And in theſe caſes, tho it be found *per infortunium*, or *ſe defendendo* upon the ſpecial matter ſet forth, yet this ſpecial matter muſt be recorded, for tho it be not ſuch a felony, as hath judgment of life, yet it is ſuch an offenſe, as gives the forfeiture of goods, and therefore they may not find a general *nôt guilty*, but muſt find the ſpecial matter, and leave it to the court to judge.

[303] At the ſeſſions at *Newgate* 16 *Car.* 2. upon the evidence it appeard, that *A.* a boy riding in the ſtreet upon an horſe, *B.* another boy whipt the horſe, the horſe ran away againſt the will of *A.* and ran over a child and kild it, for this *A.* was indicted of murder by the grand inqueſt, and the jury found him generally *not guilty*; the court was in doubt of receiving the verdict, becauſe it was *per infortunium*, and ſo ought ſpecially to be found, but becauſe the coroner's inqueſt had found the ſpecial matter, and concluded it, as in truth it was, *per infortunium*, which preſentment *A.* was ready to confeſs, that ſo he might have his pardon of courſe, the verdict of *not guilty* was recorded, and ſo it was ſaid was the uſual courſe in that caſe; but it was agreed, that if *A.* had of his own accord put the horſe into ſpeed, and he had ſo kild the child, it had not been *per infortunium* but manſlaughter. *Richard Pretty*'s caſe for killing *Anne Jones*.

But now ſuppoſe the priſoner kild the party, but yet in ſuch a way as makes no felony, as if he were of *non ſane memory*, or if a man kills a thief, that comes to rob him, or to commit a burglary, or if an officer in his own defenſe kills one, that aſſaults him in the execution of his office, which are neither felony nor forfeiture, whether is it neceſſary to find the ſpecial matter, or may the party be found *not guilty*? *Foſter* 265.

And I think, and ſo I have known it conſtantly practiſed, the party in theſe caſes may be found *not guilty*, and the jury need not find the ſpecial matter.

And the reaſon is, that in theſe caſes there is neither felony nor forfeiture.

And this is in effect declared by the ſtatute of 24 *H.* 8. *cap.* 5. "If "any attempt to commit murder, robbery or burglary in or nigh "any common high way, or in the manſion-houſe, *&c.* and the evil "doer be ſlain, and if the ſame by verdict be found or tried, the "ſlayer ſhall not loſe any goods or chattels, but ſhall thereof be "fully acquitted and diſcharged in like manner as he ſhould be, if "he

" he were lawfully acquit of the death," and accordingly ruled in *Cooper*'s caſe. *P.* 15 *Car. B. R. Croke, p.* 544.

But it is uſed in ſuch caſes (and prudently enough), for the coroner's inqueſt to find the ſpecial matter, and the bill [304] of indictment of the grand jury to be for murder, and to have the party arraigned upon the bill of indictment, and to be acquitted thereupon upon trial, and to enter the acquittal upon the bill, and then to confeſs the coroner's preſentment, and to have judgment alſo thereupon; thus it was done in the caſe of *Richardſon* keeper of *Newgate*, who kild *Hyde*, that had committed a robbery and made reſiſtance, that he could not be taken without being kild. *M.* 25 *Car.* 2. at *Newgate*.

And therefore, where a thief was kild in purſuit becauſe of neceſſity, if the ſpecial matter be found, the killer ſhall have judgment, *quòd eat ſine die*. 22 *Aſſiz.* 55. *Coron.* 179. 22 *E.* 3. *Coron.* 258. 26 *Aſſiz.* 23. *Coron.* 192. 22 *E.* 3. *Coron.* 261. and the reaſon is, becauſe it is no felony, nor cauſeth any forfeiture ſo much as of goods, but is a juſtifiable act, and ſo differs from *ſe defendendo*, or *per infortunium*, which give a forfeiture of goods.

And ſince in an indictment or an appeal of felony the defendant cannot plead a juſtification, he ſhall have the advantage of it upon the general iſſue pleaded. 26 *H.* 8. 5. *b.* 37 *H.* 8. *B. Appeals* 122.

Yet *vide* 37 *H.* 6. 20 & 21. *per Needham* upon an indictment of murder the defendant may plead, that in an appeal before the conſtable and marſhal of treaſon he being appellee kild the appellant; yet in that caſe it ſeems, if he pleaded *not guilty*, he ſhall have advantage of that ſpecial juſtification upon evidence.

But [notwithſtanding] this, that I have ſaid, where the matter itſelf appears not to be felony, the priſoner upon *not guilty* pleaded may be found *not guilty*, without finding the ſpecial matter, and accordingly ruled. *P.* 15 *Car.* 1. *Croke, p.* 544.

Yet if the coroner's inqueſt find not the ſpecial matter but murder or manſlaughter, and the priſoner is arraigned upon it and plead *not guilty*, and upon the evidence it appear, that the priſoner kild the man, but in ſuch a manner as makes no felony, as a thief that aſſaults him upon the highway, or a thief that reſiſts [305] the arreſt, in this caſe the jury cannot find a general *not guilty*, but muſt find, that the priſoner did it, and the manner how, and this is to be entred of record, as in caſe of a verdict *ſe defendendo*.

And

And the reaſon of the difference is, becauſe in the former caſe the jury gives a verdict of *not guilty* generally, without inquiring who did the fact. But where a man is arraigned upon the coroner's inqueſt *ſuper viſum corporis*, and pleads *not guilty*, if the jury acquit the priſoner by *not guilty*, yet they muſt inquire who did it, for here it is apparent there was a man ſlain, becauſe the coroner takes the inqueſt upon view of the body, and if they ſhould find him generally *not guilty*, and yet ſhould upon their other inquiry find he kild him, it would be a contradiction in itſelf, and therefore in this caſe, they are to find the ſpecial matter, and thereupon the court ſhall give judgment for his diſcharge.

Many ſpecial verdicts have been found, as upon the ſtatute of ſtabbing, ſo upon the point, whether murder or not, but it is difficult to find them ſo that judgment may be given for murder, becauſe there are ſo many circumſtances required to be found, that if any be omitted, the verdict will fall only to manſlaughter.

I have rarely known upon any ſpecial verdict, where the queſtion was murder or manſlaughter, judgment to be given for murder *(d)*, but commonly for manſlaughter or *ſe defendendo*. *Tutius erratur ex parte mitiori.*

Burn. Tit. Jurors. ſect. 5.

(d) There have been however ſeveral inſtances, wherein it has been done, *viz. Mackally*'s caſe, 9 *Co. Rep.* 70. *a. Mawgridge*'s caſe, *Hill.* 5 *Ann. B. R. Kel.* 120. *Onchy*'s caſe. *Trin.* 13 *Geo. B. R.* all which were ſpecial verdicts, and the court ruled them to be murder.

---

[306] CHAP. XLII.

Concerning the miſdemeanors of jurors, *and their* puniſhment.

IF any of the jury eat or drink without licenſe of the court before they have given up their verdict, they are fineable for it.

But tho it be not at the charges of either party, antiently it was held it would avoid the verdict. 24 *E.* 3. 24. *a.*

But at this day the law is ſettled, that it is only a miſdemeanor fineable in them that do it, but avoids not the verdict. 14 *H.* 7. 29. *b.* *(a)*. 20 *H.* 7. 3. *a.*

(a) Vide pluis de eo caſe 15 H. 7. 1. b.

But

But if it be at the charge, for the purpoſe, of the priſoner, and the verdict find him guilty, the verdict is good; but if they find him *not guilty*, and this appears by examination, the judge, before whom the verdict is ſo given, may record the ſpecial matter, and thereupon the verdict ſhall be ſet aſide, and a new trial awarded. 14 *H.* 7. 30. *a*, *b*.

If a juryman before he be ſworn take information of the caſe, this is cauſe of challenge, as the law ſtands at this day, but antiently it was held otherwiſe, and that it was lawful, and that was the reaſon given in the ſtatute of 6 *H.* 6. *cap.* 2. which enacts, "That pannels "of aſſiſes be deliverd by the ſheriff to either party ſix days before "the ſeſſions, namely, that they might inform the jurors of their right "before the ſeſſion.

But this brought great inconvenience in embracery and tampering with jurors, and therefore it is juſtly diſuſed and diſapproved.

If a juryman have a piece of evidence in his pocket, and after the jury ſworn and gone together he ſheweth it to them, this is a miſdemeanor fineable in the jury, but it avoids not the verdict, tho the caſe appears upon examination. *M.* 23 *Car.* 1. [307] *B. R. M.* 40 & 41 *Eliz. B. R. Croke, n.* 1. *Graves* & *Short (b)*; *vide tamen contra* 11 *H.* 4. 18. *a.*

But if after the jury ſworn either party deliver a piece of evidence to the jury, and the verdict is given for him that deliverd it, it ſhall avoid the verdict, but then this muſt appear by examination, and be indorſed upon the *poſtea* or verdict, ſo as it appears of record, and it muſt not be barely by affidavit made after. *M.* 40 & 41 *Eliz. B. R. Graves* & *Short. Co. Lit.* 227. *b.*

But if the verdict be given againſt him that deliverd the evidence, the verdict is good. *Ibid.*

If a piece of evidence under ſeal be read in court, the jury ought regularly to have it with them, but not if it be not under ſeal.

But yet if after the jury ſworn a piece of evidence not under ſeal be by the court deliverd to the jury, it doth not avoid the verdict, and ſo it is, if it be deliverd by a mere ſtranger, or if it be deliverd by one of the parties, and the verdict be given againſt him, on whoſe behalf it was deliverd. *M.* 37 & 38 *Eliz. B. R. Croke, n.* 1. *(c)*

If after the jury ſworn and gone from the bar they ſend for a witneſs to repeat his evidence, that he gave openly in court, who doth it

(*b*) *Cro. Eliz.* 616. (*c*) *Vicary* & *Farthing, Cro. Eliz.* 411.

accordingly, this appearing by examination in court and indorſed upon the record or *poſtea* will avoid the verdict. *T.* 32 *Eliz. B. R. Croke, n.* 17. *Metcalfe & Deane (d). M.* 20 *Jac. B. R. Hillord & Hall (e)*, becauſe not done openly in court, nor in the preſence of the parties concerned. *M.* 32 *Eliz. B. R. Leon, n.* 426. *Elmes* caſe *(f)*.

But if the jury after their departure from the bar deſire to hear the teſtimony of a witneſs again, they may be ſent for into court, and the witneſs may be heard again openly, where the court or parties may aſk what queſtions they think fit.

[308] If depoſitions are read in court to the jury, and after the jury ſworn and going from the bar the ſolicitor or proſecutor for the king or party without conſent of parties or order of the court deliver the copies of the depoſitions to the jury, if they find againſt him on whoſe part the copies were deliverd, the verdict is good, but if they find for him on whoſe part they were deliverd, and this appear by examination, and be (as it ought to be) indorſed upon the *poſtea* or record, the verdict ſhall be quaſhed, and a new *venire facias*, or award for a new jury ſhall be returned. *M.* 20 *Jac. B. R. Hillord* and *Hall.*

If after the evidence given, where divers evidences are read on both ſides, and the clerk is making up his bundle of evidences, that were under ſeal, to deliver to the jury, the ſolicitor for the plaintiffs delivers a bundle of depoſitions to the jury, ſome whereof were read, and ſome not read, and upon examination this appeard, tho the jury ſwore they opened not the bundle deliverd by the ſolicitor, yet the verdict for the plaintiff was for this cauſe avoided, (the matter being indorſed upon the record) and a new *venire facias* awarded, for great inconvenience may be by ſuch a practice, and the oath of the jury, that never looked into them, was not regarded, for poſſibly it may be a miſdemeanor in them to look into it, which they ſhall not excuſe in this manner. *T.* 1653. *Webb & Taylor*, 2 *R. A.* 714. *pl.* 6.

If the party after the jury ſworn ſpeak with a juryman, but nothing touching the buſineſs in iſſue, this doth not avoid the verdict given after for him. *M.* 7. *B. R. per curiam.*

But if he or any in his behalf ſay to a juryman after his departure from the bar and before verdict given, the caſe is clear for the plain-

(*d*) *Cro. Eliz.* 189.
(*e*) 2 *Rol. Rep.* 262. *Palm.* 325.
(*f*) 1 *Leon.* 305.

tiff,

tiff, this ſhall avoid the verdict, if given for the plaintiff, for it is new evidence. *H.* 22 *Jac. B. R. Athil & Bulwer* adjudged. 2 *Rol. Abr.* 716. *pl.* 20.

If *A.* be challenged off, and twelve more ſworn, yet *A.* goes along with the twelve ſworn and is preſent at their conſultation, if *A.* give no new evidence, nor adviſed or directed them to find that party, for whom the verdict is given, the verdict is good, but *A.* ſhall be fined for his miſdemeanor. *P.* 17 *Jac. B. R. Park's* caſe. [309]

Now touching fining of jurors I ſhall add farther.

If a man, that is one of the indictors, be returned upon the petit jury, and do not challenge himſelf, he ſhall be fined. 40 *Aſſiz.* 10.

If a jury ſay they are agreed, and it being aſked, who ſhall ſay for them, they ſay their foreman, but upon farther inquiry they are not agreed, the jury ſhall be fined, *viz.* every one apart. 40 *Aſſiz.* 10. 29 *Aſſiz.* 27.

If a juryman be called and refuſe to appear, or if having appeard withdraw himſelf before he be ſworn, the court may ſet a fine upon him at their diſcretion: *vide Stat.* 35 *H.* 8. *cap* 6.

So if he be challenged, and while the challenge is trying withdraw himſelf, and the challenge is upon the trial diſallowd, and he be not preſent to be ſworn 36 *H.* 6. 27. *a.* or being ſworn withdraw himſelf from his fellows before the verdict given. 34 *E.* 3. *Office de court* 12.

If eleven of the jury be agreed, and the twelfth refuſe, and make his companions lie by it, heretofore ſuch juryman hath been impriſond for his wilfulneſs, 8 *Aſſiz.* 35. and fined, and the inqueſt taken by the other eleven jurors. 3 *E.* 3. *Verdict* 40.

But upon great conſideration both theſe courſes have been diſallowd, and the judgment upon the verdict of eleven jurors reverſed, and the juryman (fined and impriſond) diſcharged, as being contrary to law, for it may be the twelfth was in the right, yet howſoever his conſcience is not in this manner to be forced, and therefore former precedents of this kind have been diſallowd. 41 *E.* 3. 11. *a.* 41 *Aſſiz.* 11.

But what if a juror give a verdict againſt all reaſon, convicting or acquitting a perſon indicted againſt evidence, what ſhall be done? I ſay, if the jury will convict a man againſt or without evidence, and againſt the direction or opinion of the court, the court hath this

ſalve to reprive the perſon convict before judgment, and to acquaint the king, and certify for his pardon.

And as to an acquittal of a perſon againſt full evidence it is likewiſe certain the court may ſend them back again, and ſo in the former caſe, to conſider better of it before they record the verdict, but if they are peremptory in it, and ſtand to their verdict, the court muſt take their verdict and record it, but may reſpite judgment upon the acquittal.

But as touching puniſhing the jury, I ſhall ſay, what I think may be done, and what may not be done.

1. I think in ſuch a caſe the king may have an attaint, for altho a man convicted upon an indictment can have no attaint, becauſe the guilt is affirmed by two inqueſts, the grand inqueſt, that preſents the offenſe upon their oaths, and the petit jury, that agrees with them, yet where the petit jury acquits, they ſtand as a ſingle verdict, for they diſaffirm what the grand inqueſt of twelve men have upon their oaths preſented, and with this agrees the book 10 *H.* 4. *Attaint* 60, 64. *per Thorn.*

2. By the ſtatute of 26 *H.* 8. *cap.* 4. the juſticiar or ſteward, before whom any perſon is acquit of felony againſt pregnant evidence in *Wales* or the marches thereof, may bind over the jurors to appear before the preſident and council of the marches of *Wales*, who may, as they ſee cauſe, fine and impriſon ſuch jurors by their diſcretion.

3. I do confeſs in the king's bench there have been many precedents of jurors, that have acquitted perſons of murder, or other felony tried in that court, if they have gone againſt pregnant evidence, that have been fined, impriſond and bound to their good behaviour during their lives *(g)*.

The like hath been done before juſtices in *Eyre*, and the court of king's bench is a court in *Eyre* and much more, for that court may reverſe judgment given in *Eyre*. See for this purpoſe *T.* 43 *Eliz. B. R. Rot.* 979. *Noy's Rep. p.* 48 & 49. *Wharton's* caſe, where the jury in the king's bench acquitting the priſoner of murder againſt pregnant evidence, and finding it only manſlaughter were fined 20*l.* apiece, bound to the good behaviour and for the good behaviour of the priſoner, and committed, and this was done by the advice of all the judges. See the ſame caſe *M.* 44 & 45 *Eliz. B. R. Yelv. Rep. p.* 23.

[311]

(g) *Vide ſupra p.* 159.

M. 42 & 43 *Eliz. B. R. Croke, n.* 12. *p.* 778. *Wats & Braines.* In an appeal of murder there was a confederacy among the jury to bring in the verdict *not guilty*, and if the court diſliked it, then to change their verdict, and accordingly they did, and the court diſliking their verdict they went out and found him guilty, and this agreement being diſcoverd, the principal confederates were fined and impriſond, but this fine was for their confederacy and practice, not for their verdict.

7 *R.* 2. *Coron.* 108. The jury acquitted a notorious robber in the king's bench againſt great evidence, and the court bound the jury for the good behaviour of the priſoner; the reporter makes a *quære per quel ley*, *vide* the notes annexed to *Benloe* 153. to the ſame purpoſe.

4. Again, in caſes of inqueſt of office there have been precedents in the *Exchequer*, and more frequent in the court of wards for fining of jurors, that would not find according to their evidence. *H.* 28 *Eliz. in Scaccario coram Theſſ. & baronibus.* 3 *Hughes* 196.

5. The practice of the king's bench to fine jurors for finding verdicts contrary to their evidence was endeavouring to be brought in practice before judges of *niſi prius*; and about 14 *Car.* 2. in an *Oxfordſhire* caſe *Huntingdon* and his eleven companions jurors were fined 5*l.* apiece for ſuch a verdict, and the fine eſtreated into the *Exchequer*, but by the whole court by the advice of the greater part of the reſt of the judges proceſs was ſtayed upon that eſtreat, as being impoſed contrary to law *(h)*.

6. Before juſtices of *oyer* and *terminer* and gaol-delivery, if the jury acquitted a felon contrary to their evidence, the uſe was to bind them over to appear in the king's bench to anſwer an information, but I never knew any preferd, and indeed it were impoſſible almoſt for any judge or jury to convict a jury upon ſuch an account, becauſe impoſſible, that all the circumſtances of the caſe, that might move the jury to acquit a priſoner, could be brought in evidence; this therefore ſeems to me to be but *in terrorem*. [312]

* 7. But then it was endeavoured to bring the practice of the king's bench into uſe before juſtices of gaol-delivery and *oyer* and *terminer* to fine jurors in criminal cauſes for not obſerving the judges directions, and acquitting felons againſt their evidence, and accordingly a jury in *Glouceſterſhire* was fined 5*l.* a man for acquitting a perſon in-

(*b*) *Vide antea cap.* 22. *p.* 160. *Vaugh.* 145.

dicted of burglary, the form of the fine was much the ſame as is hereafter mentiond, this fine was alſo eſtreated into the *Exchequer*, but all the court after great advice with the judges of the common pleas orderd a ſtay of proceſs thereupon, as being neither warrantable by law nor antient precedents in any court leſs than *Eyre*.

At the gaol-delivery at *Newgate* 10 *Maii* 17 *Car.* 2. *Wagſtaff (i)* and eleven other jurymen were fined five marks apiece for acquitting *Richard Tomſon* and others indicted for conventicles, *Eo quòd ipſi juratores adtunc & ibidem eoſdem* Ricardum Tomſon *&c. de prædictâ tranſgreſſione & contemptu contra regem hujus regni* Angliæ, *& contra plenam evidentiam, & contra directionem curiæ in materiâ legis ibidem de & ſuper præmiſſis eiſdem juratoribus versùs præfatos* Ricardum Tomſon *&c. in dictâ curiâ ibidem apertè dat' & declarat' de præmiſſis eis impoſitis in indictamento prædicto acquietaverunt in contemptum dicti domini regis nunc legúmque ſuarum, & ad magnam obſtructionem & impedimentum juſticiæ, necnon in malum exemplum omnium aliorum juratorum in conſimili caſu delinquentium.*

They were thereupon committed, and brought their *habeas corpus* in the court of common-bench, and all the judges of *England* were aſſembled to conſider of the legality of this fine, and the impriſonment thereupon, wherein there was ſome little diverſity of opinion, whether without a cauſe of ſuit returned alſo, the common pleas could give judgment touching this fine, and if there were cauſe, deliver the party, or whether he muſt go into the king's bench by *habeas corpus* and *certiorari*.

[313] But it was agreed by all the judges of *England*, (one only diſſenting,) that this fine was not legally ſet upon the jury, for they are the judges of matters of fact, and altho it was inſerted in the fine, that it was *contra directionem curiæ in materiâ legis*, this mended not the matter, for it was impoſſible any matter of law could come in queſtion, till the matter of fact were ſettled and ſtated and agreed by the jury, and of ſuch matter of fact they were the only competent judges.

And altho the witneſſes might perchance ſwear the fact to the ſatisfaction of the court, yet the jury are judges as well of the credibility of the witneſſes, as of the truth of the fact, for poſſibly they might know ſomewhat of their own knowledge, that what was ſworn

(i) In *Buſhell's* caſe, *Vaugh.* 153.

was

was untrue, and poſſibly they might know the witneſſes to be ſuch as they could not believe, and it is the conſcience of the jury, that muſt pronounce the priſoner *guilty* or *not guilty*.

And to ſay the truth, it were the moſt unhappy caſe that could be to the judge, if he at his peril muſt take upon him the guilt or innocence of the priſoner, and if the judge's opinion muſt rule the matter of fact, the trial by jury would be uſeleſs.

Whereupon, and upon view of the precedents in the court of common bench, where priſoners not legally committed or fined had been diſcharged, tho no cauſe of privilege were returned, the jurors were diſcharged of their impriſonment.

And therefore, altho the long uſe of fining jurors in the king's bench in criminal cauſes may give poſſibly a juriſdiction to fine in theſe caſes, yet it can by no means be extended to other courts of ſeſſions of gaol-delivery, *oyer* and *terminer*, or of the peace, or other inferior juriſdictions.

3 Wilſon, 172, 177.

CHAP. XLIII. [314]

Concerning ſtanding mute, *and the puniſhment of* penance, *or* peine fort & dure. [*]

I HAVE hitherto conſiderd the pleas of the priſoner in capital cauſes, namely, 1. Confeſſion. 2. Pleas in bar, and 3. Pleas to the felony, or *not guilty*.

And I have conſiderd the proceedings in order to bring the party to his trial, and the trial thereupon by the jury.

It remains, that I ſhould now come to conſider what is to be done in caſe the priſoner will not anſwer, but ſtand mute and make no defenſe.

[*] But now by the ſtatute 12 *Geo.* 3. *c.* 30. If any perſon being arraigned on any indictment or appeal of felony, or on any indictment for piracy, ſhall upon ſuch arraignment ſtand mute, or will not anſwer directly to the felony or piracy, he ſhall be convicted of the offenſe, and the court ſhall thereupon award judgment and execution, in the ſame manner as if he had been convicted by verdict or confeſſion; and ſuch judgment ſhall have all the ſame conſequences, as a conviction by verdict or confeſſion.

And the ſame law is, with reſpect to an arraignment for treaſon or petty larciny. See *Burn. Tit. Mute.* 2 *Inſt.* 177. 2 *Hawk. P. C.* 329.

In this matter theſe things are conſiderable.

1. What ſhall be ſaid in law a *ſtanding mute*, and what not.

2. What the conſequence or penalty is of a ſtanding mute in capital cauſes, and therein of *peine fort* and *dure*.

3. What cautions are to be uſed before the inflicting of it.

4. By what law it is introduced.

I. As to the firſt of theſe.

If the priſoner hath received his judgement already, or be convicted and brought to the bar, and demanded what he can ſay, why judgment ſhould not be given againſt him, if convicted, or why execution ſhould not be awarded, and he ſaith nothing, yet this is not ſuch a ſtanding mute as is in hand, for he is already convict or attaint: And therefore in ſuch caſe, if the party ſo called hath always remained in cuſtody from the time of his plea of *not guilty*, if he be called to ſhew what he can ſay, why he ſhould not have judgment upon his conviction or execution upon his former judgment, [315] and he ſay nothing, it ſhall not be inquired, whether he can ſpeak or not, but he ſhall not have preſent judgment or execution, as the caſe requires. 10 *E.* 4. 19. *b.* But if long time hath paſſed between his conviction or judgment and this ſecond calling to the bar, it is prudent to make the inquiry, at leaſt by witneſſes, whether he can ſpeak, for poſſibly he may have a pardon to plead.

But if a man abjure or be outlawd of felony, and after return again, and be taken and brought to the bar to ſhew cauſe why execution ſhould not be done, if he ſtand mute, an inqueſt of office is to be taken by the court to inquire, whether he can ſpeak or not, and if it be found, that by viſitation of God ſince his abjuration, *&c.* he hath loſt his ſpeech, it ſhall be alſo inquired, whether it be the ſame perſon containd in the record of outlawry or abjuration, before judgment or execution (as the caſe requires), ſhall be awarded againſt him, for he may plead in bar of execution in ſuch caſe, that he is not the ſame perſon. 10 *E.* 4. 19. *b.* 8 *H.* 4. 1. *b.* And ſo it ſeems to be, if he were brought *in* upon a *capias utlegat'* or *habeas corpus* by the ſheriff; *de quo infra.*

And therefore the book of 26 *Aſſiz.* 19. that ſaith a party abjured ſtanding mute ſhall have *peine fort & dure* is miſtaken, for he ſhall be hanged, if he ſtand mute of malice. *Stamf. P. C. Lib.* II. *cap.* 60. *fol.* 150. *b.*

If

If a man indicted of felony demur to the indictment, and will not otherwiſe anſwer, this is no ſtanding mute, but if the demurrer be ruled againſt him, he ſhall have judgment of death. 14 *E.* 4. 7. *a. per cur.*

If a man indicted or appeald of felony pleads *not guilty*, and puts himſelf upon the country, and the jury remains upon challenges till another day and then appears, and the priſoner at the bar will ſay nothing but ſtand mute, yet this is not a ſtanding mute, for the inqueſt ſhall be taken upon the iſſue already joined; and ſo in an appeal. 15 *E.* 4. 33. *b.*

And yet even in that caſe it is poſſible the priſoner may be taken dumb between his plea and his trial, and ſo loſe ſome advan- [316]
vantages, that the law gives him for his defenſe, as callenges, examination of witneſſes and many matters for his defenſe; [therefore] the court hath uſed ſometimes by inqueſt, ſometimes by inquiry *ex officio* by the inqueſt impannelled to try his iſſue to inquire, whether he ſtand mute of malice, and then to try him, or if it be *ex viſitatione Dei*, then to reſpite his trial, but if he ſpoke the ſame day in the hearing of the court, then ſuch inqueſt of office is not taken, for the court is of their own knowledge aſcertained of his ability to ſpeak. 43 *Aſſiz.* 30. 8 *H.* 4. 1 & 2.

The ſtanding mute of a priſoner is not, where he hath pleaded *not guilty* and put himſelf upon the country, tho afterwards he would retract it.

If a priſoner for felony plead *not guilty* and put himſelf upon the country, and when the jury appears he challengeth peremptorily above thirty-five, in ſuch caſe the jury was not to be taken, but judgment of penance was antiently given againſt him, and ſo it was no attainder in caſe of felony. 17 *Aſſiz.* 6. 17 *E.* 3. 23. *a.* 14 *E.* 4. 7. *a.* 3 *H.* 7. 12. *a.* 2. *a.*

But the law herein was after declared otherwiſe, and by the advice of all the judges judgment of death ſhall be given, and ſo it was an attainder. 3 *H.* 7. 12. *a.* where it was ſettled for a rule in all circuits, and ſo it continued until 22 *H.* 8. *cap.* 14. when by act of parliament the challenge was reduced to twenty, and ſo the judgment of death upon peremptory challenge ceaſed, unleſs in high treaſon or petit treaſon, where it ſtands on foot as before, *vide Co. P. C. cap.* 102. *p.* 227, 228. who ſeems to hold, that for challenging above thirty-

thirty-five judgment of *peine fort & dure* ſhall be given according to 14 *E.* 4. 7. *a.* & 3 *H.* 7. 2. *a. per omnes juſticiarios contra Keble.*

Regularly therefore a man is ſaid to ſtand mute, when being arraigned for felony or treaſon, either 1. He anſwers not at all, or 2. If he anſwers with ſuch matter, as is not allowable for anſwer, and will not anſwer otherwiſe, or 3. Where he pleads *not guilty*, but when demanded how he will be tried, either will ſay nothing, or not put himſelf upon the country.

[317] If he ſtand mute and ſay nothing at all, in caſe of felony the court ought *ex officio* to impannel a jury and ſwear it as an inqueſt of office to inquire, whether he ſtand mute of malice, and if found ſo, he ſhall have the judgment of *peine fort & dure*, or whether it be *ex viſitatione Dei*, and if found ſo, they are to inquire touching all thoſe points, which he might poſſibly plead for himſelf, as whether a felony were done, whether he be the ſame perſon, that is indicted for it, whether he did it, and whether he hath any matter to alledge for his diſcharge.

But what if all this be found againſt the priſoner, what ſhall be done? whether judgment of death ſhall be given againſt him, tho he never pleaded, ſeems yet undetermined *(a)*.

If a man plead *not guilty*, and being demanded how he will be tried anſwers by God and holy church 4 *E.* 4. 11. *a.* or delivers in a protection 7 *E.* 4. 29. *a. Coron.* 30. or will not put himſelf upon trial of his country, this is a ſtanding mute, as much as if he had not at all pleaded.

II. As to the conſequences of ſtanding mute.

In caſe of an indictment of high treaſon, the party ſtanding mute, judgment of high treaſon ſhall be given againſt him as upon a *nihil dicit*, *M.* 3 & 4 *Eliz. Dy.* 205. *a. rule accordant. Stamf. P. C. Lib.* II. *cap.* 60. *fol.* 150. *a.* 2 *Co. Inſt. ſuper ſtat' Weſtm'* 1 *cap.* 12. *vide infra, cap.* 44.

In an appeal antiently it had been held, that if the priſoner ſtands mute, judgment ſhould be given for the appellant. 21 *E.* 3. 18. *a.* (*).

But afterwards the law was held all one in caſe of an appeal and of an indictment, namely the defendant ſtanding mute judgment of *peine fort & dure* was given againſt him, and the ſtatute of *Weſtm'* 1. *cap.*

(a) Vide B. Corone 217. where a perſon, who could neither ſpeak nor hear, was arraigned for felony; *vide Part* I. *p.* 34. *in notis.*

(*) See *State Tr. Vol.* I. *p.* 367. lord *Audley*'s caſe.

12 ſpeaks

12. ſpeaks only of the *king*'s ſuit, (†) *vide* 43 *Aſſiz.* 30. 3 *H.* 7. 2. *a.* 14 *E.* 4. 7. *a.*

If a man be indicted of felony and ſtands mute, he ſhall be put to penance, *T.* 18 *E.* 2. *B. R. Rot.* 20. *in dorſo, Berks, rex (b).* And yet *vide H.* 18 *E.* 3. *B. R. Rot.* 16. *Ebor. rex, Petrus Geildhird* arraigned *(c) pro depræ datione in regiâ viâ* ſtood mute, and an inqueſt of office being charged to inquire, if it were wilful, and found ſo, he had judgment to be hanged. [318]

On the other ſide *T.* 30 *E.* 3 *Rot.* 11. *in dorſo Hunt. rex,* The biſhop of *Ely* arraigned for felony *dicit, quòd ipſe eſt membrum ſanctæ eccleſiæ, & epiſcopus unctus, & frater domini Papæ,* and that he could not anſwer without the archbiſhop of *Canterbury* [his ordinary] *coram laico judice*; there went out thereupon a writ to the ſheriff of *Hunt.* to return twenty-four to inquire of the whole fact, and by the inqueſt he was found guilty of the felony charged upon him, [*de receptamento felonûm*] and his goods ſeiſed, but he was demanded by the archbiſhop of *Cant.* and delivered to him as a member of holy church, ſo that there the fact was inquired of, tho the biſhop refuſed to anſwer, which was a kind of ſtanding mute *(d).*

By the ſtatute of 33 *H.* 8. *cap.* 12. any perſon arraigned before the lord ſteward for treaſon, murder, manſlaughter, or blood-ſhed in the king's palace, and ſtanding mute ſhall have judgment, as if convicted ſo there is no penance in that caſe.

But upon the ſtatute of 28 *H.* 8. *cap.* 15. for commiſſioners of the admiralty proceeding in maritime felonies, *&c.* there is no ſuch excluſive proviſion, and therefore they follow herein the [319]

(†) 2 *Co. Inſt.* 178.

(*b*) This was the caſe of *Stephen le Ferrour*, who was indicted before juſtices of *oyer* and *terminer pro receptamento felonûm*, and upon being arraigned *mutum ſe tenuit*, a jury was impannelled *ex officio*, who found *quòd mutum ſe tenet de merâ & ſpontaneâ voluntate ſuâ, & quòd loqui poteſt ſi velit*, and he was thereupon put to penance, *ad pœnam*; the record was removed by writ of error *coram rege*, where he pleaded *not guilty*, and was committed to the marſhall and afterwards produced the king's pardon, *Ideo inde quietus.*

(*c*) It appears by the record, that it was not upon arraignment, that he ſtood mute, for he had fled from juſtice and was outlawed, but being afterwards taken he was brought into court, and demanded why execution ſhould not be done upon him in purſuance of the outlawry, to this he made no anſwer; but this is not a ſtanding mute to the purpoſe in hand, as our author himſelf hath ſhewn at the beginning of this chapter.

(*d*) This was not properly a ſtanding mute, but a claiming the benefit of clergy, (which in antient times was uſually done before pleading,) and was of the like nature with the caſe of *Alan de Beckingham Mich.* 20 & 21 *Edw.* 1 *Rot* 4. *in dorſo coram rege, Nottingham*, ſee *Part* 1. *p.* 343. *in notis.* and the caſe of *John de Boſco, P.* 6 *E.* 2. *B. R. Rot.* 2. *Eſſex*, ſee *Part* 1. *p.* 180. *in notis*, the reaſon therefore, why the fact was inquired of, was the ſame in this caſe, as in thoſe, *viz.* that it might be known *pro quali ordinario liberari debeat*, whether as a clerk convict or acquit. *Vide* 2 *Co. Inſt. p.* 633.

courſe

courſe of the common law, ſo that any perſon indicted for piracy before theſe commiſſioners ſtanding mute ſhall have judgment of *peine fort & dure*. *T.* 7. *Eliz. Dy.* 241. *b. Brooke*'s caſe.

The judgment of *peine fort & dure* is, as it is recited by *Stamf. P. C. Lib.* II. *cap.* 60. *fol.* 150. *b.* & 4 *E.* 4. 11 *b. viz.* "That he be "ſent to the priſon from whence he came, and put into a dark, lower "room, and there to be laid naked upon the bare ground upon his "back without any clothes or ruſhes under him or to cover him except "his privy members, his legs and arms drawn and extended with cords "to the four corners of the room, and upon his body laid as great a "weight of iron, as he can bear, and more. And the firſt day he "ſhall have three morſels of barley bread without drink, the ſecond "day he ſhall have three draughts of water, of ſtanding water next "the door of the priſon, without bread, and this to be his diet till he "die" *(e)*. *Vide* the entry thereof *Raſt. Entries* 385. *a.*

This judgment is given for his contempt in refuſing his legal trial, and therefore he thereby forfeits his goods, but it is no attainder, nor gives any eſcheat or corruption of blood· *vide* 34·*E.* 3. *Eſcheat* 10. *Dy.* 308. *a.* 14 *E.* 4. 7. *a.*

The ſeverity of the judgment is to bring men to put themſelves upon their legal trial, and tho ſometimes it hath been given and executed, yet for the moſt part men bethink themſelves and plead.

If a peer of the realm arraigned upon an indictment of felony before his peers refuſes to plead, [he ſhall have] this judgment of *peine fort & dure*. *P.* 17 *Car.* 1. *caſus domini Caſtlehaven. (f).*

And a woman ſhall have the ſame judgment if ſhe ſtands mute. 2 *Co. Inſt.* 177. *ſuper ſtat. Weſtm'* 1. *cap.* 12. *Wiſeman*'s caſe there cited.

[320] If a man be indicted of petit larceny and refuſes to plead, it ſeems judgment of *peine fort & dure* ſhall not be given, but the party convict, for he is not to have judgment of death.

But if a woman be indicted for ſimple larceny of goods under 10*s.* tho ſhe ſhall not die for it, but only be burnt in the hand by the ſtatute of 21 *Jac. cap.* 6. yet if ſhe refuſes to plead, the judgment of *peine fort & dure* ſhall be given againſt her, becauſe it may fall out upon the caſe, that ſhe hath been burnt in the hand before, and then ſhe is to be executed; and it is but a privilege, as clergy is, which ſhe muſt put herſelf by her defenſe into a capacity of enjoying.

(*e*) But before they proceed to this extremity, it has been the practice to endeavour to make the priſoner plead by tying his thumbs together with whip cord. *Thorely*'s caſe *Kel.* 27.

(*f*) *State Tr. Vol.* I. *p.* 367.

If

If a new felony be made by act of parliament, tho it makes no proviſion touching the penalty of ſtanding mute, yet it is a neceſſary conſequence thereof, tho not ſpecially provided for, if it be not ouſted by the act, that makes it felony; as clergy is an incident to every new created felony, unleſs ſpecially ouſted by act of parliament (*), for they are incidents: *vide Dy.* 241. *b.*

And therefore in rape, tho made felony by *Weſtm'* 2. *cap.* 34. if the party indicted ſtand mute, he ſhall have judgment of penance. *P.* 7 *Car.* 1. lord *Caſtlehaven*'s caſe.

Tho judgment be given of *peine fort & dure*, yet if the offenſe laid in the indictment be within clergy, his clergy ſhall be allowed him, which appears by the ſtatutes of 23 *H.* 8. *cap.* 1. 25 *H.* 8. *cap.* 3. and other ſtatutes that ouſt clergy, where the party ſtands mute, in ſome particular caſes, and by the books.

III. As for the third general, the neceſſary cautions to be uſed in inflicting this ſevere puniſhment are theſe.

1. Let not the judgment be too haſtily given, let the priſoner have not only *trina admonitio*, but alſo ſome convenient reſpite, poſſibly till the afternoon, to bethink himſelf, if the arraignment be in the morning; or till the next morning, if the arraignment be in the afternoon: and let the judgment itſelf be diſtinctly read to him, that he may know his danger before his final refuſal with due admonition not to deſtroy himſelf. 4 *E.* 4. 11. *b.* [321]

2. Before any judgment final be given, if the priſoner ſtands wholly mute and ſays nothing at all, let an inqueſt of office be taken to inquire, whether it be *ex malitiâ*, or *ex viſitatione Dei*, unleſs he hath ſpoken in court the ſame day, *vide Raſt. Entries* title *gaol-delivery.*

3. And likewiſe let the judge hear the witneſſes upon oath to give a probable teſtimony of his guilt, for tho his malicious ſilence carries with it a preſumption of guilt, yet it is good to have ſome concurrent teſtimony. 1. In reſpect of the ſeverity of the judgment. 2. Becauſe the ſtatute of *Weſtm'* 1. *cap.* 12. *de quo infra*, ſeems to require it.

4. If the offenſe laid in the indictment be within clergy, tho in ſtrictneſs of law the priſoner ought to pray it, yet it is the duty of the judge to allow it, tho not prayed, and that as well after judgment pronounced as before.

IV. Concerning the fourth particular, by what law this judgment of *peine fort & dure* is introduced.

(*) *Vide Part* I. *p.* 704.

By

By the ſtatute of *Weſtm'* 1. *cap.* 12. *Purvieu eſt enſement que les felons eſcries, & queux ſont apertement de male fame, & ne joy voilent mitter en enqueſt de felonies, que homes met ſur eux devant juſtices a la ſuit le roy ſoient miſes en la priſon fort & dure, come ceux queux refuſent eſtre al common ley de la terre, mes ceo neſt my a entender pur priſoners, que ſont priſes per legier ſuſpicion.*

Some *(h)* have antiently thought, that this act of parliament introduced the penance, and therefore they did antiently think it did not extend to an appeal, becauſe that is the ſuit of the party and not the ſuit of the king, *de quo antea p.* 317.

But it ſeems, that altho this ſtatute is in ſome points directive, namely, that it ſhould be applied to thoſe, that are of ill fame, and not thoſe, who are taken upon a light ſuſpicion, and therefore the court before they give this judgment ought either by inqueſt of office, or at leaſt by examination of witneſſes to inquire concerning the pro-
[322] babilities of the guilt: *vide Stamf. P. C. Lib.* II. *cap.* 60. *fol.* 150. *a.* yet this ſtatute doth not originally introduce the penance, but it was to be done by the common law, and accordingly it is agreed by my lord *Coke* in his comment upon this ſtatute 2 *Inſt. p.* 179.

And this appears 1. Becauſe this ſtatute only ſpeaks of impriſonment *fort & dure*, but enacts not the puniſhment itſelf by this lingering painful death, therefore the puniſhment, as it is thus inflicted, was at common law, and is by force of the common law. 2. Becauſe tho ſome antient opinions were, that it extended not to the caſe of an appeal of felony, yet the law hath conſtantly for many ages extended it to an appeal *(i)*, which cannot be by force of this ſtatute, but by the common law.

3. The antients, as *Fleta (k)*, *Britton (l)* and *Horn (m)*, tho they wrote ſince the making of this ſtatute, mention the penance without referring of it to this act of *Weſtm'* 1. *(n)*.

CHAP.

(h) Stamf. P. C. 149. *b. Poulton de pace regis* 211. *b.*
(i) Kel. 37.
(k) Lib. I. *cap.* 34. § 83.
(l) Cap. 4. § 23. & *cap.* 22. § 73.
(m) Mirror, cap. 1. § 9.
(n) This ſtatute was made 3 *E.* 1. and tho by the manner of the expreſſion it does not ſeem to have introduced this penance, but rather ſpeaks of it as a thing already known, yet I cannot find, that it is ever taken notice of in any antient author, book, caſe, or record before the reign of *E.* 1. on the contrary I find ſome inſtances in the preceding reign of perſons arraigned for felony ſtanding mute, who yet were not put to their penance, but had judgment to be hanged: at which time it ſeems to have been the uſual practice, that if the priſoner ſtood wilfully mute, a jury of twelve were impannelled *ex officio*, and if they found him guilty, another jury of twenty

CHAP. XLIV.

Concerning clergy *how it ſtood at* common law, *and how generally* at this day.

HAVING in the former chapter gone through the pleas and trials of the priſoners, and the proceeding upon ſtanding mute, I come to conſider the *privilegium clericale*, and I the rather refer it to be examined in this place, becauſe tho antiently clergy was prayed and allowed upon the arraignment of the priſoner, yet at this day it is rarely done but upon his conviction or ſtanding mute, and this is, 1. For the convenience of the court to be aſcertained firſt of the nature of the crime by the confeſſion or trial of the priſoner. 2. For the advantage of the priſoner, who poſſibly may be acquitted, and ſo need not the benefit of clergy: *vide Hob. Rep.* 288. *Searle* & *Williams.*

And for the full diſcuſſion of this matter, (which I muſt needs ſay is one of the moſt involved and troubleſome titles in the law,) I ſhall, as near as I can, hold this method. 1. To conſider ſomewhat in general touching the original and alteration of the privilege of clergy. 2. In what caſes it is to be allowed, and in what not *(a)*. 3. What perſons are capable of this privilege, and what not *(b)*. 4. At what time it is to be allowed, and when not *(c)*. 5. The manner how it is to be allowed, and who the judge of it *(d)*. 6. The conſequence of the praying or allowing of it *(e)*.

twenty-four were choſen to examine the verdict of the former; and if they were of the ſame opinion, the priſoner was ſentenced to be hanged. *Placita coronæ coram juſtic' itinerant' in comitatû* Warwicenſi *anno* 5 *H.* 3. *Rot.* 1.

" *Agnes*, quæ fuit uxor *Roberti de Boſco*, " appellat *Thomam* filium *Huberti* de morte " *Roberti* viri ſui, & *Thomas* venit, & quia " ipſa habet virum *Robertum de Verdun* " nomine, qui nullum facit appellum, ipſa " non habet vocem appellandi, & ideò in- " quiratur veritas per patriam, & *Thomas* " defendit mortem, ſed non vult ponere ſe " ſuper patriam, & xii juratores dicunt, " quòd culpabilis eſt de morte illâ, & xxiv " milites, alii a prædictis xii, ad hoc e- " lecti idem dicunt, & ideò ſuſpendatur.

Catalla *Thomæ* xxxiv. ſolidos & vi denarios, unde vicecomes reſpondebit.

Ibidem in dorſo. " *Thomas* de la *Hethe* " captus per indictamentum pro furtis & " aliis nequitiis & pro receptamento venit, " & non vult ponere ſe ſuper patriam; & " juratores dicunt ſuper ſacramentum ſuum, " quòd malè credunt eum de receptamento " *Holbæ Golightly*, qui fuit latro cognitus, " & poſtea ſuſpenſus apud *Caunped'em*, & " de hoc & de aliis furtis eum malè cre- " dunt, & xxiv milites ad hoc electi dicunt " idem, quod prædicti xii juratores, & " quòd latro eſt de ovibus & de averiis & " aliis rebus, & ideò ſuſpendatur.

(a) Cap. 45. 46, 47, 48, 49, 50.
(b) Cap. 51.
(c) Cap. 52.
(d) Cap. 53.
(e) Cap. 54.

For

For the firſt of theſe, namely the original and progreſs of this *privilegium clericale.*

Antiently princes and ſtates converted to chriſtianity in favour of the clergy, and for their encouragement in their offices and imployments, and that they might not be ſo much intangled in ſuits, did grant to the clergy very bountiful privileges and exemptions, principally of two kinds. 1. Exemption of places conſecrated to religious duties from arreſts of crimes, which was the original of ſanctuaries. 2. Exemption of their perſons from criminal proceedings in ſome caſes capital before ſecular judges, which was the true original of the *privilegium clericale.*

[324]

The clergy increaſing in wealth, power, honour, number and intereſt, afterwards ſet up for themſelves, and that, which they obtained by the favour of princes and ſtates at firſt, they now began to claim as their right, and a right of the higheſt nature, namely *jure divino*; and by their canons and conſtitutions endeavoured, and (where they met with tame and eaſy princes and ſtates,) obtained vaſt extenſions of theſe exemptions. 1. In the perſon concerned, namely to all that had any kind of ſubordinate miniſtration relative to the church. 2. In the cauſes, exempting as far as they could all cauſes of clergymen, as well civil as criminal, from the juriſdiction of the ſecular power, and wholly ſubordinating them immediately and only to the eccleſiaſtical juriſdiction, which they ſuppoſed to be lodged firſt in the pope by divine right and inveſtitute from *Chriſt*, and from the pope ſhed abroad into all ſubordinate and eccleſiaſtical juriſdictions, whether ordinary or delegate.

And by this means they endeavoured and in ſome kingdoms and for ſome ages obtained, that there was a double ſupreme power, or two kingdoms in every kingdom, the one a *regnum eccleſiaſticum*, abſolute and independant upon any but the pope over eccleſiaſtical men and cauſes, exempt and ſeparate from the ſecular magiſtrate; the other a *regnum ſeculare* of the king or civil magiſtrate, which yet was not ſo abſolute, but that it had ſubordination and ſubjection to this *regnum eccleſiaſticum*; ſo it was *regnum ſub graviori regno.*

He that liſts to ſee the whole ſcheme of their claim, let him read *Suarez* his large diſcourſe of the *monumenta eccleſiaſtica* in his *opuſcula.*

But altho the uſurpations of the pope were very great and obtained much in this kingdom, until the extermination of his pretended ſupremacy by king *H.* 8. yet this claim of the exemption of the clergy totally

totally from ſecular juriſdiction grew ſo burdenſome and intolerable, that it was from time to time qualified and abridged by the civil power, ſometimes by acts of parliament taking it away in ſome caſes, ſometimes by the interpretation and conſtruction of the judges, and ſometimes by the contray uſage of the kingdom; for eccleſiaſtical canons never bound in *England* farther than they were received, and ſo had not their authority from their own ſtrength and obligation, but from the uſages and cuſtoms of the kingdom that admitted them, and only ſo far forth as they were ſo admitted. And therefore,

I. As to the exemption of the clergy from civil ſuits between party and party only, if upon the *diſtringas* he was returned *clericus & beneficiatus non habens laicum feodum*, proceſs iſſued to the biſhop to bring him in, and in caſe of a ſtatute merchant they were by ſpecial acts exempted from arreſts by *capias*. But yet they were not exempt from the juriſdiction of civil courts in civil cauſes, yet antiently they attempted this alſo in the king's courts but with ill ſucceſs, and ſo they never attempted it after, that I remember.

M. 7 & 8 *E.* 1. *B. R. Rot.* 13. *Cant. William Joye* plaintiff [brought an action] againſt *Guy Mortimer* rector of *Kingſton* for beating him and cutting off his upper lip with a knife; the defendant pleaded *quòd ipſe eſt clericus, & non debet hic reſpondere*, and that was all the anſwer he would give, *Et quia querela iſta non tangit vitam & membrum, ſed eſt de quâdam tranſgreſſione perſonali, nec ipſe vult in curiâ domini regis reſpondere ad querelam iſtam*, judgment was given for the plaintiff to recover 100*l.* damages taxed by the court, and [the defendant was] committed to gaol, and afterwards paid twenty marks to the king for a fine *(o)*.

II. If they were indicted in caſes criminal but not capital, nor wherein they were to loſe life or limb, there *privilegium clericale* was

(o) The record of that caſe was thus, "*Willielmus Joye* de *Kyngeſton* queritur de "*Guydone de mortuo mari*, rectore eccleſiæ "de *Kyngeſton*, & *Thomâ le Clerk* de *Ha-*"*rengton* de hoc, quod *Thomas* ſimul cum "aliis ex præcepto prædicti *Guydonis* ip-"ſum *Willielmum* inſultaverunt, verbera-"verunt, & male tractaverunt, ita quòd "de vitâ ipſius deſperabatur, & dictus "*Guydo* manû ſuâ propriâ, & knypulo ſuo "labium ipſius *Willielmi* ſuperius abſcidit, "unde dicit quòd deterioratus eſt & damp-"num habet ad valentiam centum libra-"rum; & inde producit ſectam. Et præ-"dicti *Guydo & Thomas* veniunt & dicunt, "quòd clerici ſunt, & non debent hic reſpondere, & ſæpiùs quæſiti ſi velint reſpondere, ſemper dicunt quòd clerici ſunt, & ſine ordinariis ſuis nolunt reſpondere. Et quia querela iſta non tangit vitam & membrum, ſed eſt de quâdam tranſgreſſione perſonali, nec ipſi volunt in curiâ domini regis reſpondere ad querelam iſtam, conſideratum eſt, quòd prædicti *Guydo & Thomas* de prædictâ tranſgreſſione convincantur, & ſatisfaciant prædicto *Willielmo Joye* de dampnis, ſcilicet quilibet eorum de centum libris, & domino regi de miſericordiâ, & committantur gaolæ pro tranſgreſſione &c.

not allowd them, and therefore not in indictments of treſpaſs, petty larciny, or killing *ſe defendendo*. *Stamf. P. C. fol.* 124. *a.*

III. If they were not indicted of high treaſon, clergy was not allowable, and therefore *Hill.* 2 *H.* 4. *Rot.* 4. *B. R. rex*, where the biſhop of *Carliſle* was indicted of high treaſon, and inſiſted upon his *privilegium clericale, quia epiſcopus unctus*, yet this claim was diſallowd and he put upon his trial, and convicted *(p)*.

Yet *Hill.* 17 *E.* 2. *Rot.* 87. *in dorſo, Heref. coram rege*, the biſhop of *Hereford* indicted of high treaſon for levying war againſt the king alleged, that he was *epiſcopus* Heref. *ad voluntatem Dei & ſummi pontificis*, and could not anſwer *abſque offenſâ diviná & ſanctæ eccleſiæ*. Thereupon the plea was adjourned into parliament, where the biſhop anſwered as before, and the archbiſhop of *Canterbury* claimed him and had him; thereupon it was ordered, that day ſhould be given in the king's bench to the biſhop, and the archbiſhop was to have him there at the day, and in the mean time a writ iſſued to the ſheriff of *Heref.* to return twenty-four to inquire, as if he had pleaded, [*quòd venire faciat tot & tales, &c. ad inquirendum prout moris eſt, &c. pro quali, &c.*] returnable at the ſame day; the biſhop appeard accordingly in the cuſtody of the archbiſhop, and the jury found him guilty, *Ideo conſiderat' eſt, quòd prædictus epiſcopus tanquam convictus &c. remaneat penes prædictum archiepiſcopum ut priùs, &c.* and all his goods and chattels, lands and tenements were ſeiſed into the king's hands by writ directed to the ſheriff: Upon which it is obſervable, 1. That a kind of allowance is made of clergy in high treaſon. 2. That notwithſtanding his claim of clergy, yet a writ iſſued to ſummon a jury, who inquired whether guilty or not. 3. That upon this plea and this inquiſition, tho he had his clergy, it was *ut clericus convictus*.

[327]

Nota in the parliament of the 1 *E.* 3. this judgment was reverſed for this cauſe, that the juſtices took the inquiſition, *licèt idem epiſcopus in aliquam inquiſitionem ſe non poſuiſſet. Clauſ.* 1 *E.* 3. *Part* I. *M.* 13. ſo that the judgment was given upon the inquiſi-

(p) The treaſon given in the record is in theſe words, "Quicumque ligeus domini regis, cujuſcumque ſtatûs, ſeu conditionis, ſpiritualis, vel temporalis fuerit, in terrâ *Angliæ* pro altâ proditione & crimine læſæ majeſtatis indictatus eſt, & coram rege, vel juſticiariis ſuis inde arrenatus tenetur, & debet per legem *Angliæ* inde reſpondere.

Yet in antient times a difference was made between treaſons, that were immediately againſt the king's perſon, and other treaſons; *vide Part* I. *p.* 185, 186. 222. *in notis*; and the caſe of the biſhop of *Hereford* here mentiond.

tion,

tion, and not upon *nihil dicit* for ſtanding mute, and therefore erroneous *(q)*.

But afterwards *T.* 21 *E.* 3. *Rot.* 23. *Hertford, rex, John Gerberge,* was indicted for a conſtructive treaſon namely, accroaching royal power, *de quo vide ſupra, Part* I. *cap.* 11. *p.* 80. 138. and thereupon claimed the privilege of clergy, *Et quia privilegium clericale in hujuſmodi caſu ſeditionis ſecundùm legem & conſuetudinem regni hactenus obtentas & uſitatas non eſt allocandum &c. quæſitum eſt ab eo ſepiùs qualiter ſe velit acquietare,* he ſtill replied, that he was a clerk, *aſſerens ſe nolle aliam reſponſionem exhibere*; and thereupon he [328] is committed to the marſhal *ad pœnitentiam ſuam ſecundùm legem & conſuetudinem regni ſubiturum &c.*

Nota clergy denied in ſuch a treaſon, yet penance awarded, tho the charge was treaſon.

Yet at common law before the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero,* it ſeems that clergy was allowable to him that was indicted for counterfeiting coin, or for counterfeiting money. *B. Clergy* 1. But that is alterd by the ſtatute of 25 *E.* 3. *pro clero.*

IV. If clerks were indicted with theſe clauſes *inſidiatores viarum & depopulatores agrorum,* clergy was denied them, and therefore the act of 4 *H.* 4. *cap.* 2. was made to put theſe clauſes out of indictments and to allow clergy, if they were in the indictment.

Again, as it was denied in reſpect of ſome offenſes, ſo this *privilegium clericale* was by the common law abridged in reſpect of the perſon; for certainly by the canon laws Nuns had the exemption from

(q) The error of this judgment conſiſted not merely in its being given upon an inquiſition "in quam epiſcopus ſe non "poſuiſſet," but becauſe it was given upon an inqueſt, "in quam epiſcopus ſe non "poſuiſſet," *after he had been allowed his clergy and deliverd to his ordinary.* For the *Placita Coronæ* of thoſe times ſhew, that it was the conſtant practice of inqueſts *ex officio* to paſs upon clerks pleading their *privilegium clericale,* where clergy was allowable the method whereof was thus. The clerk upon his arraignment pleaded his *privilegium clericale*; then came the ordinary and demanded him; then a jury *ex officio* was ſummoned to inquire into the truth of the charge; or as it is expreſt in this record, "ad inquirendum, prout mo-"ris eſt, pro quali, &c. *(i. e. pro quali ei-"dem ordinario liberari debeat,"* and according to ſuch inqueſt, the clerk was deliverd to the ordinary as acquit, or convict. Thus are the entries upon the rolls, "*A. B.* indictatus de felonia, eò quod, "&c. & ductus coram rege, & allocutus "qualiter ſe velit de felonia prædicta ac-"quietare, dicit quòd clericus eſt, & ſine "ordinario ſuo non debet hic reſpondere. "Et ſuper hoc venit *C. D.* &c. Et petit "ipſum tanquam clericum ſibi liberari; "ſed ut ſciatur pro quali eidem ordinario "liberari debeat, inquiratur rei veritas per "patriam." Then a jury *ex officio* was ſummoned, by which if it was found, "Quòd *A. B.* non eſt culpabilis, liberatur "ordinario pro tali &c." But if culpabilis "liberatur ordinario tanquam clericus convictus, ſalvò cuſtodiendus, ſub "pœnâ quâ decet &c." *Vide M.* 20 & 21 *E.* 1. *Rot.* 4. *in dorſo, B. R. Hill.* 22 *E.* 1. *Rot.* 15. *Ibid. Trin.* 30 *E.* 3. *Rot.* 11. *B. R. Rex. Trin.* 31 *E.* 3. *Rot.* 15. *Ibid. Rex.*

temporal juriſdiction, but the privilege of clergy was never allowd them by our law: *vide ſtat'* 21 *Jac.* (*r*).

Again, tho the ordinary took himſelf to be the judge of the allowance of the clergy and of the purgation of the clerk, yet the king's courts took that courage to make the ordinary but a miniſter, and themſelves judges of the allowance and diſallowance of the clergy and purgation. 21 *E.* 4. 21. *b.* 9 *E.* 4. 28. *a.*

And ſo the judges of the common law would oftentimes deliver the clerk to the ordinary, but *abſque purgatione*, as where the clerk is attaint by outlawry or by judgment, or convict by his own confeſſion, or upon an appeal. *Stamf. P. C. Lib.* II. *cap.* 49. 3 *H.* 7. 12. *a.* 10 *E.* 3. *Coron.* 247. *Hob. Rep.* 288. *Searle* & *Williams*, or if he were a notorious malefactor, *vide* 10 *E.* 3. *Corrn.* 247. or if he be convict by verdict of counterfeiting the ſeal or coin at common law before the ſtatute of 25 *E.* 3. *Lib. Parl.* 18 *E.* 1. *Berton*'s caſe [329] (*), or if he be committed by record to the ordinary *abſque purgatione*. *Hob. ubi ſupra.*

And in theſe caſes, if the ordinary admitted him to his purgation, he was fineable for it as a great miſdemeanor, and the party deliverd by ſuch purgation ſhall be again committed to priſon, *M.* 34 & 35 *E.* 1 *Rot.* 59. *Kanc. B. R.* the caſe of *Hugh Forſham* deliverd by *William Teſta*, and another commiſſionated from the pope (*s*); and the entry in ſuch caſes is, *liberatur ordinario tanquam clericus convictus & utlegatus ad ſalvò cuſtodiend' periculo, quòd incumbit &c. & inhibitum eſt eidem ordinario, nè ad aliquam purgationem ipſius* A. B. *procedat domino rege inconſulto, eò quòd prædictus* A. B. *pro feloniis &c. utlegatus eſt &c. H.* 14 *E.* 3. *B. R. Rot.* 19. *Rex. Suff. Lond.* The caſe of *John de Hemmyngeſton* chaplain. But indeed, if the clerk had had his clergy and were generally deliverd to the ordinary, he might

(*r*) *Cap.* 28. §. 6 & 7.

(*) *Ryley*'s *Plac. Parl. p.* 56.

(*s*) That caſe was thus: Whilſt the temporalities of the archbiſhop of *Canterbury* were in the king's hands, two clerks convict of felony impriſond in the archbiſhop's priſon had been admitted to purgation, and deliverd out of cuſtody by maſter *Hugh Forſham*, "Per mandatum "magiſtrorum *Willielmi Teſta*, & *Geraldi*, "clericorum papæ, adminiſtratorum ſpi-"ritualitatis archiepiſcopatûs prædicti, "abſque mandato domini regis." *Forſham* was brought *coram rege*, and arraigned for the ſaid offenſe; and the keeper of the gaol was alſo arraigned for bringing the ſaid clerks "coram prælato *Hugone* ad pur-"gandum, abſque præcepto domini re-"gis;" and were both convicted by their own confeſſion, and committed to the marſhal, "Et poſtea finem fecerunt pro "tranſgreſſione & contemptu prædictis." Afterwards the two clerks, who had been deliverd by ſuch purgation, were brought from the tower, where they had been impriſond by the king's writ. "Et ſeparatim alloeuti qualiter de feloniâ prædictâ ſe velint acquietare, dicunt quod clerici ſunt, & liberantur ordinario ſub pœnâ, quâ decet, &c.

admit

admit him to make his purgation, and upon ſignification thereof by the ordinary into the chancery a writ ſhould iſſue to the ſheriff to deliver unto the party ſo purged all his goods and chattels ſeiſed into the king's hands upon that occaſion, *niſi fugam fecerit eâ occaſione.* *F. N. B.* 66. *a* And all this is to ſhew, that whatſoever weight the clergymen laid upon their canons and their exemptions from the ſecular juriſdictions, yet their canons or conſtitutions, or pretenſions or claims of this kind were not binding here, nor ſo taken farther than either by acts of parliament or the common acceptation of the kingdom they were received, and therefore theſe privileges received divers alterations and corrections and reſtrictions by [330] the temporal judges, as the occaſion required.

2 Hawk. P. C. ch. 33 per totum. 4 Blackſ. Com. ch. 28. per tot. See Index to Foſter. Tit. Clergy. Burn. Title Clergy. ſ. 2. Benefit of Clergy. 3. Peere Williams. 439—504.

CHAP. XLV.

In what offenſes *clergy is allowable or not.*

NOW touching the offenſes, wherein clergy is or was allowable, and in what not.

There are theſe general rules, that have influence in this whole diſcourſe.

1. That in caſe of high treaſon againſt the king clergy was never allowable in this kingdom.

2. That at common law in all caſes of felony or petit treaſon clergy was allowable, excepting two.

3. That where a ſtatute makes a new felony, clergy is incident thereunto, unleſs it be ſpecially taken away by acts of parliament; but where it makes a new treaſon, there is no clergy.

Upon theſe generals much of the ſucceeding buſineſs of this chapter, and ſome that follow will be built.

I. As to the firſt of theſe I ſay generally in all caſes of high treaſon clergy was never allowd.

And this propoſition will be conſiderd two ways. 1. How the common law ſtood before the ſtatute of 25 *E.* 3. *pro clero*, and 2. How it ſtood after.

The ſtatute of 25 *E.* 3. *for the clergy* was made in the parliament held in *Hill.* 25 *E.* 3. which was in the ſame parliament, wherein the ſtatute of declaration of treaſon is made, commonly called the *The ſtatute of purveyance.*

By this ſtatute *pro clero cap.* 4. it is enacted, "That all manner of
[331] "clerks, as well ſecular as religious, which ſhall be from
"henceforth convict before ſecular judges for any treaſons
"or felonies touching other perſons than the king himſelf or his
"royal majeſty, ſhall from henceforth have and enjoy the privilege
"of holy church, and ſhall be without impeachment or delay de-
"liverd to the ordinaries demanding them, and upon this the arch-
"biſhop promiſeth, that upon the puniſhment and ſafe keeping of
"ſuch clerks offenders, which ſhall be deliverd to the ordinaries, he
"ſhall thereof make a convenient ordinance, whereby they ſhall be
"ſafely kept and duly puniſhed, ſo that no clerk ſhall take courage
"to offend for default of correction.

At the ſame parliament it was declared what was treaſon, and among the reſt counterfeiting the great or privy ſeal, or the king's coin is declared treaſon, and put in the ſame rank with compaſſing the king's death or levying of war, and it is thereby enacted, "That no
"other offenſes, than what are therein declared, be treaſon till de-
"clared by parliament.

Before this ſtatute there were two ſorts of treaſons, that concerned the king, one was of a greater note, and another of a leſs note.

Thoſe of the greater note were *conſpiring the king's death, levying of war againſt the king, adhering to his enemies*, and two others, that are ſince abrogated by the ſtatute of 25 *E.* 3. which came under the general and obſcure names of *ſedition*, and *accroaching of royal power.*

In any of theſe a party convict had not his clergy at common law, this appears by the judgment cited in the former chapter *(a)*. *T.* 21 *E.* 3. *B. R. Rot.* 23. *Rex.*

But there were other treaſons, that concerned the king, which were of an inferior note, namely *counterfeiting the ſeal* and *counterfeiting the coin* and theſe, (the latter eſpecially,) had only judgment as in caſe of petit treaſon, namely to be drawn and hanged.

And it ſeems before the ſtatute of 25 *E.* 3. *de proditionibus* clergy was allowd in both caſes, as appears by the old book of *E.* 3. *B. R.*

(a) p. 327. *Gerberge's* caſe.

title

title *Clergy*, *placito ultimo*, and the judgment in parliament of 18 *E.* 1. in *Berton*'s caſe, who being convict for counterfeiting the king's ſeal had his clergy, but *tradatur ordinario ſine purgatione (b)*.

But now as to the ſtatute of 25 *E.* 3. *pro clero*, and the ſtatute of 25 *E.* 3. at the ſame parliament *de proditionibus* laying them both together in all caſes of treaſon touching the king himſelf or his royal majeſty clergy is wholly taken away, and in all other caſes of treaſon or felony clergy is allowd; and conſequently in murder, robbery, petit treaſon clergy is ſettled by this act of parliament.

But whatſoever is declared treaſon againſt the king by the ſtatute of 25 *E.* 3. *de proditionibus*, as well counterfeiting the ſeal or the money of the kingdom, as any other treaſon therein declared, is wholly exempted from clergy. 19 *H.* 6. 47. *b. Stamf. P. C. Lib.* II. *cap.* 42. *fol.* 124. *a. M.* 31 *E.* 3. *coram rege Rot.* 18. *Rex, in dorſo, Bucks, caſus abbatis de Muſſenden (c) pro reſecatione & falſificatione legalis monetæ*, 24 *H.* 8. *Spelman*'s *Rep. accordant adjudge. 2 Co. Inſtit.* 635, 636. *ſuper Artic' cleri.*

So that at this day in all caſes of high treaſon, whether thoſe declared by the ſtatute of 25 *E.* 3. *de proditionibus*, or any other treaſons newly enacted ſince, the privilege of clergy is wholly taken away; and, (which is the ſecond propoſition above mentiond.)

II. In all felonies, that were at common law before the ſtatute of 25 *E.* 3. *pro clero*, and in all caſes of petit treaſon by that ſtatute the privilege of clergy is reſtored and ſettled.

And therefore in all ſuch felonies or petit treaſons, which were ſuch at the time of the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero* clergy is allowable, unleſs in ſuch caſes where it is taken away by ſubſequent acts of parliament, and ſo far forth only as the ſame is ſo taken away.

But in what caſes ſubſequent acts of parliament have taken away clergy, where at the time of the ſtatute of 25 *E.* 3. it was allowable, ſhall be the buſineſs of the next chapter.

But yet there ſeem to be two felonies, where clergy was not allowable notwithſtanding this act, namely certain acts, [333] that by interpretation of law were hoſtile acts, which was the reaſon, that I long ſince heard Mr. *Noy* then the king's attorney give for it

(b) *Vide ſupra p.* 328. See alſo *Part* I. *p.* 185, 186. *in notis, & p.* 223. *in notis.* (c) *Part* I. *p.* 216.

in the king's bench about 7 *Car.* 1. *viz.* 1. *Inſidiato viarum & depopulatio agrorum.* 2. Wilful burning of houſes.

1. Concerning the former of theſe it appears, that *inſidiatores viarum* and *depopulatores agrorum* were ouſted of their clergy notwithſtanding the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero.*

Rot. Parl. 4 *H.* 4 *n.* 30. there was a complaint in parliament by the archbiſhop of *Canterbury* and clergy, whereupon it was enacted, that *that* general clauſe ſhould be left out in indictments and words of the ſame effect inſerted, and that notwithſtanding the indictment carried the ſame effect, yet benefit of clergy ſhould not be denied, as appears at large by the ſtatute of 4 *H.* 4. *cap.* 2.

2. As touching wilful burning of houſes I have heard, as before, that clergy was not allowable by the common law, but of this more fully in the next chapter.

Now touching *ſacrilege* tho ſome later ſtatutes were made to ouſt clergy in that crime, yet it ſeems at common law or at leaſt after the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero* it was allowable, as appears 26 *Aſſiz.* 27. where it is agreed by the juſtices, that a perſon indicted of robbing a chapel and breaking a church ſhould have his clergy; but it ſeems, it was with this difference, that if the ordinary refuſed him, as he might, he ſhould not have his clergy. 20 *E.* 2. *Coron.* 283. *Stamf. P. C.* 123, 124, but otherwiſe the court would allow it him. 26 *Aſſiz.* 27.

See the references at the end of Ch. XLIV. ante.

---

[334]

CHAP. XLVI.

Where and in what offenſes, *that where capital at common law*, clergy is taken away *in part or in all by acts of parliament ſubſequent to* 25 E. 3. *and firſt of* petit treaſon.

I HAVE before declared what capital offenſes were exempt from clergy at common law, and how the law ſtood in relation thereunto before and by the ſtatute of 25 *E.* 3. and have there ſettled it, that regularly in all capital offenſes, except treaſons, which touch the king, the offender is to have the privilege of his clergy.

But

But as touching treaſons, that touch the king, by virtue of the common law and the declaration of that ſtatute the benefit or privilege of clergy is not allowable, neither is there any ſtatute, that hath altered the law in that point of treaſon, but it ſtands ſtill excluded from the privilege of clergy.

But as to petit treaſon and felonies ſubſequent ſtatutes have made great alterations as to the point of clergy from what was declared by the ſtatute of 25 *E.* 3. *cap* 4. *pro clero.*

The inquiry therefore touching the alterations made by ſubſequent ſtatutes in point of petit treaſon and felony may be conſiderd in this method.

1. What alterations have been made by acts of parliament in relation to new felonies made by acts of parliament ſince 25 *E.* 3. And

2. What alterations have been made in ſuch offenſes, as were petit treaſon or felony at the time of the making of that ſtatute.

I. As to the former of theſe this general rule holds, that if an act of parliament make a felony, and doth not take away clergy in expreſs words, in all thoſe caſes clergy is allowable. [335]

And if it doth make a felony and takes away clergy not generally, but in ſuch or ſuch caſes, regularly in other caſes clergy is allowable, as if it takes away clergy in caſe the party be convicted by verdict, yet he ſhall have his clergy, if he ſtand mute.

But if it enacts generally, that it ſhall be felony without benefit of clergy, or that he ſhall ſuffer as in caſe of felony without benefit of clergy, this excludes it in all circumſtances, and to all intents; and becauſe I have before in the particular enumeration of felonies by act of parliament taken notice all along what are excluded of clergy and what not, I ſhall diſmiſs that part of the inquiry referring myſelf to the ſeveral acts of parliament, that enact the felonies themſelves; and ſhall proceed to the ſecond part of the inquiry.

II. Therefore as to thoſe felonies, that were ſuch at the time of the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero.*

I ſhall firſt deliver ſome general poſitions, and then proceed to the particular felonies themſelves.

1. Therefore it is certain, that whatſoever petit treaſon or felony there was at the time of the making of that ſtatute, it was within the privilege of clergy by force of that ſtatute at leaſt, except thoſe two above mentiond in the laſt chapter.

2. That

2. That therefore all ſuch petit treaſons and felonies are at this day within clergy, unleſs where it is ouſted by ſubſequent ſtatutes now in force.

3. That where any ſtatute ſubſequent to 25 *E.* 3.° *cap.* 4. hath ouſted clergy in any of thoſe felonies, it is only ſo far ouſted, and only in ſuch caſes and as to ſuch perſons as are expreſly compriſed within ſuch ſtatutes, for *in favorem vitæ & privilegii clericalis* ſuch ſtatutes are conſtrued literally and ſtrictly.

And therefore, if clergy be ouſted as to the principal, it is not ouſted as to the acceſſary; if as to the acceſſary *before*, it is not extended to the acceſſary *after*; if where the priſoner is convict by ver-
[336] dict, it holds not as to a conviction by confeſſion, nor as to an attainder by outlawry, nor to a ſtanding mute, as we ſhall ſee in the ſubſequent inſtances.

4. That in all caſes, where a ſubſequent act of parliament ouſteth clergy in caſe of any felony, the indictment muſt preciſely bring the party within the caſe of the ſtatute, otherwiſe, altho poſſibly the fact itſelf be within the ſtatute, and it may ſo appear upon the evidence, yet if it be not ſo alledged in the indictment, the party, tho convict, ſhall have his clergy. *Stamf. P. C. fol.* 130. *a. Dy.* 99. *a.* 183. *b.* 224. *b.* 261. *a.*

5. Altho the caſe be ſo laid in the indictment, that it comes within the ſtatute to exempt the priſoner from clergy, yet if upon the evidence it fall out that, tho it be a felony, yet it is not ſo qualified, as laid in the indictment, the jury ought to find him guilty of the felony ſimply, but not as to the manner laid in the indictment, (as for inſtance guilty of the felony, but not of the robbery, or not of the breaking of the houſe,) and thereupon the priſoner ſhall be admitted to his clergy; and this is commonly done.

And now I come to the particular offenſes, wherein clergy is taken away from ſuch felonies, where by the common law and the ſtatute of 25 *E.* 3. *cap.* 4. it was allowable.

And thoſe offenſes are theſe that follow.

1 Petit treaſon. 2. Murder. 3. Manſlaughter. 4. Rape. 5. Robbery. 6. Burglary. 7. Larciny of ſeveral kinds and degrees.

And I ſhall now purſue them in the ſame order, as they are ſet down.

Firſt, Petit treaſon, as the ſervant killing his maſter, &c.

It

It is plain, that after the ſtatute of 25 *E.* 3. *cap.* 4. clergy was to be allowd until 12 *H.* 7. *cap.* 7. & 23 *H.* 8. *cap.* 1.

The firſt ſtatute, that ouſted clergy generally in petit treaſon, was that of 12 *H.* 7. *cap.* 7. which yet extended but to conviction or attainder, and only to the principal not to the acceſſary.

By the ſtatute of 23 *H.* 8. *cap.* 1. it is enacted, "That no [337]
"perſon, which ſhall be found guilty after the laws of the
"land for any manner of petit treaſon, or wilful murder of malice pre-
"penſed, or for robbing any churches, chapels, or other holy places, or
"for robbing any perſon or perſons in their dwelling houſe or dwelling
"place, the owner or dweller of the ſame houſe, his wife, children,
"or ſervants then being within, and put in fear or dread by the ſame,
"or for robbing any perſon or perſons in or near the highways, or
"for wilful burning of any dwelling houſes or barns, wherein any
"corn or grain ſhall happen to be, nor any perſon found guilty of
"any abetment, procurement, helping, maintaining or counſelling of
"or to any ſuch petit treaſons, murders or felonies ſhall from hence-
"forth be admitted to the benefit of clergy, except clerks in holy
"orders, *viz.* in the order of ſubdeacon or above; and that ſuch
"perſons in orders convict of thoſe offenſes ſhall be delivered to
"the ordinary, but ſhall remain in priſon without purgation, unleſs
"he become bound by recogniſance before the king's juſtices,
"where he was convict, with two ſufficient ſureties for his good
"behaviour.

"Perſons attaint by judgment upon confeſſion, outlawry, or verdict
"admitted to clergy to remain in priſon without purgation.

"Clerks convict, and upon their clergy allowd deliverd to the ordi-
"nary may be degraded, and then ſent into the king's bench by the
"ordinary to receive judgment upon their conviction, and the juſtices
"having the record before them ſhall give judgment upon ſuch con-
"viction, as if had not had clergy.

This act, tho temporary, was continued by the ſtatute of 28 *H.* 8. *cap.* 1. and made perpetual by 32 *H.* 8. *cap.* 3. and by the ſame act perſons in orders are put into the ſame condition, as other perſons not in orders, notwithſtanding this ſtatute of 23 *H.* 8. *cap.* 1. or 25 *H.* 8. *cap.* 3.

This ſtatute of 23 *H.* 8. as to all theſe crimes extended to principals and acceſſaries before the fact, but not to acceſſaries after.

But

But yet it extended to exclude principals and acceſſaries *before*, only in caſes where they were found guilty after due courſe of law, *viz.* by verdict or confeſſion, *&c.* and extended not to ſtanding mute, *&c.* And therefore by the ſtatute of 25 *H.* 8. *cap.* 3. it is enacted, "That "every perſon that ſhall be indicted of petit treaſon, wilful burning "of houſes, murder, robbery, or burglary, or other felony according "to the tenor or meaning of the ſaid ſtatute of 23 *H.* 8. and there- "upon arraigned do ſtand mute of malice or froward mind, or chal- "lenge peremptorily above the number of twenty, or do not anſwer "directly to the indictment and felony, whereof he ſhall be ar- "raigned, ſhall be excluded from clergy in like manner, as if he had "pleaded to the offenſe and been found guilty according to the laws "of the land.

And provides, "That if any perſon be indicted in a foreign county "for ſtealing of goods in another county, and be found guilty, ſtand "mute, challenge above twenty peremptorily, or will not directly "anſwer, he ſhall be excluded from clergy, as he ſhould have been, "if he had been arraigned for the robberies or burglaries in the "ſame ſhire where they were done, if by examination it ſhall ap- "pear to the juſtices, that he had been indicted and arraigned in "the county where the burglary was done, he ſhould have been ex- "cluded from his clergy by the ſaid ſtatute, had he been found "guilty there.

This ſtatute was but temporary, becauſe bottomed upon the ſtatute of 23 *H.* 8. *cap.* 1. that was but temporary, but by the ſtatute of 28 *H.* 8. *cap.* 1. was continued till the laſt day of the next parliament, and by the ſtatute of 32 *H.* 8. *cap.* 3. made perpetual.

But hitherto in this caſe of petit treaſon, (and indeed generally in all theſe caſes of the ſtatute of 23 *H.* 8.) there were theſe defects.

1. That as to the principal the ſtatute of 23 *H.* 8. *cap.* 1. did extend to appeals, as well as indictments for the offenſes deſcribed in that ſtatute, and if they were found guilty by verdict or confeſſion, [339] the appellee and acceſſary *before* were excluded of clergy, but ſtatute of 25 *H.* 8. *cap.* 3. extended only to indictments, and therefore an appellee ſtanding mute, *&c.* was to have his clergy in the caſes of the ſtatute of 25 *H.* 8. *cap.* 3. Again,

2. Neither of theſe ſtatutes extend, where the party is outlawd for theſe crimes.

3. As

3. As the law was then taken, challenging above twenty had been a conviction, or at leaſt had put the party to his penance; but that I may obſerve it once for all, now that clauſe of challenging above twenty mentiond in the ſtatute of 25 *H.* 8. and other ſtatutes hereafter mentiond imports nothing as to the point of clergy, for his challenge is over-ruled and he put upon the jury, as hath been before obſerved (*).

But becauſe the ſtatute of 1 & 2 *P.* & *M. cap.* 10. in caſe of petit treaſon reſtores the peremptory challenge of thirty five, it ſhould ſeem, that if he challenge peremptorily above thirty-five, he ſhall have the benefit of his clergy, for it is now become *caſus omiſſus.*

And therefore by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. "If "any ſhould malitiouſly command, hire or counſel any to commit "petit treaſon, wilful murder, or to do any robbery in any dwelling "houſe or houſes, or to do any robbery in or near the highway, or "to burn any dwelling houſe or any part thereof, or any barn then "having any corn or grain in the ſame, then every ſuch offender, "1. Being outlawd for the ſame, or 2. Arraigned and found guilty "by order of law, or 3. Otherwiſe lawfully convict or attaint of "the ſame, or 4. Who ſhall ſtand mute of malice or froward mind, "or 5. Shall peremptorily challenge above twenty perſons, or 6. "Will not directly anſwer, is ouſted of his clergy.

But *nota*, every indictment to ouſt the acceſſary *before* of his clergy muſt run *malitioſè*, otherwiſe he ſhall have his clergy. 2 *Eliz. Dy.* 183. *b.*

But now by the ſtatute of 1 *E.* 6. *cap.* 12. it is enacted, "That "no perſon, that hath been, or ſhall be in due form of law attaint "or convict of murder of malice prepenſed, or of poiſoning [340] "of malice prepenſed, or breaking any houſe by day or by "night, any perſon being then in the houſe, where the ſame break-"ing ſhall be committed, and thereby put in fear or dread, or of or "for robbing any perſon or perſons in or near the highways, or for "felonious ſtealing of horſes, geldings or mares, or for felonious "taking goods out of any pariſh church or other church or chapel, "or being indicted or appeald of any of the ſaid offenſes, and there-"upon found guilty by twelve men, or ſhall confeſs the ſame upon "his or their arraignment, or will not anſwer directly according to "the laws of this realm, or ſhall ſtand wilfully or of malice mute,

(*) *p.* 270.

"ſhall

" ſhall be admitted to have the privilege of clergy or ſanctuary, but " ſhall be put from the ſame, and that all perſons in all other caſes " of felony, other than ſuch as are before mentiond, which ſhall be " arraigned or found guilty upon their arraignment, or ſhall not con- " feſs the ſame, or ſtand mute, or will not directly anſwer, ſhall have " and enjoy the benefit of clergy and ſanctuary, as they might have " had before the 24th of *April* 1 *H.* 8.

This ſtatute doth not reſtore clergy to the principal in caſe of petit treaſon, but leaves the law in relation thereunto, as it ſtood before, and upon the ſtatutes of 23 & 25 *H.* 8. tho there be no word of *petit treaſon*, for if the opinion of *Walſh* and my lord *Dyer M.* 6 & 7 *Eliz. Dy.* 235. *a.* be law, *viz.* that a general pardon of all offenſes except murder, doth not except petit treaſon, and ſo petit treaſon comes not within the expreſſion of *felony*, then the clauſe, *that in all other caſes of* felony *clergy ſhall be allowd*, doth not extend to allow clergy in petit treaſon.

But if that opinion be not law *(a)*, (as I think it is not) then the excluſion of clergy from murder by this ſtatute excludes it alſo in petit treaſon.

But if it did not, yet it does not reſtore clergy in petit treaſon to the principal *(b)*, where found guilty or attaint, becauſe before 1 *H.* 8. clergy was taken away in petit treaſon from the principal by 12 *H.* 7. *cap.* 7. [341]

Again, by the ſtatute of 5 & 6 *E.* 6. taking notice, that by the act of 1 *E.* 6. the act of 25 *H.* 8. *cap.* 3. touching robbers and burglars arraigned in a foreign county, and ouſting them of clergy by examination ſtands repeald, whereby offenders were much emboldened, it is enacted, " That the ſaid act made in the 25th year of King " *H.* 8. touching the putting ſuch offenders from their clergy, [and " every article, clauſe and ſentence contained in the ſame touching " clergy] ſhall from henceforth touching ſuch offenſes from hence- " forth to be committed or done ſtand, remain, and be in full ſtrength " and virtue in ſuch manner, as it did before the making of the ſaid " act in the ſaid firſt year of King *E.* 6. any clauſe, article or ſen- " tence compriſed in the ſaid act of 1 *E.* 6. to the contrary thereof " notwithſtanding.

(a) Vide ſupra, Part I. *cap.* 29. *p.* 378.

(b) The words here in the original MS. are [*takes not away clergy from the principal,*] but the ſcope of our author's argument plainly ſhews he intended to have wrote [*does not reſtore*].

Now

Now upon this act of 5 *E.* 6. *cap.* 10. it hath been taken, that not only the clauſe of the act of 25 *H.* 8. *cap.* 3. touching foreign felonies ouſted of clergy upon examination, but the whole act of 25 *H.* 8. *cap.* 3. is re-enacted, and upon that account wilful burning ſtands by virtue of that act ouſted of clergy, becauſe ouſted of clergy by 23 & 25 *H.* 8. tho no mention be made thereof in the ſtatute of 1 *E.* 6. and accordingly reſolved 11 *Co. Rep.* 33. *Alexander Poulter's* caſe, *de quo infra.*

Upon the whole matter it ſeems plain, that at this day in relation to petit treaſon the law ſtands thus.

1. The principal convict by verdict or confeſſion is ouſted of clergy by 23 *H.* 8. *cap.* 1. both in appeals and indictments.

2. The principal ſtanding mute, or not directly anſwering is ouſted of clergy by 25 *H.* 8. *cap.* 3. in caſes of indictment, but not in caſe of an appeal; and the ſtatute of 1 *E.* 6. *cap.* 12. doth not alter the caſe as to the principal in petit treaſon.

3. Yet I ſee no proviſion to ouſt clergy of a clerk attaint of petit treaſon by outlawry, but that he may claim his clergy and be deliverd to the ordinary, as a clerk attaint without purgation, for this is not provided for, as it ſeems by theſe ſtatutes. [342]

4. But in my opinion the ſtatute of 1 *E.* 6. *cap.* 12. taking away clergy from perſons attaint, as well as from perſons convict of murder doth extend to petit treaſon, which is in truth murder, and conſequently a perſon outlawd of petit treaſon, tho not by the ſtatutes of 23 or 25 *H.* 8. yet the ſtatute of 1 *E.* 6. is exempt from clergy under the name of wilful murder *(c)*.

And the ſtatute of 4 & 5 *P.* & *M. cap.* 4. taking away clergy from acceſſary *before* in caſe of petit treaſon, where attainted by outlawry, had committed a great piece of abſurdity in putting the acceſſary in a worſe caſe than the principal, unleſs the law had been taken, that the ſtatute of 1 *E.* 6. *cap.* 12. had taken it away from the principal in the like caſe of outlawry, which is an attainder in law.

5. As to the acceſſary before the fact, he is ouſted of clergy in all the caſes before mentiond by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. and ſo the law ſtands at this day, but it muſt be laid *malitiosè*. 2 *Eliz. Dy.* 183. *b.*

(c) If this ſtatute be conſtrued to take away clergy from petit treaſon, it takes it away, as well in caſe of an appeal, as of an indictment, not only where the party is convict by verdict or confeſſion, but alſo where he will not anſwer directly, or ſhall ſtand wilfully mute.

6. But

6. But the acceſſary after the fact hath his clergy in all caſes in petit treaſon, for no ſtatute takes it from him.

I have been the longer in this, becauſe it was neceſſary to take notice of the ſeries of all the ſtatutes, and to diſintangle them, and it will ſerve for the briefer collection of what follows in other caſes.

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

---

[343]

CHAP. XLVII.

Concerning the alteration made by ſeveral ſtatutes *in* caſes *of* murder, manſlaughter, rape, *and* wilful burning *of houſes or barns with corn.*

I. I Shall briefly conſider how the privilege of clergy ſtands as to *murder*, and therein.

1. At the common law, and by the ſtatute of 25 *E.* 3. *cap.* 4. clergy was to be allowed as well in murder, as any other felony.

2. Tho there were ſome particular ſtatutes, that in particular caſes took away clergy in caſe of heinous murders (*), yet the firſt general law, that took away clergy in caſe of wilful murder *ex malitiâ præcogitatâ* generally was 23 *H.* 8. *cap.* 1. which extended only to a conviction by verdict or confeſſion, and included acceſſaries *before*, and extended to appeals, as well as indictments.

3. The ſtatute of 25 *H.* 8. *cap.* 3. extended only to indictments but not to appeals; to principals and not to acceſſaries *before* or after.

4. But the ſtatute of 1 *E.* 6. *cap.* 12. took away clergy from principals in murder in all caſes, *viz.* conviction by verdict or confeſſion, attainder by outlawry or otherwiſe, ſtanding mute, or not directly anſwering *(a)*, but this ſtatute of 1 *E.* 6. extended not to acceſſaries.

[344] 5. By the ſtatute of 4 & 5 *P.* & *M. cap.* 4. all that ſhall malitiouſly command, hire, or counſel any to commit any wilful murder are ouſted of clergy in all caſes.

(*) *Vide* 12 *H.* 7. *cap.* 7. 4 *H.* 8. *cap.* 2. 22 *H.* 8. *cap.* 9.

(a) This ſtatute omits the caſe of challenging above twenty, but this our author thinks unneceſſary to be inſerted, becauſe ſince 22 *H.* 8. *cap.* 14. neither penance nor judgment of death is to follow in that caſe, but only the challenge is to be overruled, *vide ſupra p.* 270. & *infra cap.* 48. however this omiſſion is ſupplied by 3 & 4 *W.* & *M. cap.* 9. as to indictments.

6. But

6. But acceſſaries to murderers after the fact have their clergy in all caſes.

So that the principal ſtands at this day ouſted of clergy in all caſes, and the acceſſary *before* is alſo ouſted of clergy in all caſes, but the acceſſary *after* is in no caſe ouſted of clergy.

But it muſt be remembered, that the party indicted muſt be brought within the very letter of the ſtatute.

If the indictment be *felonicè & ex malitiâ ſuâ præcogitatâ interfecit*, yet he ſhall have his clergy, becauſe there wants the word *murdravit*. *Dy* 261. *a.*

So if it be *felonicè interfecit & murdravit*, and ſays not *ex malitiâ ſuâ præcogitatâ*, it is but an indictment of manſlaughter, and the priſoner ſhall have his clergy.

So if a man be indicted, as acceſſary before, *viz. quòd præcepit*, and ſays not *malitiosè præcepit*. *P. 2 Eliz. Dy.* 183. *b.*

II. As to *manſlaughter*, regularly in all caſes the perſon indicted or appealed ought to be admitted to his clergy.

But if *A. B.* and *C.* be indicted ſpecially upon the ſtatute of 1 *Jac. cap.* 8. ſetting forth, (as the indictment muſt) "That *A. felonicé pu-*"*pugit & percuſſit D.* not having any weapon drawn, nor having "ſtricken firſt, and that *B.* and *C.* were preſent, aiding and abetting," tho *A. B.* and *C.* are all principals in manſlaughter at common law, yet *A.* only, that gave the ſtroke, ſhall be ouſted of his clergy. *H. 23 Car.* 1. *B. R. Page*'s caſe. *(b)*.

And therefore it ſeems in that caſe, if it be found, that *A.* gave not the ſtroke, but *B.* and that *A.* and *C.* were aiding and abetting, not only *A.* and *C.* that gave not the ſtroke ſhall have their clergy, but alſo *B.* becauſe, tho the caſe of *B.* is within the ſtatute, yet as to him the indictment brings him not within the ſtatute, and ſo differs from the caſe of a general indictment of murder, where tho it be laid, that *A.* gave the ſtroke, and *B.* was preſent, aiding and abetting, yet if upon the evidence it appears, that *B.* gave the ſtroke, [345] and *A.* was abetting, *&c.* both ſhall be convict of murder, for both are equally murderers, and the indictment is true as to both *quòd ex malitiâ ſuâ præcogitatâ interfecerunt & murdraverunt* (*).

By the ſtatute of 1 *Jac. cap.* 8. clergy is ouſted as to him that ſo ſtabs upon any conviction by verdict, confeſſion or otherwiſe, and that as well in caſe of an appeal as of an indictment; but it extends

(b) *Styl.* 86. (*) *Vide ſupra p.* 292. 1 *Salk.* 334.

not to ſtanding mute or not directly anſwering, for there is no conviction in that caſe, and ſo it ſeems as to an outlawry *(c)*.

III. As to *rape*, by the ſtatute of 18 *Eliz. cap.* 7. If any man be convict thereof by verdict or confeſſion, or be outlawd for the ſame, he is excluded of clergy, but this act extends not to a ſtanding mute or not directly anſwering, for this is *caſus omiſſus (d)*, and he ſhall have his clergy 11 *Co. Rep.* 35. *b Poulter's* caſe.

But at this day in all caſes challenging above twenty makes nothing either for or againſt clergy, for the party ſhall not be put to his penance nor be convict thereupon, but only his challenge ſhall be over-ruled and he put upon his trial, as hath been before obſerved (†), and therefore the clauſe in the act of parliament ouſting clergy, where he challengeth above twenty, or the not mentioning of that clauſe makes nothing at this day one way or another as to the point of clergy.

But neither acceſſaries *before* or *after* are upon this ſtatute exempt from the privilege of clergy.

IV. As to the caſe of *wilful burning*.

It ſtands now a ſettled point, that if the principal be convict by verdict or confeſſion, or ſtand mute, or will not directly anſwer, he ſhall not have his clergy, this is the point reſolved 11 *Co. Rep.* 35. *a. Poulter's* caſe, and the conſtant practice is, and always hath been accordingly.

[346] And the ſtatute of 4 & 5 *P. & M. cap.* 4. ſtrongly proves the law to be ſo, for clergy is taken away from the acceſſary *before*, and it were a ſtrange overſight, if an act of parliament ſhould exempt the acceſſary from clergy in this caſe, and yet the principal ſhould have the benefit of it.

That which cauſed the doubt was the ſtatute of 1 *E.* 6. *cap.* 12. where it enumerates all the offenſes, which were then to be exempt from clergy, and mentions not the caſe of wilful burning and enacts, "That in all other caſes of felony the offenders ſhall have clergy, as "they ſhould have had before 1 *H.* 8." and the firſt ſtatute that took away clergy from wilful burning of houſes or barns with corn was a ſtatute made after 1 *H.* 8. *viz.* 23 *H.* 8. *cap.* 1. & 25 *H.* 8. *cap.* 3.

There have been three anſwers given hereunto (*), *viz.*

(c) But in all theſe caſes the offender is excluded from clergy by 3 & 4 *W. & M. cap.* 6. upon an indictment, but not in an appeal.

(d) But this is provided for in caſe of an indictment by 3 & 4 *W. & M. cap.* 9.

(†) *p.* 270.

(*) *Vide Part* 1. *p.* 570, *&c.*

1. That

1. That this was a felony, that even by the common law before 1 *H.* 8. was exempt from clergy, being an act of hoſtility, and this I remember was given by *Noy* attorney general about 8 *Car.* 1. but poſſibly this may be doubtful as to the fact, whether at common law clergy were not allowable upon this offenſe, and if it were not, yet it is a greater doubt, whether that law were not altered by the act of 25 *E.* 3. *cap.* 4. *pro clero*, wherein clergy was ſettled in all caſes, except treaſons or felonies, that touch the king or his royal dignity.

2. Others have agreed, that clergy was taken away in theſe caſes of wilful burning by the ſtatutes of 23 *H.* 8. *cap.* 1. and 25 *H.* 8. *cap.* 3. and conſequently this offenſe not being enumerated in the ſtatute of 1 *E.* 6. *cap.* 12. is by the general concluding clauſe of that ſtatute reſtored to the benefit of clergy: But then they think, that by the ſtatute of 5 & 6 *E.* 6. *cap.* 10. the ſtatute of 25 *H.* 8. *cap.* 3. is wholly revived, and conſequently now the repeal of the exemption of clergy in caſe of wilful burning is repealed by the revival of the ſtatute of 25 *H.* 8. *cap.* 3. by the ſubſequent ſtatute of 5 & 6 *E.* 6. *cap.* 10. and thereby exemption from clergy in caſe of wilful burning is again eſtabliſhed.

But this hath in it many difficulties. 1. It ſeems by the whole ſcope of the preamble and the ſtrict penning of the [347] body of the act of 5 & 6 *E.* 6. *cap.* 10. that *that* act revived only ſo much of the act of 25 *H.* 8. *cap.* 3. as concerns the ouſting of felons of their clergy upon examination, where robberies or burglaries were committed in foreign counties. 2. Again, the ſtatute of 25 *H.* 8. took away clergy from wilful burning, only in caſes of indictment, and that only where the priſoner ſtands mute, anſwers not directly, or challengeth above twenty, but the ouſting of clergy in caſe of appeals, as well as indictments upon conviction by verdict or confeſſion ſtood purely upon the ſtatute of 23 *H.* 8. *cap.* 1. which is no where revived as to the point in queſtion, and yet that is the caſe, that muſt moſt ordinarily occur, namely, where the party is convict.

3 Therefore the laſt and I think the ſureſt anſwer as to this difficulty is, that the ſtatute of 3 & 4 *P.* & *M.* *cap.* 4. taking away clergy in all caſes from him that malitiouſly commands, hires, or counſels the wilful burning of any dwelling-houſe or barn with corn, in all caſes of conviction, attainder, ſtanding mute, outlawry, peremptory challenge of above twenty, or not directly anſwering, doth by neceſſary conſequence take away clergy in all theſe caſes from the principal offender in ſuch wilful burning.

But *quâcunque viâ datâ* the law ſtands ſettled, that clergy is taken away in all caſes from the principal in wilful burning of a dwelling-houſe or a barn with corn, *quod vide* 11 *Co. Rep. Alexander Poulter*'s caſe *per totum*.

And therefore I can by no means think, that outlawry of the principal in this offenſe is within the privilege of clergy, for the acceſſary even in that inſtance is exempt from *(e)* clergy by 4 & 5 *P. & M. cap.* 4.

Now as touching the acceſſary by the ſtatute of 4 & 5 *P. & M.* [348] *cap.* 4. they that ſhall malitiouſly command, hire, or counſel this fact, *viz.* acceſſaries *before*, are exempt from the benefit of clergy in all caſes.

But acceſſaries *after* are within the benefit of clergy in all caſes.

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

CHAP. XLVIII.

Concerning clergy in robbery from the houſe, *or* robbery from the perſon.

ROBBERY is of two kinds, from the perſon, and from the houſe of another.

Firſt, Robbery from the perſon is a violent aſſault upon the perſon, and felonious and violent taking away his goods putting him in fear.

The principal in caſe of robbery in or near the highway is ouſted of his clergy, *viz.*

1. By the ſtatute of 23 *H.* 8. *cap.* 1. "Where he is convicted by "verdict or confeſſion, whether it be in an appeal or an indictment.

2. By the ſtatute of 25 *H.* 8. *cap.* 3. "In an indictment, where "the party ſtands mute, will not directly anſwer, or challengeth "above twenty."

And in caſe the robbery were in or near the highway in the county of *A.* and he carry the goods into the county of *B.* and there be indicted of larceny, and upon examination it appears it was ſuch a rob-

(e) The MS. has it [*is ſubject to*] but both the ſtatute and the ſenſe require it ſhould be [*is exempt from.*]

bery

bery in the county of *A.* that had he been indicted in the county of *A.* he ſhould have been ouſted of his clergy by the ſtatute of 23 *H.* 8. *cap.* 1. the juſtices of the county of *B.* ſhall ouſt him of his clergy in the county of *B.* whether he be convicted, ſtand mute, challenges above twenty, or anſwers not directly.*

And tho this clauſe be repealed by the ſtatute of 1 *E.* 6. *cap.* 12. it is again revived by 5 & 6 *E.* 6. *cap.* 10. and [349] ſtands now in force as to all robberies, where the party, if convict, is to be ouſted of his clergy by the ſtatute of 23 *H.* 8. *cap.* 1.

But it extends not to any felony, where clergy is ouſted by any ſtatute after 23 *H* 8. *Co. P. C. cap.* 50. *p* 115. *Stamf. P. C. fol.* 128. *a.* (*).

If *A.* commits a robbery near the highway in the county of *B.* and takes away but to the value of 6*d.* yet if indicted for robbery in the county of *B.* he ſhall have judgment of death without benefit of clergy, but if he carry thoſe goods into the county of *C.* and there is indicted and pleads, and the jury find him guilty to the value of 6*d.* tho upon the evidence it appears that it was a robbery in the county of *B.* yet he ſhall not have judgment of death, becauſe as it now ſtands, it is but petit larceny *(a)*, where the priſoner is not to have his clergy but to be whipt, and the examination given by the ſtatute of 25 *H.* 8. is only to ouſt clergy, where demandable. *M.* 31 *Eliz. Moore's Rep. n.* 739. *p.* 550.

If a man be indicted for a robbery *in viâ regiâ* (†), or *in altâ viâ*, or *in altâ viâ regiâ*, and be convict, he ſhall be ouſted of his clergy by the ſtatute of 23 *H.* 8. but if it be laid to be in *in viâ regiâ pedeſtri ducent' de London ad Iſlington*, tho he be convict, he ſhall have his clergy; adjudged 38 *H.* 8. *Moore's Rep. n.* 16. *p.* 5.

But in that caſe it might have been laid *propè altam viam regiam*, and he ſhould have been ouſt of his clergy, for the words of the ſtatute are *in* or *near* the highway.

If a man be robbed upon the river *Thames*, or other public river within the body of a county, this is a robbery upon the king's highway, and may be ſo laid in the indictment, and the party ſhall be ouſted of his clergy upon theſe ſtatutes, and ſo it was agreed in *Hide's*

(*) *Vide Part* I. *p.* 518. But by 3 & 4 *W.* & *M. cap.* 9. the like clauſe is enacted as to all felonies, wherein clergy was ouſted by that or any other ſtatute.

(a) Vide Part I. *p.* 586.

(†) According to what our author ſays *Part* I. *p.* 535. if the indictment be laid only *in viâ regiâ*, this will not be ſufficient to ouſt clergy.

caſe at *Newgate*, *M.* 23 *Car.* 2. for the public ſtreams are highways, and therefore they are called *hault ſtreames le roy* (*).

But this ſtatute of 25 *H.* 8. extends not to ſtanding mute, or not directly anſwering in an *appeal*, but only in an *indictment*, and therefore,

3. The ſtatute of 1 *E.* 6. *cap.* 12. ouſts ſuch robbery of clergy as well in an appeal as indictment, where the offender ſtands mute, or will not directly anſwer.

But mentions nothing of challenging peremptorily above twenty, neither need it, for, as hath been ſaid (†), he ſhall be only put from his challenge, and the jury ſhall be charged to paſs upon him, and no conviction or *peine fort & aure* ſhall enſue upon his peremptorily challenging above twenty, as the law now ſtands.

But whereas *Stamf. Lib.* II. *cap.* 42. *fol.* 129. *b.* affirms, "That "upon all theſe ſtatutes, and in all the caſes mentioned in them there "are two caſes, wherein the offender in murder, robbery, &c. ſhall "have his clergy, namely, where the offender is outlawed, or convict "by battle," it is not true of the former, for outlawry is an attainder, and tho 23 *H.* 8. & 25 *H.* 8. ſpeak neither of outlawry nor attainder, yet the ſtatute of 1 *E.* 6. *cap.* 12. ſaith, if any perſon be *attaint* or convict of murder, &c. he ſhall be ouſted of clergy.

And the ſame law it is, if the appellee of robbery be vanquiſhed in an appeal, for he is thereby *convict*, and the ſtatute doth not mention only a conviction by twelve men, but *any perſon in due form of law attaint or* convicted *of murder*, &c.

And thus far concerning principals.

As touching acceſſaries by malitious commanding, hiring or counſelling any ſuch robbery, they are ouſted of clergy by 4 & 5 *P.* & *M.* *cap.* 4. in all caſes, namely being convict, ſtanding mute, not directly anſwering, or outlawed, &c.

But acceſſaries *after* having the benefit of clergy in all caſes.

Secondly, As touching a robbery from the houſe of any perſon.

This divides itſelf into theſe ſeveral heads.

[351] 1. Robbing in the dwelling houſe, the owner, his wife or family in the houſe and put in fear.

2. Robbing in the dwelling houſe, *any perſon* being in the houſe and put in fear.

(*) *Vide Par.* I. *f.* 536.

(†) *Supra*, *f.* 270.

3. Robbing

3. Robbing in the houſe or tent, the owner, his wife, or ſervants being in the houſe, tho not being put in fear.

4. Robbing a houſe, and no perſon being therein.

As to theſe in their order.

I. Robbing any perſon in his dwelling houſe or dwelling place, the owner or dweller, his wife, children, or ſervants being within the ſame and put in fear or dread by the ſame.

By the ſtatute of 23 *H.* 8. *cap.* 1. as well in an appeal as an indictment, the principal and acceſſary before the fact are ouſted of clergy in two caſes, namely,

1. If convict by verdict. 2. If convict by confeſſion.

By the ſtatute of 25 *H.* 8. *cap.* 3. there is farther proviſion made, but only in caſe of indictment, not of appeal, and only againſt the principal, but not the acceſſary *before* or *after*, *viz.* 1. If the principal ſtand mute of malice or froward mind. 2. If he challenge above twenty peremptorily. 3. If he will not directly anſwer.

There is farther proviſion made for ouſting of clergy, where robbers of houſes carry the goods into another county and be there indicted of larciny, if upon examination they ſhould be ouſted of clergy, had they been indicted in the firſt county; but, as hath been before obſerved,

1. This ouſting of clergy by examination in a foreign county refers only to ſuch robbery, as by the ſtatute of 23 *H.* 8. *cap.* 1. is ouſted of clergy, namely, where the owner, his wife, children, or ſervants are then in the houſe and put in fear, not to ſuch robberies, as by acts of parliament made ſince are put out of clergy. 2. In caſe of an arraignment in a foreign county, if the goods prove to be but of the value of 12*d.* here is no clergy to be demanded or allowd, being but petit larciny, and therefore no ouſting of clergy by examination.

Dorothy Cole (*) was indicted in *Suſſex* for ſtealing goods, upon the evidence it appeard, that ſhe broke a houſe in *Kent*, [352] and brought the goods into *Suſſex*, the jury found the goods to be of the value but of 7*s.* yet in as much as there was no putting in fear of the owner, his wife, or family, ſhe was to have the benefit of the ſtatute of 21 *Jac.* and could not be ouſted of it by examination, for tho by the ſtatute of 39 *Eliz. cap.* 15. clergy was taken away, yet the taking away of clergy upon examination in a foreign county extends only

(*) *Vide Part* 1. *p.* 518.

to robberies where clergy is taken away by 23 *H.* 8. but if it had been with a putting in fear, ſo that in caſe of a man he ſhould have been ouſted of his clergy, it deſerves conſideration, whether the woman, if under 10*s.* ſhould have been ouſted of the benefit of the ſtatute of 21 *Jac. cap.* 6. by examination, tho originally it were a burglary and robbery. *Sed de hoc infra.*

But theſe ſtatutes did not extend to any ſuch robbery, where 1. There was no putting in fear. 2. Where the owner, his wife, children or ſervants were not in the houſe, but only a ſtranger were there and put in fear. 3. Neither did they extend to one attaint by outlawry or battle. 4. The ſtatute of 25 *H.* 8. extended not to appeals.

As to the acceſſaries before the fact, by the ſtatute of 4 & 5 *P. & M. cap.* 4. it is enacted, "That if any ſhall command, hire, or "counſel any perſon to do any robbery in any dwelling houſe or "houſes, they ſhall be excluded from clergy in all caſes, *viz.* convict, "outlawd, ſtanding mute, &c.

Upon this ſtatute theſe things are obſervable.

1. It requires an actual robbing, *viz.* taking away ſome goods; a bare breaking of the houſe is not ſufficient.

2. It extends to a robbing, without mentioning *put in fear.*

3. It extends to outlawry, which 23 or 25 *H.* 8. extended not to.

4. It extends to appeals as well as indictments; but acceſſary *after* are in no caſe excluded from clergy.

[353] II. Robbing of any perſon by day or night, any perſon being then in the ſame houſe, and put in fear or dread thereby.

By the ſtatute of 1 *E.* 6. *cap.* 12. clergy is taken away in all caſes, *viz.* if he be attaint by outlawry or otherwiſe, convict by verdict, confeſſion, or wager of battle, ſtands mute, or will not directly anſwer: And this as well in appeals as indictments.

It is true, it mentions not peremptory challenge of above twenty, neither is it material for the reaſon before given.

But this ſtatute, tho it ſpeaks generally of breaking a houſe by day or by night, hath had this conſtruction always allowd, *viz.*

If the breaking of the houſe be in the night, then it muſt be ſuch a breaking as amounts to burglary, *viz.* with an intention to commit a felony, and then it ouſts clergy, if it be with a putting in fear.

If

If it be a breaking the houſe in the day-time, then it muſt be alſo a breaking, as hath an actual robbery joined with it, and then if there be a putting in fear alſo, the clergy is ouſted in all the caſes mentiond in this ſtatute.

But in both caſes there muſt be a putting in fear, otherwiſe this ſtatute ouſts not clergy.

This ſtatute therefore hath made theſe additions to the ſtatutes of 23 & 25 *H.* 8. *viz.* 1. It exempts burglary from clergy, tho there be no robbery, if there be a putting in fear. 2. If there be a burglary in the night, or robbery in the day committed in the houſe, and any ſtranger be then in the houſe and put in fear, it excludes from clergy, tho it be not the owner or any of his family. 3. It excludes the principal from clergy in all caſes, where he is not excluded by any of the two former ſtatutes *(b)*.

But again on the other ſide, it reſtores clergy to the acceſſary before the fact, tho convict by verdict or confeſſion, and repeals ſo much of the ſtatute of 23 *H.* 8. as excludes the acceſſary *before* from clergy. But as hath been ſaid, the ſtatute of 4 & 5 *P.* & *M. cap.* 4. takes off the clergy again from acceſſaries where there is a [354] robbery and a putting in fear, but not where there is only a burglary with a putting in fear, but without robbery; but acceſſaries *after* in all caſes have their clergy.

III. If any perſon be found guilty of robbing any perſon in any part of his dwelling houſe or dwelling place, the owner or dweller of the ſame houſe, his wife, children, or ſervants then being within the ſame, or in any other place within the precinct of the ſame houſe or place, ſuch offender ſhall not be admitted to his clergy, whether ſuch dweller or owner, his wife or children then and there being ſhall be ſleeping or waking. 5 & 6 *E.* 6. *cap.* 9.

And the ſame proviſion is made for excluding clergy, where a perſon ſhall commit a robbery in a booth or tent in any fair or market, the owner, his wife, children or ſervant being then in the ſame booth ſleeping or waking.

Upon this act we are to obſerve,

1. There muſt be an actual breaking of the houſe, ſuch a breaking as would make a burglary if committed in the night, and the indictment muſt run *fregit & intravit dominum manſionalem* J. S.

(b) Viz. in caſe of attainder by outlawry, and alſo in caſe of ſtanding mute, or not directly anſwering in an appeal.

præ-

præfato J. S. *uxore & liberis ſuis in eâdem domo exiſtent'*, and ſuch a breaking of the houſe muſt be provided in evidence: *vide ſupra, Lib.* I. *cap.* 44. *p.* 522.

2. The alleging of ſuch a breaking of the houſe is ſufficient to bring him within the ſtatute to ouſt him of his clergy, if it be proved, tho it be not alleged by the way of robbery, *viz. violenter & à perſonâ*, but only *è domo prædictâ*, for it countervails a robbery within this ſtatute.

If the ſervant ſteal goods out of his maſter's houſe in the day or night, the maſter, his wife and children being in the houſe, the ſervant is not to be ouſted of clergy by this ſtatute, for here is no breaking of the houſe.

If the ſervant unlatch a door, or turn a key in a door in the houſe and ſteal goods out of that room, tho if he had been a ſtranger, that had not to do in the houſe, he ſhould hereupon be ouſted of his clergy, yet it ſeems to me the ſervant ſhall not be thereupon ouſted
[355] of his clergy, for the opening the door in this manner is within his truſt and ſo no breaking of the houſe, nor robbery within this act, and the ſame law ſeems to be upon the ſtatute of 39 *Eliz. cap.* 15.

But if the ſervant break open a door, whether outward or inward, (as for the purpoſe a cloſet ſtudy, or counting-houſe,) and ſteal goods, this is a robbery and breaking the houſe within this ſtatute, as alſo within the ſtatute of 39 *Eliz.* for ſuch a breaking, tho by a ſervant in the night, would make burglary, for ſuch an opening is not within his truſt.

3. But there muſt not only be a breaking of the houſe, the owner, his wife, children or ſervants being within the ſame, but there muſt be alſo a felonious taking of the goods out of the houſe to exclude clergy by this ſtatute.

4. But a bare felonious taking of goods out of the houſe, whether by night or day without ſuch a breaking, as would make burglary, if done in the night, excludes not from clergy within this ſtatute.

5. This ſtatute both as to robbery in dwelling houſes or booths requires, that the dweller or owner, his wife, children, ſervants or ſervant be then within the houſe; ſo that the being of a ſtranger in the houſe excludes not clergy no more than upon the ſtatutes of 23 *H.* 8. *cap.* 1. *Stamf. P. C. fol.* 129. *b.*

6. It

6. It extends to no other caſe, but where the party is found guilty, *viz.* either by verdict or confeſſion, and not to outlawry, ſtanding mute, or not directly anſwering, therefore in all theſe caſes the offender ſhall have his clergy. *(c)*.

7. It extends to an appeal, as well as indictment.

8. It doth not exclude acceſſaries neither *after* nor *before* from clergy.

Neither doth the ſtatute of 4 & 5 *P. & M. cap.* 4. extend to acceſſaries in this caſe, but only where robbery is committed, and any perſon within the houſe put in fear.

So that upon this ſtatute all acceſſaries to the felony deſcribed by this ſtatute are to have their clergy.

IV. Robbing from the houſe goods to the value of 5*s.* in the day-time, no perſon being in the houſe. [356]

By the ſtatute of 39 *Eliz. cap.* 15. it is enacted, "That if any "perſon be found guilty by verdict, confeſſion, or otherwiſe for the "felonious taking away in the day-time of any money, goods or "chattels of the value of 5*s.* or upwards in any dwelling houſe or "houſes, or any part thereof, or in any outhouſe belonging or uſed "with the ſaid dwelling houſe, altho no perſons ſhall be in the ſaid "houſe or outhouſe at the time of the felony committed, ſuch per-"ſons ſhall be excluded from their clergy.

1. Altho this ſtatute ſpeak only of *felonious taking* in the body or purview, yet inaſmuch as in the preamble it ſpeaks of *robbery* of houſes, a bare taking of goods out of a houſe, no body therein, without an actual breaking of the houſe, ſuch as would make burglary were it in the night, is not ſuch a taking out of a houſe, as excludes from clergy, and thus it hath conſtantly obtained in practice againſt the opinion in *Popham's Reports* 84. *Bayne's* caſe *(d)*.

2. The indictment muſt run according to the ſtatute, *viz. quòd tempore diurno, ſcilicet inter horas &c. domum manſionalem* J. S. *fregit & intravit nullâ perſonâ in eâdem domo tunc exiſtente, & ibidem &c. in eâdem domo inventa adtunc & ibidem felonicè furatus fuit, cepit & aſportavit*, for breaking the houſe in the day without taking goods is no felony. 11 *Co. Rep.* 36. *a. b. Poulter's* caſe.

(c) But by 3 & 4 *W. & M. cap.* 9. clergy is taken away in theſe caſes alſo.

(d) This caſe therefore was not eſteemed to be law, *Kel.* 68. but now by 10 & 11 *W.* 3 *cap.* 23. clergy is taken away from all, who ſhall by night or day privately and feloniouſly ſteal to the value of 5*s.* in any ſhop, ware-houſe, coach-houſe or ſtable, or by 12 *Ann. cap.* 7. to the value of 40*s.* in any dwelling houſe or outhouſe thereto belonging, altho it be not broken, nor any perſon therein.

And

And if upon the evidence it fall out, that it was in the night, or that any perſon was in the houſe at the time, or that he ſtole, but broke not the houſe, he ſhall be found guilty of a ſimple felony and have his clergy, but not guilty according to the ſtatute *(e)*.

[357] But there need not either in this caſe, or upon the ſtatute of 5 & 6 *E.* 6. above-mentiond be a formal mention of a robbery, as is uſed in an indictment for robbery from the perſon, for *fregit domum* imports it.

3. It takes away clergy only from the principal, and that only where the perſon is convict by verdict, confeſſion, or otherwiſe, and therefore excludes not clergy, where the party ſtands mute, or is outlawd *(f)*, or will not directly anſwer, nor from the acceſſary. 11 *Co. Rep.* 36. *b. Poulter*'s caſe.

4. If a man break the houſe in the day-time with intent to ſteal, but ſteals nothing, this is no felony, but otherwiſe in caſe of breaking the houſe in the night with intent to ſteal, this is burglary 11 *Co. Rep.* 31. *b. Poulter*'s caſe.

If a man enter by the doors or windows open and ſteal goods, this excludes not clergy upon this ſtatute, nor upon the ſtatute of 5 & 6 *E.* 6. *cap.* 9. for it muſt be ſuch an act to make a robbery within either of theſe ſtatutes, as would make a burglary, were it in the night; it muſt be *fregit & intravit.*

And therefore the conſtant uſe at *Newgate* is, and always hath been upon theſe ſtatutes, that if a man enter the doors being open, and breaks open a cheſt and ſteals goods to the value of 5*s.* this ſhall not ouſt him of his clergy within this ſtatute, or the ſtatute of 5 & 6 *E.* 6. *c.* 9. *(g)*.

But if a man enters an houſe the outward doors being open, and when he is in the houſe, breaks open, or unlocks or unlatcheth an inward door and ſteals goods out of the room to the value of 5*s.* he ſhall be ouſted of his clergy upon this ſtatute, the ſame being done in the day-time no body being in the houſe; or if he ſteals goods of any value out of that inward room ſo opened by day or by night, the owner of the houſe, his wife, children, or ſervants being in the houſe,

(e) But theſe caſes are now provided againſt by 10 & 11 *W.* 3 & 12 *Ann* above-mentiond. *Vide Part* I. *p.* 564. *in notis.*

(f) Theſe caſes are ſince taken in by 3 & 4 *W. & M. cap.* 9. by which ſtatute clergy is alſo taken away from all who comfort, aid, abet, aſſiſt, counſel, hire, or command.

(g) Vide Part I. *p.* 523, 524, 527, & *Kel.* 69.

he

he ſhall be ouſted of his clergy, being indicted upon the ſtatute of 5 & 6 *E.* 6. *cap.* 9.

T. 16 *Car.* 2. *Simpſon*'s caſe *(h)* at *Cambridge* aſſiſes. *A.* being indicted upon the ſtatute of 39 *Eliz.* it was found by [358] ſpecial verdict, that *A.* breaking into the houſe by day, no body being in the houſe, and breaking open a chamber-door and a cheſt, took out goods to the value of 5 *s.* and laid them on the floor, and before he could carry them out of the houſe was taken: By the advice of all the judges of *England* he was ouſted of his clergy upon this ſtatute, for the taking them out of the cheſt was felony, and the ſtatute doth not alter the felony, but excludes from clergy, if it were done in the houſe, and of the value of 5 *s.* and none in the houſe.

Trin. 13 *Car.* 1. *Evans* & *Finch (i)* were indicted, for that they *tempore diurno, viz. circa horam* 12. did break *domum manſionalem* Hugonis Audley in the *Inner-Temple* London, *nullâ perſonâ in eâdem domo exiſtente*, and ſtole thence 40 *s.* Upon a ſpecial verdict found in this caſe, theſe points were reſolved.

1. That a chamber in an inn of court is *domus manſionalis* within this ſtatute.

2. That if no body were in the chamber at the time, tho others were in other chambers of the temple, yet this was a breaking of the *domus manſionalis* Hugonis Audley *nullâ perſonâ in eâdem domo exiſtente*, and maintains the indictment.

3. Becauſe only one of the perſons indicted did actually enter the chamber and took out the money, *viz. Evans*, and the other ſtood without upon the ladder and received it, *Evans* was excluded his clergy, and the other who ſtood upon the ladder and received the money had his clergy.

And poſſibly the ſame law may be upon the ſtatute of 5 & 6 *E.* 6. *cap.* 9. that he only, that enters the houſe in the day- [359] time without putting in fear, and actually takes the goods ſhall be excluded from clergy, and thoſe, that ſtand without the houſe and

(h) According to this ſtate of the caſe here was a breaking not only of *a cheſt*, but alſo of *a chamber-door*, which is on all hands agreed to be an act ſufficient to make a robbery within the ſtatute, and ſo the difficulty removed, which ariſes from this caſe, as ſtated above *Part* I. *p.* 524 & 527, and indeed as that caſe is reported in *Kelyng p.* 31. and *in hoc libro Part* I. *p.* 508. & *p.* 526. the queſtion about the cheſt or trunk ſeems to have been only with relation to the *taking away*, whether the taking goods out of a cheſt and laying them on the floor without carrying them out of the chamber was a *taking away* or *ſtealing* within the ſtatute, and not whether it was a *robbery*, for if it were a ſtealing, that would be clear by the breaking open the chamber-door.

(i) Cro. Car. 473. *vide Part* I. *p.* 527. 556.

are

are preſent and abetting, tho all principals, yet ſhall have their clergy, for I can ſee no difference in the caſes; *quære tamen (k)*.

But if it were a burglary, then as well thoſe without, that were preſent and aſſiſting, as thoſe within, ſhall be excluded from clergy by the general words of the ſtatute of 18 *Eliz. cap.* 7. *they that commit any manner of burglary*; and the like in rape and in murder.

And ſo I do take it without any difficulty, if *A. B.* & *C.* come to commit a robbery upon the perſon of a man, and *A.* only takes the money from the perſon, and *B.* and *C.* are preſent and aſſiſting, or if they break a houſe in the day-time and commit a robbery in the houſe putting in fear, tho *A.* only enters the houſe, and *B.* and *C.* watch without, they ſhall be all excluded from clergy, for they are all robbers.

And if it ſhould be otherwiſe, this great abſurdity would follow, that *B.* and *C.* that are preſent, aiding and aſſiſting in the robbery, ſhould have a greater privilege, where they are preſent and ſo principals in the felony, than they ſhould have had, if they had been abſent, and only acceſſaries before the fact, in which caſe the ſtatute of 4 & 5 *P. & M. cap.* 4. excludes them from clergy in all caſes.

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

(k) This doubt is now at an end, for by 3 & 4 of *W. & M. cap.* 9. clergy is excluded from all aiders, abettors, &c.

---

[360] CHAP. XLIX.

Concerning clergy *in* burglary.

BURGLARIES may be of two kinds. 1. Simple burglary, that hath no robbery joined with it. 2. Burglary, that hath robbery or theft joined with it.

1. The former of theſe is, when a man in the night-time breaks and enters a houſe to the intent to commit a robbery, theft, or other felony.

And this, as it had the benefit of clergy by the common law and by the ſtatute of 25 *E. 3. cap.* 4. *pro clero*, ſo it was not ouſted of clergy neither

neither by the ſtatute of 23 *H.* 8. nor the ſtatute of 25 *H.* 8. but the firſt ſtatute that ouſted clergy in burglary was 1 *E.* 6. *cap.* 12.

This ſimple burglary is again of two kinds. 1. Where any perſon is in the houſe and put in fear or dread. 2. Where no perſon is put in fear or dread, as poſſibly where no perſon is in the houſe, which yet taketh not away the offenſe of burglary. *Popham's Rep.* 42. *per omnes juſticiarios Angliæ*, or if any perſon being in the houſe, yet is ſleeping and perceives not the burglary till the next morning, *&c.*

1. In the *firſt* of theſe caſes of ſimple burglary, namely with putting in fear or dread, the ſtatute of 1 *E.* 6. *cap.* 12. takes away clergy from the principal in all caſes, *viz.* tho attaint by outlawry or otherwiſe, or convict, or ſtanding mute, or not directly anſwering, as appears by the ſtatute itſelf, and the interpretation made of it. *Stamf. P. C. fol.* 126. *a.* 11 *Co. Rep. Poulter's* caſe.

But clergy is not taken away from acceſſaries *before* or *after* by this or any other ſtatute, for as to the ſtatute of 4 & 5 *P. & M.* tho it take away clergy from thoſe, that maliciouſly command, or hire, or counſel any perſon to do any robbery in any dwelling houſe, yet unleſs there be a robbery in the dwelling houſe, as well as a burglary, it takes not away clergy from the acceſſary *before* [361] *(a)*, nor at all from the acceſſary *after*.

2. As to the *ſecond* kind of ſimple burglary without putting in fear, the ſtatute of 18 *Eliz. cap.* 7. generally takes away clergy from all perſons that ſhall commit any manner of burglary in three caſes. 1. If he be outlawed for it. 2. If he ſhall be found guilty of it by verdict, or 3. If upon his arraignment he ſhall confeſs it.

But in all other caſes of ſtanding mute, or not directly anſwering he is to have his clergy (*).

And therefore, if a man be generally indicted of burglary without purſuing the ſtatute of 1 *E.* 6. *cap.* 12. *viz.* without alleging in the indictment, that the owner, his wife, children or ſervant were in the houſe and put in fear, the priſoner ſtanding mute, or not directly anſwering ſhall have his clergy, (namely, where the indictment is general,) notwithſtanding the ſtatute of 18 *Eliz. cap.* 7.

But the acceſſaries as well *before* as *after* are within privilege of clergy, for neither this nor any other ſtatute hath excluded them *(a)*.

(*) By the ſaid ſtatute of 3 & 4 of *W. & M.* clergy is taken away alſo in caſes of ſtanding mute, or not directly anſwering.

(a) But by 3 & 4 of *W. & M. cap.* 9. clergy is taken away from the acceſſary before the fact.

II. But

II. But now as to burglary joined with larceny or robbery in the dwelling houſe, this again is of two kinds, either with putting in fear, or without putting in fear.

If with putting in fear, then by the ſtatute of 23 *H.* 8. *cap.* 1. & 25 *H.* 8. *cap.* 3. the owner or dweller, his wife, children, or ſervants being within the houſe and put in fear, the offender is ouſted of his clergy, not upon the account of the burglary ſimply conſidered, but upon the account of the robbery, if the party be found guilty by verdict or confeſſion, or ſtand mute, or will not directly anſwer.

But by the ſtatute of 1 *E.* 6. *cap.* 12. he is excluded from clergy in all caſes, if any perſon were in the houſe and put in fear.

[362] And altho as to the acceſſaries *before*, the ſtatute of *E.* 6. *cap.* 12. reſtores clergy unto them, yet by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. clergy is in this caſe taken away from acceſſaries before the fact, *viz.* counſellors, or commanders to do any robbery in a manſion-houſe are ouſted of clergy in all caſes.

But if it were a burglary joined with robbery of goods out of the houſe, whether the party were put in fear or not, the principal is ouſted of clergy by the ſtatute of 18 *Eliz. cap.* 7. upon the ſingle account of the offenſe of burglary, (if the offender be outlawed or convict by verdict or confeſſion,) for that ſtatute as to the point of clergy is not at all concerned as to the robbery, but ſingly upon the account of burglary the clergy is ouſted, tho he be acquit of the robbery or larceny.

But then as to the acceſſaries before the fact it is conſiderable, whether in burglary joined with robbery without putting in fear the acceſſary ſhall be ouſted of clergy by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. it ſeems to me to be with this difference.

If the principal be indicted upon the ſtatute of 5 & 6 *E.* 6. *cap.* 9. ſpecially, ſetting forth, that the offender *felonicè & burglariter fregit domum* J. S. *prædicto* J. S. *uxore, liberis & ſervientibus ſuis in eâdem domo exiſtentibus*, and ſtole the goods in the ſame houſe, then the acceſſary to ſuch an indictment ſhall be arraigned and tried, and if convicted ſhall be ouſted of his clergy by force of the ſtatute of 4 & 5 *P.* & *M. cap.* 4.

But if in that caſe the principal be convict of the burglary, but acquit of the robbery, the acceſſary ſhall have his clergy, for the ſtatute of 4 & 5 *P.* & *M.* doth not exclude the acceſſary from clergy, but where there was a robbery.

And

And again, if the principal be indicted generally of burglary and robbery without forming the indictment either upon 23 *H.* 8. of putting in fear, or upon the ſtatute of 5 & 6 *E.* 6. the owner, his wife or children being in the houſe, tho the principal be convicted and ouſted of his clergy by the ſtatute of 18 *Eliz.* yet the [363] acceſſary ſhall have his clergy, altho here were a robbery committed in the dwelling houſe, and ſo within the ſtatute of 4 & 5 *P.* & *M.* *cap.* 4. and the reaſons are apparent.

1. Becauſe the principal is not ouſted of his clergy in reſpect of the robbery, for that not being laid according to either of the ſtatutes of 23 *H.* 8. or 5 & 6 *E.* 6. if there were no burglary in the caſe, he ſhould have had his clergy, and he is ouſted of his clergy merely upon the account of the burglary by the ſtatute of 18 *Eliz.* *cap.* 7. and not of the robbery, becauſe not laid purſuant to either of theſe ſtatutes of 23 *H.* 8. & 5 & 6 *E.* 6. and the ſtatute of 4 & 5 *P.* & *M.* ouſts the acceſſary of clergy in relation to the robbery in the dwelling houſe, and not in relation to the burglary.

2. Becauſe the ſtatute of 4 & 5 *P.* & *M.* cannot at all have any reſpect to the ſtatute of 18 *Eliz.* which was made twenty years after, and at the time of the ſtatute of the queen neither ſimple burglary, nor burglary joined with robbery had ouſted the principal of clergy, unleſs the robbery were purſuant to the ſtatutes of 23 *H.* 8. or 5 & 6 *E.* 6. which is not laid in the indictment purſuant to either, and therefore the acceſſary could not be ouſted of clergy by 4 & 5 *P.* & *M.* in this caſe, when if the principal himſelf had been indicted of burglary and robbery generally, he ſhould have had his clergy both as to the burglary and as to the robbery; ſo that upon a general indictment of the principal of burglary and robbery in the houſe, the acceſſary can in no ſort be excluded of clergy, unleſs the principal be ſpecially indicted of the robbery purſuant to the ſtatute of 23 *H.* 8. the owner, his wife or children being in the houſe and put in fear, or according to the ſtatute of 5 & 6 *E.* 6. *cap.* 9. the owner, his wife or ſervants being in the houſe, for tho the principal upon a general indictment of burglary and robbery may be ouſted of his clergy by the ſtatute of 18 *Eliz.* if found guilty of the burglary, yet he cannot be ouſted of his clergy upon the account of the robbery, becauſe not particularly laid according to the old ſtatutes, and conſequently the acceſſary muſt [364] in that caſe have his clergy *(b)*.

(b) But as to this point the law is now altered, for by 3 & 4 *W.* & *M.* *cap.* 9. clergy is taken away from the acceſſary *before* in all caſes of burglary.

But in all caſes acceſſaries *after*, muſt have their clergy.

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

CHAP. L.

Concerning clergy *in* ſimple larceny *and other felonies.*

I Come now to conſider of ſome other kinds of felonies, wherein clergy is taken away, and eſpecially in larcenies of ſeveral kinds.

1. Stealing of horſes. 2. Sacrilege. 3. Taking from the perſon *clàm & ſecretè*. 4. Servants robbing their maſters. 5. Taking clothes off from racks. 6. Stealing king's ſtores. 7. Taking away women againſt their wills. 8. I ſhall conſider of piracies and robberies upon the ſea. 9. Concerning clergy of priſoners arraigned before the ſteward and marſhal.

I. By the ſtatute of 1 *E.* 6. *cap.* 12. the felonious ſtealing of horſes, mares or geldings is put from the privilege of clergy.

1. If the perſon be attainted. 2. Or convict by verdict or confeſſion. 3. Or ſtands mute. 4. Or will not directly anſwer. This was in effect enacted before by 37 *H.* 8. *cap.* 8. but it was neceſſary to be re-enacted here, becauſe otherwiſe the general clauſe in the act of 1 *E.* 7. *cap.* 12. reſtoring clergy in all caſes where they had it before 1 *H.* 8. had reſtored clergy in this caſe.

[365] There aroſe a doubt, whether, if there were one horſe, mare, or gelding ſtolen, the offender ſhould have had clergy; and the reaſon of the doubt was not ſingly, becauſe the ſtatute of 1 *E.* 6. was in the plural number, *horſes*, *mares*, or *geldings*, for then it might as well have been a doubt, whether upon the ſtatute of 23 *H.* 8. *cap.* 1. he, that had wilfully burned one houſe, ſhould not have had his clergy, becauſe the words of that ſtatute are in the plural number *dwelling houſes* or *barns*; and ſo for robbing any *churches* or *chapels*.

But the reaſon that made the ſcruple was, becauſe the ſtatute of 37 *H.* 8. *cap.* 8. was expreſly penned in the ſingular number, *If any man do ſteal any horſe, mare or filly:* and then this ſtatute of 1 *E.* 6. thus varying the number, and yet expreſly repealing all other excluſions of clergy introduced ſince the beginning of *H.* 8. made ſome doubt, whether

whether it were not intended to enlarge clergy, where only one horſe was ſtolen.

To remove this doubt was the ſtatute of 2 & 3 *E.* 6. *cap.* 33. whereby clergy is excluded from him that ſteals one horſe, gelding or mare in all the caſes of attainder, conviction, ſtanding mute, or not directly anſwering.

Theſe ſtatutes exclude the principal from clergy in all theſe caſes, but the acceſſary *before* or *after* have the privilege of clergy. 1 *Mar. Dy.* 99 *a.*

But by the ſtatute of 31 *Eliz. cap.* 12. *in fine ſtatuti* acceſſaries both *before* and *after* in horſe ſtealing are ouſted of clergy, as the principal ought to be.

II. As to ſacrilege, *viz.* the felonious taking of any goods out of any pariſh church, or other church or chapel, the principal is ouſted of clergy by the ſtatutes of 23 *H.* 8. *cap.* 1. 25 *H.* 8. *cap.* 3. and laſtly by 1 *E.* 6. *cap.* 12. in all caſes above-mentioned.

And by the ſtatute of 23 *H.* 8. *cap.* 1. the acceſſary *before*, if found guilty by verdict or confeſſion, was of clergy, but that is repealed by 1 *E.* 6. *cap.* 12. as to all acceſſaries.

And the ſtatute of 4 & 5 *P.* & *M. cap.* 4. extends not to [366] this caſe, for it takes away clergy from robbery of any dwelling houſe, but doth not extend to robbing of churches or chapels *(c)*.

And certainly clergy was not taken away in caſe of ſacrilege at common law, or if it were, yet the ſtatute of 25 *E.* 3. *pro clero cap.* 4. reſtored clergy in that caſe as well as others, and the ſtatutes of 23 *H.* 8. & 1 *E.* 6. had been needleſs in this caſe, if ſacrilege were ouſted of clergy at common law, and accordingly in the book of 26 *Aſſiz.* 19. *(d)* and conſequently it is miſtaken in *Poulter*'s caſe 11 *Co. Rep.* 29. *b.*

III. As to picking of pockets, by the ſtatute of 8 *Eliz. cap.* 4. "If "any perſon be indicted or appealed for felonious taking any money, "goods, or chattels from the *perſon* of another *privily without his* "*knowledge* in any place whatſoever, and be found guilty by twelve "men, or confeſs upon his arraignment, or be outlawed, or ſtands "obſtinately mute, or will not directly anſwer, or challenge peremp- "torily above twenty, he ſhall be excluded from clergy.

(c) But if this ſhould be conſtrued a burglary, as it ſeems to be according to the book of 22 *Aſſiz.* 95. then clergy would be excluded from the acceſſaries *before*, by the 3 & 4 of *W.* & *M. cap.* 9.

(d) Vide accordant 26 *Aſſiz.* 27. *Corone* 193. *Vide contra* 20 *E.* 2. *Corone* 283. but according to *Stamf. P. C. fol.* 123. *b.* it was left to the diſcretion of the ordinary to claim him or not. *Vide Co. P. C. p.* 114.

Upon this ſtatute theſe things are obſervable.

1. It muſt be taken from the *perſon*.

2. It muſt be taken *privily without his knowledge*, and ſo laid in the indictment, otherwiſe he ſhall have his clergy.

3. The goods muſt be above the value of 12*d*. for tho in robbery of never ſo ſmall a value clergy is ouſted, becauſe done *violently*, yet here it is otherwiſe, for if it be not above the value of 12*d*. it is but petit larceny, for the ſtatute did not intend to alter the nature of the crime, but to exclude clergy, where it was grand larceny. *Co. P. C. cap.* 16. *p.* 68. *(e)*.

[367] 4. It doth not ouſt the acceſſary either *before* or *after* of the privilege of clergy.

IV. Concerning ſervants carrying away their maſters goods to the value of 40*s*. this was made felony by the ſtatute of 21 *H.* 8. *cap.* 7. *(f)*. And by the ſtatute of 27 *H.* 8. *cap.* 17. clergy was taken away.

By the ſtatute of 1 *E.* 6. *cap.* 12. reſtoring clergy in all caſes, as it was before 1 *H.* 8. except the caſes mentioned in that ſtatute, clergy is reſtored to that offenſe.

By the ſtatute of 1 *Mar. cap.* 1. repealing all felonies enacted ſince 1 *H.* 8. the very act itſelf of 21 *H.* 8. making this felony is repealed.

But by the ſtatute of 5 *Eliz. cap.* 10. the ſtatute of 21 *H.* 8. is again re-enacted to have continuance for ever; but the ſtatute of 27 *H.* 8. *cap.* 17. taking away clergy in that offenſe is not revived and ſo clergy ſtands allowable as to that offenſe at this day *(g)*.

V. By a ſtatute made the 22 *Car.* 2. *cap.* 5. clergy is taken away from thoſe that ſteal clothes off the racks, with power in the judge to tranſport them to the king's plantations *(h)*.

VI. By

(e) Vide Part I. *cap.* 44. *p.* 529.

(f) This ſtatute is to be taken ſtrictly with relation to ſuch goods, as are actually delivered to keep by the *maſter* or *miſtreſs*. *Dy.* 5. *a.* 6. for as to other goods, it was a felony at common law, tho under the value of 40*s*. but where there was a delivery, the ſervant being in lawful poſſeſſion, it could not at common law be a felony, *vide Part* I. *p.* 667. Otherwiſe therefore it is in the caſe of a lodger ſtealing goods or furniture belonging to his lodgings, becauſe he is not intruſted with the poſſeſſion, but only with the uſe, and therefore it was felony at common law; *vide Part* I. *p.* 506. however to obviate all doubt, it is enacted and declared by 3 & 4 *W.* & *M. cap.* 9. "That if "any perſon or perſons ſhall take away with "an intent to ſteal, imbezzle, or purloin "any chattel, bedding or furniture, which "by contract or agreement he or they are "to uſe, or ſhall be let to him or them to "uſe in or with ſuch lodging, ſuch taking, "imbezzelling, or purloining ſhall be to "all intents and purpoſes taken, reputed "and adjudged to be larceny and felony, "and the offender ſhall ſuffer as in caſe of "felony.

(g) But ſince our author wrote is taken away again by 12 *Ann. cap.* 7. from all perſons, (except apprentices under the age of fifteen years, who ſhall rob their maſters,) if the offenſe be committed in a dwelling houſe or outhouſe.

(h) By 4 *Geo.* 2. *cap.* 16. the ſtealing linen, fuſtian, &c. from any whitening ground