries / and Iudgm[en]t of murthrs and Fellonie / and to hould Plea of the Crowne / w[hi]ch afterwards being denyed vnto Him by the Statute of 28: Ed: 3 : Cap 4: (as I take it) the said writt (de Odio et Acia / hath lost his Force/ But heere A question maye be demau[n]ded / whether A man committing anye offence vpon the Sea / or w[i]thin the Iurisdic[i]on of the Admiraltie / For w[hi]ch / yf the same had bine Comitted vpon the Land / he might haue bine Bayled / whether the Comissioners of the Admiralltie / maye lett him to Bayle or noe / eith[e]r before or aft[e]r Indictm[en]t

[*Right margin:*(Cap: 11:) In what Comissi[o]ners of the Admiraltye / may let Prisonors to Bayle/ either before of after Indictment] And First I take it / sine preuidicio melioru[m] Sententia / that [th]e Comissioners of the Admiraltie cannot lett to Bayle / anye Pr[i]son(or) ynnprisoned / for anye offence / or For suspition of anye offence Comitted vpo[n] the Sea / or w[i]thin the Iurisdiction of the Admiralltye / Before [th]e Person soe ymprisoned / be thereof Indicted / Allthoughe in that Case yf the Fellonye / and offence / had bine done vpon the Land / the Partye Had bine Baileable / & I am induced to be of that opynion / For [th]e Co[n]sideratio[n] foll[ow]ing/

First it is to be agreed /that both the Statute of 28: Hen: 8: Cap: 13: All Murtherers / Pyracies / Robberyes / and all other offences done vpo[n] the Sea / were determined by the Civill Lawe / w[hi]ch Lawe was in [tha]t behalfe Found verye deffective / For as much / as by that Lawe; none of the saide offences soe Comitted / could bee punished w[i]thout the Testimonyes of two Competeu[n]t Wittnesses/ or An expresse Confession of [th]e P[ar]tye offendinge / those dandgearous / and detestable offences / as well as for the want of sufficient Testimonie (Murther being of the shadow of pyracye) As allsoe by Reason of the Perverse and obstinate obstina[n]cye of the offenders (An Indictm[en]t seperable to the Pyratt / in not confessing his owne offence / he como[n]lye went awaye w[i]thout Punishm[en]t

This Mischeiffe was Remedied by the Stat[ute] of 28 Henry 8: Ca: 13 whereby it is p[ro]vided / that all Treasons/ Robberyes / Fellonyes / Murthers / and Conspiracyes / after the said Acte / be Comitted in or vpon the Sea etc shal be inquired / Tryed / heard / and determyned / & Iudged / in such Sheires and Places of the Realme as shal be lymitted by the Kings Comission / to heare and determine such offences / had bine Comitted /vpon the Land / in the same Sheire

Of this much I gather / that heerevnto the said offenders word not Bayleable / neither by the Como[n] Lawe / nor by anye statute / For how Could they be Bayleable by the Como[n]

Lawe / where the offence was not determinable / by the Como[n] Lawe / And I finde noe statute / that taketh away the Tryall of those offences From the Civill Law vnto the statut[e] of 28: H: 8: w[hi]ch statute doth not make anye Provision at all/ For letting the said offenders to Bayle / Therefore I doe conclude that w[i]thout anye greate doubt (as mee seemeth / such offenders before Indictm[en]t were not Bayleable before the Comissioners / neither by the Como[n] Lawe / nor by the statute 28: He: 8:

But it maye be demaunded / whie the said statut[e] of i et 2: Phi et Ma: should not extend to the Comissioners allsoe / For w[i]thin the Admiralls Iurisdiction / they allsoe are Iudges of Peace/

This question is safelye Resolved / as maye appeare in those w[hi]ch will dilligentl[y]e pervse the Statutes / For they shall safelye soe that the Statut[e] doth not extend to the Comissioners for [th]e Admiraltie /

But

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But onl[y]e to those w[hi]ch are comissioners for the Peace / For the Bodye of the Cou[n]tie / w[hi]ch as by divers others other P[ar]tes of the saide Acte/ soe doth it plainelye appeare by that w[hi]ch is therein p[ro]vided / videl[icet]/ And in Casse anye Iustice of the Peace etc shall offend etc That the Iustices of the Gaole deliverye For the Sheires etc where suche offences shall happen to be Comitted / shall for everye suche offence sett A fine / whereby it is evident / that the saide statute was meant only to extend to the Iustices of the Peace / w[i]thin the Bodye of the Countye/ But I take it after Iudgment the Comissioners of the Admiraltie maye lett to Bayle / such p[er]sons as are Bayleable by the Lawe / Because they being Iudges of Record / are after Indictm[en]t Iudges as well of the Person offendinge / as of the offence it selfe / And therefore maye deliver such p[er]sons soe Indicted / in Balliu[m] / (I take it)

And what Persons are Bayleable by the Lawe / and what not/ maye appeare by that w[hi]ch hath bine said before / This onl[y]e I will observe in this Place / that seeinge murther is such an Incident Pyracie I thinke that the Comissionors of the Admirallitye maye well denye such persons / as are Indicted of Pyracie / to bee lett to Bayle / & / Mainprise as well for the haynousnes of the offence / as for the Affinitye that it hath with Murther / [th]e offendo[r]s wherein as is aforesaid Are not Baileable/

[Left margin: (Cap: 12: Howe or in what Sorte Bayle or Maine prise / may be discharged /:]
Yf the Iustice of the Peace doe lett anye Prisoner that is Baile able to Baile / and afterwarde / as well the Prysono[r] by A writt of Habeas Corpus / as the record of the Indictm[en]t / be Removed by a writt of Certiorari / either into the Chancerye / or into the Kings Bench / the Bayle or Mainprise / taken by the Iustice of the Peace / is discharg[e]d for ever / As it is houlden in 32: Hr: 8: Tit[le] Mainp[r]y[s]e allthoughe the Recorde bee Remaunded by A Proctdendo / askit is there likewise houlde[n]/

Mr Hatham /doth reporte A Case / in 12: R: 2: that after Indictment given etc. The Maineprisors are disregarded / And it is nott holpen by the staut[e] of 1: Ed: 6: Cap: 7 (as I take it)

If the Processe vpon anye Indictm[en]t be discontinued / [th]e mainpriso[r]s are discharged / as I take it / and if the Partie dyeth / the mainprisors are discharged / For / mors omnia

Soluit / et impotentia excusat lege As Bracton Saythe / But at the daye of Appearance / the mainepriso[rs] cannot pleade the death of the Partie / But vpon Processe against them / it must come in by the Retourne of the Shreiffe / as it is hould[en] And then allsoe / maye the mainepriso[r]s pleade the same / as I take it in discharge of the Recognizance / And of this matter thus much shall suffice/

[*Left margin:*(Cap: 13) The Ende and conclusion with Aduertisement /] The ende and scope of this Little Treatise / is vnder Correctio[n] of those of better Iudgm[en]t to sett forthe / what the law of this Realme doth require / Touching Bayle / and Maineprise / A necessarye thinge in my opynion / For such as be Iustices of the Peace to be knowne; For as hee that standeth vpon plaine /and sure grounde / Allthoughe hee should be Bourne by Rage or Tempest to the grounde / might bee w[i]thout dau[n]ger / and rise of himselfe agayne / Soe he that hath the Administrac[i]on of Iustice / and in all his Acc[i]ons is guided and directed by the Rule of lawe / neither abusing his authoritye nor exceeding his Comission standeth on A sure ground / w[hi]ch will beare him vp as all seasons (Sapientis est Cogitare (saith Cicero) Tantum Sibi else permissum / quantum est Comissum et Creditum) / And good was the Cou[n]sell (as those that followe it finde) whosoever gave it / videl[icet] exceed not the Comission / And albeit it is truly saide / that / Iudiciu[s] est legibus / et non exemplis) And as [th]e Logitian saithe / exempla / demonstrant / non probant / yett assuredlye it is greate Contentm[en]t / and satisfact[i]on to an honest mynde / and a good

Conscience

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Conscience the liffe / and Lib[er]tye of A man/ to follow the President / { } example of grave / and Reverend Men / How be it For as much / as all good lawes / instituted and made / For the Repellinge of those evills / that most Como[n]lye happen / For ad ea que frequentius Accidunt Iura / as apta[tan]tur/ and principallye doe respect the generall Peace; and p[ro]fitt of the People / And therefore / we vse to Saye / that A mischeiffe is rather to be suffered / than an Inconveniencye / that is to saye / it is better / that a Private Person / should be punished / or dampnified / by the rigo[r] of the Lawe / than A generall Rule of the Lawe should bee Broken / to the generall Trouble of many

It is therefore verye necessarye that Lawe / and discretio[n] should be Coniuntina; and the one to bee an Incident inseperable to the other/ soe that neither Lawe w[i]thout discretion / least it should inclyne to Rigo[r] nor discretion w[i]thout Lawe / least Confusion should followe; shoulde be put in ore/ My Meaninge is not thereby to Allowe of every mans discretion that sitteth in the Seate of Iustice / For that would bringe forthe A Monstrous Confusion; But I meane the discretion [tha]t risethe from the right discerning / and due Consideration of the true & necessary Circu[m]stances of the Matter / And as was comonlye use to saye [tha]t como[n] Lawe/ is nothinge els / but como[n] Reason / whereby A man is naturally endowed; But that p[er]fection of Reason / w[hi]ch is gotten by longe / and Continuall Studdye / Soe in Associating discretion soe neere to lawe is not meant to p[re]ferr it to that societie of oath mans discretio[n] w[hi]ch Comonlye rather deserveth the name of Affection / and selfe will then of discretion indeed / But that discretion onelye wee allowe of in this Place / that either grave / or reverend men / have vsed in such cases before / or Rise of the Circu[m]stances of the matter / as is aforesaid/ As for examples / being allsoe not impertinent to the matter of our Treatise / It were a question / whether to an Appeale of Mayne/ the deffen[d]eth were to be lett to Bayle / or Maineprise / or noe/

It is necessarye to be examined / whether the manno[r] of the Mayne /were horrible / or heynous / For the deffend[en]t maye be denyed Bayle / or Mainprise / whether the sauce were suddau[n]ly done or vppon A Suddaine Affraye / or of the Pet[ty] Assault / or against [th]e intent of the deffend[en]t etc/ For the deffend[en]t maye be lett to Bayle And this I take to bee A Lawfull discretion / for to that end/ is the Booke Reason / of the Booke in the 6: H: 7: Fol: i: where in An Appeale of Mayne / Iustices of the Kings Bench / denyed to the deffend[en]t to be Bayled / For / that vpon the examinac[i]on of [th]e matter it Appeared to be most Cruell / and horrible / And there fore in repect of the Abhominable haynousnes of the same / the Iustices would not suffer the deffend[en]t to be bayled;

And with this Agrees the opinyon of Bracton / in his Second Treatise of his Third Booke Cap: 8: (Appellativero de morte hominis/ et de Pace / et de Plagis periculosus / Saltem Capiantur[r] et in Prisonam deliberantur delandantur / et ibi Custodiantur[r]/ uel per Iudicem deliberantur; where by I noate / that he saith Plagis Periculosus / In that he saithe / donec p[ro] Dominu[m] Regem per Plegios dimittantur / It is to bee vnderstood vntill by that Courte / where the offence / is to bee determind / and Iudged/ they bee lett to Bayle/

And this Partiiculer / maye suffice to the Reason of the Generall

To conclude / the Aurthour of all wisdome / and true knowledge / thought it Requisite / that those whoe are Iudges of the earthe / should bee both wise/ and learned / whom I beseech

to

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to Blesse all those that on Earthe he hath sett on his owne with his true knowledge and Wisdeome /

The Table

- 1: Where of those Wordes / Bayle / and Mainprise be derived/
- 2 The discription of Bayle and Mainprise /
- 3 The difference betweene Bayle / and Mainprise/
- 4 What Personnes are Bayleable by the Comon Lawe /
- 5 What Personnes are not Bayleable by [th]e Comon Lawe /
- 6 What Persones ymprisoned for anye offence / or for Suspition of the same / may be lett to Bayle / before Indictm[en]t or Appeale brought either by the Comon Lawe { } or by anye Statute/
- 7 What Persons Comitted to Prison / maye before Indictm[en]t or Appeale / be lett to Bayle / by Iustices of the Peace / by anye statute now in Force/
- 8 Howe many Iustices of the Peace are Requisite in such a Case / and how manye suertyes or Pledges are Requisite by the Lawe /
- 9 Howe often For One Offence A ma[n] maye be lett to Bayle/
- 10 What Remedye A man ymprisoned / and Bayleable by the Lawe hath to be lett to Bayle/
- 11 In what Cases / the Comissiono[r]s of the Admiraltie maye lett Prisono[r]s to Bayle /
- 12 Howe or in what Sorte / Bayle / or Mainprise / maye be discharged /
- 13 The Conclusion / w[i]th Advertisement/

Finis

Other manuscript witnesses

Manuscript Pamphleteering in Early Stuart England

- British Library, Harley MS 444, ff. 185r–202r
- British Library, Additional MS 48102, ff. 262r–277r
- British Library, Harley MS 738, ff. 68r–82x
- British Library, Harley MS 829, ff. 1r–17x
- British Library, Harley MS 829, ff. 49x–52x
- British Library, Stowe MS 145, ff. 80r–98v
- Beinecke Library, OSB MSS 28, Box 1, Folder 15, item 18, ff.279x–298x
- Bodleian Library, MS Rawlinson A 242, pp18
- Cambridge University Library, MS Ii.5.9, ff. 87r–107r

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<https://mpese.ac.uk/t/CokeTreatiseBailMainprise.html>