thoſe that are of that party, and that came for that purpoſe, tho in other rooms of the ſame houſe, ſhall be ſaid to be preſent. *Dalt. cap.* 93. *p.* 241. *(f)*

The lord *Dacre* and divers others came to ſteel deer in the park of one *Pelham*, *Rayden* one of the company *killed* the keeper in the park, the lord *Dacre* and the reſt of the company being in other parts of the park, it was ruled, that it was murder in them all, and they died for it. *Crompt.* 25. *a Dalt. ubi ſupra*, 34 *H.* 8. *B. Coron.* 172. *(g)*

The like in caſe of burglary, tho ſome ſtood at the lane's end or field-gate to watch if any came to diſturb them, *Co. P. C. p.* 64. 11 *H* 4. 13. *b.* yet they are ſaid to be burglars, becauſe preſent, aiding, and aſſiſting to the burglary.

II. Who ſhall be ſaid abetting, aiding and aſſiſting.

If *A.* comes and kills a man, and *B.* runs with an intent to be aſſiſting to him, if there ſhould be occaſion, tho *de facto* he doth nothing, yet he is principal being preſent, as well as *A.* 3 *E.* 3. *Coron.* 309.

[440] If divers come with one aſſent to do miſchief, *(male faire)* as to kill, rob or beat, and one doth it, they are all principals in the felony, *&c.* 3 *E.* 3. *Coron.* 314.

If *A.* and divers others in his company intending to rob a perſon charge him with felony, and as they are carrying him to gaol, ſome of the company rob the perſon attached, this is robbery in all, but if the reſt of the company come without any ſuch intent, it ſeems they are not guilty. 3 *E.* 3. *Coron.* 350.

If *A.* comes in company with *B.* to beat *C.* and *B.* beats *C.* that he die, *A.* is principal, but then, according to thoſe elder times, the indictment muſt not be only, that he was preſent, aiding, and aſſiſting, for that, as the law was then taken, makes him only acceſſary, but the indictment muſt ſhew the ſpecial matter, that they came to that intent, 19 *E.* 2. *Coron.* 433. but now that courſe is altered, and the indictment only runs, that *A.* was preſent, aiding, and aſſiſting, and that is ſufficient to make him principal.

So if *A.* being preſent commands *B.* to kill *C.* and he doth it, both are principals. 13 *H.* 7. 10. *a. (h)*

(f) New Edit. cap. 145. *p.* 472.

(g) See alſo *Moor* 86. *Kelynge* 56.

(h) This caſe was ſomething more than a bare command, for one held him, while the other killed him; but what our author here ſays is more directly proved by the caſe in 4 *H.* 7. 18. *a.*

If

If many be preſent, and one only gives the ſtroke, whereof the party dies, they are all principals, if they came for that purpoſe. 21 *E.* 4. 71. *a.*

The caſe of *Drayton Baſſet* reported by Mr. *Crompton*, *fol.* 28. was this: *A.* with thirty others and more entered with force upon the manor-houſe of *Drayton Baſſet*, and ejected *B.* his children, and ſervants out of the ſame; afterwards twenty others on the behalf of *B.* three days after, in the night, came with weapons with intent to reenter, and one of the twenty, about ten of the clock in the night, caſt fire into a thatcht houſe adjoining to the houſe, whereupon one that was in the houſe ſhot off a gun, and *killed* one of the party of *B.* and then the reſt of the party of *B.* fled, and *A.* and his company continued the forcible poſſeſſion of the houſe for many days after, whereupon *A.* and twenty-ſeven more were indicted of murder, and arraigned in the king's bench, and the matter aforeſaid given [441] in evidence againſt him, and *Mich.* 22 & 23 *Eliz.* he was found guilty of manſlaughter, & *divers autres de rioters, que fueront in le meaſon al temps, que le home fuit tue, fueront arraigns come principals, coment que ne aſſent al ſetter del gunne ne al tuer, purceo que fueront la illoyalment aſſemblies, & in forcible manner gard le meaſon oue* A. *que fuit convict.*

And conſonant to this is Mr. *Dalton*, *p.* 241. *(i)* in theſe words: "Note alſo, that if divers perſons come in one company to do any "unlawful thing, as to kill, rob or beat a man, or to commit a riot, "or to do any other treſpaſs, and one of them in doing thereof kill "a man, this ſhall be adjudged murder in them all that are preſent of "that party abetting him, and conſenting to the act, or ready to aid "him, altho they did but look on.

A man ſeizeth the goods of a *Frenchman* in time of war, and carries them to his houſe, a ſtranger pretending to be deputy-admiral with a great multitude of men came with force to the houſe, where the goods were, and at the gate of the houſe made an aſſault upon them that were in the houſe, a woman iſſued out of the houſe without any weapon, and is *killed* by one of the ſervants, who came to take the goods, by throwing a ſtone at another, that was in the gate, and the perſon, that came to ſeize the goods, ſaid, (before his coming) he would make him *a cokes* that kept the goods and would make him to know the baſeſt in his houſe. By five judges, two ſerjeants, the queen's

(i) *New Edit. p.* 472.

attorney,

attorney, and ſolicitor, it was held, that if it appear that the woman came in defenſe of the maſter of the houſe, then it was murder in the vice-admiral and all his companions: but by other five judges contrary, for no malice was againſt the woman, and murder ſhall not be extended further, than it was intended, and the former held, that if *A.* and *B.* fight by appointment before-hand, and a ſtranger comes between them to part them, and he is *killed* by *A.* it is murder in him, and ſome ſaid in both, but the others *noluerunt ad hoc concordare*. *Manſell* and *Herbert*'s caſe, *H.* 2 & 3 *P. & M. Dyer* 128. *b.*

[442]

That point, wherein the judges differed, was whether the miſtake of the perſon excuſeth it from murder, but it ſeems not queſtioned, but all agreed it manſlaughter, and that not only in him, that gave the blow but in all the companions of that party: but now the former point is ſufficiently ſettled, that if it had been murder, in caſe the man had been *killed*, that was meant, it is murder in killing the woman, and that, whether ſhe came as a partizan to *Manſell*, the owner of the houſe, or not, *quod vide ſupra*: and in the laſt caſe put, in *Herbert*'s caſe before, it is certainly murder in him that kills the man that comes to part them, and if it had been only a ſudden quarrel, it had been manſlaughter in him that kills him, and *Dalt. cap.* 93. *p.* 240. *(k)* yea, and if the combating were by malice prepenſe, it is held, that the killing of him, that comes to part them, is murder in both, and both were hanged for it, becauſe each of them had a purpoſe to have kild the other. 22 *E.* 3. *Corone* 262. *Lambert* out of *Dalliſon*'s report, *p.* 217. but that ſeems to me to be miſtaken, it is not murder in both, unleſs both ſtruck him that came to part them; and by the book of 22 *Aſſ.* 71. *Coron.* 180. (which ſeems to be the ſame caſe, tho more at large,) he only that gave the ſtroke, had judgment, and was executed. *(l)*

And therefore it is a miſtake in thoſe that ſay, if it be not known which of them did it, they ſhall both have judgment, for the jury ought preciſely to inquire, and upon circumſtances to ſatisfy themſelves, whether the one, or the other, or both did it, and neither to acquit, nor convict both, becauſe they know not who did it.

(*k*) *New Edit. cap.* 145. *p.* 472.

(*l*) The other doth not appear to have been before the court, but upon putting the caſe, the court ſaid, he that ſtruck is guilty of felony, but ſaid nothing as to him, who did not ſtrike.

But

But to return to the aiders and abetters again.

By the caſes of *Drayton Baſſet* and *Herbert* it appears, that if many come to commit a riotous unlawful act, if in the purſuit of that action one of them commits murder or manſlaughter, they are all guilty, that are of that party, that committed the diſorder; wherein nevertheleſs theſe things muſt be obſerved. [443]

1. In that caſe it muſt be intended, when one of the ſame party commits the murder or manſlaughter upon one of the other party, or upon thoſe that came to appeaſe or part them, or by due courſe of law to diſperſe them.

And therefore I have always taken the law to be, that if *A.* and *B.* have a deſign to fight one with another upon premeditation or malice, and *A.* takes *C.* for his ſecond, and *B.* take *D.* for his ſecond, *A.* kills *B.* in this caſe *C.* is principal, as preſent, aiding, and abetting, but *D.* is not a principal, becauſe he was of the part of him, that was killed, and yet I know, that ſome have held, that *D.* is principal as well as *C.* becauſe it is a compact, and rely much upon the book of 22 *E.* 3. *Coron.* 262. before-mentioned, but, as I think, the law was ſtrained too far in that caſe, and ſo it is much more in making, *D.* a principal in the death of *B.* that was his friend, tho it be, I confeſs, a great miſdemeanor, yet I think it is not murder in *D.*

And the books in all the inſtances of this nature ſay, that it is murder or manſlaughter in that party, that abetted him (*), and conſented to the act, but *D.* never abetted *A.* to kill *B.* but abetted *B.* indeed to have killed *A.*

2. It muſt be a killing in purſuit of that unlawful act, that they were all engaged in, as in the caſe of the lord *Dacre* before-mentioned, they all came with an intent to ſteal the deer, and conſequently the law preſumes they came all with intent to oppoſe all that ſhould hinder them in that deſign, and conſequently when one killed the keeper, it is preſumed to be the act of all, becauſe purſuant to that intent: but ſuppoſe, that *A. B.* and *C.* and divers others come together to commit a riot, as to ſteal deer, or pull down incloſures, and in their march upon the deſign, *A.* meets with *D.* or ſome other with whom he had a former quarrel, or that by reaſon of ſome collateral provocation given by *D.* to *A. A.* kills him without any

(*) *viz.* who committed the homicide.

abetting by any of the reſt of his company, this doth not make all the party of *A.* tho preſent, to be therefore aiding and abetting, and conſequently principals in this murder or manſlaughter, which was accidental, and not within the compaſs of their original intention. [444]

But if, when they had come to ſteal the deer, or throw down the incloſure, any had oppoſed them in it, either by words or actual reſiſtance, and *A.* had killed him, it had been murder in all the reſt of the company, that came with the intent to do that unlawful act, tho there were no expreſs intention to kill any perſon in the firſt enterprize, becauſe the law preſumes they come to make good their deſign againſt all oppoſition.

And this is the reaſon of the book 3 *E.* 3. *Coron.* 350. where many came to commit a diſſeiſin, and one was killed, and all that were of the company were arraigned as principals, and the fact found and they were condemned, tho the jury ſaid they did nothing *(de male volunt)* of malice, but were of the company; tho poſſibly, as the circumſtances of that caſe were, it was only manſlaughter, as in the caſe of *Drayton Baſſet*, becauſe it was upon a ſudden, and upon a pretenſe of title.

3. Again, altho if any come upon an unlawful deſign, and one of the company kills one of the adverſe party in purſuance of that deſign, all are principals; yet if many be together upon a lawful account, and one of the company kills another of an adverſe party without any particular abetment of the reſt to this fact of homicide, they are not all guilty that are of the company, but only thoſe, that gave the ſtroke, or actually abetted him to do it.

There is a common nuiſance committed in the highway by *A. B. C. D.* in the vill of *M.* and *E. F. G. H. J. &c.* and twenty more of the inhabitants of *M.* come to remove the nuiſance, *A. B. C.* and *D.* oppoſe, *F.* ſtrikes *A.* ſuddenly, and kills him, *F.* is guilty of manſlaughter, but the reſt of the party of *F.* are not therefore guilty, barely upon this account that they were of the company, but only ſuch of the company, as did actually aſſiſt or abet *F.* to ſtrike or kill *A.*

But if in truth it were no nuiſance, but an act that was lawfully done by *A.* and then *A.* had been killd by *F.* all the reſt of the party and company of *F.* had been guilty, that came with deſign to remove *that* which they thought a nuiſance, but was not, becauſe it was a riotous and unlawful aſſembly. [445]

If

If *A.* hath a good title to his houſe, or hath been in poſſeſſion thereof for three years, (in which caſe he may detain it with force by the ſtatute of 8 *H.* 6. *cap.* 9.) if any perſon comes to rob him or kill him, and he ſhoot and kill him, it is not felony, nor doth he forfeit his goods, as in caſe of homicide *ſe defendendo.* 11 *Co. Rep.* 82. *b.* 5 *Co. Rep.* 91. *b.*

But if *A.* comes to enter with force, and in order thereunto ſhoots at his houſe, and *B.* the poſſeſſor, having other company in his houſe, ſhoots and kills *A.* this is manſlaughter in *B.* and ſo it is ruled 5 *Eliz.* in *Harcourt*'s caſe, *Crompt.* 29. *a. Dalt. cap.* 78. *p.* 105. *(m). Ibid. cap.* 98. *p.* 250. *(n)*

And in this caſe, if *B.* ſhoots out of his houſe, and killeth *A.* I think it plain, that it is not felony in the reſt of the houſehold, nay, tho he had hired extraordinary company to help to guard his houſe upon ſuch an occaſion, (as by law it ſeems he may do, notwithſtanding the opinion of *Crompton, fol.* 70. *a.* to the contrary, *vide* 21 *H.* 7. 39. *a.* 5 *Co. Rep.* 91. *b. Seaman*'s caſe, 11 *Co. Rep.* 82. *b. Lewes Bowle's* caſe) yet this is not man-ſlaughter in the reſt of the company, becauſe the aſſembly was lawful and juſtifiable.

And therefore in that caſe, no others of the company, that are in the houſe, ſhall be ſaid guilty, but only ſuch as actually abet him to do the fact; and theſe indeed will be principals by reaſon of actual abetting, but not barely upon the account of being in the houſe, and of the ſame company, becauſe the aſſembly to defend the houſe by lawful means was lawful.

But in the caſe of a riotous aſſembly to rob, or ſteal deer, or do any unlawful act of violence, there the offenſe of one is the offenſe of all the company; as in the caſe of the lord *Dacre*, and of the houſe of *Drayton Baſſet*, where there was firſt a riotous and unlawful entry, and keeping poſſeſſion by thoſe that ſhot.

4. If there be many, that are preſent, abetting, aiding, and aſſiſting, tho all may, as in the caſes afore ſhewn, [446] be guilty of homicide, yet upon different circumſtances ſome may be guilty of homicide, and not of murder, others may be guilty of murder; *vide* the caſe of *Saliſbury* before, *Plowd. Com.* 101. *a.* The maſter aſſaults with malice prepenſe, the ſervant being ignorant of the malice of his maſter, takes part with his maſter, and kills the other, it is manſlaughter in the ſervant, and murder in the maſter.

(m) *New Edit. cap.* 137. *p.* 427. (n) *cap.* 150. *p.* 483.

Upon a ſudden falling out between *A.* and *B.* in the ſtreet, *B.* gathers many of his friends together to aſſault *A.* and *A.* doth the like, the conſtable, and ſome in his aid, come to part the affray, and keep the peace. *A.* hath notice, that he is the conſtable, but divers of his company know it not, nor could reaſonably or probably know it, *A.* kills the conſtable, this is murder in *A.* but the reſt of his company, that knew it not, are not guilty of the murder.

But ſuch of them, as knowing it to be the conſtable, yet abetted *A.* to kill him, are guilty of murder, thoſe that knew it not, and yet abetted *A.* to kill him, are guilty of manſlaughter; and thoſe, that neither knew him to be the conſtable, nor did actually abet nor aſſiſt *A.* to kill him, are not guilty, as it ſeems, becauſe this was a new emergency, and out of the bounds and verge of the quarrel, wherein they were before engaged, and ſuch whereunto theſe were not privy; *quod tamen quære.*

See Foſter 121—131. and his diſcourſe III. p. 341.—per tot. 4 Blackſ. Com. ch. 3. p. 34—40. See Index to 1 Hawk. *P.* C. tit. Acceſſary.

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447 CHAP. XXXV.

Concerning the death of a perſon unknown, *and the proceedings thereupon.*

BECAUSE this chapter as well concerns *murder* as *manſlaughter*, before I come to examine the particular offenſes themſelves, I ſhall ſubjoin a few words touching this title.

Anciently there was a law introduced by *Canutus* the *Dane*, that if any man were ſlain in the fields, and the manſlayer were unknown, and could not be taken, the townſhip, where he was ſlain, ſhould be amerced to ſixty-ſix marks (*), and if it were not ſufficient to pay it, the hundred ſhould be charged, unleſs it could be made appear before the coroner, upon the view of the body, that the party ſlain were an *Engliſhman*, and this *making it appear* was various, according to the cuſtom of ſeveral places, but moſt ordinarily it was by the teſtimony of two males of the part of the father of him that was ſlain, and by two females of the part of his mother.

(*) See the laws of *Edward* the confeſſor, *Lib.* XV. & XVI. by which it appears the amerciament was XLVI. marks, and not LXVI. marks, as *Bracton* ſays, which miſtake might probably be occaſioned, as *Wilkins* obſerves in his notes *ad Leg. Anglo-Sax. p.* 280. by the tranſpoſition of the numeral letters L and X.

And

And this amercement was uſually called *murdrum*; and the preſentment and proof, that the party ſlain was an *Engliſhman*, was called *Engleſbury*, and preſentment of *Engleſbury*.

And this was therefore provided to avoid the ſecret murder of the *Danes*, who were hated by the *Engliſh*, and oftentimes privily murdered; this appears by *Bracton (a)*, and is tranſcribed out of him by *Stamf. Lib.* I. *cap.* 10. *fol.* 17.

When *William* the firſt came in, he found the like animoſity by the *Danes* and *Saxons* againſt the *French* and *Normans*, who were many times ſecretly killed by the natives, and therefore he did in effect continue this law (‡), only he applied it to the *French* and *Normans*, *viz.* that if a perſon were ſlain by an unknown [448] hand, if he were a *Frenchman* or a *Norman*, the hundred was amerced, where he was found, and if they were inſufficient, then the county, which was ſometimes 36*l.* ſometimes 24*l.*

And tho this was inſtituted for the preſervation of the *French* and *Normans*, yet intermarriages happening between the natives and them, ſo that in proceſs of time they became, as it were, one people, the ſame cuſtom was continued as to all perſons that were killed by unknown hands, and this amerciament was called *murdrum* †.

This appears at large by the black book of the Exchequer written by *Gervaſius Tilburienſis*, *Lib.* I. *cap. Quid murdrum, & quare ſit dictum*, which expounds the true ſcope of the ſtatute of *Marlbridge*, *cap.* 26. *Quod murdrum de cætero non adjudicetur pro mortuo per infortunium.*

But as well the preſentment of *Engleſbery*, as the amerciament for ſecret homicide by perſons unknown, was taken away by the ſtatute of 14 *E.* 3. *cap.* 4. yet there remained a certain amerciament upon the townſhip, where a perſon was ſlain, and the offender eſcaped, *viz.* If a perſon were ſlain in the day-time, in a town walled, or not walled, the town is to be amerced, if the vill be not ſufficient, the hundred ſhall be charged, and on default of them the county.

If he be ſlain in the day-time out of any vill, the hundred ſhall be amerced, and on their diſability the county ſhall be charged with the amerciament.

(a) *Lib.* III. *de corona cap.* 15. *p.* 134. *b.* *vide Spelm. verb. Englecheria. Blackſ. Com.* Lib. IV. *cap.* 14. *p.* 195.

(‡) *Vide Leg. Gul. Con. l.* 26. *& Leg. Hen. I. l.* 91. *Wilk. Leg. Anglo-Sax. p.* 224. 280.

† By the word "murder" in grants, the grantee claimed to have amerciaments of murderers. *Bro. tit. Quowarranto. Pl.* 2.

If a man be killed either in day or night, and the offender be taken and committed to the conſtable, or to the vill, if he eſcape, the townſhip where the party was ſlain, or where the offender was taken, ſhall be fined. *(b)*

But if a perſon be ſlain in the day or night in a walled town, and the offender be not taken, the town or city ſhall be fined.

If any private perſon be preſent when a murder or manſlaughter is committed, and doth not his beſt endeavour to apprehend [449] the malefactor, he ſhall be fined and impriſoned.

All which differences appear by comparing the books of *Stamf. P. C. cap.* 30 & 31. *Coke P. C. cap.* 7. *p.* 53. 3 *H.* 7. *cap.* 1. and the books there cited.

(b) For the vill is not diſcharged till he be delivered into goal, or to the cuſtody of the ſheriff, after which the ſheriff will be chargeable. *Stamf. P. C. cap.* 31.

CHAP. XXXVI.

Touching murder, *what it is, and the kinds thereof.*

MURDER and manſlaughter differ not in the kind or nature of the offenſe, but only in the degree, the former being the killing of a man of malice prepenſe, the latter upon a ſudden provocation and falling out.

And therefore it is, that upon an indictment of murder the party offending may be acquitted of murder, and yet found guilty of manſlaughter, as daily experience witneſſeth *(a)*, and they may not find him generally *not guilty*, if guilty of manſlaughter.

In an appeal of murder it is agreed on all hands, that the jury may find him not guilty of the murder, and guilty of manſlaughter; this was accordingly ruled *(b)* P. 34 *Eliz. B. R.* the caſe of *Wroth* and *Wigges (c)*. *P.* 5 *Jac. B. R. n.* 20. *Pellet* and *Barendon*, *P.* 7 *Jac. B. R. n.* 11. *(d)*; but it hath been held, that altho upon an indictment of murder, if the party appear to be guilty of manſlaughter, the jury ought not to acquit him generally, but find him guilty of

(a) See *Daliſon* 14.
(b) Or rather taken for granted.
(c) *Cro. Eliz.* 276. See alſo *Cro. Eliz.* 296. 1 *Sid.* 325.
(d) Theſe two caſes I do not find any where among the printed reports.

man

manſlaughter; yet in an appeal of murder, tho the jury may, if they pleaſe, find him guilty of manſlaughter, if the fact be ſuch, yet they may find generally, that he is *not guilty*, becauſe it is the ſuit of the party, and he ſhould lay his caſe according to the truth. [450]

With this agrees *H.* 38 *Eliz. B. R. Penryn* and *Corbett (e)*, *H.* 38 *Eliz. B. R. B.* 183. *(f)*, *M.* 22 *Jac. B. R. L.* 278. *Blount*'s caſe *(g)*, but it was held *P.* 2 *Car.* 1. in *Baſſage*'s caſe *(h)*, that they may not in ſuch a caſe find a general verdict of *not guilty*, but muſt find him guilty of manſlaughter, becauſe included in murder, as well in caſe of an appeal, as in caſe of an indictment, and ſo it ſeems the law is.

The difference between the offenſes of murder and manſlaughter ſeems to reſt in theſe particulars.

1. In the degree and quality of the offenſe, for murder, as hath been ſaid, is accompanied with malice forethought, either expreſs or preſumed; but bare homicide is upon a ſudden provocation or falling out.

2. And therefore in murder there may be acceſſaries before, as well as after, becauſe ordinarily it is an act of deliberation, and not merely of ſudden paſſion; but in bare homicide or manſlaughter there can be no acceſſaries before, tho there may be acceſſaries after, and therefore, if an indictment be of murder againſt *A.* and that *B.* and *C.* were counſelling and abetting as acceſſaries before only, (and not as preſent, aiding and abetting, for ſuch are principals, as hath been ſaid) if *A.* be found guilty only of homicide, and acquit of the murder, the acceſſaries before are hereby diſcharged.

3. The indictment of murder eſſentially requires theſe words, *felonicè ex malitiâ ſuâ præcogitatâ interfecit & murdravit*, but the indictment of ſimple homicide is only *felonicè interfecit*.

4. Altho at common law, and by the ſtatute of 25 *E.* 3. *cap.* 4. clergy was promiſcuouſly allowed, as well in caſe of murder, as of homicide and manſlaughter, yet by the ſtatute of 23 *H.* 8. *cap.* 1. 25 *H.* 8. *cap.* 3. 1 *E.* 6. *cap.* 12. 5 & 6 *E.* 6. *cap.* 10. clergy is taken away from murder *ex malitiâ præcogitatâ*.

Now having before, *cap.* 33. declared thoſe things, that are common to the offenſes of murder and manſlaughter, it re- [451]

(*e*) *Cro. Eliz.* (464.)
(*f*) I ſuppoſe this may be the caſe of *Goff* and *Byby*, *Cro. Eliz.* 540.
(*g*) 2 *Roll. Rep.* 460.
(*h*) *Latch* 126.

mains, that I conſider thoſe things, that are ſpecificial and peculiar to murder, which is what ſhall be ſaid a killing *ex malitiâ præcogitatâ*, or what in law is ſaid ſuch a malice, as makes the offenſe of killing a perſon thereby to be murder.

Such a malice therefore, that makes the killing of a man to be murder, is of two kinds, 1. Malice in fact, or 2. Malice in law, or *ex præſumptione legis*.

Malice in fact is a deliberate intention of doing ſome corporal harm to the perſon of another.

Malice in law, or preſumed malice, is of ſeveral kinds, *viz.* 1. In reſpect of the manner of the homicide, when without provocation. 2. In reſpect of the perſon kild, *viz.* a miniſter of juſtice in execution of his office. 3. In reſpect of the perſon killing.

Touching the firſt of theſe in this chapter, *viz.* malice in fact.

Malice in fact is a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized.

The evidences of ſuch a malice muſt ariſe from external circumſtances diſcovering that inward intention, as lying in wait, menacings antecedent, former grudges, deliberate compaſſings, and the like, which are various according to variety of circumſtances.

It muſt be a compaſſing or deſigning to do ſome bodily harm.

If there have been a long ſuit in law between *A.* and *B.* either touching intereſt or wrong done, as if *A.* ſues *B.* or threaten to ſue him, this alone is not a ſufficient evidence of malice prepenſe, tho poſſibly they meet and fall out, and fight, and one kills the other, if it happen upon ſudden provocation; but this may by circumſtances be heightened into a malice prepenſe, as if *A.* without any new provocation ſtrike *B.* upon the account of that difference in law, whereof *B.* dies, or *è converſo*, or if he lie in wait to kill him, or comes with a reſolution to ſtrike or kill him, for in ſuch a caſe the difference in the law-ſuit, (which alone makes not malice) is coupled and joined with circumſtances, that prove the purpoſe of the party was more, than the law allows in a legal vindication of wrong done.

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If there be an old quarrel betwixt *A.* and *B.* and they are reconciled again, and then upon a new and ſudden falling out *A.* kills *B.* this is not murder, but if upon circumſtances it appears, that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the ſcore of the old malice, then it is murder.

If

If there be malice by *A.* againſt *B.* and by *B.* againſt *A.* and they meet, and upon the account of that malice *A.* ſtrikes *B.* and *B.* thereupon kills *A.* (otherwiſe than in his own neceſſary defenſe) it is murder in *B.* but if they meet accidently, and *A.* aſſaults *B.* firſt, and *B.* merely in his own defenſe, without any other malicious deſign kills *A.* this is not murder in *B.* for it was not upon the account of the former malice, but upon a new and ſudden emergency for the ſafeguard of his life; but if *A.* and *B.* had met deliberately to fight, and *A.* ſtrikes *B.* and purſues *B.* ſo cloſely, that *B.* in ſafeguard of his own life kills *A.* this is murder in *B.* becauſe their meeting was a compact, and an act of deliberation, and therefore all, that follows thereupon, is preſumed to be done in purſuance thereof, and thus is Mr. *Dalton*, *cap.* 93. *p.* 241. *(i)* to be underſtood.

But yet *quære*, whether if *B.* had really and truly declined the fight, ran away as far as he could, (ſuppoſe it half a mile,) offerd to yield, and yet *A.* refuſing to decline it had attempted his death, and *B.* after all this kills *A.* in his own defenſe, whether it excuſeth him from murder; but if the running away were only a pretenſe to ſave his own life, but was really deſigned to draw out *A.* to kill him, it were murder.

A. commands *B.* to kills *C.* and before the act done repents, and countermands *B.* and charges him not to do it, yet *B.* doth it, *A.* is not guilty. *Coke P. C. p.* 51.

A. challenges *C.* to meet in the field to fight, *C.* declines it as much as he can, but is threatened by *A.* to be poſted for a coward, &c. if he meet not, and thereupon *A.* and *B.* his ſecond, and *C.* and *D.* his ſecond, meet and fight, and *C.* kills *A.* this is [453] murder in *C.* and *D.* his ſecond, and ſo ruled in *P.* 14 *Jac.* in *Taverner's* caſe *(k)*, tho *C.* unwillingly accepted the challenge.

But if it ſeems not to be murder in *B.* becauſe tho he had malice againſt *C.* and *D*, his opponents, yet he had none againſt *A.* tho ſome have thought it to be murder alſo in *B.* becauſe done by compact and agreement. 22 *Eliz.* 3. 262. *ſed quære de hoc.*

If *A.* challenge *B.* to fight, *B.* declines the challenge, but lets *A*, know, that he will not be beaten, but will defend himſelf; if *B.* going about his occaſions wears his ſword, is aſſaulted by *A.* and kild, this is murder in *A.* but if *B.* had kild *A.* upon that aſſault, it had

(i) New Edit. cap. 145. *p.* 471. *(k)* 1 *Roll. Rep.* 360. 3 *Bul.* 171.

been

been *ſe defendendo*, if he could not otherwiſe eſcape, or bare homicide, if he could eſcape, and did not.

But if *B.* had only made this as a diſguiſe to ſecure himſelf from the danger of the law, and purpoſely went to the place, where probably he might meet *A.* and there they fight, and he kills *A.* then it had been murder in *B.* but herein circumſtances of the fact muſt guide the jury.

If *A.* and *B.* fall ſuddenly out, and they preſently agree to fight in the field, and run and fetch their weapons, and go into the field and fight, and *A.* kills *B.* this is not murder but homicide, for it is but a continuance of the ſudden falling out, and the blood was never cooled; but if there were deliberation, as that they meet the next day, nay, tho it were the ſame day, if there were ſuch a competent diſtance of time, that in common preſumption they had time of deliberation, then it is murder. *Co. P. C. p.* 51, *Jac. B. R. Ferrer*'s caſe, *M.* 8 *Jac. B. R. Morgan*'s caſe.

A. the ſon of *B.* and *C.* the ſon of *D.* fall out in the field and fight, *A.* is beaten, and runs home to his father all bloody, *B.* preſently takes a ſtaff, runs into the field, being three quarters of a mile diſtant, and ſtrikes *C.* that he dies, this is not murder in *B.* becauſe done in ſudden heat and paſſion. *T.* 9 *Jac. B. R.* 12 *Co. Rep. p.* 87. *(l)*.

[454] A boy came into *Oſterly* park to ſteal wood, and ſeeing the woodward climbs up a tree to hide himſelf, the woodward bids him come down, he comes down, and the woodward ſtruck him twice, and then bound him to his horſe-tail, and dragged him till his ſhoulder was broke, whereof he died; it was ruled murder, becauſe, 1. The correction was exceſſive, and 2. It was an act of deliberate cruelty. *M.* 4 *Car. B. R. Holloway*'s caſe. *(m)*.

If the maſter deſigneth moderate correction to his ſervant, and accordingly uſeth it, and the ſervant by ſome misfortune dieth thereof, this is not murder, but *per infortunium*. *Crompt.* 136. *b. Dalt. cap* 96. *p.* 245. *(n)*, becauſe the law alloweth him to uſe moderate correction, and therefore the deliberate purpoſe thereof is not *ex malitiâ præcogitata*.

But if the maſter deſigneth an immoderate or unreaſonable correction, either in reſpect of the meaſure, or manner, or inſtrument thereof, and the ſervant die thereof, I ſee not how this can be excuſed from

(*l*) *Cro. Jac.* 296. *Royley*'s caſe. 127.
(*m*) *Cro. Car.* 131. *W. Jones* 198. *Kelyng*
(*n*) *cap.* 148. *p.* 478.

murder,

murder, if done with deliberation and deſign, nor from manſlaughter, if done haſtily, paſſionately, and without deliberation; and herein conſideration muſt be had of the manner of the provocation, the danger of the inſtrument, which the maſter uſeth, and the age or condition of the ſervant that is ſtricken, and the like of a ſchool-maſter towards his ſcholar. *(o)*.

The ſheriff hath a warrant to hang a man for felony, and he beheads him, this is held murder, for it is an act of deliberation. *Co. P. C. p.* 52.

A man hath the liberty of *Infangthiefe (p)*, the ſteward of the court gives judgment of death againſt a priſoner againſt law, this was a cauſe of ſeizure of the liberty, but was not murder in the judge, *quia factum judicialiter, licet ignoranter.* 2 *R.* 3. 10. *a.* the caſe of the ſteward of the liberty of the abbot of *Crowland.*

Blackſ. Com. lib. iv. cap. 14. p. 194. See Foſter, Diſc. II. ch. 8. per tot. 1 Hawk. P. C. ch. 31.

(*o*) See *Kelyng* 64, 65. (*p*) See *Spelman's Gloſſary, p.* 313.

CHAP. XXXVII. [455]

Concerning murder *by* malice implied *preſumptive, or* malice in law.

I HAVE before diſtinguiſhed malice implied into theſe kinds: 1. When the homicide is voluntarily committed without provocation. 2. When done upon an officer or miniſter of juſtice. 3. When done by a perſon, that intends a theft or burglary, *&c.*

1. Therefore touching the former of theſe.

When one voluntarily kills another without any provocation, it is murder, for the law preſumes it to be malicious, and that he is *hoſtis humani generis*; it remains therefore to be inquired, what is ſuch a provocation, as will take off the preſumption of malice in him, that kills another.

He that wilfully gives poiſon to another, that hath provoked him or not, is guilty of wilful murder, the reaſon is, becauſe it is an act of deliberation odious in law, and preſumes malice.

If *A.* comes to *B.* and demands a debt of him, or comes to ſerve him with a *Subpœna ad reſpondendum* or *ad teſtificandum*, and *B.* thereupon kills *A.* this is murder, becauſe it is no provocation.

Watts

Watts came along by the ſhop of *Brains*, and diſtorted his mouth, and ſmiled at him, *Brains* kills him, it is murder, for it was no ſuch provocation, as would abate the preſumption of malice in the party killing. *M.* 42 & 43 *Eliz. B. R. Brain*'s caſe. *(a)*

If *A.* be paſſing the ſtreet, and *B.* meeting him, (there being convenient diſtance between *A.* and the wall,) takes the wall of *A.* and thereupon *A.* kills him, this is murder; but if *B.* had juſtled *A.* this juſtling had been a provocation, and would have made it man-
[456] ſlaughter, and ſo it would be, if *A.* riding on the road, *B.* had whipt the horſe of *A.* out of the track, and then *A.* had alighted, and killed *B.* it had been manſlaughter. 17 *Car.* 1. *Lanure*'s caſe.

In the caſe of the lord *Morley*, 18 *Car.* 2. *(b)* all the judges met, and it was agreed by all judges except one, that if *A.* gives ſlighting words to *B*, and thereupon *B* immediately kills him, this is murder in *B.* and that ſuch words are not in law ſuch a provocation, as will extenuate the offenſe into manſlaughter, and the ſtatute of 1 *Jac. cap.* 8. of ſtabbing in ſuch a caſe was but proviſional, becauſe the juries were apt upon any verbal provocation to find the fact to be manſlaughter; but yet it was there held, that words of menace of bodily harm would come within the reaſon of ſuch a provocation, as would make the offenſe to be but manſlaughter.

And many, who were of opinion, that bare words of ſlighting, diſdain, or contumely, would not of themſelves make ſuch a provocation, as to leſſen the crime into manſlaughter, yet were of this opinion, that if *A.* gives indecent language to *B.* and *B.* thereupon ſtrikes *A.* but not mortally, and then *A.* ſtrikes *B.* again, and then *B.* kills *A.* that this is but manſlaughter, for the ſecond ſtroke made a new provocation, and ſo it was but a ſudden falling out, and tho *B.* gave the firſt ſtroke, and after a blow received from *A. B.* gives him a mortal ſtroke, this is but manſlaughter according to the proverb *the ſecond blow makes the affray*; and this was the opinion of myſelf and ſome others.

There was a ſpecial verdict found at *Newgate, viz. A.* ſitting drinking in an alehouſe, *B.* a woman called him a *ſon of a whore*, *A.* takes up a broomſtaff, and at a diſtance throws it at her, which hitting her upon the head kild her, whether this was murder or manſlaughter was the queſtion in *P.* 26 *Car.* 2. it was propounded to all the judges at *Serjeants-Inn*, two queſtions were named, 1. Whether bare words,

(a) Cro. Eliz. 778. *Kel.* 131. *(b) Kelyng* 55.

or

or words of this nature, would amount to ſuch a provocation, as would extenuate the fact into manſlaughter? *(c)*

2. Admitting it would not in caſe there had been a ſtriking with ſuch an inſtrument, as neceſſarily would have cauſed [457] death, as ſtabbing with a ſword, or piſtolling, yet whether this ſtriking, that was ſo improbable to cauſe death, will not alter the caſe; the judges were not unanimous in it; and in reſpect, that the conſequence of a reſolution on either ſide was great, it was adviſed the king ſhould be moved to pardon him; which was accordingly done.

A. and *B.* are at ſome difference, *A.* bids *B.* take a pin out of the ſleeve of *A.* intending thereby to take an occaſion to ſtrike or wound *B.* which *B.* doth accordingly, and then *A.* ſtrikes *B.* whereof he died; this was ruled murder, 1. Becauſe it was no provocation, when he did it by the conſent of *A.* 2. Becauſe it appeared to be a malicious and deliberate artifice thereby to take occaſion to kill *B.*

If there be chiding between huſband and wife, and the huſband ſtrikes his wife thereupon with a peſtle, that ſhe dies preſently, it is murder, and the chiding will not be a provocation to extenuate it to manſlaughter. 43 *Eliz. Crompt. fol.* 120. *a. (d)*

II. The ſecond kind of malice implied is, when a miniſter of juſtice, as a bailiff, conſtable, or watchman, *&c.* is killed in the execution of his office, in ſuch a caſe it is murder.

If the ſheriff's bailiff comes to execute a proceſs, but hath not a lawful warrant, as if the name of the bailiff, plaintiff, or defendant be interlined or inſerted after the ſealing thereof by the bailiff himſelf, or any other, if ſuch bailiff be killed, it is but manſlaughter, and not murder.

But if a proceſs iſſuing out of a court of record to a ſerjeant at mace, ſheriff, or other miniſter, be erroneous, as if a *Capias* iſſue, when a *Diſtringas* ſhould iſſue, yet the killing of ſuch a miniſter in the execution of that proceſs is murder, altho he executes the proceſs in the night *(e)*, or upon a *Sunday (f)*. *Mackally's* caſe, 9 *Co. Rep.* 68. *a.*

(c) See *Kel.* 131.
(d) See alſo *Kel.* 64.
(e) 9 *Co.* 66. *a.*
(f) 9 *Co.* 66. *b.* for miniſterial acts might lawfully be executed upon a *Sunday*, but ſince our author wrote, the law is altered in this reſpect; for by 29 *Car.* 2. *cap.* 7. all proceſs, warrants, *&c.* ſerved or executed on a *Sunday* are void. except in caſes of treaſon, felony, or breach of the peace, ſo that now, an officer arreſting a man upon a warrant on a *Sunday* is, as if he had him arreſted without any warrant at all.

But

But if the proceſs be executed out of the juriſdiction of the court, the killing of the miniſter is only manſlaughter, and ſo it is, if the iſſuing of the proceſs were void, and *coram non judice*.

A bailiff or officer *jurus & conus* may arreſt a man without ſhewing his warrant *(g)*, and a private bailiff need not ſhow his warrant upon the arreſt, till the party arreſted demand it, and therefore, if the party arreſted kills a bailiff upon the arreſt without ſuch a warrant ſhewn, it is murder, and ſo it is, if a ſerjeant at mace makes the arreſt without ſhewing his mace, *ibidem Mackally's* caſe. *(h)*

A bailiff *jurus & conus* had a warrant to arreſt *Pew* upon a *Capias*, and came to arreſt him, not uſing any words of arreſt, *Pew* ſaid, *Stand off, I know you well enough, come at your peril*, the bailiff takes hold of him, *Pew* thruſts him through; it was ruled murder, tho he uſed no words of arreſt, nor ſhewed his warrant, for poſſibly he had not time. *P.* 6 *Car.* I. *B. R. (i)*

A bailiff having a warrant to arreſt *Cook* upon a *Capias ad ſatisfaciendum* came to *Cook's* houſe, and gave him notice, *Cook* menaceth to ſhoot him if he depart not, yet the bailiff departs not, but breaks open the window to make the arreſt, *Cook* ſhoots him, and kills him; it was ruled, 1. That it is not murder, becauſe he cannot break the houſe *(k)*, otherwiſe it had been, if it had been upon an *Habere facias poſſeſſionem (l)*. 2. But it was manſlaughter, becauſe he knew him to be a bailiff. But 3. Had he not known him to be a bailiff, or one that came upon that buſineſs, it had been no felony, becauſe done in defenſe of his houſe. *P.* 15. *Car. B. R. (m)*

But if a ſheriff enter the houſe by the outward door open, he or his
[459] bailiff may break open the inward doors, tho the proceſs be without a *Non omittas*, and therefore the killing of him in ſuch caſe is murder. *M.* 17 *Jac. B. R. White* and *Wiltſhire. (n)*

If the ſheriff or bailiff have once laid hands upon the priſoner, and ſo began his execution, he may break open the outward doors to take him, Sir *William Fiſhe's* caſe *(o)*, and if the warrant be directed to

(g) Tho the party do demand it; this is intended of the warrant conſtituting him bailiff; but as to the writ or proceſs againſt the party, there is no difference between a public or a private bailiff, for in either caſe, if the party ſubmit to the arreſt, and do demand it, he is bound to ſhew at whoſe ſuit, for what cauſe, out of what court the proceſs iſſues, and when and where returnable. 5 *Co.* 54. *a.* 9 *Co.* 69. *a.*

(h) 9 *Co.* 69 *a.*

(i) *Cro. Car.* 183.

(k) 5 *Co.* 92. *b. Semayne's* caſe.

(l) 5 *Co.* 91. *b.*

(m) *Cro. Car.* 537. *W. Jones* 429.

(n) *Palmer* 52.

(o) Cited in *White's* caſe, *Palmer* 534.

five

five bailiffs, two or three may make execution; reſolved in *White*'s caſe, *ubi ſupra*.

Upon a warrant againſt a felon, or one that hath dangerouſly wounded another, or for ſurety of the peace, or good behaviour, the conſtable may break open the door where the offender is, *Dalt. cap.* 78. *(p)*, and ſo may the ſheriff or his bailiff upon a *Capias utlegatum*, *Capias pro fine*, or other proceſs for the king, if not opened upon demand.

The conſtable of the vill of *A.* comes into the vill of *B.* to ſuppreſs ſome diſorder, and in the tumult the conſtable is kild in the vill of *B.* this is only manſlaughter, becauſe he had no authority in *B.* as conſtable.

But it ſeems, that if the conſtable of the vill of *A.* had a particular precept from a juſtice of peace directed to him by name, or by the name of the conſtable of *A* to ſuppreſs a riot in the vill of *B.* or to apprehend a perſon in the vill of *B.* for ſome miſdemeanor, and within the juriſdiction and conuſance of the juſtice of peace, and in purſuance of that warrant he go to arreſt the party in *B.* and in execution of his warrant is killed in *B.* this is murder; for tho, in ſuch caſe, it ſeems the conſtable was not bound to execute the warrant out of his juriſdiction, neither could he do it ſingly *virtute officii*, as conſtable of *A.* yet he may do it as bailiff or miniſter by virtue of the warrant, and the killing of him is murder, as well as if he had been conſtable of the hundred wherein *A.* and *B.* lie, or ſheriff of the county; for a juſtice of peace may for a matter within his juriſdiction iſſue his warrant to a private perſon, as ſervant; but then ſuch perſon muſt ſhew his warrant, or ſignify the contents of it. 14 *H.* 8. 16. *a.*

And altho the warrant of the juſtice be not in ſtrictneſs lawful, as if it expreſs not the cauſe particularly enough, yet [460] if the matter be within his juriſdiction as juſtice of peace, the killing of ſuch officer in execution of his warrant is murder; for in ſuch caſe the officer cannot diſpute the validity of the warrant, if it be under ſeal of the juſtice. 14 *H.* 8. 16.

If *A.* and *B.* are conſtables of the vill of *C.* and there happens a riot or quarrel between ſeveral perſons, *A.* joins with one party, and commands the adverſe party to keep the peace, *B.* joins with the other party, and in like manner commands the adverſe party to keep the peace, and the aſſiſtants and party of *A.* in the tumult kill *B.* it

(p) New Edit. cap. 127. *p.* 426.

ſeems

ſeems that this is but manſlaughter, and not murder, in as much as the officers and their aſſiſtants were one engaged againſt the other, and each had as much authority as the other.

But if the ſheriff having a writ of *Habere facias poſſeſſionem* againſt the houſe and lands of *A.* and *A.* pretending it to be a riot upon him, gain the conſtable of the vill to aſſiſt him, and to ſuppreſs the ſheriff or his bailiffs, and in the conflict the conſtable is killed, this is not ſo much as manſlaughter; but if any of the ſheriff's officers were killed, it is murder, becauſe the conſtable had no authority to encounter the ſheriff's proceeding or acting by virtue of the king's writ.

If a conſtable, or tithing-man, or watchman be in execution of his office, and be killed, it is murder; and in all caſes of implied malice, or malice in law, the indictment need not be ſpecial, but general *ex malitiâ ſuâ præcogitatâ interfecit & murdravit*, and the malice in law maintains the indictment. 9 *Co. Rep.* 68. *Mackally*'s caſe.

But now touching the point of notice.

1. It is not neceſſary to make it murder, that the party killing know the perſon of the bailiff, conſtable, or watchman.

2. If he be a bailiff *juris & cons*, it ſeems there is no neceſſity for him to notify himſelf to be ſuch by expreſs words, but it ſhall be preſumed that the offender knew him, as it ſeems by the book 9 *Co. Rep.* 69. *b. Mackally*'s caſe; *quære.*

[461] 3. But if it be a private bailiff, either the party muſt know that he is ſo, as in *Pew*'s caſe before, or there muſt be ſome ſuch notification thereof, whereby the party may know it, as by ſaying, *I arreſt you*, which is of itſelf ſufficient notice, and it is at the peril of the party, if he kills him after theſe words, or words to that effect pronounced, for it is murder, if *de facto* it falls out, that he were a bailiff, and had a warrant. 9 *Co. Rep. ubi ſupra.*

4. A conſtable coming to appeaſe a ſudden affray in the day time in the village, whereof he is conſtable, it ſeems every man *ex officio* is bound to take notice that he is the conſtable, becauſe he is to be choſen and ſworn in the leet, where all reſiants are to attend, 4 *Co. Rep.* 40. *b. Young*'s caſe *(q)*; but it is not ſo in the night-time, unleſs there be ſome notification, that he is the conſtable.

5. But whether it be in the day or night, it is ſufficient notice, if he declares himſelf to be the conſtable, or commands the peace in the

(q) The reaſon here given by our author is not mentioned in this caſe, but it is there held, that a perſon's acting as conſtable is a ſufficient notification, altho the party do not otherwiſe know him to be ſo.

king's

king's name, and the like for any that come in his aſſiſtance, or for a watchman, &c. and therefore, if any of them are killed after ſuch a notification, it is murder in them that kill him. 9 *Co. Rep.* 68. *b. Mackally's* caſe.

And theſe differences may be collected out of the books, 4 *Co. Rep.* 40. *Young's* caſe. "Et en ceſt caſe fuit tenus *per totam curiam*, que "ſi ſur affray fait le conſtable & autres en ſon aſſiſtance veignont a "ſuppreſſer le affray & a preſerver le peace, & en feſant lour office "le conſtable ou aſcun de ſes aſſiſtants ſoit tue, ceo eſt murder en ley, "coment que le murderer ne ſcavoit le party, que fuit tue, & coment "que le affray fuit ſodein, pur ceo que le conſtable & ſes aſſiſtants "veigne per authoritie del ley pur le garder del peace & a preventer "le danger, que poit enſuer per le infreinder de ceo, & pur ceo le ley "adjudgera ceo murder, & que le murderer avoit malice prepenſe, "pur ceo, que il oppoſe luy meſme enconter le juſtice del realme, & "iſſint de le viſcont, ou ſon bailiff, ou watchman en feſant [462] "ſon office." And 9 *Co. Rep.* 69. *Mackally's* caſe, where it was objected, that the ſerjeant at mace did not ſhew his mace, whereby the offender might know him to be an officer; yet it was ruled, that the killing of him was murder, 1. Becauſe it was found, that he was *ſerviens ad clavam*, *juratus & cognitus*, and a bailiff *jurus & conus* need not ſhew his warrant, tho demanded, nor another bailiff without demand; and when the books ſpeak of a bailiff *jurus & conus*, it is not neceſſary that he be known to the party arreſted, but it is ſufficient if he be commonly known. 2. "Si notice fuit requiſite il "done ſufficient notice, quant il dit *jeo toy arreſt in le noſme le roy*, &c. "Et le party a ſon peril doit luy obeyer, & ſil nad loyall garrant, il "poit aver ſon action de faux impriſonment, iſſint que in ceſt caſe "ſans queſtion le ſerjant ne beſoigne a monſtre ſon mace, car ſils "ſerra chaſe a monſtre lour mace, ceo ſerra warning al party deſtre "arreſt a fuer.

H. 24 & 25 *Car.* 2. A great number of perſons aſſembled in a houſe called *Siſſinghurſt* in *Kent*, iſſued out and committed a great riot and battery upon the poſſeſſors of a wood adjacent. One of their names, *viz. A.* was known, the reſt were not known; a warrant was obtain'd from a juſtice of peace to apprehend the ſaid *A.* and divers other perſons unknown, which were all together in *Siſſinghurſt-houſe*. The conſtable, with about ſixteen or twenty called to his aſſiſtance. came with the warrant to the houſe, and demanded en-

trance, and acquainted ſome of the perſons within, that he was the conſtable, and came with the juſtice's warrant. and demanded *A.* with the reſt of the offenders, that were then in the houſe, and one of the perſons within came and read the warrant, but denied admiſſion to the conſtable, or to deliver *A.* or any of the malefactors, but going in commanded the reſt of the company to ſtand to their ſtaves: the conſtable and his aſſiſtants fearing miſchief went away, and being about five rod from the door, *B. C. D. E. F. &c.* about fourteen in number, iſſued out and purſued the conſtable and his aſſiſtants; the conſtable commanded the peace, yet they fell on and killed one of the aſſiſtants of the conſtable, and wounded others, and then re-
[463] tired into the houſe to the reſt of their company, which were in the houſe, whereof the ſaid *A.* and one *G.* that read the warrant, were two, for which the ſaid *A. B. C. D. E. F. G.* and divers others were indicted of murder, and tried at the king's bench bar, wherein theſe points were unanimouſly agreed.

1. That altho the indictment were, that *B.* gave the ſtroke, and the reſt were preſent, aiding, and aſſiſting, tho in truth *C.* gave the ſtroke, or that it did not appear upon the evidence, which of them gave the ſtroke, but only that it was given by one of the rioters, yet that evidence was ſufficient to maintain the indictment, for in law it was the ſtroke of all that party, according to the reſolution in *Mackally*'s caſe, 9 *Co. Rep.* 67 *b.*

2. That in this caſe all, that were preſent and aſſiſting to the rioters, were guilty of the death of the party ſlain, tho they did not all actually ſtrike him, or any of the conſtable's company.

3. That thoſe within the houſe, if they abetted or counſelled this riot, were in law preſent, aiding, and aſſiſting, and principals as well as thoſe that iſſued out and actually committed the aſſault, for it was but within five rod of the houſe, and in view thereof, and all done as it were in the ſame inſtant; *vide* lord *Dacre*'s caſe before.

4. That here was ſufficient notice, that it was the conſtable before the man was killed, 1. Becauſe he was conſtable of the ſame vill. 2. Becauſe he notified his buſineſs at the door before the aſſault, *viz.* that he came with the juſtice's warrant. 3. Becauſe after his retreat, and before the man ſlain, the conſtable commanded the peace, and notwithſtanding it, the rioters fell on, and killed the party.

5. It was reſolved, that the killing of the aſſiſtant of the conſtable was murder, as well as the killing of the conſtable himſelf.

6. That

6. That thoſe, that came in the aſſiſtance of the conſtable, tho not ſpecially called thereunto, are under the ſame protection as they that are called to his aſſiſtance by name.

7. That altho the conſtable retired with his company upon the not delivering up of *A.* yet the killing of the aſſiſtant of the conſtable in that retreat was murder. 1. Becauſe it was one [464] continued act in the purſuance of his office, his retiring was as neceſſary, when he could not attain the effect of his warrant, and was in effect a continuation of the execution of his office, and under the ſame protection of the law, as his coming was. 2. Principally, becauſe the conſtable in the beginning of the aſſault, and before the man was ſtricken, commanded the peace, and is all one with *Yonge*'s caſe.

8. It ſeems, that tho the conſtable had not commanded the peace, yet when he and his company came about what the law allow'd them, and, when they could not effect it fairly, were going their way, that the rioters purſuing them, and killing one, was murder in them all, becauſe it was done without provocation, for they were peaceably retiring; but this point was not ſtood upon, becauſe there was enough upon the former point to convict the offenders, and in the concluſion the jury found nine of them guilty, and acquitted thoſe within, not becauſe they were abſent, but becauſe there was no clear evidence, that they conſented to the aſſault, as the jury thought, and thereupon judgment was given againſt the nine to be hanged: and note, that the award was for the marſhal to do execution, becauſe they were remanded to the cuſtody of the marſhal, and he is the immediate officer of the court, and precedents in caſes of judgment given in the king's bench have commonly run, *Et dictum eſt mareſcallo, &c. quod faciat executionem periculo incumbente.* (r)

At *Newgate* in *Lent* vacation, 26 *Car.* 2. the caſe was thus: five perſons committed a robbery about *Hounſlow-heath* in *Middleſex*, *viz.* *Jackſon* and four others, the party robbed raiſed hue and cry, the country purſued them, and at *Hampſtead* *Jackſon* one of the five

(r) And thus it was in the caſe of the *Althoes*, *T.* 9. *Geo.* I. *B. R.* who were convicted of a barbarous murder in *Pembrokeſhire*, at *Hereford* aſſizes, being the next *Engliſh* county; the indictment was removed by *Certiorari* into the king's bench, in order to argue ſome exceptions, which were over-ruled; and after ſome queſtion made, whether they ought not to be ſent back to *Herefordſhire* to receive ſentence there, the court was of opinion, that they had the ſame juriſdiction over facts committed in *Wales*, as if committed in the next adjacent county in *England*, and ſo they were ſentenced at the king's bench, and were executed by the marſhal at *Kennington* gallows near *Southwark*.

turned upon his purſuers, the reſt being in the ſame field, and having often reſiſted the purſuers, and refuſing to yield, killed one of the purſuers, by five judges then preſent it was ruled. 1. That this was murder, becauſe the country, upon hue and cry levied, are authorized by law to purſue and apprehend the malefactors; and in this caſe here was a felony done, and a felony done by thoſe perſons, that were thus purſued. 2. That altho there was no warrant of a juſtice of peace to raiſe hue and cry, and tho there was no conſtable in the purſuit, yet the hue and cry was a good warrant in law for them to apprehend the offenders, and the killing of any of the purſuants by *Jackſon* was murder. 3. In as much as all of the robbers were of a company, and made a common reſiſtance, and ſo one animated the other, all thoſe of the company of the robbers that were in the ſame field, tho at a diſtance from *Jackſon*, were all principals, *viz.* preſent, aiding, and abetting. 4. That when one of the malefactors was apprehended a little before the party was hurt, *that* perſon being in cuſtody when the ſtroke was given was not guilty, unleſs it could be proved, that after he was apprehended he had animated *Jackſon* to kill the party: they had all judgment of death for the robbery, and four of them for the murder.

A preſs-maſter ſeiſed *B.* for a ſoldier, and with the aſſiſtance of *C.* laid hold on him. *D.* finding fault with the rudeneſs of *C.* there grew a quarrel between them, and *D.* killed *C.* By the advice of all the judges, except very few, it was ruled, that this was but manſlaughter, 17 *Car.* 2. *(f)*

III. The third kind of *malice implied* is in relation to the perſon killing.

If *A.* comes to rob *B.* in his houſe, or upon the highway, or otherwiſe, without any precedent intention of killing him, yet if in the attempt, either without or upon the reſiſtance of *B. A.* kills *B.* this is murder. *Co. P. C. p.* 52.

So if men come to ſteal deer in a park or foreſt, or to rob a warren of conies, and the parker, foreſter, or warrener reſiſts and is killed, this is murder; the lord *Dacre*'s caſe.

[466] If a priſoner dies by reaſon of dureſs and hard uſage by the goaler, it is murder in the gaoler. *Co. P. C. p.* 52.

So if a ſheriff have a precept to hang a man for felony, and he beheads him, it is murder. *Co. P. C. Ibidem.*

(f) Hugget's caſe, 25 *April* 1666, at *Newgate*, *Kel.* 59, 137.

To

To theſe may be added the caſes abovementioned, *viz.* if *A.* by malice forethought ſtrikes at *B.* and miſſing him ſtrikes *C.* whereof he dies, tho he never bore any malice to *C.* yet it is murder, and the law transfers the malice to the party ſlain; the like of poiſoning, *ſed de his ſupra cap.*

See Foſter. 138, 291, 292, 256, 257, 261, 262, 297, 298, 299, 300, 309, 310, 311, 314, 352, 371. See Index to 1 Hawk. P. C. Tit. Malice and Murder. Blackſ. Com. lib. iv. chap. 14. p. 198, 199, 200, 206.

CHAP. XXXVIII.

Of manſlaughter, *and particularly of* manſlaughter exempt from clergy, *by the ſtatute of* 1 Jac. 8.

MANSLAUGHTER, or ſimple homicide, is the voluntary killing of another without malice expreſs or implied, and differs not in ſubſtance of the fact from murder, but only differs in theſe enſuing circumſtances.

1. In the degree of the offenſe, murder being aggravated with malice preſumed or implied, but manſlaughter not, and therefore in manſlaughter there can be no acceſſaries before. 2. In the form of the indictment, the former being always *felonicè ex malitiâ præcogitatâ interfecit & murdravit*, the latter only *felonicè interfecit*. 3. In the point of clergy, murder being by the ſtatute of 23 *H.* 8. *cap.* 1. exempt from the benefit of clergy, but not manſlaughter. 4. In the form of the pardon of murder, for tho at common law a pardon of all felonies had pardoned murder; yet by the ſtatute of 13 *R.* 2. *cap.* 1. the pardon of murder muſt either be by the expreſs word of *murder*, or elſe it muſt be a pardon of *felonica interfectio* with a ſpecial *non obſtante* of the ſtatutes of 13 *R.* 2. *H.* 1 *Jac. Lucas's* caſe. *(a)* [467]

But the pardon of manſlaughter may be general by the words of *felonia* or *felonica interfectio*, and hence it is, that if a man indicted of murder obtains a pardon of felony, or *felonica interfectio* only, and be afterwards arraigned upon an indictment of murder, he muſt plead *quoad murdrum & interfectionem ex malitiâ præcogitatâ* not guilty, and

(a) *Moor, n.* 1033. *p.* 752.

as to the felony and interfection muſt plead his pardon; and then if the jury being charged to inquire of the plea of *not guilty*, find it to be only a ſimple felony and interfection without malice forethought, his pardon is to be allowd; and thus upon good deliberation it was done in the year 1668. at *Norwich*, Sir *Thomas Potte*'s caſe, and is purſuant to the ſtatute of 13 *R.* 2. which ſaith, "That before a pardon of felonies "ſhall be allowed as to murder, it ſhall be inquired by good inqueſt, "if he were ſlain by await or malice prepenſed." And I remember very well in the caſe of *Rutaby*, *T.* 1653. who was indicted of murder in *Durham*, the defendant pleaded a pardon of *felonica interfectio*, and a general *non obſtante* of all ſtatutes; and the attorney general demurred; it was ruled, 1. That the pardon was inſufficient with only a general *non obſtante*, unleſs murder had been containd in the body of the pardon by expreſs words. 2. But tho the party was ſo diſallowd as to murder, yet the priſoner was remitted into *Durham* to be tried, whether guilty of murder, and being ſo found was executed; but had it been found only manſlaughter, he ſhould have been diſcharged, and altho his plea of the pardon to the indictment of murder was diſallowd, yet it had ſtood good, if the conviction were of manſlaughter: by the ſtatute of 1 *Jac. cap.* 8. "Any perſon that ſhall ſtab or thruſt any "perſon, that hath not any weapon drawn, or hath not firſt ſtricken "the party, that ſhall ſo ſtab or thruſt, if the party die within ſix "months, the offender is ouſted of clergy, provided it ſhall not extend "to him, that kills *ſe defendendo*, or by misfortune, or in preſerving "the peace, or chaſtizing his child or ſervant.

[468] This act, tho but temporary, is continued till ſome other act of parliament ſhall be made touching the continuance or diſcontinuance thereof. 17 *Car.* I. *cap.* 4.

The uſe hath been in caſes of this nature to prefer two indictments againſt offenders in this kind, *viz.* one of murder, another upon this ſtatute, and put the priſoner to plead to both, and to charge the jury firſt with the indictments of murder, and if they find it not to be murder, then to charge them to inquire upon the other bill, becauſe, if convict upon either, the offender is ouſted of clergy.

The indictment to put the priſoner from his clergy muſt be ſpecially formed purſuant to the ſtatute, *viz.* that he did with a ſword, *&c.* ſtab the party dead, he having no weapon drawn, nor having ſtruck firſt, otherwiſe it will be but a common manſlaughter, and the party will have his clergy.

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The indictment need not conclude *contra formam ſtatuti*, no more than in burglary or robbery, for the ſtatute doth not make the offenſe to be felony, but ouſts the priſoner of his clergy, where the crime is ſo circumſtantiated as the ſtatute expreſſeth; this was agreed in the caſe of *Page* and *Harwood*. *H.* 23 *Car.* 1. *B. R.* (*b*)

But yet it doth not vitiate the indictment, tho it do conclude, *Et ſic interfecit contra formam ſtatuti*, as was adjudged *Trin.* 9 *Jac. B. R. Bradley* and *Banks* (*c*); and accordingly for the moſt part to this day the indictments upon this ſtatute do conclude *contra formam ſtatuti*, ſo it is good with or without ſuch concluſion, but it is beſt to follow the common uſage, becauſe every man doth not readily obſerve the reaſon of the omiſſion of that concluſion.

In the caſe of *Page* and *Harwood*, *H.* 23 *Car.* 1. before cited, theſe points were reſolved in the king's bench, *viz.*

1. That no man is ouſted of his clergy by this ſtatute, but he that actually ſtabs, and therefore thoſe, that are laid in the indictment to be preſent, aiding, and abetting in ſuch a caſe, ſhall be admitted to the benefit of clergy; and therefore, tho the indictment of ſuch a manſlaughter be ſpecially formed upon the ſtatute, and [469] concludes *contra formam ſtatuti*, yet it is a good indictment of manſlaughter againſt them that were preſent, aiding, and abetting, and therefore upon ſuch a ſpecial indictment of manſlaughter upon the ſtatute, the priſoner may be convict of ſimple manſlaughter, and acquitted of manſlaughter upon the ſtatute, and the indictment ſerves for a common manſlaughter, as well as a man upon an indictment of murder may be acquitted of murder, and convict of manſlaughter.

22 *Martii*, 14 *Car.* 1. At *Newgate* ſeſſions *David Williams* was indicted ſpecially upon this ſtatute for the death of *Francis Marbury* (*d*), *viz. Quod felonicè &c. unum malleum de ferro & ligno, anglice* an hammer of wood and iron, *è manu ſuâ dextrâ erga & ad anteriorem partem capitis ipſius* Franciſci *felonicè violenter & in furore ſuo projecit, & cum malleo prædicto ipſum* Franciſcum *in & ſuper anteriorem partem capitis &c. percuſſit & pupugit, anglice* did ſtab and thruſt the ſaid *Marbury* having no weapon drawn, nor ſtruck firſt, whereof he preſently died, *& ſic modo & formâ prædictâ interfecit &c. contra formam ſtatuti &c.* The priſoner pleaded not guilty, and a ſpecial verdict was found, *viz.* that upon *St. David*'s day the priſoner being

(*b*) In this caſe, as reported in *Styles* 86. it is not agreed to be ſo, on the contrary it was denied *per Roll*, and doubted *per Bacon*.

(*c*) *Cro. Jac.* 283.

(*d*) *W. Jones* 432.

a *Welſhman* had a leek in his hat, and there was at the ſame time in waggery a *Jack-a-lent* in the ſtreet put up with a leek, and one *Nicholas Redman*, a porter, ſpake to the priſoner, and pointing to the *Jack-a-lent* ſaid, *Look at your countryman*, and the priſoner being therewith enraged, threw an hammer at *Redman* to the intent feloniouſly to hit him, but miſſing him, the hammer did hit *Francis Marbury*, whereof he died, *& ſic prædictus* David *præfatum* Franciſcum *cum malleo prædicto pupugit & percuſſit*, anglice *did ſtab and thruſt*, the ſaid *Francis* then not having any weapon drawn, nor then having firſt ſtricken the ſaid *David*; and it was judged by *Bramſton*, *Jones*, and the recorder *Gardiner*, that *Williams* was guilty of manſlaughter at the common law, *ſed non contra formam ſtatuti*, ſo that it ſeems they thought not this to be a ſtabbing within the ſtatute, being done with the throwing of the hammer, or at leaſt they took this [470] killing of *Marbury*, which was not at all intended by *Williams*, to be out of the ſtatute, tho it excuſed him not for manſlaughter at common law. *(e)*

The words of the ſtatute are *ſtab or thruſt*, if the ſtabbing or thruſting were with a ſword, or with a pikeſtaff, it is within the ſtatute, ſo it ſeems, if it be a ſhot with a piſtol, or a blow with a ſword or ſtaff, yet *quære*, for *Jones* juſtice denied it.

In *M.* 5 *Jack.* it was ruled, that if the party ſlain had a cudgel in his hand, it is a weapon drawn within this ſtatute, and the priſoner was admitted to his clergy at *Newgate*; but it ſeems it muſt be intended of ſuch a cudgel, as might probably do hurt, not a ſmall riding-rod or cane.

In the year 1657. *(f)* at *Newgate* before *Glynn*, who then ſat as chief juſtice, a man was indicted upon this ſtatute, and a ſpecial verdict found, that a bailiff having a warrant to arreſt a man, preſſed early into his chamber with violence, but not mentioning his buſineſs, nor the man knowing him to be a bailiff, nor that he came to make an an arreſt, ſnatched down a ſword, that hanged in his chamber, and ſtabbed the bailiff, whereof he preſently died: there was ſome diverſity

(*e*) Lord chief juſtice *Holt* in *Mawgridge*'s caſe, *Kel.* 131. concurs with this judgment, for that it was not ſuch a weapon or act, as is within the ſtatute of ſtabbing, but he is of opinion, that *Williams* ought to have been found guilty of murder, if the indictment had been ſo laid, for that there was not a ſufficient provocation to leſſen the offenſe to manſlaughter.

(*f*) *Quære*, whether the caſe here meant be not *Buckner*'s caſe, *M.* 1655. reported in *Styles* 467. but that, as it is there reported, was not the caſe of a bailiff, but of a creditor, who ſtood at the door with a ſword undrawn to keep the debtor in, till they could ſend for a bailiff, and was killed by the debtor.

of

of opinion among the judges, whether this were within the ſtatute, but at length the priſoner was admitted to his clergy, for tho this caſe was within the words of the ſtatute, and not within the particular exceptions, yet it was held, that this caſe was never intended in the ſtatute, for the priſoner did not know, but that the party came in to rob or kill him, when he thus violently brake into his chamber without declaring his buſineſs. *(g)*

(g) See *Kel.* 136.

CHAP. XXXIX. [471]

Touching involuntary homicide, *and firſt of* chance-medley *or* killing *per infortunium.*

INVOLUNTARY homicide is the death or hurt of the perſon of a man againſt or beſides the will of him that kills him.

And in theſe caſes, to ſpeak once for all, the indictment itſelf muſt find the ſpecial matter, or in caſe the indictment be of murder or manſlaughter, and upon the trial it appears to the jury it was involuntary, (as by misfortune, or in his own defenſe) the jury ought to find the ſpecial matter, and ſo conclude, *Et ſic per infortunium*, or *ſe defendendo*, and not generally, that it was *per infortunium*, or *ſe defendendo*, becauſe the court muſt judge upon the ſpecial matter, whether it be murder, homicide, or *per infortunium*, or *ſe defendendo*, and and the jury is only to find the fact, and leave the judgment thereupon to the court; and in ſuch caſe the priſoner muſt not plead the ſpecial matter, and ſo juſtify, but muſt plead not guilty, and the ſpecial matter muſt be found by the jury, *Stamf. P. C. Lib.* I. *cap.* 7. *fol* 15. *a. Lib.* III. *cap.* 9. *fol.* 165. *a.* for upon the ſpecial matter found, the court may give judgment againſt the concluſion of the verdict, as that the fact is manſlaughter, tho the concluſion of the verdict be *per infortunium*, or *ſe defendendo*. 44 *E.* 3. *Coron.* 94.

This involuntary homicide is of two kinds, *viz.* either 1. When it is purely involuntary or caſual, as the killing of a man *per infortunium*, or 2. When it is partly involuntary, and partly voluntary, but occaſiond by a neceſſity, that the law allows, which is commonly called homicide *ex neceſſitate*, as killing a man in his own defenſe, or the like; *de quibus poſtea.*

Homicide

Homicide *per infortunium* is, where a man is doing a lawful act, and without intention of bodily harm to any perſon, and by that act death of another enſues, as if a man be ſhooting at buts or pricks, and by caſualty his hand ſhakes, and the arrow kills a by-ſtander. 21 *H.* 7. 28. *a.* 6 *E.* 4. 7. *b.*

Or if a carpenter or maſon in building caſually let fall a piece of timber or ſtone, and kills another. 21 *H.* 7. *B. Coron.* 69.

But if he voluntarily let it fall, whereby it kills another, if he gives not due warning to thoſe that are under, it will be at leaſt man-ſlaughter; *quia debitam diligentiam non adhibuit.*

So if a man be felling a tree in his own ground, and it fall and kill a perſon, it is chance-medley. 6 *E.* 4. 7.

But in all theſe caſes, if it doth only hurt a man by ſuch an accident, it is nevertheleſs a treſpaſs, and the perſon hurt ſhall recover his damages, for tho the chance excuſe from felony, yet it excuſeth not from treſpaſs. 6 *E.* 4. 7.

Regularly he that voluntarily and knowingly intends hurt to the perſon of a man, tho he intend not death, yet if death enſues, it excuſeth not from the guilt of murder, or manſlaughter at leaſt; as if *A.* intends to beat *B.* but not to kill him, yet if death enſues, this is not *per infortunium*, but murder or manſlaughter, as the circumſtances of the caſe happen.

And therefore I have known it ruled, that if two men are playing at cudgels together, or wreſtling by conſent, if one with a blow or fall kill the other, it is manſlaughter, and not *per infortunium*, tho Mr. *Dalton*, *cap.* 96. *(a)* ſeems to doubt it; and accordingly it was reſolved *P.* 2 *Car.* 2. by all the judges upon a ſpecial verdict from *Newgate*, where two friends were playing at foils at a fencing ſchool, one caſually kild the other; reſolved to be manſlaughter.

Sir *John Chicheſter*, and his man-ſervant, whom he very well loved, were playing together, the man had a bedſtaff in his hand, and Sir *John* had his rapier in the ſcabbard, Sir *John*, according to the uſual ſport between them, bids his man guard his thruſt or paſs, which he was making at him with his rapier in the ſcabbard, the ſer-
[473] vant with the bedſtaff brake the thruſt, but withal ſtruck off the chape of the ſcabbard, whereby the end of the rapier came out of the ſcabbard, but the thruſt was not ſo effectually broken, but the end of the rapier prickt the ſervant in the groin, whereof he died:

(a) New Edit. cap. 148. *p.* 479.

Sir

Sir *John Chicheſter* was for this indicted of murder, and tried at the king's bench bar, where all this evidence was given; and it was ruled, 1. That it was not murder, tho the act itſelf was not lawful, becauſe there was no malice or ill will between them. 2. That it was not barely chance-medley, or *per infortunium*, becauſe altho the act, which occaſioned the death, intended no harm, nor could it have done harm, if the chape had not been ſtricken off by the party kild, and tho the parties were in ſport, yet the act itſelf, the thruſting at his ſervant, was unlawful, and conſequently the death, that enſued thereupon, was manſlaughter, and was accordingly found and adjudged, which I heard 23 *Car.* I. *(b)*, 11 *H.* 7. 23. *a. Kelw.* 108, 136.

But if two play at barriers, or run a-tilt without the king's commandment, and one kill the other, it is manſlaughter; but if it be by the king's command, it is not felony, or at moſt *per infortunium*. 11 *H.* 7. 23. *B. Coron.* 229. *Dalton, cap.* 96. *Co. P. C. p.* 56. *(c)*

If *A.* comes into the wood of *B.* and pulls his hedges, or cut his wood, and *B.* beat him, whereof he dies, this is manſlaughter, becauſe, tho it was not lawful for *A.* to cut the wood, it was not lawful for *B.* to beat him, but either to bring him to a juſtice of peace, or puniſh him otherwiſe according to law.

But if a ſchool-maſter correct his ſcholar, or a maſter his ſervant, or a parent his child, and by ſtruggling, or otherwiſe, the child or ſcholar, or ſervant die, this is only *per infortunium*, [474] *Crompt. Juſt.* 28. *b.*

But this is to be underſtood, when it happens only upon moderate correction, for if the correction be with an unfit inſtrument *(d)*, or too outragious, then it is murder, as it happend in a caſe at *Norwich* aſſizes 1670. where the maſter ſtruck a child, that was his apprentice, with a great ſtaff, of which it died, it was ruled murder.

Several perſons come to enter the houſe of *A.* as treſpaſſers, *A.* ſhoots and kills one, this is manſlaughter, otherwiſe it had been, if they had entered to commit a felony. *Crompt. de Pace, fol.* 29. *a. Harcourt's* caſe.

(b) Aleyn 12. This ſeems a very hard caſe, and indeed the foundation of it fails, for the puſhing with a ſword in the ſcabbard by conſent ſeems not to be an unlawful act, for it is not a dangerous weapon likely to occaſion death, nor did it do ſo in this caſe but by an unforeſeen accident, and therein differs from the caſe of juſting, (or prize-fighting) wherein ſuch weapons are made uſe of, as are fitted, and likely to give mortal wounds.

(c) Brooke, after having taken notice of this as *Fineux's* opinion, ſays, That other juſtices in the time of *Henry* VIII. denied this, and held it felony to kill a man in juſting, or ſporting after that manner, notwithſtanding the king's command, *for ſuch command is againſt law.*

(d) As with a bar of iron, or a ſword, or a great cudgel, *Kel.* 64, 133.

But

But in the caſe of *Levet* indicted for the death of *Frances Freeman*, the caſe was, That *William Levet* being in bed and aſleep in the night in his houſe, his ſervant hired *Frances Freeman* to help her to do her work, and about twelve of the clock in the night the ſervant going to let out *Frances* thought ſhe heard thieves breaking open the door, ſhe therefore ran up ſpeedily to her maſter, and informed him, that ſhe thought thieves were breaking open the door, the maſter riſing ſuddenly, and taking a rapier ran down ſuddenly, *Frances* hid herſelf in the buttery leſt ſhe ſhould be diſcovered, *Levet*'s wife ſpying *Frances* in the buttery, and not knowing her cried out, *Here they be that would undo us:* *Levet* runs into the buttery in the dark, not knowing *Frances*, but thinking her to be a thief, and thruſting with his rapier before him hit *Frances* in the breaſt mortally, whereof ſhe inſtantly died: this was reſolved to be neither murder, nor manſlaughter, nor felony: *vide* the caſe cited by juſtice *Jones*, *P.* 15 *Car.* 1. *B. R.* and *Croke*, *n.* 1. (in *Cook*'s caſe *(e)* for killing a bailiff, that broke a window to execute a *Capias*, which was judged to be manſlaughter;) where the book ſays it was not felony, *quære* whether it be not homicide by miſadventure, for the party kild was in truth no thief, tho miſtaken for one, and tho it be not homicide voluntary, yet it ſeems to be *per infortunium*.

[475] If a man knowing that people are paſſing along the ſtreet throws a ſtone, or ſhoots an arrow over the houſe or wall with intent to do hurt to people, and one is thereby ſlain, this is murder, and if it were without ſuch intent, yet it is manſlaughter, and not barely *per infortunium*, becauſe the act itſelf was unlawful; but if the man were tiling an houſe, and let fall a tile knowingly, and gave warning, and yet a perſon is kild, this is *per infortunium*, but if he gave not convenient warning, it is manſlaughter, *quia non adhibuit debitam diligentiam*. *(f)*

If *A.* in his own park ſhoot at a deer, and the arrow glancing againſt a tree hits and kills *B.* this is homicide *per infortunium*, becauſe it was lawful for him to ſhoot in his own park.

But if *A.* without the licence of *B.* hunts in the park of *B.* and his arrow glancing from a tree killeth a by-ſtander, to whom he intended no hurt, this is manſlaughter, becauſe the act was unlawful.

(*e*) *Cro. Car.* 538. *W. Jones* 429.

(*f*) This is upon ſuppoſition, that the houſe do not ſtand near an highway or place of reſort, for then, tho he ſhould cry out firſt, it is manſlaughter. See *Hull*'s caſe 1664. *Kel.* 40.

So

So if *A.* throws a ſtone at a bird, and the ſtone ſtriketh and killeth another, to whom he intended no harm, it is *per infortunium*

But if he had thrown a ſtone to kill the poultry or cattle of *B.* and the ſtone hit and kill a by-ſtander, it is manſlaughter, becauſe the act was unlawful, but not murder, becauſe he did it not maliciouſly, or with an intent to hurt the by-ſtander.

By the ſtatute of 33 *H.* 8. *cap.* 6. "No perſon not having lands, "*&c.* of the yearly value of one hundred pounds *per annum* may "keep or ſhoot in a gun upon pain of forfeiture of ten pounds." Suppoſe therefore ſuch a perſon not qualified ſhoots with a gun at a bird, or at crows, and by miſchance it kills a by-ſtander by the breaking of the gun, or ſome other accident, that in another caſe would have amounted only to chance-medley, this will be no more than chance medley in him, for tho the ſtatute prohibits him to keep or uſe a gun, yet the ſame was but *malum prohibitum*, and that only under a penalty, and will not inhanſe the effect [476] beyond its nature.

A. having deer frequenting his corn-field out of the precinct of any foreſt or chace ſets himſelf in the night-time to watch in a hedge, and ſets *B.* his ſervant to watch in another corner of the field with a gun charged with bullets, giving him order to ſhoot, when he hears any buſtle in the corn by the deer, the maſter himſelf improvidently ruſhes into the corn, the ſervant ſuppoſing it to be the deer ſhoots, and thereby kills his maſter in the night, this is neither petit treaſon, murder, nor manſlaughter, but chance-medley, for the ſervant was miſguided by his maſter's own direction, and was ignorant, that it was any thing elſe but the deer. This was my opinion in a caſe happening at *Peterborough* ſeſſion; but it ſeemed to me, that if the maſter had not given ſuch direction, that was the occaſion of his miſtake, it would have been manſlaughter to have ſhot at a man, tho by miſtaking it for the deer, becauſe he did not *adhibere debitam diligentiam* to diſcover his mark, but ſhot directly at the perſon of a man, tho miſtaking it for a deer.

A. drives his cart careleſly, and it runs over a child in the ſtreet, if *A.* have ſeen the child, and yet drives on upon him, it is murder; but if he ſaw not the child, yet it is manſlaughter; but if the child had run croſs the way, and the cart run over the child before it was poſſible for the carter to make a ſtop, it is *per infortunium*, and accordingly

ingly this direction was given by us at *Newgate* ſeſſions in 1672. and the carter convict of manſlaughter.

If a man or boy riding in the ſtreet whip his horſe to put him into ſpeed, and run over a child and kill him, this is homicide, and not *per infortunium*. and if he had rid ſo in a preſs of people with intent to do hurt, and the horſe had kild another, it had been murder in the rider.

But if a man or boy be riding in the ſtreet, and a by-ſtander whip the horſe, whereby he runs away againſt the will of the rider, and in his courſe runs over and kills a child or man, it is chance-medley only. and in that caſe the jury ought not to find him *not* [477] *guilty* generally, but the ſpecial matter; but yet, becauſe the coroner's inqueſt, which ſtood untraverſed, had found the ſpecial matter, the court received the verdict of *not guilty* upon the indictment by the grand inqueſt of murder, and the party confeſſed the indictment by the coroner, and had his pardon of courſe, and this was ſaid by *Lee* ſecondary to be the courſe at *Newgate*, 1 *Sept.* 16 *Car.* 2. *Richard Pretty*'s caſe.

Tho the killing of another perſon *per infortunium* be not in truth felony, nor ſubjects the party to a capital puniſhment, and therefore uſually in ſuch caſes the verdict concludes, *quod interfecit per infortunium. & non per feloniam*, yet the party forfeits his goods, and tho he ought to have *quaſi de jure* a pardon of courſe upon the certificate of the conviction, yet he is not to be diſcharged out of priſon, but bailed till the next term of ſeſſions to ſue out his pardon of courſe, for tho it was not his crime, but his misfortune, yet becauſe the king hath loſt his ſubject, and that men may be the more careful, he forfeits his goods, and is not preſently abſolutely diſcharged of his impriſonment, but bailed, *ut ſupra*.

And ſo ſtrict was the judicial law of the *Jews* in relation to the life of man, that even in this caſe the avenger of blood might kill the manſlayer *per infortunium* before he got to the city of refuge, *Deut.* xix. 5, 6.

3 Wilſon. 407, 408. Foſter. 262, 263, 259, 280, 299. Keil. 40.

CHAP.

CHAP. XL.

Of manſlaughter ex neceſſitate, *and firſt* ſe defendendo.

I COME to thoſe homicides that are *ex neceſſitate*, and this neceſſity makes the homicide not ſimply voluntary, but mixed, partly voluntary and partly involuntary, and is of two kinds.

1. That neceſſity, which is of a private nature.

2. That neceſſity, which relates to the public juſtice and ſafety.

The former is that neceſſity, which obligeth a man to his own defenſe and ſafeguard, and this takes *in* theſe inquiries, 1. What may be done for the ſafeguard of a man's own life. 2. What may be done for the ſafeguard of the life of another. 3. What may be done for the ſafeguard of a man's goods. 4. What may be done for the ſafeguard of a man's houſe of habitation.

I. As touching the firſt of theſe, *viz.* homicide in defenſe of a man's own life, which is uſually ſtyled *ſe defendendo*.

It is generally to be obſerved, that in caſe of any indictment or charge of felony the priſoner cannot plead any thing by way of juſtification, as that he did it in his own defenſe, or *per infortunium*, but muſt plead *not guilty*; and upon his trial the ſpecical matter is to be found by the jury, and thereupon the court gives judgment.

Homicide *ſe defendendo* is of two kinds.

1. Such, as tho it excuſeth from death, yet it excuſeth not the forfeiture of goods, nor is the party to be abſolutely diſcharged out of priſon, but bailed, and to purchaſe his pardon of courſe.

2. Such as wholly acquits from all kinds of forfeiture.

Firſt, therefore, of common homicide *ſe defendendo*.

Homicide *ſe defendendo* is the killing of another perſon [479] in the neceſſary defence of himſelf againſt him that aſſaults him.

In this caſe of homicide *ſe defendendo*, there are theſe circumſtances obſervable.

1. It is not neceſſary that the party killed be the firſt aggreſſor or aſſailant, or of his party, tho commonly it holds.

There is a malice between *A.* and *B.* they appoint a time and place to fight, and meet accordingly, *A.* gives the firſt onſet, *B.* retreats as far as he can with ſafety, and then kills *A.* who had otherwiſe

wiſe killed him; this is murder, for they met by compact and deſign, and therefore neither ſhall have the advantage of what they themſelves each of them created.

There is malice between *A.* and *B.* they meet caſually, *A.* aſſaults *B.* and drives him to the wall, *B.* in his own defenſe kills *A.* this is *ſe defendendo*, and ſhall not be heightened by the former malice into murder or homicide at large, *Copſton*'s caſe cited *Crompt. de Pace* 27. *b.* and *Dalt. cap.* 98. *(a)*, for it was not a killing upon the account of the former malice, but upon a neceſſity impoſed upon him by the aſſault of *A.*

A. aſſaults *B.* and *B.* preſently thereupon ſtrikes *A.* without flight, whereof *A.* dies, this is manſlaughter in *B.* and not *ſe defendendo*, 43. *Aſſiz.* 31 but if *B.* ſtrikes *A.* again, but not mortally, and blows paſs between them, and at length *B.* retires to the wall, and being preſſed upon by *A.* gives him a mortal wound, whereof *A.* dies, this is only homicide *ſe defendendo*, altho that *B.* had given divers other ſtrokes, that were not mortal before he retired to the wall, or as far as he could. *Stamf. P. C. Lib.* I. *cap.* 7. *fol.* 15. *a. Dalt. cap.* 98. *Cromp.* 28. *a.*

But now ſuppoſe, that *A.* by malice makes a ſudden aſſault upon *B.* who ſtrikes again, and purſuing hard upon *A. A.* retreats to the wall, and in ſaving his own life kills *B.* ſome have held this to be murder, and not *ſe defendendo*, becauſe *A.* gave the firſt aſſault, *Cromp. fol.* 22. *b.* grounding upon the book of 3 *E.* 3. *Itin. North.* [480] *Coron.* 287. but Mr. *Dalton*, *ubi ſupra*, thinketh it to be *ſe defendendo (b)*, tho *A.* made the firſt aſſault, either with or without malice, and then retreated; therefore the book of 3 *E.* 3.

(a) New Edit. cap. 150. *p.* 484.

(b) The caſe here referred to in *Dalton* is the caſe of an affray, (which is likewiſe the caſe put by *Stamford*) of this he ſays there was a difference of opinions, but delivers no opinion of his own; but as to the caſe here put by our author of a *malicious* aſſault, which he afterwards mentions, he ſeems plainly to be of the contrary opinion, and to think it murder; nor do I ſee any thing in *Coron.* 284, 287. that could occaſion any doubt about this matter, or any way relates to this caſe, for both thoſe caſes (which ſeem to be but one and the ſame) were of an affray, in which he that ſtruck firſt, was the party killed, and the party killing ſtruck not at all, till after he had fled as far as he could, and was neceſſitated to do it in his own defenſe; ſo that the reaſon aſſigned by our author for demanding the queſtion of the jury is grounded on a miſtake; that, which to me ſeems the reaſon of putting that queſtion to the jury, is this, the jury had found the fact ſpecially, but had not drawn any general concluſion from it, the queſtion was therefore aſked, that they might make the uſual concluſion, *unde dicunt, quod prædictus* A. (the defendant) *ſe defendendo prædictum* B. (the deceaſed) *interfecit, & non per felloniam aut malitiam præcogitatam*, which was done accordingly; and therefore in the firſt of thoſe places, *viz. Coron.* 284. the uſual concluſion being inſerted, no notice is taken of the queſtion put to the jury.

Coron.

Coron. 284, 287. which occaſioned the doubt, is to be examined, which is thus.

It ſeems to me, that if *A.* did retreat to the wall upon a real intent to ſave his life, and then merely in his own defenſe killed *B.* that it is *ſe defendendo*, and with this agrees *Stamf. P. C. Lib.* I. *cap.* 7. *fol.* 15. *a.* But if on the other ſide *A.* knowing his advantage of ſtrength, or ſkill, or weapon, retreated to the wall merely as a deſign to protect himſelf under the ſhelter of the law, as in his own defenſe, but really intended the killing of *B.* then it is murder, or manſlaughter, as the circumſtance of the caſe requires, and that was the reaſon, why the judges demanded of the jury 3 *E.* 3. whether he killed *B.* of malice, or otherwiſe to ſave himſelf, and when the jury anſwered, *It was to ſave his life*, he was remitted to priſon to have his pardon of courſe, 3 *E.* 3. *Coron.* 284. 287.

2. In homicide *ſe defendendo*, there ſeems neceſſary ſome act to be done by the party killing, for if he be merely paſſive, this will make it only a killing *per infortunium.*

A. aſſaults *B.* who flies to the wall, or falls, holding his ſword knife or pike in his hand, *A.* runs violently, or falls upon the knife of *B.* without any thruſt or ſtroke offered at him by *B.* and thereupon dies, this is death *per infortunium*, and ſome have ſaid, that in this caſe *A.* is *felo de ſe, de quo antea, vide Stamf. P. C.* [481] *Lib.* I. *cap.* 7. *p.* 16. *& libros ibi.*

3. Regularly it is neceſſary, that the perſon that kills another in his own defenſe, fly as far as he may to avoid the violence of the aſſault before he turn upon his aſſailant; for tho in caſes of hoſtility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet in caſes of aſſaults and affrays between ſubjects under the ſame law, the laws own not any ſuch point of honour, becauſe the king and his laws are to be the *vindices injuriarum*, and private perſons are not truſted to take capital revenge one of another.

But this hath ſome exceptions.

1. In reſpect of the perſon killing.

If a gaoler be aſſaulted by his priſoner, or if the ſheriff or his miniſter be aſſaulted in the execution of his office, he is not bound to give back to the wall; but if he kills the aſſailant, it is in law adjudged *ſe defendendo*, tho he gives not back to the wall; the like of a conſtable or watchman, for they are miniſters of juſtice, and under

a more ſpecial protection in the execution of their office, than private perſons. *Co. P. C. p.* 56. 9 *Co. Rep.* 68. *b. Mackally's* caſe.

But if the priſoner makes no reſiſtance, but flies, yet the officer either for fear that he, or ſome other of his party will reſcue the priſoner, ſtrikes the priſoner, whereof he dies, this is murder, for here was no aſſault firſt made by the priſoner, and ſo it cannot be *ſe defendendo* in the officer.

And here is the difference between civil actions and felonies.

If a man be in danger of arreſt by a *Capias* in debt or treſpaſs, and he flies, and the bailiff kills him, it is murder; but if a felon flies, and he cannot be otherwiſe taken, if he be killed, it is no felony, and in that caſe the officer ſo killing forfeits nothing, but the perſon ſo aſſaulted and killed forfeits his goods.

2. In relation to the perſon killed.

If a thief aſſaults a true man either abroad or in his houſe to rob or kill him, the true man is not bound to give back, but may kill the aſſailant, and it is not felony. *Co. P. C. p.* 56.

[482] 3. In reſpect of the manner of the aſſault.

If *A.* aſſaults *B.* ſo fiercely, that *B.* cannot ſave his life if he gives back, or if in the aſſault *B.* falls to the ground, whereby he cannot fly, in ſuch caſe if *B.* kills *A.* it is *ſe defendendo*, *Co. P. C. p.* 56. but now here will be occaſion to reſume the former debate, where the firſt aſſailer may be ſaid to kill the aſſailed *ſe defendendo.*

If *A.* aſſaults *B.* and *B.* thereupon reaſſaults *A.* and *A.* really flies to avoid the aſſault of *B.* who purſues him, and then *A.* being driven to the wall turns again and kills *B.* it ſeems this may be *ſe defendendo*, as hath been ſaid; for it appears *de facto*, that *A.* fled from the aſſault of *B.* till he could fly no farther.

But if *A.* aſſaults *B.* firſt, and upon that aſſault *B.* re-aſſaults *A.* and that ſo fiercely, that *A.* cannot retreat to the wall or other *non ultra* without danger of his life, nay, tho *A.* falls upon the ground upon the aſſault of *B.* and then kills *B.* this ſhall not be interpreted to be *ſe defendendo* (*c*), but to be murder, or ſimple homicide, according to the circumſtances of the caſe, for otherwiſe we ſhould

(*c*) Becauſe his fall not being voluntary, as a flight is, it does not appear, that he declined fighting, ſo that the party firſt aſſaulted cannot ſafely quit the advantage he has got.

have

have all caſes of murders or manſlaughters by way of interpretation turned into *ſe defendendo*.

The party aſſaulted indeed ſhall, by the favourable interpretation of the law, have the advantage of this neceſſity to be interpreted as a flight *(d)* to give him the advantage of *ſe defendendo*, when the neceſſity put upon him by the aſſailant makes his flight impoſſible; but he that firſt aſſaulted hath done the firſt wrong, and brought upon himſelf this neceſſity, and ſhall not have advantage of his own wrong to gain the favourable interpretation of the law, that *that* neceſſity, which he brought upon himſelf, ſhould, by way of interpretation, be accounted a flight to ſave himſelf from the guilt of murder or manſlaughter.

If *A.* after the aſſault, had really and *bonâ fide* fled from *B.* or that they had been parted by by-ſtanders, that had [483] given a kind of interruption to the affray, and a declining of any farther affray by *B.* and therefore when *B.* purſues him to kill him, and *A.* after his flight, upon neceſſity of ſaving his life, kills *B.* this is apparent to be *ſe defendendo*; but when it is done altogether without any interval of flight or parting, and *B.* that was firſt aſſaulted, gains the preſent advantage by his ſtrength, courage or fortune, to preclude the flight of *A.* and then *A.* kills him, this ſeems to be manſlaughter, and not *ſe defendendo*.

And it muſt be obſerved, that the flight to gain the advantage of *ſe defendendo* to the party killing, muſt not be a feigned flight, or a flight to gain advantage of breath, or opportunity to fall on a freſh, as fighting cocks retire to gain advantage, but it muſt be a flight from the danger, as far as the party can, either by reaſon of ſome wall, ditch, company, or as the fierceneſs of the aſſailant will permit.

In *Fleet ſtreet* *A.* and *B.* were walking together, *B.* gave ſome provoking language to *A.* who thereupon gave *B.* a box on the ear, they cloſed *B.* was thrown down, and his arm broken, he ran to his brother's houſe preſently, which was hard by, *C.* his brother, taking the alarm, came out with his ſword drawn and made towards *A.* who retreated ten or twelve yards, *C.* purſued him, *A.* drew his ſword and made a paſs at *C.* and killed him; *A.* being indicted at *Newgate* ſeſſions for murder, the court directed the jury upon the

(d) Not the law eſteems this neceſſity to be a flight, but the party not having opportunity of flying, the law does not require it of him; but excuſes him in the ſame manner, as if he had fled.

trial to find this manſlaughter, not murder, becauſe upon a ſudden falling out; not *ſe defendendo*, partly becauſe *A.* made the firſt breach of the peace by ſtriking *B.* and partly becauſe, unleſs he had fled as far as might be, it could not, by way of interpretation, be ſaid to be in his own defenſe: and it appeared plainly upon the evidence, that he might have retreated out of danger, and his ſtepping back was rather to have an opportunity to draw his ſword, and with more advantage to come upon *C.* than to avoid him; and accordingly, at laſt, it was found manſlaughter 1671. at *Newgate*.

[484] II. I come to the ſecond conſideration, namely, what the offenſe is, if a man kills another in the neceſſary ſaving of the life of a man aſſaulted by the party ſlain.

A. aſſaults the maſter, who flies as far as he can to avoid death, the ſervant kills *A.* in defenſe of his maſter; this is homicide *defendendo* of the maſter, and the ſervant ſhall have a pardon of courſe, 21 *H.* 7. 39. *a.* but if the maſter had not been driven to that extremity, it had been manſlaughter at large in the ſervant, if he had no precedent malice in him. *Plowd. Com.* 100.

The like law had been for a maſter killing in the neceſſary defenſe of his ſervant, the huſband in the defenſe of the wife, the wife, of the huſband, the child of the parent, or the parent of the child, for the act of the aſſiſtant ſhall have the ſame conſtruction in ſuch caſes, as the act of the party aſſiſted ſhould have had, if it had been done by himſelf, for they are in a mutual relation one to another.

If *A.* and *B.* and *C.* be of a company together, and walking in the field *C.* aſſaults *B.* who flies, *C.* purſues him, and is in danger to kill him, unleſs preſent help, *A.* thereupon kills *C.* in defenſe of the life of *B.* it ſeems that in this caſe of ſuch an inevitable danger of the life of *B.* this occiſion of *C.* by *A.* is in nature of *ſe defendendo*, but then it muſt appear plainly by the circumſtances of the caſe, as the manner of the aſſault, the weapon with which *C.* made the aſſault, *&c.* that the imminent danger of the life of *B.* be apparent and evident.

And the reaſon ſeems to be, becauſe every man is bound to uſe all poſſible lawful means to prevent a felony, as well as to take the felon, and if he doth not, he is liable to a fine and impriſonment, therefore if *B.* and *C.* be at ſtrife, *A.* a by-ſtander, is to uſe all lawful means that he may, without hazard of himſelf, to part them; and

and the very relation of acquaintance, and mutual ſociety between *A. B.* and *C.* ſeems to excuſe the fact of *A.* in the neceſſary ſafeguard of the life of *B.* from the crime of ſimple homicide; *tamen quære.*

If *A.* be travelling, and *B.* comes to rob him, if *C.* falls into the company, he may kill *B.* in defenſe of *A.* and therefore much more, if he come to kill him, and ſuch his intent be apparent, for in ſuch caſe of a felony attempted, as well as of a felony committed, every man is thus far an officer, that at leaſt his killing of the attempter in caſe of neceſſity puts him in the condition of *ſe defendendo* in defending his neighbour; but of this more hereafter. [485]

A. makes an aſſault upon *B.* a woman or maid with intent to raviſh her, ſhe kills him in the attempt, it is *ſe defendendo* becauſe he intended to commit a felony. *Dalt. cap.* 98. *p.* 250.

And ſo it is if *C.* the huſband or father of *B.* had killed him in the attempt, if it could not be otherwiſe prevented; but if it might be otherwiſe prevented, it is manſlaughter; therefore circumſtances muſt guide in that caſe.

III. I come to conſider, what the offenſe is in killing him that takes the goods, or doth injury to the houſe or poſſeſſion of another.

And herein there will be many diverſities, as firſt, between a treſpaſſing act and a felonious act, and between felonious acts themſelves.

If *A.* pretending a title to the goods of *B.* takes them away from *B.* as a treſpaſſer, *B.* may juſtify the beating of *A.* but if he beat him ſo that he dies, it is neither juſtifiable, nor within the privilege of *ſe defendendo*, but it is manſlaughter. *Dalt. cap.* 98. *p.* 251.

A. is in poſſeſſion of the houſe of *B. B.* endeavours to enter upon him, *A.* can neither juſtify the aſſault nor beating of *B.* for *B.* had the right of entry into the houſe, but if *A.* be in poſſeſſion of a houſe, and *B.* as a treſpaſſer enters without title upon him, *A.* may not beat him, but may gently lay his hands upon him to put him out, and if *B.* reſiſts and aſſaults *A.* then *A.* may juſtify the beating of him, as of his own aſſault.

But if *A.* kills him in defenſe of his houſe, it is neither juſtifiable, nor within the privilege of *ſe defendendo*, for he entered only as a treſpaſſer, and therefore it is at leaſt common manſlaughter: this was *Harcourt's* caſe *Crompt.* 27. *a.* who being in poſſeſſion of a houſe

by title, as it ſeems, *A.* endeavoured to enter and ſhot an arrow at them within the houſe, and *Harcourt* from within ſhot an [486] arrow at thoſe that would have entered, and killed one of the company, this was ruled manſlaughter, 5 *Eliz.* and it was not *ſe defendendo*, becauſe there was no danger of his life from them without.

But if *A*, had entered into the houſe, and *Harcourt* had gently laid his hands upon him to turn him out, and then *A.* had turned upon him, and aſſaulted him, and *Harcourt* had killed him, it had been *ſe defendendo*, and ſo it had been if *A.* had entered upon him, and aſſaulted him firſt. tho he intended not to kill him, yet if *Harcourt* had thereupon killed *A.* it had been only *ſe defendendo*, and not manſlaughter, tho the entry of *A.* was not with intent to murder him, but only as a treſpaſſer to gain the poſſeſſion, 3 *E.* 3. *Coron.* 35. *Cromp.* 27. *b.* and it ſeems to me in ſuch a caſe *Harcourt*, being in his own houſe, need not fly as far as he can, as in other caſes of *ſe defendendo*, for he had the protection of his houſe to excuſe him from flying, for *that* would be to give up the poſſeſſion of his houſe to his adverſary by his flight.

A. commits adultery with *B.* the wife of *C.* who comes up and takes them in the very act, and with a ſtaff kills the adulterer upon the place; this is manſlaughter, and neither murder, nor under the privilege of *ſe defendendo:* but if *A.* had been taken by *C.* in the very attempt of a rape upon the wife, and ſhe crying out, her huſband had come and killed *A.* in the act of his raviſhment, it had been within the privilege of *ſe defendendo*, becauſe it was a felony; the former caſe was adjudged manſlaughter by the court, *B. R. M.* 23. *Car.* 2. *(d)*.

Now concerning felonies, as there is a difference between them and treſpaſſes, ſo there is a difference among themſelves in relation to the point of *ſe defendendo*.

If a man come to take my goods as a treſpaſſer, I may juſtify the beating of him in defenſe of my goods, as hath been ſaid; but if I kill him, it is manſlaughter.

But if a man comes to rob me, or take my goods as a felon, and in my reſiſtance of his attempt I kill him, it is *me defendendo* at leaſt, and in ſome caſes not ſo much.

(*d*) *Manning*'s caſe *Raym.* 212. When he was to be burnt in the hand, the court directed it to be done gently, becauſe they ſaid there could not be a greater provocation.

in

At common law, if a thief had aſſaulted a man to rob him, and he had kild the thief in the aſſault, it had been *ſe defendendo*, but yet he had forfeited his goods, as ſome have thought, 11 *Co. Rep.* 82. *b.* thó other books be to the contrary. 26 *Aſſiz.* 32.

But if *A.* had attempted a burglary upon the houſe of *B.* to the intent to ſteal, or to kill him, or had attempted to burn the houſe of *B.* if *B.* or any of his ſervants, or any within his houſe had ſhot and kild *A.* this had not been ſo much as felony, nor had he forfeited ought for it, for his houſe is his caſtle of defenſe, and therefore he may juſtify aſſembling perſons for the ſafe-guard of his houſe. 21 *H.* 7. 39. *a.* 11 *Co. Rep.* 82. *b.* 5 *Co. Rep.* 91. *b* 26 *Aſſiz.* 23 3 *E.* 3. *Coron.* 330.

But otherwiſe it is, as hath been ſaid, in caſe of a treſpaſſing entry into the houſe claiming a title, and not to commit felony.

But now by the ſtatute of 24 *H.* 8. *cap.* 5. "If any perſon attempts "any robbery or murder of any perſon in or near any common high-"way, cartway, horſeway, or footway, or in their manſion houſes, "or do attempt to break any manſion-houſe in the night-time, and "ſhall happen to be kild by any perſon or perſons, *&c.* (tho a lodger "or ſervant) they ſhall upon their trial be acquitted and diſcharged in "like manner, as if he had been acquitted of the death of ſuch per-"ſon." *P.* 15 *Car.* 1. *Cooper*'s caſe. *(e)*

This ſtatute was to remove a doubt, and was declarative and enacting, and puts the killing of a robber in or near the highway, *&c.* in the ſame condition with one, that intends to rob or murder in the dwelling-houſe, and exempts both from forfeiture, and hath ſettled the doubt.

And upon this ſtatute it was, that when there was malice between *A.* and *B.* and they had fought ſeveral times, and after met ſuddenly in the ſtreet near *Ludgate*, and *A.* ſaid he would fight him, *B.* declined it, and fled to the wall, and called others to witneſs it, and *A.* purſued him, and ſtruck him firſt, and *B.* in his own defenſe kild him, he was acquit from any forfeiture by the ſtatute of 24 *H.* 8. *cap.* 5. 15 *Eliz. Cromp.* 27. *b. Copſton*'s caſe: but upon this ſtatute [488] theſe things are obſervable.

1. It extends not to the caſe of a bare treſpaſſing entry into a houſe, but only to ſuch an entry or attempt as is intended to be for murder or robbery, *&c.* or ſome ſuch felony, and therefore the caſes of treſpaſſes, either in houſes or near highways, are left as before.

(e) Cro. Car. 544.

2. It ſeems, that it extends not to indemnify the killing of a felon, where the felony is not accompanied with force, for it ſpeaks of *robbery*, therefore the killing of one that attempts to pick my pocket, is not within the act, for there is no ſuch neceſſity; indeed, if any felon, after a felony committed, doth reſiſt thoſe, that endeavour to apprehend him, or fly, and be kild, this killing is no felony, but *that* is upon another account, for this ſtatute hath relation only to killing *before*, or in the felony committed, not *after*.

3. It ſpeaks only of breaking the houſe in the *night-time*, ſo that it ſeems it extends not to a breaking the houſe in the *day-time*, unleſs it be ſuch a breaking, as imports, with it apparent robbery, or an intention, or attempt thereof.

4. Tho the ſtatute ſpeaks not of burning houſes, yet he, that attempts the wilful burning of a houſe, and is kild in that attempt, is free from forfeiture, without the aid of this ſtatute, as appears 26 *Aſſiz.* 23.

By the judicial law, *Exod.* xxii. 2, 3. *If a thief be found breaking up, and he be ſmitten that he die, no blood ſhall be ſhed for him, but if the ſun be riſen upon him, there ſhall blood be ſhed for him, for he ſhould make reſtitution, and if he have nothing, he ſhall be ſold for his theft:* and by the *Roman* law of the twelve tables, *Fur manifeſto furto deprehenſus, ſi aut, cum faceret furtum, nox eſſet, aut inter-diu ſe telo, cum deprehenderetur, defenderet, impune occideretur (f):* upon the latter of theſe laws the civilians and canoniſts have made many curious diſtinctions, *quas vide apud* Covarruviam, Tom. I. Par. 3. *de homicidio ad defenſionem commiſſo (g)*; and upon the former the *Jewiſh* [489] Rabbies have made the like, *quas vide apud* Selden *de jure gentium.*

But as the laws of ſeveral nations, in relations to crimes and puniſhments differ, and yet may be excellently fitted to the exigencies and conveniences of every ſeveral ſtate, ſo the laws of *England* are excellently fitted in this and moſt other matters to the conveniencies of the *Engliſh* government, and full of excellent reaſon, and therefore I ſhall not trouble myſelf about other laws than thoſe of *England. (h).*

(f) Dig. Lib. IV. *tit.* 2. *ad leg. Aquil. l.* 4. §. 1. *Agel. Lib.* XI. *cap.* 18. *vide ſupra cap.* 1. *p.* 3 & 6.

(g) p. 561. *Edit. Antwerp* 1614.

(h) By the common law, *Qui latronem occiderit noctturnum vel diuturnum, non tenetur, ſi aliter periculum evadere non poſſit, tenetur tamen, ſi poſſit. Bract. Lib.* III. *de corona, fol.* 155. *a.*

Vide LL. Withred. Edit. Wilk. p. 12. *LL. Inæ, l.* 16. 20. 21. 35. *LL. Ethelſtani, l.* 11. *LL. Canuti, l.* 59.

IV. There

IV. There remains yet one other particular, namely, the killing a malefactor, that doth not yield himſelf to juſtice upon purſuit.

If a perſon be indicted of felony and flies, or being arreſted by warrant or proceſs of law upon ſuch indictment eſcapes and flies, and will not render himſelf, whereupon the officer or miniſter cannot take him without killing of him, this is not felony, neither ſhall the killer forfeit his goods, or be driven to ſue forth his pardon, but upon his arraignment ſhall plead *not guilty*, and accordingly it ought to be found by the jury. 3 *E.* 3. *Coron.* 288.

But if he may be taken without ſeverity, it is at leaſt manſlaughter in him, that kills him, therefore the jury is to inquire, whether it were done of neceſſity or not. 22 *Aſſiz.* 55 *Stamf. P. C. Lib.* I. *cap.* 5. *fol.* 13. *b.*

And the ſame law it is, if *A.* commits felony and flies, or reſiſts the people, that come to apprehend him, ſo that he cannot be taken without killing him, ſuch killing is not felony, nor does the perſon, that did it, forfeit any thing, tho *A.* were not indicted, nor the perſon, that did it, had any warrant of any court of juſtice, for in ſuch caſe the law makes every perſon an officer to apprehend a felon. 22 *E* 3. *Corn.* 261.

And the ſame law it is, if he be taken, and in bringing to the goal he breaks away, and the people of the vill purſue and cannot take him, unleſs they kill him, thoſe, that kill him, upon their arraignment ſhall be acquitted of the felony, but yet the townſhip ſhall be amerced for the eſcape, and the perſon kild ſhall forfeit his goods upon the flight found. 3 *E.* 3. *Cor.* 328. 340. and by ſome it hath been held he ſhall forfeit the iſſue of his lands, till the year and day be paſt. 3 *E.* 3. *Coron.* 290. [490]

If *A.* be ſuſpected by *B.* to commit a felony, but in truth he committed none, neither is indicted, yet upon the offer to arreſt him by *B.* he reſiſts and flies, whereby *B.* cannot take him without killing him, and *B.* kills him, if in truth there were no felony committed, or *B.* had not a probable cauſe to ſuſpect him, this killing is at leaſt manſlaughter, but if there was a felony committed, and *B.* hath cauſe to ſuſpect *A.* but in truth *A.* is not guilty of the fact, tho upon this account *B.* may juſtify the impriſonment of *A.* yet *quære*, if *B.* kills *A.* in the purſuit, whether this will excuſe him from manſlaughter.

But if a felony be committed, but not by *A.* but by ſome other, and *B.* hath a warrant from a juſtice of peace to apprehend *A.* or

that

that a hue and cry comes to *B.* the conſtable of *D.* to apprehend *A.* who endeavours to eſcape, or ſtands in reſiſtance, ſo that he cannot be taken without killing him, it ſeems the killer is excuſed from felony, tho *A.* were not indicted; *vide pro hoc* 3 *E.* 3. *Coron.* 289. and the reaſon is becauſe he is bound by law to execute his warrant, or purſue the party upon hue and cry and to apprehend him, and is indictable for a contempt if he doth not, and ſo it differs from the former caſe, for no man is bound to ſuſpect another, but it is the act of his own judgment, and ſo he is merely his own warrant, and he may not adventure ſo far as the death of the party, unleſs he be ſure he was the offender, tho he may impriſon him, for thereupon he ſhall be brought to his trial; *ſed de his vide Stamf. P. C. Lib.* I. *cap.* 5. *Crompt. fol.* 30.

And it is to be obſerved, that whether the party reſcues himſelf after he is taken, and fly or reſiſt, or whether he fly or reſiſt before he is taking, and be kild in the purſuit, it is all one, the killer forfeits nothing, but the perſon kild forfeits his goods, tho he were kild before attainder, upon an inquiſition either by the coroner, or petit [491] jury finding his flight. 3 *E.* 3. *Coron.* 288. 328.

By the ſtatute of 21 *E.* 1. *de malefactoribus in parcis*, if a parker, foreſter, or warrener, finds any treſpaſſers wandering in his park, foreſt, or warren, intending to do damage therein, and they will not yield to the foreſter after hue and cry made to ſtand to the king's peace, but fly or defend themſelves, whereupon they are kild, the parker, foreſter, or warrener, or their aſſiſtants ſhall not loſe life or limb for the ſame, but ſhall enjoy the king's peace, ſo it be not done upon any former malice or evil will; but to make good ſuch juſtification by a parker, foreſter, or warrener, there are theſe things requiſite: 1. It muſt be a legal foreſt, park, or warren, or chace, (for a chaſe includes warren) and not a bare warren, park, *&c.* in reputation, for if a man incloſeth a piece of ground, and put deer or conies in it, this makes it not a park or warren without a preſcription time out of mind, or the king's charter. 2. If a man hath a park within a foreſt, where he may hunt, and the foreſter kills the purloinman, or his ſervant hunting in the purloin, this doth not excuſe the foreſter from murder or manſlaughter, as the circumſtances of the caſe are. *Dyer* 327. *a.*

And note, that in all theſe caſes of homicide by neceſſity, as in purſuit of a felon, in killing him that aſſaults to rob, or comes to burn

or

or break a houſe, or the like, which are in themſelves no felony, the matter may be ſpecially preſented by the grand inqueſt, (*quod vide* 3 *E.* 3. *Coron.* 305. 289. and ſeveral other places,) or by the coroner's inqueſt. And thus it was done in *Holme*'s caſe, 26 *Eliz. Crompt.* 28. and in the caſe of a ſervant of juſtice *Croke*, who coming with the judge out of the circuit was aſſaulted in the highway, and he kild the aſſailant, and the matter preſently was ſpecially found by the coroner's inqueſt, whereby he was diſcharged by the ſtatute of 24 *H.* 8. *cap.* 5. and in theſe caſes upon this ſpecial preſentment the party ſhall be preſently diſcharged without being put to plead, but then this acquittal by preſentment is no final diſcharge, for he may be indicted and arraigned again afterwards, if the matter of the former indictment be falſe; but if in ſuch caſe the preſentment of the grand inqueſt or coroner's inqueſt be ſimply of murder [492] or manſlaughter, and thereupon he is arraigned and tried, and this ſpecial matter given in evidence, he ſhall be acquitted thereupon, for upon theſe ſpecial matters proved in evidence, he is not guilty, for it is no felony, and this acquittal is a perpetual diſcharge and bar againſt any other indictment for the ſame death; therefore this latter way is more advantageous in the concluſion for the party, than a ſpecial preſentment. *Cromp. fol.* 28. *Holme*'s caſe.

Foſter, 271, 277, 318.

CHAP. XLI.

Concerning the forfeiture *of him, that kills in his own defenſe, or* per infortunium.

IF a man kill another by misfortune, yet he ſhall forfeit his goods in ſtrictneſs of law, in reſpect of the great favour the law hath to the life of a man, and to the end that men ſhould uſe all care, diligence and circumſpection in all they do, that no ſuch hurt enſue by their actions.

But if the occiſion or killing can by no means be attributed to the act of the perſon, but to the act of him, that is kild, there it ſeems, tho the inſtrument of the death is forfeited as a deodand, there follows no forfeiture of the goods of the perſon: for inſtance,

— If

If *A.* ſhoots at rovers, as he may lawfully do, if *B.* after the arrow is deliverd runs into the place, where the arrow is to fall, of his own accord, and ſo is kild, this ſeems to be ſuch an *infortunium*, that affects not the loſs of goods, for it was not his act that contributed to the death of *B.* but the wilful or improvident act of *B.* himſelf; *quære.*

[493] If *A.* aſſaults *B.* and *B.* in his own defenſe kills *A.* yet *B.* forfeits his goods.

If the coroner's inqueſt find the killing ſpecially *ſe defendendo*, yet the court ſhall arraign him, and try him, whether it were *ſe defendendo*, before he ſhall have his pardon of courſe. 4 *H.* 7. 1 & 2.

But if *B.* having a pitch-fork in his hand, *A.* aſſaults *B.* ſo fiercely, that he runs upon the pitch-fork of *B.* *B.* offering no thruſt at all againſt *A.* (tho this be a very difficult matter of fact to ſuppoſe, yet if the fact be ſuppoſed to be ſo) it ſeems *B.* forfeits no goods, becauſe it was the act of *A.* himſelf, and ſome have ſaid rather, that in that caſe *A.* is *felo de ſe*, and forfeits his goods, *de quo ſupra*, 44 *E.* 3. 44. *Coron.* 94. tho 3 *E.* 3. *Coron.* 286. ſaith his goods are forfeit in that caſe.

But where the killing of a man in his defenſe is in the law no felony, but the party upon his arraignment upon the ſpecial matter is to be found or judged ſimply not guilty, there is no forfeiture, but the party ought to be abſolutely acquitted, unleſs he fled, and it be found, that *fugam fecit*, for *that* is a diſtinct forfeiture, altho the party be not guilty of the fact, and therefore always the jury is charged to inquire, whether the priſoner be guilty or not guilty, and if not guilty, whether he fled for the ſame, and if he fled, then to inquire alſo of his goods and chattles.

And the caſes, where the priſoner is not to forfeit any goods or chattles, but is to be abſolutely acquitted, if he kills in his own defenſe, are before remembered, and I here recollect them.

1. He that kills a thief, that attempts to rob him.

2. He that kills a perſon, that attempts to rob or kill him in or near the highway, or in the manſion of the killer, by the ſtatute of 24 *H.* 8. *cap.* 5. and this, tho he hath not yet actually robbed. 3 *E.* 3. *Coron.* 330.

3. He that kills a perſon, that attempts wilfully to fire his houſe, or to commit burglary, tho he hath not actually broken or fired the houſe. 26 *Aſſiz.* 23. 29 *Aſſiz.* 23. if he came with that purpoſe.

4. An

4. An officer or bailiff, that in execution of his office kills a perſon, that aſſaults him, tho the officer gives not back to the wall, for the officer is under the protection of the law, and the books tell us it is not felony in ſuch caſe. *Co. P. C. p.* 65.

5. The ſame law is of a conſtable, that commands the king's peace in an affray, and is reſiſted.

6. He that kills a felon, that reſiſts, or *juſticiari ſe non permittit*, and the like of a conſtable or watchman, that is charged to take a perſon charged with felony, or attempts to take him upon hue and cry, if the perſon ſo charged reſiſt or fly, and cannot be otherwiſe taken, tho perchance he be innocent, for the reaſon before given, and this either before or after the arreſt.

7. If there be a great riot, or rebellious aſſembly, how far the killing of ſuch perſons in ſuppreſſing of them is criminal is to be ſeen.

By the ſtatute 1 *Mar. cap.* 12. "If any perſons to the number of "twelve or more ſhall intend, practiſe, or put in ure to overthrow "pales, hedges, ditches, or incloſures of parks or other grounds, "banks of fiſh-ponds, conduit-heads, or pipes, or to pull down dove-"cotes, barns, houſes, mills, or burn ſtacks of corn, or abate rents "or price of victual or corn, and being required by the juſtices of "peace, ſheriff of the county, mayors, bailiffs, or head officers of "cities, by proclamation in the queen's name to retire to their homes, "ſhall remain together one hour after ſuch proclamation, or ſhall put "in ure ſuch things, they ſhall be adjudged felons.

"And if any perſons above the number of two ſhall unlawfully "aſſemble to put in ure the things aforeſaid, that it ſhall be lawful "for the ſheriff, juſtices of peace, mayors, bailiffs, and every other "perſon having commiſſion from the queen to raiſe force in manner "of war, to be arrayed to ſuppreſs and apprehend the rioters, and if "the perſons ſo unlawfully aſſembled after command and requeſt by "proclamation ſhall continue together, and not return to their habi-"tations, and if any of them happen to be kild, maimed or hurt in "or about the ſuppreſſing or taking them, the ſheriff, juſ-"tice, mayor, &c. and their aſſiſtants, ſhall be diſcharged [495] "and unpuniſhable for the ſame againſt the queen and all other:" this act was continued hy the ſtatute of 1 *Eliz. cap.* 16. during her life. *(a)*

(a) 1 *Geo. cap.* 5. a new act was made to the ſame purport, which is perpetual.

And

And it ſeems, as to this manner of killing rioters, that reſiſt the miniſters of juſtice in their apprehending, it is no other but what the common law allows, or at leaſt what the ſtatute of 13 *H.* 4. *cap.* 7. implicitly allows to two juſtices of the peace, with the ſheriff or under-ſheriff of the county, by giving them power to raiſe the *poſſe comitatus*, if need be, and to arreſt the rioters, and they are under the penalty of 100*l.* if they neglect their duty herein.

And with this agrees Mr. *Dalton*, *cap.* 46. *p.* 115. *(b)*, *cap.* 98. *p.* 249. *(c)*, and *Crompt. de Pace* 62. *b.* "Nota, que viſcount & juſ-" tices de peace point prendre tants des homes in harneys, quant ſont " neceſſary & guns &c. & tuer les rioters, ſils ne voilent eux rendre, " come fuit pris in caſe de *Drayton Baſſet*, car le ſtatute 13 *H.* 4. " *cap.* 7. parle, quils eux arreſtant, & ſi les juſtices ou aſcuns de leur " company tue aſcun des rioters, qe ne voil render neſt offence in " lui, come fuit auxi priſe in le dit caſe de *Drayton Baſſet (d)*;" and *note*, that tho the ſtatute of 1 *Eliz.* was then in force, yet *that* was not a caſe within that ſtatute, nor depending on it.

And it ſeems the ſame law is for the conſtable of a vill in caſe a riot happens within a vill, he may aſſemble force within his vill to arreſt the rioters, and if he or thoſe aſſembled in his aſſiſtance come to arreſt the rioters, and they reſiſt, and be kild by the conſtable or any of his aſſiſtants, the conſtable and his aſſiſtants are diſpuniſhable for the ſame, for he is enabled hereunto by the common law, as being an officer for the preſervation of the peace, and may command perſons to his aſſiſtance, and if they refuſe, they are fineable for it.

[496] And farther, the ſtatute of 17 *R.* 2. *cap.* 8. commands and authorizes the king's miniſters to uſe all their power to take and ſuppreſs ſuch riots and rioters, and a conſtable is the king's miniſter; and the ſtatute of 13 *H.* 4. *cap.* 7. is no repeal of this ſtatute, ſo that the killing of a rioter by a ſheriff, juſtice of peace, or conſtable, when he will reſiſt and not ſubmit to the arreſt, ſeems to be no felony at common law, nor makes any forfeiture, for they do but their office, and are puniſhable if they neglect it.

8. If the priſoners in gaol aſſault the gaoler, and he in his defenſe kills any of them, this is no felony, nor makes any forfeiture. 22 *Aſſiz.* 5. *per Thorp, adjudge per tout le councel.*

(b) New Edit. cap. 182. *p.* 297.
(c) cap. 150. *p.* 481.
(d) See alſo *Crompt.* 23. *b.*

CHAP.

CHAP. XLII.

Concerning the taking away of the life of man, by the courſe of law, *or* in execution of juſtice.

THIS kind of occiſion of a man according to the laws of the kingdom and in execution thereof ought not to be numbered in the rank of crimes, for it is the execution of juſtice, without which there were no living, and murders, burglaries, and all capital crimes would be as frequent and common, as petit treſpaſſes and batteries.

The taking away of the life, therefore, of a malefactor according to law by ſentence of the judge, and by the ſheriff or other miniſter of juſtice purſuant to ſuch ſentence, is not only an act of neceſſity, but of duty, not only excuſable, but commendable, where the law requires it.

But becauſe there are ſome cautions and conſiderations in this matter, I have added it to the cloſe of this title of homicide. [497]

Regularly it is not lawful for any man to take away the life of another, tho a great malefactor, without evident neceſſity, (whereof before,) or without due proceſs of law, for the deliberate, uncompelled extrajudicial killing of a perſon attaint of treaſon, felony, or murder, or in a *præmunire*, tho upon the ſcore of their being ſuch, is murder. *(a)*

Therefore it is neceſſary, 1. That he, that gives ſentence of death againſt a malefactor, be authorized by lawful commiſſion or charter, or by preſcription to have cognizance of the cauſe. 2. That he that executes ſuch ſentence be authorized to make ſuch execution, otherwiſe it will be murder or manſlaughter, or at leaſt a great miſpriſion in the judge that ſentenceth, or in the miniſter that executeth.

I. As touching the authority of the judge, I ſhall not at large diſcourſe the juriſdiction of the judges or courts in this place; it will be more proper hereafter; but ſhall mention only ſome things, that may be ſeaſonable for this place.

If he that gives judgment of death againſt a perſon, hath no commiſſion at all, if ſentence of death be commanded to be executed by

(a) Coron. 203.

ſuch

ſuch perſon, and it is executed accordingly, it is murder in him that commands it to be executed, for it was *coram non judice*.

If a commiſſion of the peace iſſue, this extends not to treaſon, neither can juſtices of peace hear and determine all treaſons by force of this commiſſion, for it extends only to felonies, (tho ſome treaſons are by act of parliament limited to their cognizance, as hath been before obſerved) if they take an indictment of treaſon, and try and give judgment upon the party, this is moſt certainly erroneous, and poſſibly avoidable by plea, but I do not think it makes the juſtices guilty of murder in commanding the execution of ſuch ſentence, for they were not without ſome colour of proceeding therein, becauſe all treaſon is felony, tho it be more, and the king may, if he pleaſes,
[498] proceed againſt a traitor for felony; and antiently a pardon of all felonies diſcharged ſome treaſons. 1 *E* 3. *Charter de Pardon* 13. 22 *Aſſiz.* 49. *Co. P. C. p.* 15. but it is a great miſpriſion in ſuch juſtices.

The juſtices of the common pleas cannot hold plea upon an indictment or appeal in capital cauſes, it will be at leaſt erroneous, if not voidable by plea; but if they hold plea in appeal of death by writ, and give judgment therein for the party to be hanged, which is executed accordingly, I think it is an error, and a great miſpriſion in them, but not felony, becauſe they had colour to hold plea thereof by an original writ out of the chancery under the great ſeal.

Upon the ſame reaſon I take it, that if there be a writ ſent to the ſheriff, eſchetor, or *A. B.* and *C.* to hear and determine felonies, whereas it ought to be a commiſſion, 42 *Aſſiz.* 12, 13. and they proceed thereupon to a judgment and execution in caſe of felony, it is a great miſpriſion, but I think it makes not the judge nor executioner guilty of murder; the ſame law I take to be in *Lacie*'s caſe, *quod vide Co. P. C. p.* 48. 5 *Co. Rep.* 106. *a Conſtable*'s caſe. The commiſſioners upon the ſtatute of 28 *H.* 8. had given judgment of death againſt him that ſtruck at ſea, and the party died at land; and the ſame law I take to be, where he that hath the franchiſe of *Infangthief*, gives judgment of death againſt a felon not within his juriſdiction. 2 *R.* 3. 10. *b.* the caſe of the abbot of *Crowland*; it might be a cauſe of a ſeizure of the liberty, but makes not the ſteward guilty of murder.

And what I have ſaid of a proceeding in capitals without the ſtrict extent of their commiſſion may be ſaid of the like proceeding, where, in ſtrictneſs of law, the commiſſion happens to be determined.

A commiſſion

A commiſſion of gaol-delivery iſſues to *A. B. &c.* they ſit one day, and forget to adjourn their commiſſion, or the clerk forgets to enter the adjournment, a felony is committed the next day, and they proceed in ſeſſions, and take an indictment, and give judgment of death againſt the malefactor, this judgment is erroneous, and the clerk of aſſizes ſhall never be permitted to amend the record, and enter an adjournment, this judgment is erroneous, and ſhall be reverſed; but it makes not the judges guilty of murder or homicide, tho in ſtrictneſs of law their commiſſion was determined by the firſt day's ſeſſion without adjournment. [499]

King *James* iſſued out ſeveral commiſſions of gaol-delivery, *&c.* the juſtices went their circuit, the king died, yet they proceeded, and before notice of the king's death condemned and executed many priſoners; it is held theſe proceedings were good, and the commiſſions ſtood till notice of the king's death, *M.* 3 *Car. C. B.* Sir *Randolph Crew*'s caſe *(b)*, tho, in ſtrictneſs of law, their commiſſions were determined by the king's death; but ſuppoſe they were both in law and fact determined, the judgments that happened upon ſeſſions begun after the king's death would be erroneous, but the judges had not been criminal in commanding the execution of their ſentence before notice; for if *ignorantia juris* doth in ſome caſes excuſe a judge, much more doth *ignorantia facti*.

If a commiſſion of gaol-delivery iſſue to *A. B.* and *C.* in the county of *D.* and afterward a ſecond commiſſion of gaol-delivery in the ſame county iſſue to *E. F.* and *G.* and there is notice given to the former commiſſioners, but no ſeſſion by virtue of the ſecond commiſſion, whereupon the former proceed notwithſtanding that notice *in pays*, (as conceiving it inſufficient, unleſs either a writ of *Superſedeas* had been ſent them, or at leaſt a ſeſſion by the ſecond commiſſion) and they proceed in caſes capital, this makes them not guilty of felony, 34 *Aſſiz.* 8. becauſe tho the ſecond commiſſion be effectual for them to proceed without any actual revocation by *Superſedeas*, or otherwiſe of the former, yet the former is not actually determined, till a *Superſedeas* or a ſeſſion by virtue of the ſecond commiſſion, upon an extrajudicial notice, or a notice *in pays*, the firſt commiſſioners may, if they pleaſe, forbear any further ſeſſion, but they are not bound to take notice of rumours and reports; the like in caſe of a ſheriff, *M.* 26 *Eliz. Moore* 333. 5 *E.* 4.

b) Cro. Car. 98.

If in the time of peace a commiſſion iſſue to exerciſe martial law, and ſuch commiſſioners condemn any of the king's ſubjects (not being liſted under the military power), this is without all queſtion [500] a great miſpriſion, and an erroneous proceeding, and accordingly adjudged in parliament in the caſe of the earl of *Lancaſter*, *Parl.* 1 *E.* 3. *part* 1. *de quo ſupra*, *p.* 344.

And in that caſe the exerciſe of martial law in point of death in time of peace is declared murder. *Co. P. C. p.* 52.

But ſuppoſe they be liſted under a general or lieutenant of the king's appointment under the great ſeal, and modelled into the form and diſcipline of an army, either in garriſon or without, yet as long as it is *tempus pacis* in this kingdom, they cannot be proceeded againſt as to loſs of life by martial law; and the ſame for mariners that are within the body of the kingdom, but their miſdemeanors, at leaſt if capital, are to be puniſhed according to the ſettled laws of the kingdom, 3 *Car. cap.* 1. the petition of right; yea, and it ſeems as to mariners and ſoldiers at ſea, when in actual ſervice in the king's ſhips, they ought not to be put to death by martial law, unleſs it be actually in time of hoſtility; and this appears by the ſtatute of 28 *H.* 8. that ſettled a commiſſion to proceed criminally in caſes of treaſon and felony, and by the late act of 13 *Car.* 2. *cap.* 9. ſettling ſpecial orders under pain of death by act of parliament *(c)*; but indeed, for crimes committed upon the high ſea, the admiral had at common law a juriſdiction even unto death, *ſecundum leges maritimas*; but this was a different thing from martial law.

And this appears alſo by the ſtatute of 13 *R.* 2. *cap.* 2. the conſtable and marſhal, who are the *judices ordinarii* in caſes belonging to the martial law, are yet thereby declared to have no juriſdiction within the realm, but of things that touch war, which cannot be diſcuſſed nor determined by the common law.

It muſt therefore be a time of war, that muſt give exerciſe to their juriſdictions, at leaſt in caſes of life.

And thus far concerning the judicial ſentence of death, where and when it is homicide criminally, and when not.

II. Now a few words concerning the officer executing ſuch ſentence, and where and when he is culpable in ſo doing.

(c) And this appears alſo from the annual ſtatutes for puniſhing mutiny or deſertion, 3 *Geo.* 1. *cap.* 2. *& multos alios.*

Whereſoever

Whereſoever the Judge hath juriſdiction of the cauſe, the officer executing his ſentence is not culpable, tho the judge err in his judgment, but if the judge have no manner of juriſdiction in the cauſe, the officer is not altogether excuſable, if he execute the ſentence.

In the great courts of juſtice, as of *oyer* and *terminer*, gaol-delivery, and of the peace, regularly, the ſheriff of the county, or thoſe that he ſubſtitutes, as under-ſheriff, gaoler, or executioner, are the ordinary miniſters in execution of malefactors, and they are to purſue the ſentence of the court, and therefore, 1. If he vary from the judgment, as where the judgment is to be hanged, if he behead the party, it is held murder *(d)*. 2. It muſt be done by the proper officer, *viz.* the ſheriff or his ſubſtitute, if another doth it of his own head, it is held murder: *vide Co. P. C. p.* 52.

The uſe heretofore was, and regularly ſhould be ſo ſtill, that if ſentence of death be given by the lord high ſteward, a warrant under the ſeal of the lord ſteward, and in his name ſhould iſſue for the execution, and the like by three at leaſt of the commiſſioners of *oyer* and *terminer*, where ſentence of death is given by them. *Co. P. C. p.* 31.

But uſe hath obtaind otherwiſe before commiſſioners of goal-delivery, for there is no warrant under the ſeal of the juſtices for execution, but only a brief abſtract or calendar left with the ſheriff or gaoler; and I remember Mr Juſtice *Rolle* would never ſubſcribe a calendar, but after judgment given would command the ſheriff in court to do execution, and for not doing it, he fined *Varney* the ſheriff of *Warwickſhire* 2000 *l.*

If a priſoner be removed into the king's bench by *Habeas Corpus*, or taken upon an indictment of felony in *Middleſex*, [502] and be committed to the marſhal, and upon his arraignment be found guilty, and hath judgment to die, the court may ſend the perſon to *Newgate*, and command the ſheriff of *Middleſex* to do execution, but

(d) Of this opinion was alſo lord *Coke*, *Co. P. C. p.* 52. 211. notwithſtanding it had been practiſed otherwiſe in ſome inſtances, as in the caſe of queen *Ann Boleyn*, and queen *Katherine Howard*, in the time of *Henry* VIII. the duke of *Somerſet* in the time of *Edward* VI. and the lord *Audley* in the time of *Charles* I. upon the authority of which caſes the lady *Alice Liſle* was beheaded for treaſon 1 *Jac.* II. See *State Tr. Vol.* IV. *p.* 129.

So in the caſes of *Aſhton*, 19 *Jan.* 1690. at the *Old Baily*, (*State Tr. Vol.* IV. *p.* 483.) and *Matthews* the printer, *Octob.* 30, 1719. at the *Old-Baily*, who were both ſentenced for high treaſon, and were hanged till they were dead, without any quartering or beheading, altho this was not only different from, but contrary to the ſentence in high treaſon, which orders, that they ſhall be hanged, but not till they are dead: but as lord *Coke* ſays in the place above-mentioned, *Judicandum eſt legibus non exemplis*; and indeed, ſince the judgment is the warrant for the execution, it ſhould ſeem that every execution, which is not purſuant to the judgment, is unwarrantable.

if he be remitted to the marſhal, (as regularly he ought to be,) then the marſhal is the proper officer of the court to do execution, and he may execute the offender in *Middleſex*, where-ever the offenſe was committed *(e)*, and the court may *ore tenus*, or by their order, command the ſheriff of *Middleſex* to be aſſiſting, but the entry upon the roll ought to be, *Et præceptum eſt mareſcallo, &c. quod faciat executionem periculo incumbente*; and thus it was done *H.* 24 *Car.* 2. upon a conviction of murder committed in *Kent* upon a trial at the king's bench bar, upon ſearch and producing of many antient and late precedents, for regularly, he that is the immediate miniſter of the court, ought to make execution, and ſuch is the marſhal to the court of king's bench, eſpecially where the perſons are committed to his cuſtody, and this is done without any writ, but only by the command of the court *ore tenus*.

And thus far concerning the death or killing of a man, where it is not, and where it is puniſhable, and the ſeveral degrees thereof.

(e) See *Althoes* caſe *ſupra in notis p.* 464. who were executed in *Surrey* for a fact committed in *Pembrokeſhire* in *Wales*: ſee alſo the caſe of *Fitz-Patrick* and *Brodeway*, *State Tr. Vol.* I. *p.* 374, who were executed in *Middleſex* for a fact in *Wiltſhire*, and the caſe of *Layer*, *State Tr. Vol.* VI. *p.* 332. who was executed in *Middleſex* for a fact in *Eſſex*.

Foſter. 267.

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[503]

CHAP. XLIII.

Of larciny, *and its kinds.*

ALTHO the offenſes of burglary and arſon are of an higher nature than larciny, yet becauſe there be ſome things that fall under the conſideration of larciny, that are neceſſary to be known previouſly to the conſideration of burglary, *&c.* I ſhall begin with this.

Larciny or theft, under the various laws of ſeveral countries, hath been under various degrees of puniſhment: in ſome countries the puniſhment was triple or fourfold reſtitution, as among the *Jews (a)*, in others deportation or baniſhment, or condemning to ſeveral employments, as among the *Romans. (b)*

(a) *Vide ſupra p.* 9.

(b) *Vide ſupra p.* 11.

And

And in *England*, in antient time, the puniſhment of theft was not fixed or ſettled, and altho *Hoveden* and *Simon Dunelmenſis* tells us, that *firmiſſimâ lege ſtatuit* Henricus *primus*, *quod fures latrocinio deprehenſi ſuſpendantur*; yet in the time of *Henry* II. they were otherwiſe puniſhed; *quod vide apud Selden. Jur. Ang. p.* 83. But the ſame law, touching the puniſhment of grand larciny with death, ſeems to have been fixed and ſettled ever ſince the time of *Henry* II. and *Bracton*, that wrote in the time of *Henry* III. takes it as a thing ſettled and commonly practiſed in his time: *vide ipſum. Lib.* III. *cap.* 32. *p.* 151. *b.* (*)

Now touching the kinds of larcinies they are two, *viz.* either ſimple larciny, or larciny accompanied with violence or putting in fear, which is called robbery.

Simple larciny or theft is of two kinds, *viz.*

Grand larciny, when it is above the value of twelve-pence.

Petit larciny, when only of the value of twelve-pence, or under.

The nature of the offenſe is the ſame in both, but the degrees of their puniſhment differ, as ſhall be ſaid.

And therefore what is ſaid concerning grand larciny here is applicable to petit larciny, except as to the point of puniſhment, [504] for the puniſhment of grand larciny is death and loſs of goods, the puniſhment of petit larciny is loſs of goods and whipping, but not death.

Simple larciny is defined by *Bracton (c)* and *Britton (d)* to be *fraudulenta contractatio rei alienæ cum animo furandi invito domino, cujus res illa fuerit*: by my lord *Coke* to be the felonious and fraudulent taking and carrying away by any man or woman of the mere perſonal goods of another, neither from the perſon, nor by night, in the houſe of the owner. *Co. P. C. p.* 107.

I ſhall purſue his method in that chapter with ſuch additions as ſhall be requiſite.

The indictment runs *vi & armis felonicè furatus fuit, cepit & aſportavit* in caſe of dead chattles, *cepit & abduxit* in caſe of a horſe, *cepit & effugavit* in caſe of ſheep, cows, &c. wherein the words *felonicè furatus fuit, cepit*, are eſſential to the crime.

This deſcription gives us theſe heads of inquiry.

1. What a taking. 2. What a carrying away. 3. What a felonious taking and carrying away. 4. What the perſonal goods. 5. What the goods of another. 6. What or who may be ſaid a taker.

(*) *Vide ſupra p.* 12. & *notas ibidem.*
(c) *Lib.* III. *de corona, cap.* 32. *fol.* 150. *b.*
(d) *cap.* 15. *p.* 22. See alſo *Fleta, Lib.* II. *cap.* 38. *p.* 84.

Theſe regularly are the ingredients into this crime of felony, and muſt be ſeverally conſidered.

I. What ſhall be ſaid a taking,

If *A.* delivers a horſe to *B.* to ride to *D.* and return, and he rides away *animo furandi*, this is no felony; the like of other goods *(e)*. *Co. P. C. p.* 107. 28 *Eliz. Butler's* caſe.

So if a man deliver goods to a carrier to carry to *Dover*, he carries them away, it is no felony; but if the carrier have a bale or trunk with goods deliverd to him, and he break the bale or [505] trunk, and take and carry away the goods *animo furandi*, or if he carry the whole pack to the place appointed, and then carry it away *animo furandi*, this is a felonious taking by the book of 13 *E.* 4 9. *Co. P. C. p.* 107.

But that muſt be intended, when he carries them to the place, and delivers or lays them down, for then his poſſeſſion by the firſt delivery is determined, and the taking afterwards is a new taking: *vide* 21 *H.* 7. 14.

Before the ſtatute of 21 *H.* 8. *cap.* 7. if a man had deliverd goods to his ſervant to keep or carry for him, and he carrieth them away *animo furandi*, this had not been felony *(f)*, but by that ſtatute it is made felony, if of the value of forty ſhillings; but the offender ſhall at this day have his clergy *(g)*; but yet if an apprentice *(h)* doth this, or if a man deliver a bond to his ſervant to receive money, or deliver him goods to ſell, and he accordingly ſells and receives the money, and carries it away *animo furandi*, this is neither felony at common law, nor by this ſtatute. *Co. P. C. p.* 105. 26 *H.* 8. *Dy.* 5. *a. b.*

A. a ſervant of *B.* receives the rents of *B.* and *animo furandi* carries it away, this is not felony at common law, becauſe *A.* had it by delivery; nor by the ſtatute, becauſe he had it not by the delivery of his maſter or miſtreſs. *Dalt. cap.* 102. *(i)*

(e) Upon this principle it was doubted, whether a perſon hiring lodgings was guilty of felony in ſtealing the goods he had hired with his lodgings. See *Kel.* 24 *&* 81. but this doubt is removed by 8 *&* 4 *W. & M. cap.* 9. whereby it is declared to be felony.

(f) This was a diſputed point (ſee 3 *H.* 7. 12. *b.*) for which reaſon the ſtatute of 21 *H.* 8. *cap.* 7. was made to ſettle the doubt that was at common law; for in the beforementioned caſe, 21 *H.* 7. 14. it is ſaid to be felony, if he was intruſted with the keeping only within the houſe, ſtable, &c. becauſe then the things are adjudged in the maſter's poſſeſſion; but if he be intruſted to carry the things out of the houſe, &c. elſewhere, then it is not felony.

(g) By 27 *H.* 8 *cap.* 17. Clergy was taken away, reſtored again by 1 *E.* 6. *cap.* 12. and again taken away by 12 *Ann. cap.* 7. from offenſes committed in any dwelling-houſe or out-houſe, excepting in the caſe of apprentices under the age of fifteen years.

(h) The ſtatute alſo excepts all ſervants within the age of eighteen years, this act, which was repeal'd by the general words of 1 *Mar. cap.* 1. is revived by 5 *Eliz. cap.* 10.

(i) New Edit. cap. 155. *p.* 490.

A. delivers

A. delivers the key of his chamber to *B.* who unlocks the chamber, and takes the goods of *A. animo furandi*, this is felony, becauſe the goods were not deliver'd to him, but taken by him. 13 *E.* 4. 9. *b.*

He, that hath the care of another's goods hath not the poſ- [506]
ſeſſion of them, and therefore may, by his felonious em-
bezzling of them, be guilty of felony; as the butler that hath the charge of the maſter's plate; the ſhepherd that hath the charge of his maſter's ſheep. 3 *H.* 7. 12. *b.* 21 *H.* 7. 15. *a. Co. P. C. p.* 108.

The like law for him that takes a piece of plate ſet before him to drink in a tavern, *&c.* for he hath only a liberty to uſe, not a poſſeſſion by delivery. 13 *E.* 4. 9.

And ſo it is of an apprentice, that felonioufly embezzels his maſter's goods or money out of his ſhop, it is felony. *Dalt. cap.* 102.

If *A.* comes to *B.* and by a falſe meſſage or token receives money of him, and carries it away, it is no felony, but a cheat puniſhable by indictment at common law, or upon the ſtatute of 33 *H.* 8. *cap.* 1. by ſetting in the pillory.

If *A.* finds the purſe of *B.* in the highway, and takes it and carries it away, and hath all the circumſtances that may prove it to be done *animo furandi*, as denying it or ſecreting it, yet it is not felony; the like, in caſe of taking of a wreck or *treaſure-trove*. 22. *Aſſiz.* 99. or a waif or ſtray.

But yet this taking of *treaſure-trove*, waif, or ſtray muſt be where the party that takes them, really believes them to be ſuch, and colours not a felonious taking under ſuch a pretenſe, for then every felon would cover his felony with that pretenſe.

Where a man's goods are in ſuch a place, where ordinarily they are or may be lawfully placed, and a perſon takes them *animo furandi*, it is felony, and the pretenſe of finding muſt not excuſe.

If a man's horſe be going in his ground, or upon his common, and he takes it *animo furandi*, it is no finding, but a felony.

So it is if the horſe ſtray into a neighbour's ground or common, it is felony in him that ſo takes him; but if the owner of the ground takes it *damage feaſant*, or the lord ſeiſes it as a ſtray, tho perchance he hath no title ſo to do, this is not *felleo animo*, and therefore cannot be felony.

If the ſheep of *A.* ſtray from the flock of *A.* into the flock [507]
of *B.* and *B.* drives them along with his flock, or by pure
miſtake ſhears him, this is not a felony, but if he know it to be another's, and mark it with his marks, this is an evidence of a felony.

A man hides a purſe of money in his corn-mow, his ſervant finding it took part of it, if by circumſtances it can appear he knew his maſter laid it there, it is felony; but then the circumſtances muſt be pregnant, otherwiſe it may be reaſonably interpreted to be a bare finding, becauſe an unuſual place for ſuch a *depoſitum*.

A. hath a deſign to ſteal the horſe of *B.* enters a plaint of replevin in the ſheriff's court for the horſe, and gets him deliver'd to him, and then rides him away; this is taking and ſtealing, becauſe done *in fraudem legis (k) P.* 15 *Eliz. B. R. Co. P. C. p.* 108.

A. hath a mind to get the goods of *B.* into his poſſeſſion, privately delivers an ejectment, and obtains judgment againſt a caſual ejector, and thereby gets poſſeſſion, and takes the goods, if it were *animo furandi*, it is larciny.

If *A.* ſteals the horſe of *B.* and afterwards delivers it to *C.* who was no party to the firſt ſtealing, and *C.* rides away with it *animo furandi*, yet *C.* is no felon to *B.* becauſe tho the horſe was ſtolen from *B.* yet it was ſtole by *A.* and not by *C.* for *C. non cepit*, neither is he a felon to *A.* for he had it by his delivery.

But if *A.* ſteals the horſe of *B.* and after *C.* ſteals the ſame horſe from *A.* in this caſe *C.* is a felon both as to *A.* and as to *B.* for by the theft by *A. B.* loſt not the property, nor, in law, the poſſeſſion of his horſe or other goods, and therefore in that caſe *C.* may be appeal'd of felony by *B.* or indicted of felony, *quod cepit & aſportavit* the horſe of *B.* 4 *H.* 7. 5. *b.* 13 *E.* 4. 3. *b.*

And that is the reaſon, that if *A.* ſteals the goods of *B.* in the county of *C.* and carries them into the county of *D. A.* may be indicted for larciny in the county of *D.* for the continuance of the aſportation is a new caption; but if he be indicted of robbery, it muſt be in the county of *C.* where the force and putting in fear was, *de quo poſtea.* 4 *H.* 7. 5. *b.*

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II. The words of the indictment are not only *cepit*, but *cepit & aſportavit*, or *abduxit* or *effugavit*.

If *A.* comes into the cloſe of *B.* and takes his horſe with an intent to ſteal him, and before he gets out of the cloſe is apprehended, this is a felonious taking and carrying away, and is larceny. *Co. P. C. p.* 108, 109. Juſtice *Daliſon*'s reports.

So if a gueſt lodges in an inn, and takes the ſheets of the bed with an intent to ſteal them, and carries them out of his chamber into the

(k) See alſo *Kel.* 42.

hall,

hall, and going into the ſtable to fetch his horſe is apprehended, this is felony, and a felonious taking and carrying away, 27 *Aſſiz.* 39. *Co. P. C. p.* 108. and accordingly it was ruled 16 *Car.* 2. *B. R.* upon a ſpecial verdict found in *Cambridgeſhire (l)*, *A.* comes into the dwelling-houſe of *B.* nobody being there, and breaks open a cheſt and takes out goods to the value of five ſhillings, and lays them on the floor of the ſame room, and is apprehended before he can remove them he was indicted upon the ſtatute, and ouſted of his clergy by the advice of all the judges, except one; for the taking out of the cheſt was felony by the common law, and the ſtatute of 39 *Eliz. cap.* 15. alters not the felony, but ouſts only the clergy. *Ex libro Bridgeman.*

A. hath his keys tied to the ſtrings of his purſe, *B.* a cut-purſe takes his purſe with money in it out of his pocket, but the keys, which were hanged to his purſe ſtrings, hanged in his pocket, *A.* takes *B.* with his purſe in his hand, but the ſtring hanged to his pocket by the keys, it was ruled this was no felony, for the keys and purſe ſtrings hanged in the pocket of *A.* whereby *A.* had ſtill in law the poſſeſſion of his purſe, ſo that *licet cepit non aſportavit*, 40 *Eliz. Wilkinſon*'s caſe cited *M.* 8. *Jac. C. B. (m)*

III. As it is *cepit* and *aſportavit*, ſo it muſt be *felonicé* or *animo furandi*, otherwiſe it is not felony, for it is the mind that makes the taking of another's goods to be a felony, or a bare treſpaſs only but becauſe the intention and mind are ſecret, the intention muſt be judged by the circumſtances of the fact, and tho theſe circumſtances are various, and may ſometimes deceive, yet [509] regularly and ordinarily theſe circumſtances following direct in this caſe.

If *A.* thinking he hath a title to the horſe of *B.* ſeiſeth it as his own, or ſuppoſing that *B.* holds of him diſtrains the horſe of *B.* without cauſe, this regularly makes it no felony, but a treſpaſs, becauſe there is a pretenſe of title; but yet this may be but a trick to colour a felony, and the ordinary diſcovery of a felonious intent is, if the party doth it ſecretly, or being charged with the goods denies it.

If *A.* takes away the goods of *B.* openly before him or other perſons, (otherwiſe than by apparent robbery) this carries with it an evidence only of a treſpaſs, becauſe done openly in the preſence of the owner, or of other perſons that are known to the owner.

(*l*) *Simſon*'s caſe, *Kel.* 31. (*m*) See *Crompt.* Juſtice 35. *a.*

If

If *A.* leaves his harrow or his plow-ſtrings in the field, and *B.* having land in the ſame field uſeth it, and having done, either returneth them to the place where they were, or acquaints *B.* with it, this is no felony, but at moſt a treſpaſs.

If *A.* and *B.* being neighbours, and *A.* having an horſe on the common, and *B.* having cattle there, that he cannot readily find, takes up the horſe of *A.* and rides about to find his cattle, and having done, turns off the horſe again in the common, this is no felony, but at moſt a treſpaſs.

So if my ſervant, without my privity, takes my horſe, and rides abroad ten or twelve miles about his own occaſions, and returns again, it is no felony, but if in his journey he ſells my horſe, as his own, this is declarative of his firſt taking to be felonious, and *animo furandi.*

But in caſes of larciny the variety of circumſtances is ſo great, and the complications thereof ſo mingled, that it is impoſſible to preſcribe all the circumſtances evidencing a felonious intent, or the contrary, but the ſame muſt be left to the due and attentive conſideration of the judge and jury, wherein the beſt rule is, *in dubiis*, rather to incline to acquittal than conviction.

IV. It muſt be of goods perſonal, for otherwiſe no felony can be committed by taking them.

[510] 1. Therefore of chattles real no felony can be committed, and therefore the taking away of a ward cannot be felony, nor of a box or cheſt of charters, that concern land. 10 *E.* 4. 14. *b.* *(n)*

2. Neither can larciny be committed of things, that adhere to the freehold, as trees, graſs, buſhes, hedges, ſtones or lead of a houſe, or the like. *(o)*

But if they are ſevered from the freehold, as wood cut, graſs in cocks, ſtones digged out of a quarry, then felony may be committed by ſtealing of them, for they are perſonal goods. 18 *H.* 8. 2. *b.* 12 *E.* 3. *Coron.* 119.

(*n*) Nor can felony be committed of bonds, notes, or other writings, that are ſecurities for a debt, becauſe they derive their value from *choſes en action*, which cannot be ſtolen. *Dalt. New Edit. p.* 501. 8 *Co. Rep.* 33. but by a late ſtatute 2 *Geo.* II. *cap.* 25. the ſtealing of bonds, bills, notes, &c. is made felony with or without the benefit of the clergy, in the ſame manner, as if the offender had ſtolen goods of the like value, with the money ſecured by ſuch bonds, &c.

(*o*) But now by 4 *Geo.* II. *cap.* 32. it is felony to ſteal, rip, cut, or break with intent to ſteal any lead, iron bar, iron gate, iron rail or paliſado fixed to any houſe, or out-houſe, or fences thereunto belonging, and every perſon, who ſhall be aiding or abetting, or ſhall buy or receive any ſuch lead, &c. knowing the ſame to be ſtolen, is ſubjected to the ſame puniſhment.

But

But if a man come to ſteal trees, or the lead of a church or houſe, and ſever it, and after about an hour's time, or ſo, come and fetch it away, this hath been held felony, becauſe the act is not continuated but interpolated, and in that interval the property lodgeth in the right owner as a chattel, and ſo it was agreed by the court of king's bench (o. Car.). upon an indictment for ſtealing the lead of *Weſtminſter-Abbey*. *Dalt. cap.* 103. *p.* 166. *(p)*

3. Neither of corn ſtanding upon the ground, for tho it be a chattel perſonal, and goes to the executor, yet it ſavours of the realty, while it ſtands ſo. *Co. P. C. p.* 109.

4. Larciny cannot be committed of ſuch things, whereof no man hath any determinate property, tho the things themſelves are capable of property, as of *treaſure trove*, or wreck till ſeized, tho he, that hath them in point of franchiſe, may have a ſpecial action againſt him, that takes them.

5. Larciny cannot be committed of things, that are *feræ naturæ*, unreclaimed, and *nullius in bonis*, as of deer or conies, tho in a park or warren, fiſh in a river or pond, wild-fowl, wild [511] ſwans, pheaſants.

But if any of theſe are kild, larciny may be committed of their fleſh or ſkins, becauſe now they are under propriety.

Of domeſtic cattle, as ſheep, oxen, horſes, *&c.* or of domeſtic fowls, as hens, ducks, geeſe, *&c.* and of their eggs, larciny may be committed, for they are under propriety, and ſerve for food.

Of thoſe beaſts or birds, that are *feræ naturâ*, but reclaimed and made tame or domeſtic, or ſerve for food, larciny may be committed, as deer, conies, pheaſants, partridges, but then it muſt be, when he, that ſteals them, knows them to be tame, and ſo of reclaimed hawks, and likewiſe of the young of ſuch larciny may be committed, but of the young of thoſe beaſts or birds, that are *feræ naturâ*, tho in a park, and tho the owner hath a kind of property *ratione loci, privilegii & impotentiæ*, yet larciny cannot be committed of them, as of young fawns in a park, young conies in a warren: of young pigeons in a dove-coat, fiſh in a trunk or net, larciny may be committed.

Of young hawks in the neſt larciny may be committed, but not of hawks eggs, but the takers are puniſhable by fine and impriſonment upon the ſtatute of 11 *H.* 7. *cap.* 17. and 31 *H.* 8. *cap.* 12. *(r)*

(*p*) *New Edit. cap.* 156. *p.* 501.

(*r*) By this ſtatute it is made felony to take hawks eggs out of any neſts within the king's lands, but this is repealed by the general words of 1 *Mar. cap.* 1.

Of

Of wild ſwans, nor of their young, larciny cannot be committed, but if they be made tame and domeſtic, or if they be marked and pinioned, it is felony to take them or their young.

But it ſeems, that if they be marked, and yet flying ſwans, that range abroad out of the precincts or royalty of the owner, it is not felony to kill and take them, becauſe they cannot be known to belong to any: theſe ſeveral inſtances and differences may be collected from *Co. P. C. p.* 109, 110. *Dalt. cap.* 103. *(f)*, and 7 *Co. Rep.* 15. *b. Caſe de Swans & libros ibi.*

[512] 6. Larciny cannot be committed in ſome things, whereof the owner may have a lawful property, and ſuch whereupon he may maintain an action of treſpaſs in reſpect of the baſeneſs of their nature, as maſtiffs, ſpaniels, gray-hounds, blood-hounds, or of ſome things wild by nature, yet reclaimed by art or induſtry, as bears, foxes, ferrets, *&c.* or their whelps, or calves, becauſe, tho reclaimed, they ſerve not for food, but pleaſure, and ſo differ from pheaſants, ſwans, *&c.* made tame, which, tho wild by nature, ſerve for food.

Only of the reclaimed hawk, in reſpect of the nobleneſs of its nature and uſe for princes and great men, larciny may be committed, if the party know it be reclaimed.

V. What ſhall be ſaid the perſonal goods of any perſon, or of another perſon.

Every indictment of larciny ought to ſuppoſe the goods ſtolen to be the goods of ſomebody.

An indictment of larciny of the goods *cujuſdam ignoti* is good, for it is at the king's ſuit, and tho the owner be not known, the felony muſt be puniſhed. 21 *H.* 6. *Enditement* 12.

And yet 10 *H.* 6. *Enditement* 9. an indictment, *quod* A. *verberavit* B. and 20 jacks *pretii* 20*s. felonicè cepit*, held good without ſhewing whoſe they were.

But an indictment of *A.* that he is *communis latro* without ſhewing in particular what he ſtole, is not good. 22 *Aſſiz.* 73.

An indictment, that *bona domûs & eccleſiæ tempore vacationis*, or *bona capellæ in cuſtodia* J. S. *felonicè cepit*, is good, 7 *E.* 4. 14. *b. Co. P. C. p.* 110. *Stamf. P. C. p.* 25. *b.* & 95. *b.*

If a man ſteal bells, or other goods belonging to a church, he may be indicted, *quòd felonicè, &c. cepit bona parochianorum de* B. *M.* 31 & 32 *Eliz. B. R. Hadman* and *Green* verſus *Ringwood (t)*, and yet

(f) New Edit. cap. 156. *p.* 498. *(t) Cro. Eliz.* 145, 179.

an

an action of treſpaſs lies for the churchwardens in ſuch caſe, *quare bona & catalla parochianorum in cuſtodiâ ſuâ*, or *in cuſtodiâ* A. B. *prædeceſſorum ſuorum gardianorum eccleſiæ cepit & aſportavit ad damnum parochianorum.* *T.* 36 *Eliz. B. R. Method* and *Barfoot. Dyer* 99.

If *A.* have a ſpecial property in goods, as by pledge, or a leaſe for years, and the goods be ſtolen, they muſt be ſuppoſed in the indictment the goods of *A.*

If *A.* bail goods to *B.* to keep for him, or to carry for him, and *B.* be robbed of them, the felon may be indicted [513] for larciny of the goods of *A.* or *B.* and it is good either way, for the property is ſtill in *A.* yet *B.* hath the poſſeſſion, and is chargeable to *A.* if the goods be ſtolen, and hath the property againſt all the world but *A.*

A. is indicted, that he ſtole the goods of *B.* and it appears in the indictment, that *B.* was a *feme covert* at the time, the indictment is naught, for they are the goods of her huſband, and ſo if *A.* be indicted for ſtealing the goods of *B.* and upon the evidence it appears, that *B.* had neither intereſt nor poſſeſſion in the goods, or was a *feme covert*, the party ought to be acquitted, but then he may be preſently indicted *de novo* for ſtealing the goods of the huſband or true proprietor; and ſo it once happened before me at *Ayleſbury* 1667. in the caſe of *Emes*, who was convicted and executed upon a ſecond indictment.

Regularly a man cannot commit felony of the goods, wherein he hath a property.

If *A.* and *B.* be joint-tenants or tenants in common of an horſe, and *A.* takes the horſe, poſſibly *animo furandi*, yet this is not felony, becauſe one tenant in common taking the whole doth but what by law he may do.

Yet if *A.* take away the trees of *B.* and cut them into boards, *B.* may take them away, and it cannot be felony; ſo if *A.* take the cloth of *B.* and make it into a doublet, *B.* may take it, and it cannot be felony. *M.* 2 *Eliz. More n.* 67. *p.* 19.

If *A.* take the hay or corn of *B.* and mingles it with his own heap or cock, or if *A.* take the cloth of *B.* and embroider it with ſilk or gold, *B.* may retake the whole heap of corn, or cock of hay, or garment and embroidery alſo, and it is no felony, nor ſo much as a treſpaſs. *H.* 36 *Eliz. B. R. Popham n.* 2. *p.* 38.

Yet

Yet if *A.* bail goods to *B.* and afterwards *animo furandi* ſteals the goods from *B.* with deſign probably to charge him for them in an action of detinue, this is felony; *quod vide* 7 *H.* 6. 43. *a. Co. P. C. p.* 110. *Stamf. P. C. p.* 26. *a.*

The wife cannot commit felony of the goods of her huſband, for they are one perſon in law, 21 *H.* 6. *Corone* 455. *Co. P. C.* [514] *p.* 110. and therefore, if ſhe take or ſteal the goods of her huſband, and deliver them to *B.* who knowing it, carries them away, this ſeems no felony in *B.* for it is taken, *quaſi* by the conſent of her huſband *(u)*, yet treſpaſs lies againſt *B.* for ſuch taking, for it is a treſpaſs, but *in favorem vitæ* it ſhall not be adjudged a felony, and ſo I take the law to be, notwithſtanding the various opinions. *Dalt. cap.* 104. *p.* 268, 269. *ex lectu: a Cooke. (x)*

But if the huſband deliver goods to *B.* and the wife had taken them felonioufly from *B.* this had been felony in the wife, *Dalt. cap.* 104. *p.* 268. for if the huſband himſelf had taken them felonioufly from *B.* it had been felony, as hath been ſaid; but then it muſt in both caſes be a taking *animo furandi.*

But if a man take away another man's wife againſt her will *cum bonis viri*, that is felony by the ſtatute of *Weſtm.* 2. *cap.* 34. which ſaith, *Habeat rex ſectam de bonis ſic aſportatis (y)*, 13 *Aſſiz.* 6. But if it be by the conſent of the wife, tho againſt the conſent of the huſband, it ſeems to be no felony, but a treſpaſs, for it cannot be a felony in the man, unleſs it be a felony in the woman, who conſented to it, 13 *Aſſiz.* 6. but *Dalton* thinks it felony, *ubi ſupra.*

Yet in ſome caſes the principal agent may be excuſed from felony, and yet he, that is principal in the ſecond degree, may be guilty, as if a man put a child of ſeven years to take goods, and bring them to him, and he carry them away, the child is not guilty by reaſon of his infancy, yet it is felony in the other.

If *A.* die inteſtate, and the goods of the deceaſed are ſtolen before adminiſtration commited, it is felony, and the goods ſhall be ſuppoſed to be *bona epiſcopi de D.* ordinary of the dioceſe, and if he made *B.* his executor, the goods ſhall be ſuppoſed *bona B.* tho he hath not proved the will, and they need not ſhew ſpecially their title as ordinary or executor, becauſe it is of their own poſſeſſion, in which

(u) But in caſe *B.* were her adulterer, Mr. *Dalton* thinks it would be felony, for in ſuch a caſe no conſent of the huſband can be preſumed. *Dalton ubi infra.*

(x) New Edit. cap. 157. *p.* 504.

(y) 2 *Co. Inſtit.* 434.

caſe

caſe a general indictment as well as a general action of treſpaſs lies without naming themſelves executor or ordinary, and ſo for an adminiſtrator.

But if ſervants in the houſe imbezzle their maſter's goods after his deceaſe, this ſeems not to be felony at common law, but only treſpaſs, becauſe the goods were *quodammodo* in their cuſtody; and therefore remedy is provided by the ſtatute of 33 *H.* 6. *cap.* 1. that if they appear not upon proclamation, they ſhall be attaint of felony, but if they appear, they ſhall anſwer for it as a treſpaſs.

But an indictment, *quod invenit hominem mortuum, & felonicè furatus fuit duas tunicas* without ſaying *de bonis & catallis* of the executor or ordinary, is not good, and therefore the party was diſcharged. 11 *R.* 2. *Enditement* 27.

A. digged up a dead body out of the grave, and ſtole his ſhroud, and buried him again, this is reported by Mr. *Dalton*, *cap.* 103. *p.* 266. to be no felony, but a miſdemeanor, for which the party was whipt. And accordingly I have ſeen it reported to be held 16 *Jac.* in *Nottingham*'s caſe *(z)*, *quia nullius in bonis*, but ſee *Co. P. C. p.* 110. in *Haine*'s caſe *(a)* ruled by the advice of all the judges to be felony, and in the indictment the goods ſhall be ſuppoſed the goods of the executor, adminiſtrator, or ordinary.

But it is held, that if *A.* put a winding-ſheet upon the dead body of *B.* and after his burial a thief digs up the carcaſe and ſteals the ſheet, he may be indicted for felony *de bonis & catallis A.* becauſe it transferd no property to a dead man. 12 *Co. Rep.* 112.

VI. I come to the ſixth conſideration, who may be ſaid a perſon committing larciny, but of this I have at large treated before *cap.* 3, *&c.* and therefore ſhall ſay but little here.

An infant under the age of diſcretion regularly cannot be guilty of larciny, *viz.* under fourteen years, unleſs it appears by circumſtances, that he hath a diſcretion more than the law preſumes.

A madman, *non compos*, or lunatic in the times of his lunacy cannot commit larciny, but ought to be found not guilty upon due evidence thereof. [516]

A *feme covert* alone may be guilty of larciny, if done without coercion of her huſband. 27 *Aſſiz.* 40.

(z) This caſe is mentioned by *Dalton* in the place cited by our author, which in *New Edit.* is *cap.* 156. *p.* 502.

(a) 12 *Co.* 112.

But

But it hath generally now obtaind, that ſhe cannot be guilty of larciny jointly with her huſband, becauſe preſumed to be done by coercion of her huſband. *Vide Dalt. cap.* 104. *(b) Stamf. P. C. fol.* 26. *a. & libros ibi.*

But this I take to be only a preſumption till the contrary appear, for I have always thought, that if upon the evidence it can clearly appear, that the wife was not drawn to it by her huſband, but that ſhe was the principal actor and inciter of it, ſhe is guilty as well as the huſband, but *ſtabitur præſumptio, donec probetur in contrarium*, neither is the book of 2 *E.* 3. *Corone* 160. to the contrary, but in the book of 27 *Aſſiz.* 40. where ſhe was indicted alone, inquiry was made, whether it were by coercion of the huſband.

And therefore, if *A.* and *B.* his wife be indicted by theſe names of larciny, the indictment is not void, for the huſband may be convicted, tho the wife be acquitted upon the preſumption of her huſband's coercion.

Again, the huſband may be acquitted, and the wife found to have done the felony alone, for every indictment is ſeveral in law; or again, tho *primâ facie* the wife cannot be guilty of larciny, no nor of burglary, where the huſband is party in the fact, (tho ſhe may be guilty of murder or manſlaughter jointly with her huſband) and therefore *primâ facie* the wife in ſuch caſe muſt be acquitted, yet for my part I think the circumſtances may be ſuch, that the wife may be as well guilty in larciny or burglary, as her huſband.

If a ſervant commit felony by the coercion of his maſter, yet it doth not excuſe the ſervant, tho it excuſe the wife, as is before ſaid, for the wife is inſeperably *ſub poteſtate viri*, but it is not ſo with a ſervant, for as he is not bound to obey his maſter's unlawful commands, ſo he may recover damages for any wrong done him by his maſter. *Dalt. cap.* 104. *p.* 269. *(c)*

See Black. Com. Lib. iv. cap. 17. p. 229 to 244. and Foſter 73, 123, 124, 366. and 1 Hawk. P. C. Index tit. Larciny.

(*b*) *New Edit. cap.* 157. *p.* 503. (*c*) *New Edit. p.* 504.

CHAP.

CHAP. XLIV.

Concerning the diverſities of grand larcinies *among themſelves in relation to* clergy.

ALTHO the puniſhment of all grand larciny by the law is death *(a)*, yet in relation to clergy, which is a kind of relaxation of the ſeverity of the judgment of the law, there is difference made by acts of parliament between ſome larcinies and others.

By the antient privilege of the clergy, and by the confirmation and ſpecial conceſſion of the ſtatute of 25 *E.* 3. *cap.* 4. the benefit of clergy was to be allowd in all treaſons and felonies touching other perſons than the king himſelf and his royal majeſty.

Therefore as well in grand larciny, as in other felonies, clergy is to be allowd, where it is not to be taken away by ſome ſubſequent act of parliament.

And in all thoſe caſes, wherein it is ſo taken away, the indictment of ſuch larciny or other felony muſt bring the caſe within the particular proviſion of thoſe ſtatutes, which in ſuch caſes takes away clergy, otherwiſe it is to be allowd, tho upon the evidence it may fall out, that the truth of the fact appears to be ſuch, as is within the ſpecial proviſion of thoſe ſtatutes, that ſo take away clergy.

The ſtatutes therefore, that take away clergy in ſome particular larcinies, are theſe that follow:

I. By the ſtatute of 23 *H.* 8. *cap.* 1. "All perſons found guilty "of robbing any church or chapel, or other holy places, or of rob- "bing any perſon in his dwelling-houſe, the owner or dweller of the "ſame houſe, his wife, children or ſervants then being within, and "put in fear and dread by the ſame, or for robbing any per- "ſon in or near the high-way, and thoſe, that are found [518] "guilty of abetting, procuring, helping, or counſelling thereof, are "exempt from the benefit of clergy, except ſuch as are in the order "of ſub-deacon."

But upon this ſtatute, tho there muſt be a ſtealing of goods, there

(a) In antient times it was in ſome caſes puniſhed with the loſs of a thumb, in others with pillory, and the loſs of an ear. *Corone* 434. *Britt.* 24. *b.*

need not be an actual breaking *(b)*, for the ſtealing in the houſe, and putting the dweller, his wife or ſervants in fear, is robbery.

This ſtatute extended only to a conviction by verdict or confeſſion, but the ſtatute of 25 *H.* 8. *cap.* 3. extended it to a ſtanding mute, or challenging of above the number of twenty, or not directly anſwering, and alſo in caſe of an arraignment of a priſoner for a felony by bringing the goods he ſtole into one county, where he had firſt ſtolen the goods in a foreign county, in one of thoſe manners mentiond in the ſtatute of 23 *H.* 8. it gave power to the juſtices, upon examination of the fact, to put the priſoner from his clergy, but herein theſe things are obſervable: 1. It did not give power of examination, where the priſoner confeſſed the felony, but where he put himſelf upon his trial. 2. Theſe examinations need not be recorded. 3. It did not extend only to thoſe caſes, where the priſoner was to be ouſted of his clergy by force of the ſtatute of 23 *H.* 8. and not to other caſes, where he was to be ouſted of his clergy by any ſubſequent ſtatute, and therefore upon a robbery in a dwelling-houſe, where the owner, his wife or ſervants were within, and not put in fear, he could not be ouſted of his clergy by examination in a foreign county upon the ſtatute of 25 *H.* 8. *Anderſ. Rep. n.* 158. *p.* 114. *Co. P. C. cap.* 52. *p.* 115.

And therefore it was ruled in one *Cole*'s caſe, a woman broke a dwelling-houſe in *Kent* in the day-time, none being there, and took away goods above the value of five ſhillings, and under the value of ten ſhillings, and carried the goods into *Suſſex*, where ſhe [519] was indicted of larciny, and upon examination it appeard ſhe had broke the houſe, and took the goods *ut ſupra*, being above five ſhillings and under ten ſhillings, and the jury found accordingly, and ſhe was burnt in the hand, and diſcharged, for a man in ſuch a caſe ſhould have had his clergy in the county of *Suſſex*, becauſe tho the ſtatute of 39 *Eliz. cap.* 15. take away clergy in the proper county, yet the ſtatute of 25 *H.* 8. as to examination and taking away clergy in a foreign county extends only to felonies put out of clergy by 23 *H.* 8. or 5 & 6 *E.* 6. *cap.* 10. *coram domino* Bridgman *in* Suſſex *ex libro ſuo.*

(b) In the caſe of robbing a church there muſt be an actual breaking to bring it within this ſtatute; but by 1 *E.* 6. *cap.* 12. it is not neceſſary, for by that ſtatute all felonious taking of goods out of a church or chapel is ouſted of clergy in all caſes, except that of challenging above twenty, which defect is ſupplied by 3 & 4 *W.* & *M. cap.* 9.

Again,

Again, the ſtatutes of 23 *H.* 8. and 25 *H.* 8. did put acceſſaries *before* in ſuch caſes from the benefit of their clergy, as well as the principals, but as to *that* they are repeald by 1 *E.* 6. *cap.* 12.

But by the ſtatute of 1 *E.* 6. *cap.* 12. tho the ſtatute of 23 *H.* 8. be re-enacted as to the principals in the caſes before mentiond, and alſo in caſes of breaking houſes to the intent to ſteal, (any perſon being therein, and put in fear) if convict by verdict or confeſſion, or ſtanding mute, and not directly anſwering, yet it hath this general clauſe, *and in all other caſes offenders ſhall have benefit of their clergy*, and therefore by this act theſe changes were wrought.

1. In the caſes, where clergy was excluded by this act, there is no ſaving for perſons in holy orders.

2. It repeald the ſtatute of 25 *H.* 8. *cap.* 3. as to examination in a foreign county, and for that reaſon the ſtatute of 5 & 6 *E.* 6. *cap.* 10. was made, whereby that ſtatute was revived, and ſtands now in force in every article thereof.

3. It reſtored clergy to acceſſaries *before* in all thoſe caſes, wherein they were ouſted of clergy by 23 and 25 *H.* 8. and therefore the ſtatute of 4 & 5 *Ph.* & *M.* *cap.* 4. was made, whereby acceſſaries *before* in murder, or robbery in any dwelling-houſe, or in or near the highways, are ouſted of clergy upon conviction, outlawry, ſtanding mute, or challenging above twenty, or not directly anſwering.

So that the ſtatutes of 23 and 25 *H.* 8. ſtand at this day in force with this addition, that perſons in holy orders ſtand equally exempt from the benefit of clergy with others by the ſtatute of 1 *E.* 6. as to caſes within that ſtatute. [520]

But if only a ſtranger were in the houſe, and neither the owner, his wife, children or ſervants, this gives no diſcharge of clergy by the ſtatute of 23 *H.* 8. and therefore there was proviſion in that caſe by the enſuing ſtatute.

II. But the ſtatute of 1 *E.* 6. *cap.* 12. breaking of any houſe by night or by day, any perſon being in the houſe or put in fear, if it were with an intent to ſteal, tho nothing be ſtolen, a principal was excluded from clergy in all caſes, except outlawry and challenging above twenty.

And alſo in a foreign county, yet if upon examination it be ſo found, he is ouſted of clergy by the ſtatute of 5 & 6 *E.* 6. *cap.* 10. but the acceſſary *before* or *after* is not ouſted of clergy by this ſtatute.