III. By the ſtatute of 5 & 6 *E.* 6. *cap.* 9. "If any perſon be "found guilty according to the laws of the land for robbing any "perſon or perſons in his or their dwelling houſes, or dwelling-places, "the owner or dweller, his wife, children or ſervants being within "the ſame houſe or place, or in any place within the precincts "thereof, ſuch offender ſhall not be admitted to clergy, whether the "owner or dweller, his wife or children, then or there being, ſhall "be waking or ſleeping.

"And alſo he, that robs any perſon in any booth or tent, in any "fair or market, his wife, children, or ſervant then being within the "booth or tent, ſhall be excluded from clergy.

This ſtatute is of force, and of great and daily uſe, and therefore it will be convenient to make ſome obſervations upon it.

Upon this ſtatute theſe things are obſervable:

1. That it extends not to ouſt clergy in any caſe but upon conviction of the offender, either by verdict or confeſſion, for a man that confeſſeth is found guilty by his confeſſion, but it extends not to ſtanding mute, challenging above twenty, or not directly anſwering(*c*),

[521] And therefore it is conſiderable, whether, if a man be attaint by outlawry, he may not be admitted to his clergy as a clerk attaint, which, tho it avoids not the attainder, yet it may take off the execution, for clergy is allowable to a perſon attaint, if the caſe be within clergy, *Crompt. Juriſdic. of Courts* 126. *b.* (*d*) *Dy.* 205. *a. b.* and it is held, outlawry upon this ſtatute excludes not clergy. 11 *Co. Rep.* 29. *b. Poulter*'s caſe.

2. That yet by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. clergy is taken away in this caſe from the acceſſary *before*, as well as in caſe of ſtanding mute and challenging above twenty, or not directly anſwering, for the ſtatute of 4 & 5 *P.* & *M.* extends to acceſſaries *before* in all caſes of robbing in dwelling-houſes, as well thoſe within this ſtatute, as thoſe upon the ſtatute of 23 *H.* 8.

3. It hath been held by good opinion, that this ſtatute extends only to him that actually enters the houſe and ſteals there, and that therefore if *A. B.* and *C.* come to a houſe in the day-time with an intent to enter, and ſteal goods, and that *A* only breaks and enters the houſe, and takes the goods, that *A.* only ſhall be excluded of his clergy, and *B.* and *C.* that were aiding and aſſiſting ſhould have their clergy: this

(*c*) But by 3 & 4 *W.* & *M. cap.* 9. it extends to all theſe caſes, as alſo to the caſe of an outlawry.

(*d*) *Crompt. Juſtice* 119. *b.*

was

was the opinion of divers judges at a meeting in *Serjeants-Inn* 30 *Novemb.* 1664. who grounded themſelves principally upon *Audley*'s caſe *(e)*, upon the ſtatute of 39 *Eliz.* hereafter cited, but I think they are all to be excluded of their clergy upon this ſtatute of 5 & 6 *E.* 6. and there cannot be a ſtronger authority in it, than the judgment of parliament in the ſtatute of 4 & 5 *P.* & *M. cap.* 4. whereby it is enacted, "That if any perſon ſhall maliciouſly command, hire, or "counſel any perſon to commit any robbery in any dwelling-houſe, he ſhall be excluded of clergy.

And certainly he, that is preſent, aiding, and abetting, is more than an acceſſary *before*, but then perchance the indictment muſt not run generally, *was preſent, aiding, and abetting*, but that B. *and* C. *did maliciouſly command, hire, or counſel* A. *to commit the fact*, *Dy.* 183. *b.* 11 *Co. Rep.* 37. *a Poulter*'s caſe; tho, in my own opinion, the words *maliciouſly preſent, aiding, and abetting*, [522] do countervail the former, and much more, and it cannot be intended, that the ſtatute meant to take away clergy from thoſe that maliciouſly counſel or command, which at moſt makes but an acceſſary, and yet that he that is preſent and abetting, ſhall have his clergy.

But, in my opinion, all may be indicted, *quod fregerunt & intraverunt*, &c. as in caſe of burglary or robbery, and it differs from the ſtatute of 39 *Eliz.* and the rather, becauſe the ſtatute of 4 & 5 *P.* & *M.* extends not to offenſes made after by 39 *Eliz.*

4. This ſtatute extends not to breaking of the houſe with an intent to rob it, but there muſt be an actual robbing, or taking away goods.

5. The robbing by day or night is within this ſtatute.

6. The dweller, his wife, children or ſervants muſt be within the precinct of the houſe ſleeping or waking, but it is not neceſſary they ſhould be put in fear, neither is it neceſſary they ſhould be in the ſame room where the robbery is done.

7. But it is not enough, that a ſtranger be in the houſe, unleſs the owner, his wife, children, ſervants or ſome of them be in the houſe at the time alſo, tho it be enough upon the ſtatute of 1 *E.* 6. *cap.* 12.

8. There muſt be not only an actual ſtealing of ſome goods in the houſe, but an actual breaking of the houſe, for the ſtatute ſpeaks of robbing, which imports more than a bare taking of goods.

Aug. 14 *Car.* 1. *Thomas Williams*, *Thomas Bates*, and *Richard Harper* having broken the lodgings of Sir *H. Hungate* at *Whitehall*,

(e) Cro. Car. 473. by the name of *Evans and Fincke*'s caſe.

and taken thence ſeveral goods of Sir *H. Hungate*, *Croke* and *Crawley* were adviſed with, to pen the indictment, who agreed theſe points: 1. It muſt be laid for breaking the king's manſion-houſe called *Whitehall (f)*, and ſtealing the goods of Sir *H. Hungate*, for all the lodgings in *Whitehall* were part of the king's houſe, and differ'd from an inn of court, where each chamber is a ſeveral manſion-houſe, becauſe every one hath a ſeveral intereſt in his chamber. 2. That upon the ſtatute of 5 & 6 *E.* 6. the indictment need only be, that he broke the king's houſe called *Whitehall*, and ſtole the goods of Sir *H. Hungate*, divers of the king's ſervants then being in the houſe, without ſaying, that any body was put in fear (which was neceſſary by the ſtatute of 23 *H.* 8.) but merely upon the ſtatute of 5 & 6 *E.* 6. and accordingly the indictment was drawn. 3. That upon an indictment upon 23 *H.* 8. or upon 5 *E.* 6. there muſt be an actual breaking of the houſe, and alſo a robbery or ſtealing of ſome thing.

[523]

4. That if a thief comes into the houſe, the doors being open, and then breaks open a chamber-door, and ſteals goods from thence, this is a breaking of the houſe within thoſe ſtatutes, and accordingly at the gaol-delivery at the *Old Bailey*, 29 *Aug.* 14 *Car.* 1. thoſe two juſtices being preſent, they were indicted, and *Harper* being fled, the other two were found guilty; *Williams* was reprieved before judgment, but *Bates* was executed, *ex libro Twiſden.*

Upon this latter reſolution it ſeems, that *Bayne*'s caſe in *Popham*'s *Rep.* 36 & 37 *Eliz. n.* 10 was ſomewhat too ſevere *(g)*, where one came into a tavern to drink, and ſtole a cup that was brought them to drink in, the owner and his ſervants being in the houſe, and upon this he was ouſted of his clergy upon the ſtatute of 5 & 6 *E.* 6. which caſe was doubted by the juſtices upon a meeting among them *Novemb.* 1664. but it was then agreed, if two come into a tavern to drink, the door being open, and divers of the family being in the houſe, and one goes up ſtairs and breaks a chamber-door, and ſteals goods, and both depart before the felony be diſcovered; reſolved by us all, that clergy is taken away from him that breaks open the door, if he be indicted upon the ſtatute of 5 *E.* 6. but not from the other, for the breaking of the door was an act of violence, and ſo the breaking of a counter or cheſt *(h)*; for a cheſt *vide poſtea.*

(*f*) See *Kel.* 27. (*h*) See *Kel.* 69.
(*g*) This caſe denied to be law, Kel. 68.

But

But tho the breaking of the door, or perchance of a counter, may be ſuch an act, as may make it a robbery within the ſtatute of 5 *E.* 6. yea, and altho in that caſe before-mentioned, and in a caſe upon a ſpecial verdict out of *Cambridgeſhire* before-men- [524] tioned, it was held the breaking of a cheſt was all one as to this purpoſe with the breaking of a door, tho the cheſt were not fixed to the freehold, *quod vide antea cap.* 18. yet I muſt needs ſay, that the courſe at *Newgate* hath been always ſince my time, that the breaking open of a chamber-door, and of a counter or cupboard fixed to the freehold, hath brought it within the ſtatute of 5 *E.* 6. to ouſt of clergy; yet when a party enters the doors open, and breaks up only a cheſt or trunk, and ſteals thence goods, that is not ſuch a robbery, as is within the ſtatute of 5 *E.* 6. to ouſt of clergy, and ſo was the difference agreed at *Newgate* 1671. upon the robbery of the cook of *Serjeants-inn* in *Fleet-ſtreet*, by certain perſons that came in to eat, and ſlipt up ſtairs, and picked open a chamber-door, and broke open a cheſt, and ſtole plate of good value: it was agreed, that the picking open the lock of the chamber-door brought it within the ſtatute to ouſt clergy, but the breaking open of a cheſt or trunk only would not ouſt clergy upon the ſtatute of 5 *E.* 6. or 39 *Eliz.* and ſo by *Lee* ſecondary was the conſtant courſe at *Newgate* in his time.

As to robbery in booths or tents in fairs and markets, within the 5 *E.* 6. *cap.* 12. *H.* 41 *Eliz. B. R.* the robbing of a ſhop in *Weſtminſter-hall* was ruled not to be within this ſtatute to be ouſted of clergy.

If a ſervant opens a chamber-door in his maſter's houſe, and ſteals goods, Sir *N. Hyde*, who was ſevere enough in caſes criminal, doubted whether this were within this ſtatute to ouſt him of his clergy: *vide infra.*

IV. The next ſtatute relating to this matter of robbing in houſes is 39 *Eliz. cap.* 15. which recites, that the penalty of robbing of houſes in the day-time, no perſons being in the houſe at the time of the robbery committed, is not ſo penal as robbery in any houſe, any perſon being therein at the time of the robbery committed, which hath emboldened perſons to commit heinous robberies in breaking and entering perſons houſes, none being in the ſame, and enacts, "That if "any perſon ſhall be found guilty by verdict, confeſſion, or other-"wiſe for the felonious taking away in the day-time of money, "goods, or chattels to the value of five ſhillings or upwards [525]

" in any dwelling-houſe, or any part thereof, or any out-houſe or " out-houſes belonging and uſed with the ſaid dwelling-houſe or " houſes, altho no perſon ſhall be in the ſaid houſe or houſes at the " time of the felony committed, every ſuch perſon ſhall be excluded " from the benefit of clergy.

Upon this ſtatute theſe things are obſervable:

1. That the indictment, whereupon ſuch perſon is to be excluded of the benefit of his clergy, ought preciſely to follow the ſtatute, *viz.* it muſt be in the day-time, and no perſon being in the houſe, and muſt appear to be ſo upon evidence.

2. And therefore, if either the indictment purſue not the ſtatute, or the evidence make not good the indictment, he is to have his clergy, and therefore upon ſuch an indictment he may be acquitted of ſtealing againſt the form of the ſtatute, and found guilty of ſimple felony at common law, tho the indictment conclude *contra formam ſtatuti*; and the ſame law it is, if an indictment be formed upon the ſtatute of 23 *H.* 8. or 5 & 6 *E.* 6. for tho the indictments in thoſe caſes be ſpecial, and conclude ſometimes *contra formam ſtatuti*, yet they include felony at common law, and tho the indictment concluding *contra formam ſtatuti* be good, it is not neceſſary, ſo as the circumſtances required by the ſtatute be purſued, for the ſtatutes in theſe caſes make not the felony, but only exclude clergy, when the felony is ſo circumſtantiated, as the ſtatute mentions, and is ſo expreſſed in the indictment.

3. If the indictment be formed upon this ſtatute, as that he broke and entred the houſe in the day-time, and ſtole, no perſon being in the houſe, if it appear upon the evidence, that the felony was committed without theſe circumſtances, as if it were committed in the night, or not in the day, ſo that it is burglary, or if committed when ſome of the family were in the houſe, in which caſe he had been ouſted of his clergy by the ſtatute of 5 & 6 *E.* 6. if the indictment had been formed upon that ſtatute, yet in ſuch caſe the offender being ſpecially indicted upon the ſtatute of 39 *Eliz.* ſhall be found guilty of ſimple felony at common law, and ſhall not [526] be ouſted of his clergy by the ſtatute of 23 *H.* 8. 1 *E.* 6. 5 & 6 *E.* 6. or 18 *Eliz. cap.* 7. becauſe the indictment is not formed upon thoſe ſtatutes, but only upon 39 *Eliz.* and if the circumſtances of the ſtatute of 39 *Eliz.* upon which the indictment is formed, be not purſued in the evidence, he muſt have his clergy, and ſo is the conſtant practice.

4. Altho

4. Altho this ſtatute of 39 *Eliz.* in the body of the act ſpeaks only of ſtealing, yet in as much as the preamble ſpeaks of robbery, it hath been always taken, that upon this ſtatute, as well as upon the ſtatute of 5 *E.* 6. there muſt be theſe three things concur to ouſt clergy: 1. There muſt be *an actual ſtealing* or taking away of goods of ſome value upon the ſtatute of 5 & 6 *E.* 6. and of goods to the value of five ſhillings upon this ſtatute, but it is not neceſſary, that the goods be carried out of the houſe, for if he take them out of a trunk or cupboard, and lay them in the room, and be apprehended before he carry them away, it is a ſtealing within the ſtatutes, and at common law alſo, as was reſolved by all the judges, *uno diſſentiente*, in a caſe out of *Cambridgeſhire* upon a ſpecial verdict there found upon an indictment upon the ſtatute of 5 & 6 *E.* 6. *anno* 1664. *(i)*. 2. It muſt be a ſtealing of goods *in the houſe*, and therefore he that ſteals, or is party to the ſtealing them, being out of the houſe, is not by this ſtatute to be ouſted of his clergy. 3. Upon this ſtatute, as well as upon the ſtatute of 5 & 6 *E.* 6. there muſt be ſome act of force or *breaking*. *(k)*

Now what ſhall be ſaid ſuch a force, as muſt bring the party within this ſtatute, hath been touched before, to which I add, 1. That whatſoever breaking will make a burglary, if it were in the night, will make ſuch a force or breaking, as is within this ſtatute and that of 5 *E.* 6. to ouſt the thief of his clergy, as if he break open the outward or inward door of the houſe, pick the lock of [527] ſuch door, draw the latch, break open the window, &c. 2. Some breaking or force will ouſt clergy upon the ſtatutes of 5 & 6 *E.* 6. and 39 *Eliz.* which will not make a burglary, if it were in the night, as where he enters by the doors open, and breaks open a counter or cupboard fixed to the freehold, as was agreed in the *Cambridgeſhire* caſe before-mentiond.

Ꝛ 16 *Car.* 2. *Simſon*'s caſe, where the caſe was thus: a man came into a dwelling-houſe, none being within, and the doors being open, and broke up a cheſt, and took out goods to the value of five ſhillings, laid them on the floor, and before he could carry them out of the chamber, he was apprehended, and upon this matter ſpecially found

(i) This was *Simpſon*'s caſe mentioned below, and is reported *Kel* 31.

(k) But now by 10 & 11 *W.* 3. *cap.* 23. "Whoever by night or day ſhall in any "ſhop, ware-houſe, coach-houſe, or ſtable, "privately and feloniouſly ſteal to the va- "lue of 5*s.* or more, tho ſuch ſhop be "not broke open, nor any perſon therein, "or ſhall aſſiſt, hire, or command any "perſon to commit ſuch offenſe, ſhall be "excluded from the benefit of clergy. And by 12 *Ann. cap.* 7. "Whoever "ſhall feloniouſly ſteal to the value of 40*s.* "in any dwelling-houſe or out-houſe "thereto belonging, altho it be not bro- "ken, nor any perſon therein, their aiders "or aſſiſters are excluded from clergy.

he

he was ouſted of his clergy upon the ſtatute of 39 *Eliz.* for the taking them out of the cheſt was felony by the common law, and the ſtatute of 39 *Eliz.* did not alter the felony, but only excluded clergy; *per omnes juſticiarios* Angliæ. *Ex libro* Bridgman.

But whereas in that caſe the breaking open of the cheſt was held ſuch a force or breaking, as excludes clergy upon that ſtatute, I have obſerved, that the conſtant practice at *Newgate* hath not allowed that conſtruction, unleſs it was a counter or cupboard fixed; yet *note*, this reſolution of 16 *Car.* was by all the judges of *England* then preſent, and tho one diſſented, he after came about to the opinion of the reſt. *Ideo quære.*

T. 13 *Car.* 1. *B. R. Evans* and *Finch (l)* were arraigned at *Newgate* upon an indictment, that they at twelve of the clock in the day, *domum manſionalem* Hugonis Audely *de interiori templo, nullâ perſonâ in eadem domo exiſtente, fregerunt, &* 40 *l.* from thence did ſteal, a ſpecial verdict was found, that *Evans* by a ladder climbed up to the upper window of the chamber of *H. Audely*, and took out of the ſame forty pounds, and *Finch* ſtood upon the ladder in view of *Evans*, and ſaw *Evans* in the chamber, and was aſſiſting to the robbery, and took part of the money, and that at the time of the robbery divers perſons were in the *Inner Temple-hall*, and in divers other parts of
[528] the houſe; ruled, 1. That a chamber in an inn of court is *domus manſionalis* within the ſtatute of 39 *Eliz.* of him who was the owner of the chamber. 2. That altho this chamber was parcel of the *Inner Temple*, and other perſons were in the hall and other parts of the *Inner Temple*, yet no perſon being in the chamber, this offenſe was within the ſtatute of 39 *Eliz.* and ſo it differs from the caſe of *Whitehall* before-mentiond, where the indictment was upon the ſtatute of 5 & 6 *E.* 6. 3. That in as much as *Evans* was only in the chamber, and *Finch* entred not the chamber, *Evans* had judgment of death, and *Finch* had his clergy.

And the like law had been upon the ſtatute of 5 & 6 *E.* 6. as is before declared, for theſe ſtatutes only exclude the parties, that actually take out of the dwelling-houſe, not thoſe that are preſent and aſſenters *(m)*, as hath been alſo before declared *(n)* upon the ſtatute of 1 *Jac.* of ſtabbing.

(l) Cro. Car. 473.

(m) But by 3 & 4 *W.* & *M. cap.* 9. clergy is taken away from all, who comfort, aid, abet, aſſiſt, counſel, hire, or command any perſon felonioufly to break any dwelling-houſe, ſhop, or ware-houſe thereto belonging, and felonioufly to take away any money, goods, &c. to the value of 5 *s.* or upwards, altho no perſon be within the ſame.

(n) Vide antea, p. 468.

And

And herein it differs from burglary and robbery, for therein all perſons, that are preſent, aiding, and aſſiſting, are equally burglars or robbers with him, that enters or actually takes; but of this hereafter.

But this ſtatute of 39 *Eliz.* takes not away the benefit of clergy, where the offender ſtands mute, but only in the caſe of conviction by verdict, confeſſion, or otherwiſe according to the laws of the realm; *quære* of outlawry, for there the party is attaint indeed, but not found guilty, for if he reverſe the outlawry, he ſhall plead to the felony. *(o)*

And thus far for thoſe larcinies, that relate to the dwelling-houſe of any wherein clergy is excluded.

V. The next ſtatute, that excludes from clergy, is the ſtatute of 1 *E.* 6. *cap.* 12. and 2 & 3 *E.* 6. *cap.* 33. which exclude clergy from any perſon convict by verdict or confeſſion of ſtealing any horſe, mare, or gelding, or wilfully ſtanding mute.

But it takes not away clergy from acceſſaries *before* or *after*. [529]

VI. The ſtatute of 8 *Eliz.* *cap.* 4. by which he that takes money or goods feloniouſly from the perſon of any other, privily, without his knowledge, is ouſted of his clergy, if convict by verdict or confeſſion, or if he challenge above twenty peremptorily, or ſtands mute, or will not directly anſwer, or be outlawed.

Upon this ſtatute theſe things are obſervable: 1. It doth not alter the nature of the felony, and therefore, if what he takes away ſo be not above the value of twelve-pence, it is only petit larciny, as it was before, and ſo differs from the caſe of robbery, *Co. P. C. cap.* 16. *p.* 68. *Crompt. de Pace, fol.* 33. *b.* 2. The indictment muſt be purſuant to the ſtatute, *viz. quod felonicè, &c. clam & ſecretè a perſonâ, &c. cepit*, otherwiſe the offender hath his clergy. 3. It doth not ouſt acceſſaries of their clergy, nor it ſeems doth it ouſt any of his clergy but him, that actually picks the pocket, and not thoſe that are preſent, aiding and aſſiſting, upon the reaſon of *Evan*'s caſe before, for it ſhall be taken literally.

By an act of this parliament, *viz.* * * * *(p)*

See table of the principal matters in Foſter, Tit. Clergy.

(o) But now by 3 & 4 *W. & M. cap.* 9. clergy is expreſly taken away in caſe of outlawry, or of ſtanding mute, *&c.*

(p) This was left unfiniſhed by our author, but I ſuppoſe the ſtatute here meant is 22 *Car.* 2. *cap.* 5. which "All who ſhall "feloniouſly ſteal woollen manufactures "from the tenters, or ſhall embezzle the "king's naval ſtores, are excluded from "clergy.

As to ſubſequent ſtatutes, which take away clergy from larciny in dwelling-houſes, *vide poſtea ſub fine cap.* 48.

CHAP.

CHAP. XLV.

Concerning petit larciny.

PETIT larciny is the felonious ſtealing of money or goods not above the value of twelve-pence without robbery, for altho that by ſome opinions the value of twelve-pence make grand larciny, 22 *Aſſiz.* 39. *per Thorp*, yet the law is ſettled, that it muſt exceed twelve-pence to make grand larciny, *Weſt* 1. *cap.* 15. *(a)* 8 *E.* 2. *Coron.* 404.

The judgment in caſe of petit larciny is not loſs of life, but only to be whipt, or ſome ſuch corporal puniſhment leſs than death, and yet it is felony, and upon conviction thereof the offender loſeth his goods, for the indictment runs *felonicè*. 27 *H.* 8. 22.

A party indicted of petit larciny and acquitted, yet if it be found he fled for it, forfeits his goods, as in caſe of grand larciny. 8 *E.* 2. *Coron.* 406. *Stamf. P. C. p.* 184. *a.*

But in caſe of petit larciny there can be no acceſſaries neither before nor after. *P.* 9 *Jac.* 12 *Co. Rep.* 81.

If two or more be indicted of ſtealing goods above the value of twelve-pence, tho in law the felonies are ſeveral, yet it is grand larciny in both. 8 *E.* 2. *Coron.* 404.

But if upon the evidence it appears, that *A.* ſtole twelve-pence at one time, and *B.* twelve-pence at another time, ſo that the acts themſelves were ſeveral at ſeveral times, tho they were the goods of the ſame perſon, this is petit larciny in each, and not grand larciny in either.

If *A.* be indicted of larciny of goods to the value of five ſhillings, yet the petit jury may upon the trial find it to be but of the value of twelve-pence, or under, and ſo petit larciny. 41 *E.* 3. *Coron.* 451. 18 *Aſſiz.* 14. *Stamf. P. C. p.* 24. *b.*

[531] If *A.* ſteal goods of *B.* to the value of ſix-pence, and at another time to the value of eight-pence, ſo that all put together exceed the value of twelve pence, tho none apart amount to twelve-pence, yet this is held grand larciny, if he be indicted of them altogether, *Stamf. P. C.. p.* 24. collected from the book of 8 *E.* 2. *Coron.* 415. *Dalt. cap.* 101. *p.* 259. *(b)*

(*a*) 2 *Co. Inſtit.* 190. (*b*) *New Edit. cap.* 154. *p.* 494.

But

But if the goods be ſtolen at ſeveral times from ſeveral perſons, and each a-part under value, as from *A.* four-pence, from *B.* ſix-pence, from *C.* ten-pence, theſe are ſeveral petit larcinies, and tho contained in the ſame indictment make not grand larciny.

But it ſeems to me, that if at the ſame time he ſteals goods of *A.* of the value of ſixpence, goods of *B.* of the value of ſix-pence, and goods of *C.* to the value of ſix-pence, being perchance in one bundle, or upon a table, or in one ſhop, this is grand larciny, becauſe it was one entire felony done at the ſame time, tho the perſons had ſeveral properties, and therefore, if in one indictment, they make grand larciny.

If *A.* ſteal *clam & ſecretè* out of the pocket of *B.* twelve-pence, tho the ſtatute of 8 *Eliz.* take away clergy from a pick-pocket, yet it is but petit larciny; *quod vide ſupra p.* 529.

And ſo if a man could poſſibly ſteal a horſe of the value of twelve-pence only, or under, or break a houſe in the day-time, and ſteal goods only of the value of twelve-pence, the owner, his wife or children being in the houſe, and not put in fear, this will be but petit larciny, notwithſtanding the ſtatute of 5 & 6 *E.* 6. take away clergy, for that ſtatute altered not the nature of the offenſe, but takes away clergy, where clergy was before, namely where the offenſe was capital, as in caſe of grand larciny.

But if they were put in fear, then it would be robbery, how ſmall ſoever the value were, and ſo could not ſink into the nature of petit larciny; but of this in the next chapter.

4 Blackſ. Com. ch. 17. p. 229, &c. Foſter 73, 123, 124, 366. See Index of 1 Hawk. P. C. tit. Larciny.

CHAP. XLVI. [532]

Of robbery.

ROBBERY is the felonious and violent taking of any money or goods from the perſon of another, putting him in fear, be the value thereof above or under one ſhilling.

In this caſe it is to be conſidered, 1. What is a felonious taking from the perſon. 2. Who ſhall be ſaid a felonious taker from the perſon

perſon of a man. 3. What violence or putting in fear is requiſite to make up robbery. 4. In what caſes ſuch a robber is admiſſible to his clergy.

As to the firſt.

I. There muſt be in caſe of robbery (as alſo in all caſes of larciny) ſomething felonioufly taken, for altho antiently an aſſault to the intent to rob, or an attempt to rob was reputed felony, *voluntas reputabatur pro facto*, 25 *E.* 3. 42. 13 *H.* 4. 7. *per Gaſcoigne* 27 *Aſſiz.* 38. yet the law is held otherwiſe at this day *(a)*, and for a long time ſince the time of *Edward* III. and therefore if *A.* lie in wait to rob *B.* and aſſault him to that purpoſe, and require him to deliver his purſe, yet if *de facto* he hath taken nothing from him, this is not felony, but only a miſdemeanor, for which he is puniſhable by fine and impriſonment. 9 *E.* 4. 26. *b. Stamf. P. C. p.* 27. *b. Co. P. C. p.* 68.

There is a double kind of taking, *viz.* a taking in law, and a taking in fact.

If thieves come to rob *A.* and finding little about him enforce him by menace of death to ſwear upon a book to fetch them a greater ſum, which he doth accordingly, this is a taking by robbery, yet he was not in conſcience bound by ſuch compelled oath, for the fear continued, tho the oath bound him not, and in that caſe the indict-

[533] ment need not be ſpecial, for that evidence will maintain a general indictment of robbery, 44 *E.* 3. 14. *b.* 4 *H.* 4. 2. *a. Co. P. C. p.* 68. *Dalt. cap.* 100. *p.* 257. *(b)*, who ſaith it was ſo adjudged alſo in *P.* 36 *Eliz.*

If *A.* aſſaults *B.* and bids him deliver his purſe, and *B.* delivers it accordingly, this is a taking, and ſo it is if *B.* refuſe, and then *A.* prays him to give or lend him money, which *B.* doth accordingly, this is robbery, for *B.* doth it under the ſame fear, *Dal. cap.* 100. 44 *Eliz. Cromp.* 34. *b.* ſo it is if *B.* throw his purſe or cloak in a buſh, and *A.* takes it up, and carries it away; ſo if *B.* flying from the thief lets fall his hat, and the thief take it and carry it away, for all is the effect of the ſame fear. *Dalt. ubi ſupra.*

So if *A.* without drawing his weapon requires *B.* to deliver his purſe, who doth deliver it, and *A.* finding but two ſhillings in it gives it him again, this is a taking by robbery. 20 *Eliz. Crompt.* 34. *Dalt. ubi ſupra.*

(*a*) *Plowd. Com.* 259. *b.* (*b*) *New Edit. cap.* 153. *p.* 492.

If

If *A.* have his purſe tied to his girdle, *B.* aſſaults him to rob him, and in ſtruggling the girdle breaks, and the purſe falls to the ground, this is no robbery, becauſe no taking; but if *B.* takes up the purſe, or if *B.* had the purſe in his hand, and then the girdle breaks, and ſtriving lets the purſe fall to the ground, and never takes it up again, this is a taking and robbery. *Co. P. C. p.* 69. *Dalt. cap.* 100. *Crompt. fol.* 35.

It is not always neceſſary, that in robbery there ſhould be ſtrictly a taking from the perſon, but it ſufficeth if it be in his preſence, as appears by ſome of the former inſtances, in caſe it be done with a putting in fear: as where a carrier drives his pack-horſes, and the thief takes his horſe, or cuts his pack, and takes away the goods: ſo if a thief comes into the preſence of *A.* and with violence, and putting *A.* in fear, drives away his horſe, cattle, or ſheep. *Dalt. ubi ſupra. Stamf. P. C. p.* 27. *a.*

II. Who ſhall be ſaid a perſon robbing or taking.

If ſeveral perſons come to rob a man, and they are all preſent, and one only actually takes the money, this is robbery in all.

Pudſey and two others, *viz.* *A.* and *B.* aſſault *C.* to rob him in the highway, but *C.* eſcapes by flight, and as they [534] were aſſaulting him *A* rides from *Pudſey* and *B.* and aſſaults *D.* out of the view of *Pudſey* and *B.* and takes from him a dagger by robbery, and came back to *Pudſey* and *B.* and for this *Pudſey* was indicted and convict of robbery, tho he aſſented not to the robbery of *D.* neither was it done in his view, becauſe they were all three aſſembled to commit a robbery, and this taking of the dagger was in the mean time. 28 *Eliz. B. R. Crompt.* 34.

And ſo it is if *A. B.* and *C.* come to commit a robbery, and *A.* ſtands centinel at the hedge-corner to watch if any come, and *B.* and *C.* commit the robbery, tho *A.* was not actually preſent, nor within view, but at a diſtance from them; and the like in burglary. 11 *H.* 4. 13. *Co. P. C. p.* 64.

III. What ſhall be ſaid a putting in fear, or violent taking.

Without putting in fear or violence it is not robbery, but only larciny, and the indictment muſt run, *quod vi & armis apud* B. *in regiâ viâ ibidem, &c.* 40*s. in pecuniis numeratis felonicè & violenter cepit a perſonâ*; and therefore if the word *violenter* be omitted in the indictment, or not proved upon the evidence, tho it were *in altâ viâ regiâ & felonicè cepit à perſonâ*, it is but larciny, and the offender ſhall have

his

his clergy. *Dy.* 224. *b. H.* 17 *Jac.* in *B. R. (c).* *Harman* was indicted of the robbery of *Halfpenny* in the highway; and upon the evidence it appeared, that *Harman* was upon his horſe, and required *Halfpenny* to open a gap for him to go out, *Halfpenny* going up the bank to open the gap, *Harman* came by him, and ſlipt his hand into his pocket, and took out his purſe; *Halfpenny* not ſuſpecting the taking of his purſe, until turning his eye he ſaw it in *Harman*'s hand, and then he demanded it, *Harman* anſwered him, *Villain if thou ſpeakeſt of thy purſe, I will pluck thy houſe over thine ears, and drive thee out of the country, as I did* John Somers, and then went away with his purſe; and becauſe he took it not with ſuch violence, as put *Halfpenny* in fear, it was ruled to be but ſtealth, and not robbery,
[535] for the words of menace were uſed after the taking of the purſe, wherefore he was found guilty only of larciny, and had his clergy *(d).*

IV. As to the point of clergy in robbery.

The ſtatute of 23 *H.* 8. *cap.* 1. *(e)* and 5 & 6 *E.* 6. *cap.* 9. do not ouſt robbery of clergy in all caſes, but only in two, *viz.* when the robbery is committed in a manſion-houſe, the owner, his wife, children or ſervants being in the houſe and put in fear *(f)*, or when committed in or near the highway.

And therefore *Trin.* 38 *H.* 8. *Moore, n.* 16. *p.* 5. A man indicted of robbery in *quâdam viâ regiâ pedeſtri ducent' de* London *ad* Iſlington, and accordingly found guilty, had his clergy, for the words of the ſtatute are *for robbery in or near the highway he ſhall be ouſted of his clergy*, and therefore the indictment and conviction muſt be of a robbery *in vel propè altam viam regiam*, and it is not ſufficient to ſay only *viâ regiâ* or *viâ regiâ pedeſtri.*

For where any perſon is to be ouſted of his clergy by virtue of any act of parliament, two things are always requiſite. 1. That the in-

(c) 2 *Rol. Rep.* 154.

(d) But it ſhould ſeem, that this was a private ſtealing from the perſon of another, and therefore, if above the value of twelvepence, would have been ouſted of clergy by 8 *Eliz. cap.* 4. if the indictment had been laid purſuant to that ſtatute.

(e) This ſtatute, and that of 25 *H.* 8. *cap.* 3. ouſts clergy only in caſes of conviction, ſtanding mute, not directly anſwering, or challenging peremptorily above the number of twenty, but does not extend to the caſe of an outlawry, but this ſeems to be included in the word *attainted* in 1 *E.* 6. *cap.* 12. however it is expreſsly provided for by 3 & 4 *W.* & *M. cap.* 9.

(f) Being put in fear is neceſſary by the 23 *H.* 8. *cap.* 1. (and alſo by 1 *E.* 6. *cap.* 12. which perhaps is the ſtatute intended by our author) but by 5 & 6 *E.* 6. *cap.* 9. all that is requiſite is, that the owner, &c. be in the houſe, tho not put in fear, for the expreſſion of that ſtatute is, *the owner, &c. being in the houſe, whether ſleeping or waking.*

dictment

dictment bring the fact within the ſtatute, but need not conclude *contra formam ſtatuti.*

2. That the evidence and finding of the jury likewiſe bring the caſe within the ſtatute, otherwiſe the priſoner is to have his clergy.

But an indictment of a robbery *in vel propè altam viam regiam*, tho in the disjunctive is uſual at *Newgate*, for if it be either in or near it, tho an indictment ought to be certain, yet this is not the ſubſtance of the indictment, nor that which makes the crime, but only to aſcertain the court as to the point of clergy to ſerve the ſtatute.

A robbery is committed upon the *Thames* in a ſhip there lying at anchor below the bridge, on that ſide of the river [536] which is in *Middleſex*; for this robbery *Hyde* and others were indicted as of a robbery done *in vel propè altam viam regium*, and were ouſted of their clergy, for the *Thames* is in truth *alta via regia* the king's high ſtream; and if it were not, yet it is not far off from it, and the ſtatute ſays *near* not *next*.

By the ſtatute of 25 *H.* 8. *cap.* 3. *(g)*, clergy is ouſted upon examination, if the original offenſe were committed in another county, and excluded from clergy by 23 *H.* 8. *cap.* 1. and that ſtatute extends to robbery in a manſion-houſe, or in or near the highway.

A. robs *B.* on the highway in the county of *C.* of goods to the value only of twelve-pence, and carries them into the county of *D.* it is certain, that this is larciny in the county of *D.* as well as in the county of *C.* but it is only robbery in the county of *C.* where the firſt taking was, and for robbery he cannot be indicted or appeal'd in the county of *D.* but only in the county of *C.* but he may be indicted of larciny in the county of *D.* and it is certain, though the robbery were but of the value of one penny, yet if *A.* were indicted thereof in the county of *C.* he ſhould have had judgment of death, and been excluded from clergy.

Yet if *A.* be indicted of larciny in the county of *D.* and the jury find the value to be only twelve-pence, he ſhall only have the judgment of petit larciny, and not ſuffer death, as he ſhould have done, if he had been indicted of robbery in the county of *C.* altho it appears upon examination upon the trial in the county of *D.* that it was a robbery; the like law is, if it had been a robbery in a dwelling-houſe within the ſtatute of 23 *H.* 8. becauſe it can be no more than petit

(g) This ſtatute was in effect repealed by 1 *E.* 6. *cap.* 12. but is revived by 5 & 6 *E.* 6. *cap.* 10.

larciny in the county of *D.* it being found but of the value of twelve-pence, and accordingly reſolved by the opinion of all the juſtices, 31 *Eliz. Moore, n.* 739. *pag.* 550. for the ſtatute of 25 *H.* 8. extended to ouſt them of clergy, where clergy is demandable; but the [537] jury finding the value to be but twelve-pence, or under, no clergy is demandable, becauſe petit larciny, but the party is to be whipt only.

It hath been before obſerved, *cap.* 44. that upon the ſtatute of 29 *Eliz. cap.* 15. tho *A.* and *B.* be both preſent and conſenting to the breaking and entering of a houſe to rob, and *A.* only enters into the houſe, and *B* ſtands by, *A.* ſhall be ouſted of his clergy, but *B.* ſhall have his clergy *(h)*, becauſe *A.* only entered the houſe, and the words of the ſtatute extend only to him that actually enters the houſe; yet if *A.* and *B.* be preſent, and conſenting to a robbery in or near the highway, or to a burglary, tho *A.* only actually commits the robbery, or actually breaks and enters the houſe, and *B.* perchance be watching at another place near, or be about a robbery hard by, which he effects not, yet they are both robbers or burglars, and both ſhall be ouſted of their clergy, as in *Rudſey*'s caſe: and the reaſon of the difference is, becauſe in this caſe both are robbers and burglars, but in the former caſe both ſteal not in the houſe, but only *A.* and that ſtatute binds up the excluſion of the clergy to ſtealing in the houſe.

Anno 1672. at *Newgate*, *Hyde* and *A. B. C.* and *D.* conclude to ride out to rob, and accordingly they rode out; but at *Hounſlow D.* parted from the company, and rode away to *Colbrook*; *Hyde*, *A. B.* and *C.* rode towards *Egham*, and about three miles from *Hounſlow*, *Hyde A.* and *B.* aſſaulted a man; but before he was robbed *C.* ſeeing another man coming at a diſtance, before the aſſault, rode up to him about a bow-ſhot or more from the reſt, intending either to rob him, or to prevent his coming to aſſiſt, and in his abſence *Hyde*, *A.* and *B.* robbed the firſt man of divers ſilk ſtockings, and then rode back to *C.* and they all went to *London*, and there divided the ſpoil: it was ruled upon good advice, 1. That *D.* was not guilty of the robbery, tho he rode out with them upon the ſame deſign, becauſe he left them at *Hounſlow*, and fell not in with them, it may be he repented of the deſign, but at leaſt he purſued it not. 2. That *C.* tho he was not actually preſent at the robbery, nor, as I remember, at the aſſault,

(h) But now by the ſtatute of 3 & 4 *W.* & *M. cap.* 9. he would not have his clergy, for by that ſtatute clergy is taken away from all aiders, abetters, or aſſiſters.

but

but rode back to ſecure his company, was guilty as well as *Hyde*, *A.* and *B.* and thereupon *C.* as well as *Hyde*, *A.* and *B.* had judgment of death, and was excluded of clergy, the indictment being for robbery on the highway, according to the reſolution in *Pudſey*'s caſe, for they were all robbers on the highway.

Foſter 128, 129. 4 Blackſ. Com. ch. 17. p. 243. Index to 1 Hawk. P. C. tit. Robbery. Foſter. 128, 129. ſeems contra.

CHAP. XLVII.

Concerning reſtitution of goods *ſtolen, and the* confiſcation of goods *omitted in the indictment or appeal.*

ALTHO this title may ſeem to come more properly to be examined, when we come to conſider of the proceedings and judgment in criminal cauſes, yet in as much as it properly relates to larciny and robbery of goods, it will not be amiſs to take it up here as an appendix to the four former chapters touching larciny and robbery.

There are three means of reſtitution of goods for the party, from whom they were ſtolen, *viz.* 1. By appeal of robbery or larciny. 2. By the ſtatute of 21 *H.* 8. *cap.* 11. And 3. By courſe of common law.

I. Upon an appeal of robbery or larciny, if the party were convict thereupon, reſtitution of the goods contained in the appeal was to be made to the appellant, for it is one of the ends of that ſuit.

And hence it is, that if in an appeal of felony or robbery the appellant omit any of the goods ſtolen from him, they are forfeit, and confiſcate to the king. 45 *E.* 3. *Coron.* 100.

And ſo it is, if he brings an appeal of robbery or larciny, and it appears upon the trial, that indeed the goods were the [539] plaintiff's; but yet the appellee came to the goods not by felony, but by finding or bailment or the like without felony, the plaintiff forfeits theſe goods to the king for his falſe appeal. 3 *E.* 3. *Coron.* 367.

But if the defendant in the appeal be convicted, he ſhall not only have judgment of death, but the plaintiff ſhall have a reſtitution of his goods.

If *A.* ſteals the goods of *B. C.* and *D.* ſeverally, and *B.* brings his appeal, and convicts the offender, yet before judgment *C.* and *D.* may purſue their appeals, and he ſhall be arraigned alſo upon their ſeveral appeals. 4 *E.* 4. 11. *a.*

So if judgment be given againſt *A.* upon the appeal of *B.* yet if the appeal of *C.* were begun before the attainder, *A.* ſhall be arraigned upon the appeal of *C.* becauſe he is to have reſtitution of his goods thereby, yet by the book of 7 *H.* 4. 31. and 12 *E.* 2. *Coron.* 379. it ſeems, that the ſecond trial at the ſuit of *C.* is but in nature of an inqueſt of office to entitle him to the reſtitution of his goods, becauſe as to the judgment of life he is already in law a dead perſon, and the book of 4 *E.* 4. 11. *(a)* ſpeaks not in caſe of a judgment, but only of a conviction or finding guilty; *quære*, *vide* 44 *E.* 3. 44. yet *vide* *Stamf. p.* 66 and 107. it ſeems the attainder is no bar to *C.*

But certain it is, that if *A* be attaint at the ſuit of *B.* and then and not before *C.* commences his appeal, *A.* ſhall not be arraigned thereupon; but if he be afterwards pardoned, then he ſhall be arraigned at the ſuit of *C.* commenced after the attainder, 6 *H.* 4. 6. *b.* 10 *H.* 4. *Coron* 227. But if the attainder were at the king's ſuit for that very felony, for which *C.* brought his appeal after the attainder, then it ſeems he ſhall not be put to anſwer it. *Stamf. P. C. p.* 106.

Now touching reſtitutions upon appeals, *Stamf. Lib.* III. *cap.* 10. *fol.* 165. hath given us a full account, I ſhall follow his method partly and ſummarily. 1. Where the plaintiff ſhall have reſtitution. 2. When. 3. Of what things.

[540] 1. As to the *firſt*, where and in what caſes the party appellant ſhall have reſtitution.

1. It muſt be upon freſh ſuit, and tho anciently the law was ſtrict herein as to the time and manner of the purſuit and apprehending of the felon, yet the law is now more liberal.

If the felon be taken by any others, as by the ſheriff, yet if the party robbed come within a year after, and gives notice of the felony, and enters his appeal, this is a freſh ſuit, if he uſed his diligence ſhortly after the felony to have taken him. 7 *H.* 4. 43. *b.*

2. The appellant muſt proceed with his appeal to convict the felon; but yet in caſes of impoſſibility of ſuch conviction it is ſufficient that he uſed his endeavour; as if he takes the felon, and impriſons him, and he dies within the year, and before the appeal commenced; ſo if

(*a*) That caſe was of a ſecond appeal brought before the party had pleaded to the firſt.

the

the party abjure or break priſon after he is taken, 12 *E.* 2. *Coron.* 380. ſo as the appeal be commenced within the year and day, and that he made freſh ſuit, 26 *Aſſiz.* 32. or if he challenge peremptorily above the number appointed by law, ſtands mute of malice, or hath his clergy *(b)*, 8 *H.* 4. 1. or be outlawed.

2. As to the *ſecond*, when he ſhall have reſtitution.

He ſhall have reſtitution after judgment againſt the appellee, and before execution made or prayed. 21 *E.* 4. 73. *b.*

He ſhall have reſtitution after conviction of the principal, and before conviction of the acceſſary, and after conviction of one of the principals before conviction of the other, or tho the other be acquitted upon his appeal. 21 *E.* 4. 16 *a.* 10 *H.* 4. *Coron.* 466.

But if *A.* ſteal ſeverally the goods of *B.* and *C.* and he be convict upon the appeal of *B.* yet *C.* ſhall not have reſtitution till he be convict at his ſuit alſo, 4 *E.* 4. 11. *ſupra.* altho the felon be convict at the ſuit of the appellant, yet he is not to have reſtitution till the freſh ſuit be inquired, which is to be done by the ſame jury that convicts the felon, if he plead to inqueſt, but if he confeſs the felony, or ſtand mute, it ſhall be inquired by inqueſt taken *ex officio* by the judge. 1 *H.* 4. 5. *a.* 2 *R.* 3. 12. 3 *H.* 7. 12. *b.* [541]

3. Of what things he is to have reſtitution.

If a felon waive the goods ſtolen without any purſuit after him, thoſe goods are not in law *bona waiviata*, nor forfeit to the king or lord of a franchiſe; but if he waive them upon a purſuit of him, then they are *bona waiviata*, and forfeit to the king or lord of the liberty; *quod vide* 5 *Co. Rep.* 109. *a. Foxley*'s caſe.

And this forfeiture is not like a ſtray, where tho the lord may ſeize, yet the party, who is the owner, may retake them within the year and day, but here the true owner cannot ſeize his own goods, tho upon freſh ſuit within the year and day. 8 *E.* 3. 11. *a. Avowry* 151. 3 *E.* 3. *Cor.* 162.

But yet this is not an abſolute loſs of the owner's goods, but rather an expedient ſettled by law to drive the owner to convict the felon by proſecuting his appeal, and therefore if he make freſh ſuit, and proſecute his appeal, and the felon be thereupon convict and attaint, and the freſh ſuit be inquired and found by verdict or inqueſt of office, he ſhall have reſtitution of the goods ſo waived. 5 *Co. Rep.* 109. *Foxley*'s caſe, 3 *E.* 3. *Coron.* 162.

(b) 4 *E.* 4. 19. *b.*

But more of reſtitution under the next general, for it is regularly true, that of what things the owner ſhall have reſtitution upon the ſtatute of 21 *H.* 8. he ſhould have reſtitution upon a conviction in an appeal at common law, and *è converſo*, ſo that what is ſaid upon the ſtatute, is applicable to reſtitution upon an appeal.

II. By the ſtatute of 21 *H.* 8. *cap.* 11. it is enacted, "That if any "perſon do rob or take away the goods of any of the king's ſubjects "within this realm, and be indicted, arraigned, and found guilty "thereof, or otherwiſe attainted by reaſon of the evidence of the "party ſo robbed, or owner of the ſaid money, goods or chattels, or "any other by their procurement, that then the party ſo robbed, or "owner, ſhall be reſtored to his money, goods or chattels, and the "juſtices, before whom ſuch perſon ſhall be ſo attainted, or found [542] "guilty by reaſon of the evidence of the party ſo robbed, or "owner, or by any other by their procurement, have power "to reward writs of reſtitution for the ſaid money or goods, or chat-"tels in like manner, as tho any ſuch felon or felons were attainted "at the ſuit of the party in an appeal."

This ſtatute introduced a new law for reſtitution: for before this ſtatute there was no reſtitution upon an indictment, but only upon an appeal. 22 *E.* 3. *Coron.* 460. *Stamf. P. C. p.* 167. *a.*

Tho the ſtatute ſpeak of the king's ſubjects, it extends to aliens robbed; for tho they are not the king's natural-born ſubjects, they are the king's ſubjects, when in *England*, by local alligeance.

If the ſervant be robbed of the maſter's money, and the maſter, or his ſervant by his procurement give evidence and convict the felon, the maſter ſhall have a writ of reſtitution, if it appear upon the indictment and evidence it was the maſter's money, for the ſtatute gives reſtitution to the party robbed or owner. *Stamf. P. C. p.* 167.

If *A.* be robbed by *B.* and *C.* and *B.* only is convict of the robbery by the evidence of *A.* he ſhall have reſtitution, for ſo he ſhould have had in caſe of an appeal.

If *A.* be robbed of an ox by *B.* who ſells him to *C.* who keeps the money in his hands, and after kills the ox, and ſells the fleſh, or if the money be ſeized in the hands of the thief, *A.* may, if he pleaſes, have a writ of reſtitution for the money. *Noy*'s reports, *Harris*'s caſe. *(c)*

(c) *Noy* 128.

So

So if money be ſtolen, and the thief taken, and the money ſeized, he ſhall have reſtitution of the money.

The teſtator is robbed, the thief is convict upon the procurement of the executor, he ſhall have reſtitution. 3 *Eliz. Benl.* 87. *Dy.* 201. 6 *Co. Rep.* 80.

It hath been a great queſtion, if goods be ſtolen, and by the thief ſold in a market-overt, whether the thief being convicted upon the evidence of the party robbed, he ſhall have reſtitution upon this ſtatute of the thing ſold or not, the buyer not being privy to the felony: thoſe that held he ſhould not, ground themſelves upon the book of 12 *H.* 8. 10. Mr. *Dalton*'s opinion, *cap.* 111. *p.* [543] 299. *(d)* upon the reſolution in the caſe of *market-overt*, 5 *Co. Rep.* 83. *b.* which was upon occaſion of a writ of reſtitution *(e)*, where it is held, that the ſale in market-overt is a bar to the reſtitution; and upon the ſtatute of 31 *Eliz. cap.* 12. where it is ſpecially provided, that notwithſtanding a ſale of a horſe in market-overt the owner may take him within ſix months after the felony upon proof of his property, which evidenceth, that after the ſix months he ſhall not have reſtitution; and of this opinion was *Hyde* juſtice *(f)* at the ſeſſions held after *Trin.* 13 *Car.* *Brown* juſtice *diſſentiente.*

But it ſeems he ſhall have reſtitution upon this ſtatute, notwithſtanding the ſale in market-overt of the goods ſtolen, and as to the authorities, the 12 *H.* 8. 10. was before the ſtatute of 21 *H.* 8. and Mr. *Dalton*'s opinion ſeems to be grounded upon it; the caſe of *market-overt*, 5 *Co. Rep.* it is true ſeems to be againſt the reſtitution, tho the caſe fell off upon this, that the ſcrivener's ſhop was no market-overt by the cuſtom of *London.*

As to the ſtatute of 31 *Eliz.* to which I may add alſo the ſtatute of 1 *Jac. cap.* 21. that enacts, "No ſale of ſtolen goods in *London*, "*Weſtminſter* or *Southwark*, or within two miles to a broker, ſhall make "any change or alteration of the property or intereſt:" Theſe ſtatutes make nothing as to the caſe in queſtion, for without queſtion the ſale in market-overt changeth the property in thoſe caſes, wherein theſe and the like ſtatutes have not enacted the contrary, and therefore the party cannot take them again from the buyer, unleſs in caſe of brokers, and ſtolen horſes, *ut ſupra:* but this comes not to the queſtion in hand, for here the act of parliament gives the reſtitution, and that only where the felon is convicted; and this reſtitution is not prevented

(*d*) *New Edit. cap.* 164. *p.* 543. (*e*) 1 *And.* 344. (*f*) *Kel.* 35.

by the ſale in market-overt. 1. This act was made to encourage perſons robbed to purſue malefactors, and therefore they have an aſſurance of reſtitution, and it would be ſmall encouragement if a thief by ſale in market-overt, which is every day in almoſt every [544] ſhop in *London*, ſhould elude it.

2. It were againſt the common good, and would encourage offenders to the common detriment, if this ſale ſhould conclude the owner.

3. The man that is robbed, is robbed againſt his will, and cannot help it; but the buyer of ſtolen goods may chuſe whether he will buy, or if he buy, may yet refuſe to buy, unleſs well ſecured of the property of the goods, or knowing the owner.

And if it be ſaid, that the reſtitution ſhall be, as in caſe of an appeal, and a ſale in market-overt had barred a reſtitution in an appeal.

I anſwer, 1. That it is but *gratis dictum*, that a ſale in a market-overt had barred reſtitution in an appeal, for there is no authority for it, but the only book, that I know in the caſe, is to the contrary, *viz.* 2 *Co. Inſtit. p.* 714. If *A.* commit a robbery, the king's officer ſeizeth the goods ſtolen, and ſells them in market-overt, the party robbed convicteth *A.* upon his appeal, he ſhall have reſtitution notwithſtanding ſuch ſale, if he made freſh ſuit. 2. But ſuppoſe the appellant ſhould not have reſtitution, yet that reſtrains not reſtitution in caſe of the ſtatute of 21 *H.* 8. for the words *As though he had been attaint in an appeal*, are not reſtrictive, but relative only to the manner of the writ of reſtitution, which ſhall be ſuch as in an appeal.

For authorities, 1. It hath been the conſtant practice at *Newgate*, that ſale in market-overt hath not been allowed againſt this writ of reſtitution, and this Mr. *Lee*, the ſecondary there for above thirty years, hath atteſted openly in the court there oftentimes before myſelf, and divers others (*g*): again, 2 *Co. Inſtit. p.* 714. lord *Coke*'s opinion was in theſe words, *So that in this caſe alſo, (viz.* upon the ſtatute of 21 *H.* 8. *cap.* 11.*) the party robbed, or owner, ſhall have reſtitution notwithſtanding any ſale in market-overt*, and with this agreed myſelf and juſtice *Twiſden* upon conſideration of this ſtatute.

Upon this ſtatute of 21 *H.* 8. if the offender be convict [545] upon the evidence of the party robbed, or owner, he ſhall

(*g*) See *Kel.* 48.

have

have reſtitution, tho there were no freſh ſuit, or any inquiry by inqueſt touching the ſame, and this is conſtant practice, tho in caſe of an appeal it be otherwiſe.

If *A.* be robbed by *B.* of a ſilver cup, a piece of cloth, and other things, and *A.* prefers an indictment only for one of them, as namely the cloth, and convict the felon, he ſhall have reſtitution of no more than what is contained in the indictment, and the goods omitted are confiſcate to the king, as in caſe of goods omitted in an appeal, 44 *E.* 3. 44. *(h) tamen quære*, for it is not really the party's ſuit. *Vide Dalt. cap.* 111. *p.* 298. *(i)*

If *A.* have his goods ſtolen by *B.* and *A.* prefers a bill of indictment, which is found, whereupon *B.* flies and is outlawed, *A.* ſhall have reſtitution, for he gave evidence upon the indictment, which, tho it be not a conviction, is the ground of the outlawry, which is an attainder. *Dalt. ubi ſupra.*

A. and *B.* have their ſeveral goods ſtolen by *C.* *A.* prefers his bill of indictment for his goods, *C.* is thereupon convicted, notwithſtanding that conviction *B.* may prefer his bill, and *C.* ſhall be thereupon arraigned and tried, to the end that *B.* may have his reſtitution, which he could not have by the conviction upon the indictment of *A.* becauſe a diſtinct felony, tho moſt uſually at the ſame ſeſſions the ſeveral indictments againſt the ſame perſon are tried by the ſame jury: *vide* 4 *E.* 4. 11. *Stamf. P. C. fol.* 167. *b.*

But ſuppoſe that *C.* be attaint on the indictment preferred by *A.* and reprieved till another ſeſſions, and then *B.* prefer a bill of indictment for another robbery upon him by *C.* in this caſe *C.* may plead to the country if he pleaſe, and upon conviction *B.* ſhall have reſtitution, for the court is not bound to take notice at another ſeſſions, that he is attaint, but he may if he pleaſe plead *autrefoits attaint*, and refuſe to anſwer, and then by the book of 44 *E.* 3. 44. in caſe of an appeal he ſhould have no reſtitution, but his goods ſhould be confiſcate to the king, but I think that to ſerve the ſtatute of 21 *H.* 8. as to the point of reſtitution the court may and in [546] reaſon ought to inquire by an inqueſt of office touching the robbery of *B.* and being aſcertained of it thereby to grant reſtitution, tho they ought to give no new judgment of death upon ſuch inqueſt, at leaſt, unleſs the priſoner had pleaded to the indictment not guilty, and put

(h) This is more directly proved *Corone* 100. *(i) New Edit. ubi ſupra.*

himſelf

himſelf upon the country: *vide* 4 *E.* 4. 11. *Dalt. cap.* 111. *p.* 714, 715. *(k)*, *Stamf. P. C. p.* 107.

And thus far of reſtitution by the ſtatute of 21 *H.* 8.

III. Reſtitution by courſe of law is either by taking his goods, or by action.

1. As to retaking of goods ſtolen: if *A.* ſteal the goods of *B.* and *B.* take his goods of *A.* again to the intent to favour him or maintain him, this is unlawful and puniſhable by fine and impriſonment *(l)*, but if he take them again without any ſuch intent, it is no offenſe, *Mich.* 16 *Jac. B. R. Higgins* and *Andrews (m)*, but juſtifiable.

But after the felon is convicted, it can be no colour of crime to take his goods again, where he finds them, becauſe he hath purſued the law upon him, and may have his writ of reſtitution, if he pleaſe.

2. By courſe of common law: *A.* ſteal the goods of *B. viz.* fifty pounds in money, *A.* is convicted, and hath his clergy upon the proſecution of *B.* *B.* brings a *trover* and converſion for this fifty pounds, and upon not guilty pleaded this ſpecial matter is found, and adjudged for the plaintiff, becauſe now the party hath proſecuted the law againſt him, and no miſchief to the common wealth; but it was held, that if a man felonioufly ſteal goods, and before proſecution by indictment the party robbed brings *trover*, it lies not, for ſo felonies ſhould be healed. *M.* 1652. *B. R. Dawkes* and *Coveneigh (n)*; *vide accordant Noy*'s reports *(o)*, *Markham* and *Cob*; but if the plaintiff had not given evidence upon the conviction, it was held, that the action lay not, but the goods were confiſcate to the king, and for want of that averment in the caſe of *Markham*, judgment was given for the defendant in treſpaſs.

[547]

Blackſ. Com. lib. iv. cap. 29. p. 377. & cap. 27. p. 362.

(*k*) *New Edit. cap.* 164. *p.* 543.

(*l*) And ſo ſeems the practice of advertiſing a reward for bringing goods ſtolen, and no queſtions aſked, which I have heard lord chancellor *Macclesfield* declare to be highly criminal, as being a ſort of compounding of felony, for the goods by that means returning to the right owner, a ſtop is put to the inquiry and proſecution of the felon, and thereby great encouragement is given to the commiſſion of ſuch offenſes. See *poſtea*, *cap.* 56.

(*m*) 2 *Rol. Rep.* 55.

(*n*) *Style* 346.

(*o*) *Noy* 82.

CHAP.

CHAP. XLVIII.

Of burglary, *the kinds, and puniſhment.*

I COME to thoſe crimes that ſpecially concern the habitation of a man, to which the laws of this kingdom have a ſpecial reſpect, becauſe every man by the law hath a ſpecial protection in reference to his houſe and dwelling. *(a)*

And that is the reaſon, that a man may aſſemble people together for the ſafeguard of his houſe, which he could not do in relation to travel, or a journey. 21 *H.* 7. 39. *a.*

And upon the ſame reaſon it is, that not only by the ſtatute of 24 *H.* 8. *cap.* 5. but even by the common law, if any come to commit a felony upon me in my houſe, and I kill him, it is no felony, nor induceth any forfeiture; *quod vide ſupra, p.* 487. *vide* Sir *Henry Spelman Gloſſ.* tit. *Hamſecken, & ibidem* tit. *Burglaria*, whereby it appears, that by the antient laws of *Canutus (b)*, and of *H.* 1. *(c)*, it was puniſhed with death.

The common genus of offenſes, that comes under the name of *Hamſecken*, is that which is uſually called houſe-breaking, which ſometimes comes under the common appellation of *burglary*, whether committed in the day or night to the intent to commit felony, ſo that houſe-breaking of this kind is of two natures. [548]

1. That which in a vulgar and improper acceptation is ſometimes called burglary. And,

2. That which in a ſtrict and legal acceptation is ſo called.

I. As to the former of theſe, *hamſacken*, houſe-breaking, or burglary in a vulgar acceptation is of ſeveral kinds.

1. Robbing of any perſon by day or night in his dwelling-houſe, the dweller, his wife, children, or ſervants being in the houſe, and put in fear; this requires that there be ſomething taken, but it requires not an actual breach of the houſe; but it is all one, whether he actually breaks the houſe, or enters *per oſtia aperta*, for it is in

(a) That this was the notion among the *Romans* alſo appears from *Cicero in oratione pro domo*, cap. 41. *Quid enim ſanctius, quid omni religione munitius, quam domus uniuſcujuſque civium? hic aræ ſunt, hic foci,——hoc perfugium eſt ita ſanctum omnibus, ut inde abripi neminem fas ſit.*

(b) l. 61. reckons *irruptio in domum* among the *ſcelera inexpiabilia.*

(c) l. 80. See *Wilk. Leg. Anglo-Sax. p.* 273.

truth

truth robbery either way, and from this offenſe clergy is taken away by the ſtatute of 23 *H.* 8. *cap.* 1. and 25 *H.* 8. *cap.* 3. from the principal, and by the ſtatute of 4 & 5 *P. & M. cap.* 4. from the acceſſary.

2. Robbing a perſon by day or night in his dwelling-houſe, the dweller, his wife, children, or ſervants being in the houſe, and not put in fear; this requires, 1. An actual houſe breaking of the houſe. 2. An actual taking of ſomething, but the perſons need not be put in fear; and by the ſtatute of 5 & 6 *E.* 6. *cap.* 9. clergy is in this caſe taken from the principal, that enters the houſe; and by the ſtatute of 4 & 5 *P. & M. cap.* 4. from the acceſſary before.

3. Robbing a dwelling-houſe by day or night, and taking away goods, none being in the houſe; this requires an actual breaking, and an actual taking of ſomething, and without the latter it is not felony, but if accompanied with both, and the taking of goods be of the value of five ſhillings, it is excluded from clergy by 39 *Eliz. cap.* 15.

4. A breaking of the houſe in the day or night to the intent to ſteal or commit a felony, any perſon being in the houſe, and put in fear, tho nothing be actually taken, this is burglary by the common law, if it is in the night, and felony by the ſtatute of 1 *E.* 6. *cap.* 12. tho in the day, and is excluded from clergy by the ſtatute of 1 *E.* 6. whether by day or by night, but then it requires, 1. An actual breaking of the houſe, and not an entry *per oſtia aperta.* 2. An entry with intent to commit a felony, and ſo laid in the indictment, [549] *Poulter*'s caſe, 11 *Co. Rep.* 31. *b.*

3. A putting in fear, but acceſſaries have clergy.

II. Legal or proper burglary is of two kinds, *viz.* 1. Complicated and mixed with another felony, as breaking the houſe, and ſtealing goods, either with putting in fear or without putting in fear, ſomebody in the houſe, or nobody in the houſe, which requires, 1. That it be done in the night. 2. That there be an actual breaking.

2. Simple burglary, and that either, 1. With putting in fear, and then the principal is excluded of clergy by the ſtatute of 1 *E.* 6. and alſo from the ſtatute of 18 *Eliz.* or, 2. Without putting in fear, and then he is excluded of clergy by the ſtatute of 18 *Eliz.*

And this chapter ſpeaks only of proper or legal burglaries, of thoſe improper burglaries I have ſpoken before.

Burglary is deſcribed by Sir *Henry Spelman (e)* to be *nocturna di-*

(e) *in verbo* burglaria.

ruptio

ruptio alicujus habitaculi vel eccleſiæ, etiam murorum portarumve civitatis aut burgi ad feloniam perpetrandam.

My lord *Coke P. C. cap.* 14. *p.* 63. more fully deſcribes it. "A "burglar is he, that in the night-time breaketh and entreth into a "manſion-houſe of another of intent to kill ſome reaſonable creature, "or to commit ſome other felony within the ſame, whether his felo-"nious intent be executed or not.

And accordingly the indictment runs, *quod* J. S. 1 *die* Julii *anno &c. in nocte ejuſdem diei vi & armis domum manſionalem* A. B. *felonicè & burglariter fregit & intravit, ac ad tunc & ibidem unum ſcyphum argenteum &c. de bonis & catallis ejuſdem* A. B. *in eadem domo invent' felonicè & burglariter furatus fuit, cepit & aſportavit*; or if no theft were actually committed, then *ex intentione ad bona & catalla ejuſdem* A. B. *in eadem domo exiſtent' felonicè & burglariter furandum, capiendum & aſportandum*, or *eâ intentione ad ipſum* A B. *ibidem felonicè interficiendum contra pacem &c.*

And note, that theſe ſeveral clauſes in the indictment are eſſential to the conſtitution of burglary, 1. That it be ſaid *noctanter*, or in *nocte ejuſdem diei (f)*, for if it be in the day-time, it is not burglary. 2. That it be ſaid in the indictment *burglariter*, [550] for it is a legal word of art, without which burglary cannot be expreſſed with any kind of other word or other circumlocution, and therefore, where the indictment is *burgaliter* inſtead of *burglariter*, it makes no indictment of burglary, ſo if it be *burgenter*. 4 *Co. Rep.* 39. *b. (g)*

3. It muſt be *fregit & intravit*, for it is held, that breaking without entring, or entring without breaking makes not burglary, *ſed de hoc infra*; yet *Trin.* 5 *Jac. B. R.* an indictment, *quod felonicè & burglariter fregit domum manſionalem, &c.* was a good indictment of burglary, and that the entry is ſufficiently implied, even in an indictment, by the words *burglariter fregit*, but the ſafeſt and common way is to ſay *fregit & intravit*.

4. It muſt be ſaid *domum manſionalem*, where burglary is committed in a houſe, and not generally *domum*, for that is too uncertain, and at large.

5. It muſt be alledged, that he committed a felony in the ſame houſe, or that he brake and entred the houſe to the intent to commit

(*f*) See 9 *Co.* 66. *b.* (*g*) See alſo 5 *Co.* 121. *b.*

a felony,

a felony, but theſe things will be fuller examined, when we come to particulars.

1. Therefore the time, wherein it muſt be committed to make it burglary, muſt be in the night.

It hath been antiently held, that after ſun-ſet, tho day-light be not quite gone, or before ſun-riſing is *noctanter* to make a burglary, *Dalt. cap.* 99. *p.* 352. *(h)*, and accordingly cited by *Crompt. fol.* 32. *b.* to have been judged by *Portman*, 3 *E.* 6. *(i)*, and the felons executed, and 21 *H.* 7. *Kelw.* 75. *a*

But the latter opinion hath been and ſtill obtaineth, that if the ſun be ſet, yet if the countenance of a party can be reaſonably diſcerned by the light of the ſun or *crepuſculum*, it is not night, nor *noctanter* to make a burglary; and with this agrees *Co. P. C. p.* 63. and hence it is, that altho a town unwalled ſhall not be amerced for the eſcape of a murderer, if the murder were committed in the night, yet if it were done only *in veſpere diei*, the townſhip ſhall be amerced. 3 *E.*

[551] 3. *Coron.* 293. And if a robbery be committed before ſun-riſing, or after ſun-ſet, and whilſt it is ſo far day-light, that the countenance of a man can be reaſonably diſcerned by the light of the day, yet the hundred ſhall be charged, otherwiſe where it is done in the night, 7 *Co. Rep.* 34. *Milburn*'s caſe: but this is not intended of moon-light, for then midnight houſe-breaking ſhould be no burglary; and the word *noctanter* is to be applied to all that follows, *viz. fregit & intravit*, if the breaking of the houſe were in the day-time, and the entring in the night, or the breaking in the night, and entring in the day, this will not be burglary, for both make the offenſe, and both muſt be *noctanter: vide Crompt.* 33. *a. ex* 8 *E.* 4. *(k)*

But if they break a hole in the houſe one night, to the intent to enter another night and commit felony, and accordingly they come at another night, and commit a felony through the hole they ſo made the night before, this ſeems to be burglary, for the breaking and entring were both *noctanter*, tho not the ſame night; and it ſhall be ſuppoſed, that they brake and entred the night when they entred, for the breaking makes not the burglary till the entry.

(h) New Edit. cap. 151. *p.* 486.

(i) See the like judgment *per Fineux*, *Crompt.* 33. *a.*

(k) This caſe does not fully prove the point it is brought for, for the reſolution there was only, that if thieves enter in by night at an hole in the wall, which was there before, it is not burglary, but it does not appear who made the hole.

2. There

2. There muſt be a breaking and an entry to make the burglary, and therefore I ſhall ſpeak of them both together.

Antiently the law was ſo ſtrict againſt burglary, that the very coming to a houſe with intent to commit a burglary was held puniſhable with death, *Cromp.* 31. by Sir *Anthony Brown*; but that obtains not now for law without a burglary committed.

Fregit, there is a double kind of breaking, 1. In law, and thus every one that enters into another's houſe againſt his will, or to commit a felony, tho the doors be open, doth in law break the houſe. 2. There is a breaking in fact an actual force upon the houſe, as by opening a door, breaking a window, *&c.*

And altho, in the remembrance of ſome yet alive, Sir *N. H.* (*l*) chief juſtice did hold, that a breaking in law was ſufficient to make a burglary, as if a man entred into the houſe by the doors open in the night, and ſtole goods, that this is burglary, and [552] accordingly is *Crompt.* 32. *a.* 28 *Aſſiz* 38. yet the law is, that a bare breaking in law, *viz.* an entry by the doors or windows open is not ſufficient to make burglary without an actual breaking, *Co P. C. p.* 64. and ſo the law hath been generally taken to this day in caſe of burglary. (*m*)

And theſe acts amount to an actual breaking, *viz.* opening the caſement, or breaking the glaſs window, picking open a lock of a door with a falſe key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, to put back the leaf of a window with a dagger, *Dalt. cap.* 99. (*n*), *Crompt.* 33. *a.* and ſo is common experience.

To take down a pane of glaſs of a glaſs-window by taking out or bending aſide the nails that faſten it is a breaking of a houſe within this law, becauſe the glaſs-window is parcel of the houſe.

It was held by *Manwood* chief baron, that if a thief goes down a chimney to ſteal, this is a breaking and entring, *Crompt. fol.* 32. *b.* and hereunto agrees Mr. *Dalton*, *p.* 253. (*o*)

There was one arraigned before me at *Cambridge* for burglary, and upon the evidence it appeared, that he crept down a chimney; I was doubtful whether this were burglary, and ſo were ſome others; but upon examination it appeared, that in his creeping down

(*l*) Sir *Nicholas Hide*, ſee *Cro. Car.* 65. 225.

(*m*) See *Kel.* 67 & 70

(*n*) *New Edit. p.* 487.

(*o*) The reaſon of this ſeems to be, becauſe it is as much ſhut as the nature of the thing will admit.

ſome

ſome of the bricks of the chimney were looſened, and fell down in the room, which put it out of queſtion, and direction was given to find it burglary; but the jury acquitted him of the whole fact.

In ſome caſes there may be a burglary committed by a man without an actual breaking.

Thieves come with a pretended hue and cry, and require the conſtable to go along with them to ſearch for felons, and whilſt he goes with them into a man's houſe, they bind the conſtable and dweller, and rob him, this is burglary *(p)*, *Co. P. C. p.* 64. The like happened in *Black Fryars* 1664. where thieves pre-
[553] tending that *A.* harboured traitors, called the conſtable to go with them to apprehend him, and the conſtable entring, they bound the conſtable, and robbed *A.* and were executed for burglary, and yet in both caſes the owner opened the doors of his own accord, at the command of the conſtable. *Cromp.* 32. *b.*

Thieves come in the night to rob *A.* who, perceiving it, opens his door, and iſſues out and ſtrikes one of the thieves with a ſtaff, another thief having a piſtol in his hand, perceiving others in the entry ready to interrupt them, puts his piſtol within the door over the threſhold, and ſhot, ſo that his hand was over the threſhold, but neither his foot, nor the reſt of his body, and upon this evidence by great advice it was adjudged burglary, and the thief hanged, and yet he brake not the houſe. 26 *Eliz. Cromp.* 32. *a.*

If *A.* the ſervant of *B.* conſpire with *C.* to let him *in* to rob *B.* and accordingly *A.* in the night-time opens the door or window, and lets him *in*, this is burglary in *C.* but larciny in *A.* the ſervant, *Dalt. cap.* 99. *p.* 253. *(q)*. it ſeems it is burglary in both, for if it be burglary in *C.* it muſt needs be ſo in *A.* becauſe he is preſent, and aiding to *C.* to commit this burglary.

If *A.* enter the houſe of *B.* in the night-time, the outward door being open, or by an open window, and when he is within the houſe, turns the key of a door of a chamber, or unlatcheth a chamber door to the intent to ſteal, this is burglary, tho the outward door were open; and ſo it was adjudged upon a ſpecial verdict before me at the ſeſſions at *Newgate* 1672, by advice of many judges then alſo preſent.

(*p*) Becauſe *in fraudem legis*; for the ſame reaſon it is burglary, where the thieves gain entrance by pretenſes of buſineſs with one in the houſe, *Kel.* 42, or of executing any proceſs, or the like, *Kel.* 43, 44. 62. 82.

(*q*) *New Edit. p.* 487.

And

And ſo it is, if a thief be lodged in an inn, and in the night he ſtealeth goods, and goeth away, or if he enters into the houſe ſecretly in the day-time, and there ſtayeth till night, and then ſteals goods and goes away, this is not burglary, *Dalt. ubi ſupra p.* 253. and *Cromp.* 34. *a.* but if in either of the caſes they had opened an inner chamber door, and taken the goods, it had been burglary, agreed 1672. *(r)*

The ſervant lies in one part of the houſe, the maſter in another, and the ſtair-foot door of the maſter's chamber [554] is latched; the ſervant came in the night, and unlatched the ſtair-foot door, and went up into his maſter's chamber with a hatchet intending to kill him, and wounded him dangerouſly, but the maſter eſcaped *(ſ)*. Upon this ſpecial matter found at *Wincheſter* aſſizes, by the advice of the greater number of the judges, *exceptis paucis (t)*, it was adjudged burglary, and the offender was executed. *T.* 16 *Jac. Hutt. Rep.* the caſe of *Haydon* and *Edmunds (u)*

If a man enter in the night-time by the doors open, with the intent to ſteal, and is purſued, whereby he opens another door to make his eſcape, this I think is not burglary againſt the opinion of *Dalt. p.* 253. *(x)* out of Sir *Francis Bacon*, for *fregit & exivit, non fregit & intravit. (y)*

If *A.* be a lodger in an inn, and he goes up to his chamber to bed, and the chamberlain pulls the door and latcheth it, or *A.* himſelf locks it, and in the night he riſeth, openeth his chamber door, ſteals goods in the houſe, and goes away, it may be a queſtion, whether this be a burglary; it ſeems not, becauſe he had a kind of ſpecial intereſt in his chamber, and ſo the opening of his own door was no breaking of the inn-keeper's houſe, for *A.* hath a ſpecial property in his chamber; but if he had opened the chamber of *B.* a lodger in the inn to ſteal his goods, this had been burglary.

And in that caſe of a lodger, tho he hath a ſpecial intereſt in the chamber, yet he being but a lodger, and in an inn, the burglary muſt be ſuppoſed of the manſion-houſe of the inn-keeper *(z)*: *vide plus infra.*

If *A.* enters into the houſe of *B.* in the night, by the doors open, and breaks open a cheſt, and takes away goods without breaking

(r) *Kel.* 69.

(ſ) In old times this would have been adjudged petit treaſon, for antiently where the intent was ſo apparent *voluntas reputabatur pro facto. Coron.* 383.

(t) They all concurred, except *Winch*, who doubted.

(u) *Hutt.* 20. *Kel.* 67.

(x) *New Edit. p.* 487.

(y) But now this doubt is ſettled by 12 *Ann. cap.* 7. whereby breaking to get out is put upon the ſame foot with breaking to get in.

(z) *Kel.* 83.

open of an inner door, this is no burglary, becauſe the cheſt is no part of the houſe. *(a)*

[555] But if he breaks open a ſtudy or counting-houſe, or ſhop within the houſe, this is burglary, tho none uſually lodge in the ſtudy; and the ſame law ſeems to be, if he breaks open a cupboard or counter fixed to the houſe *(b)*; *quære.*

3. *Fregit & intravit.* There muſt be an entry as well as a breaking, and both muſt be in the night, and with an intent to ſteal, otherwiſe it is no burglary.

A. intending to rob *B.* breaks a hole in his houſe, but enters not, *B.* for fear, throws out his money to him, *A.* takes it and carries it away, this is certainly robbery, and ſome have held it burglary, tho *A.* never entred the houſe; and ſo it is reported to have been adjudged by *Saunders* chief baron. *Crompt.* 31. *b. tamen quære. (c)*

If *A.* breaks the houſe of *B.* in the night-time, with intent to ſteal goods, and breaks the window, and puts in his hand, or puts in a hook, or other engine to reach out goods, or puts a piſtol in at the window with an intent to kill, tho his hand be not within the window, this is burglary. *Co. P. C. p.* 64.

But if he ſhoots without the window, and the bullet comes in, this ſeems to be no entry to make burglary; *quære.*

A. B. and *C.* come in the night by conſent to break and enter the houſe of *D.* to commit a felony, *A.* only actually breaks and enters the houſe, and *B.* ſtands near the door, but actually enters not, *C.* ſtands at the lane's end, or orchard gate, or field gate, or the like, to watch that no help come to aid the owner or dweller, or to give notice to the others, if help comes, this is burglary in them all, tho *A.* only actually brake and entered the houſe, and they all, in law, are principals, and excluded from clergy by the ſtatute of 18 *Eliz. cap.* 7. and ſo it is in robbery, as hath been ſaid, 11 *H.* 4. 13. *b. Cromp.* 32. *a. Co. P. C. p.* 64.

If *A.* being a man of full age, take a child of ſeven or eight years old well inſtructed by him in this villainous art, as ſome ſuch there be, and the child goes in at the window, takes goods out, and de-

[556] livers them to *A.* who carries them away this is burglary in *A.* tho the child that made the entry, be not guilty by reaſon of his infancy.

(*a*) *Kel.* 69. But it is a felony, for which the offender is ouſted of his clergy, by 3 & 4 *W. & M. cap.* 9.

(*b*) *Kel. ubi ſupra.*

(*c*) It was adjudged by *Mountague* chief juſtice *C. B.* and *Saunders* only related it.

So

So if the wife, in the preſence of the huſband, by his threats or coercion breaks and enters the houſe of *B.* in the night, this is burglary in the huſband, tho the wife, that is the immediate actor, is excuſed by the coercion of her huſband.

4. *Domum manſionalem:* what ſhall be ſo ſaid.

An indictment, *quod felonicè & burglariter fregit & intravit eccleſiam prochialem de* D. *ea intentione, &c.* is a good indictment of burglary, for *eccleſia* is *domus manſionalis. Co. P. C. p.* 64. *Dy.* 99. *a. (d)*

If *A.* having a dwelling-houſe, and upon occaſion he and all his family are abſent a night or more, and in their abſence in the night a thief breaks and enters the houſe to commit felony, this is burglary. *Co. P. C. ubi ſupra.*

So if *A.* have two manſion-houſes, and is ſometimes with his family at one, and ſometimes at the other, the breach of one of them in the abſence of his family from thence is burglary *(e). 4 Co. Rep.* 40. *a.* 39 *Eliz. Dalt. cap.* 99. *p.* 254. *(f)*

If *A.* have a chamber in a college or inn of court, where he uſually lodgeth in term-time, and in his abſence in the vacation his chamber or ſtudy be broken open, *&c.* this is burglary, and the indictment ſhall ſuppoſe it *domus manſionalis A. Co. P. C. p.* 65. 14 *Car.* 1. *Audley*'s caſe before cited. *(g)*

So it is, if *A.* hires a chamber in the houſe of *B.* for a certain time wherein he lodgeth, and during the time contrafted for, it is broken open, *&c.* this is burglary, and the indictment ſhall ſuppoſe it to be *domum manſionalem* of *A. (h)*

But if, in the king's houſe at *Whitehall*, or in the great houſe of any nobleman, there be apartments or lodgings aſ- [557] ſigned to the jeweller, treaſurer, ſteward, chamberlain, *&c.* and any

(*d*) Lord *Coke* ſays it is the manſion-houſe of Almighty God, but this is only a quaint turn without any argument, and ſeems invented to ſuit his definition of burglary, *viz.* the breaking into a *manſion*-houſe, whereas it appears from *Spelman loco ſupra citato*, and 22 *Aſſiz.* 95. that it is not neceſſary to burglary, that a *manſion-houſe* be broken, for the breaking of churches, the walls or the gates of the city is alſo burglary, and the word *manſionalis* is only applicable to one kind of burglary, *viz.* the breaking of a private-houſe, in which caſe it muſt be a *dwelling*-houſe.

(*e*) Even tho he had never lodged in it, but was removing his goods there in order to lodge in it. *Kel.* 46.

(*f*) *New Edit. p.* 488. See alſo *Poph.* 52. *Mo.* 660.

(*g*) *Cro. Car.* 473. by the name of *Evans* and *Finch.*

(*h*) Chief juſtice *Keeling* was of a different opinion, and thought in ſuch caſe the indictment ought to be laid for breaking *domum manſionalem* of *B.* for while there is but one entrance, it is but one dwelling-houſe, tho there be ſeveral inmates, but otherwiſe it is, if a man divides ſome rooms from the reſt of the houſe, and make another door to thoſe rooms, *Kel.* 83. *&c.*

of theſe lodgings be broken up burglarily, the indictment muſt ſuppoſe it to be *domus manſionalis* of the king, or of him that is truly lord or proprietor of the houſe, for they have the uſe of the lodgings as ſervants only, and not as owners: *Hungate*'s caſe before cited. *(i)*

And ſo it is, if *A.* comes to the inn of *B.* and there hath a chamber appointed for his lodging, and this chamber is broken up burglarily, it ſhall ſuppoſe it to be *domus manſionalis* of *B.* the inn-keeper, becauſe the intereſt is in him, and *A.* hath only the uſe of it for his lodging, without any certain intereſt.

A tent or booth in a fair or market is not ſuch a *domus manſionalis*, wherein burglary may be committed, but robbery therein committed, the owner, his wife or ſervants being therein, is ſpecially exempted from clergy by the ſtatute of 5 & 6 *E.* 6. *cap.* 9. before mention'd. *Co. P. C. p.* 64.

If *A.* have a ſhop parcel of his manſion-houſe, and it be broken open in the night, &c. it is a burglary, and the indictment ſhall ſuppoſe, that he brake and entered *domum manſionalem* of *A.* for it is parcel thereof.

But if *A.* lets the ſhop to *B.* for a year, and *B.* holds it, and works or trades in it, but lodgeth in his own houſe at night, and this ſhop is broken open, &c. the indictment cannot be, that *domum manſionalem* of *A. fregit*, for it was ſevered by the leaſe during the time *(k)*, but then whether he may be indicted for burglary, as in the *domus manſionalis* of *B?* and certainly it is agreed on all hands, if *B* or his ſervant ſometimes lodge in the ſhop, it is burglary, and it ſhall be ſuppoſed *domus manſionalis* of *B.* and this is common experience.

[558] But ſuppoſe he never lodges there, but only works or trades therein in the day time, and he or his ſervants never lodge there at night, whether this be a burglary to break and enter this ſhop to commit a felony?

And certainly it was in this caſe antiently held burglary, *M.* 37 & 38 *Eliz. B. R. Cole*'s caſe *(m)*, an indictment, *quòd ſhopam cujuſdam* Ricardi *burglariter & felonicè fregit & intravit &c.* it was admitted, for the matter, by court of king's bench to be good; but doubted, whether it was good, becauſe it was *cujuſdum Ricardi* without mentioning his firname, and with this alſo agrees my lord *Coke in terminis*, *Co. P. C. p.* 64. in theſe words: *But a ſhop wherein any perſon doth con-*

(*i*) *p.* 522. (*k*) *Kel.* 84. (*m*) *Mo.* 466.

verſe,

verſe, being parcel of a manſion houſe or not parcel, is taken for a manſion-houſe.

But *T.* 17 *Jac. Hutton's Rep.* 33. it is ruled to be no burglary to break open ſuch a ſhop, and accordingly the practice hath always gone at *Newgate* ſeſſions ſince my time or obſervation, and to this day it is holden no burglary to break open ſuch a ſhop; but if the ſhop keeper, or his ſervant, uſually or often lodge in the ſhop at night it is then *domus manſionalis*, in which a burglary may be committed.

Domus manſionalis doth not only include the dwelling-houſe, but alſo the out-houſes, that are parcel thereof, as barn, ſtable, cow-houſes, dairy-houſes, if they are parcel of the meſſuage, tho they are not under the ſame roof, or joining contiguous to it; and therefore, if ſuch ſtable or out-houſe belonging to the dwelling-houſe be broken open in the night-time with intent to ſteal, it is burglary, and with this agrees *Co. P. C. p.* 64, 65. *Dalt. cap.* 99. *p.* 254, 255. where for breaking open a back-houſe of *Robert Caſtle's*, eight or nine yards diſtant from the dwelling-houſe, only a pale reaching between them, two were arraigned and condemned for burglary; and ſo it was agreed by all the judges in the time of chief juſtice *Hyde* laſt 1665. and the law was accordingly, and the contrary practice in *one* much blamed; and altho it was ſaid by ſome, that it had not been ſo uſed, and that the ſtatute of 4 & 5 *P.* & *M. cap.* 4. diſtinguiſhed between a dwelling-houſe and a barn, yet at length all the judges agreed, that the felonious breaking of a barn, parcel [559] of a meſſuage, to ſteal corn, was burglary according to my lord *Coke*, *ubi ſupra*, and with this agrees 2 *E.* 6. *B. Corone* 180.

But if the barn, or ſtable, or cow-houſe be no parcel of the meſſuage, as if a man takes a leaſe of a dwelling-houſe from *A.* and of a barn from *B.* or if it be far remote from the dwelling-houſe, and not ſo near to it as to be reaſonably eſteemed parcel thereof; as if it ſtands a bow-ſhot off from the houſe, and not within, or near the curtilage of the chief houſe; then the breaking of it is not burglary, for it is not *domus manſionalis*, nor any part thereof.

An indictment that *noctanter clauſum* or *curtilagium felonicè & burglaritèr fregit ad occidendum* or *furandum* is not good, and yet 22 *Aſſiz.* 95. burglary is defined *to break houſes, churches, walls, courts, or gates in time of peace. (n)*

(n) This was antiently underſtood only of the walls or gates *of the city: vide* Spelman *in verbo burglaria*; if ſo, it will not ſupport our author's following concluſion, wherein he applies it to the wall of a private houſe.

So that by that book it ſhould ſeem, that if a man hath a wall about his houſe for its ſafeguard, and a thief in the night break the wall or the gate thereof, and finding the doors of the houſe open, he enters into the houſe, this is burglary; but otherwiſe it had been, if he had come over the wall of the court, and found the door of the houſe open; then it had been no burglary.

5. To make up burglary, it muſt not be only to break and enter a houſe in the night-time, but either a felony muſt be committed in the houſe, or it muſt be to the intent to commit a felony.

If the indictment be, *quod domum manſionalem* J. S. *felonicè & burglariter fregit & intravit, & ad tunc & ibidem* certain goods of *J. S. felonicè & burglariter furatus fuit, cepit & aſportavit*, the indictment compriſeth two offenſes, *viz.* burglary and felony, and therefore he may be acquitted of burglary, if the caſe be ſo, upon the evidence, and found guilty only of the felony, and then he ſhall have his clergy.

[560] Or he may be acquitted of the felony, but then *quære*, whether he can be found guilty of the burglary, becauſe tho where the indictment compriſeth burglary and felony, the indictment is good, tho it be not ſuppoſed in the indictment, that it was *eâ intentione ad bona furandum*, for the act of theft being charged at the ſame time, it is a ſufficient evidence of his intention; but when he is acquitted of the felony, then, there being nothing expreſly charged in the indictment, that *burglariter fregit, &c. eâ intentione ad bona &c. felonice furandum*, it ſtands ſingle as if the indictment had been of ſingle burglary, in which caſe the clauſe of *eâ intentione ad furandum &c.* had been neceſſary to complete a ſingle burglary.

It ſeems therefore neceſſary in ſuch caſe not only to charge him, that *in nocte & burglariter & felonicè domum, &c. fregit & intravit, & bona &c. cepit*, but alſo farther to ſay *eâ intentione ad bona & catalla &c in eâdem domo exiſtentia felonicè & burglariter furandum*, and to add alſo the particular felony, *& ad tunc & ibidem unum ſcyphum argenteum &c.* and then, tho he be acquitted of the felony, the reſt of the indictment ſtands good againſt him as a ſimple burglary, and he may be convicted of it, tho acquitted of the felony.

And I think that as the offenſes of burglary and felony may be joined in the ſame indictment, ſo three offenſes may be joined in the ſame indictment, and if he be acquit of the one, he may be convicted of the other two, and it may be of uſe to exclude a malefactor of his clergy where the offenſe is great, as namely for burglary, for felony, and

and for felony upon the ſtatute of 5 & 6 *E.* 6. *cap.* 9. for there may be an offenſe againſt that ſtatute, which will exclude from clergy, and yet not amount to burglary; and the form of the indictment may run thus, *Quod* A. *prima die* Februarii *anno regni domini* Caroli &c. *in nocte ejuſdem diei vi & armis apud* B. *felonicè & burglariter domum manſionalem fregit & intravit eâ intentione ad bona & catalla ejuſdem* B. *in eâdem domo exiſtentia felonicè & burglariter furandum, capiendum & aſportandum, & ad tunc & ibidem vi & armis unum ſcyphum argenteum ejuſdem* B. *in eâdem domo exiſtentem felonicè & burglariter furatus fuit, cepit & aſportavit, ipſo* B. *ac uxore, liberis & famulis ſuis in eâdem domo tunc exiſtentibus, contra pacem,* &c.

And *note*, that ſuch an indictment need not conclude *contra formam ſtatuti*, it is ſufficient that it brings the caſe ſo [561] within the ſtatute, as to exclude clergy; and ſo, upon the ſtatute of 23 *H.* 8. *cap.* 1.

And upon this indictment, if it falls out upon the evidence that he is guilty of the burglary, but not guilty of the ſtealing, he may be convict of the burglary, and ſo ouſted of clergy, tho he be found not guilty of the felony: again, tho he be found not guilty of the burglary, becauſe, it may be, the breach of the houſe was in the day-time, the dweller, his wife or ſervants in the houſe, yet he may be found guilty of the felony within the qualifications contain'd in the indictment purſuant to the ſtatute of 5 & 6 *E.* 6. and ſo ouſted of his clergy, for that is not confined either to the day or night: again, if upon the evidence it appears not to be burglary, becauſe done in the day-time, nor yet felony ſo qualified as is excluded from clergy, becauſe either there was no act of breaking, or if there were, yet the dweller, his wife or ſervants were not in the houſe, he may be convict of common larciny, and ſo have benefit of clergy.

And ſo much for burglary joined with larciny.

Simple burglary is where the breaking and entring is *eâ intentione ad bona & catalla furandum*, or *ad interficiendum*, &c. and this clauſe, as it is uſually added in caſes of ſimple burglary, ſo it is neceſſary; and hereupon theſe things are obſervable.

1. That altho the breaking and entring be charged to be done *burglariter*, yet if the intention of that entry be either laid in the indictment, or appears upon the evidence to be to the intent only to commit a treſpaſs and not a felony, as *eâ intentione ad ipſum* A. *ad tunc & ibidem verberandum*, it is no burglary, but it muſt be laid and

proved to be *eâ intentione* to ſteal or to kill, or to commit ſome other felony, for tho the killing or murder may be the conſequence of beating, yet, if the primary intention were not to kill, the intention of beating will not make burglary. *Co. P. C. p.* 65. 13 *H.* 4. 7. *b.*

2. That if a man in the night breaks and enters a houſe to the intent to commit a felony, tho he attains not that intent, but takes or ſteals nothing, this is burglary, and excluded from clergy. 22 *Aſſiz.* 39. & 95. *Dy.* 99. *Crompt.* 31. *a. Coron.* 264. *Stamf. P. C. p.* 30. *a. Co. P. C. p.* 63. and herein it differs from robbery.

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3. It ſeems, that the intention to commit a felony to make a burglary muſt be an intention of ſuch a fact, as was felony by the common law (and not of a felony newly made by act of parliament), as larciny, or homicide.

It hath been therefore doubted, whether the breaking of a houſe in the night with intent to commit a rape be burglary or not, *Crompt. fol.* 32. thinks it is not, becauſe, made felony by the ſtatute of *Weſtm.* 2. *cap.* 34. *(p)*; but *Dalt. cap.* 99. *p.* 255. *(q)*, thinks it would be burglary; becauſe, rape was felony by the common law, until the ſtatute of *Weſtm.* 1. *cap.* 13. *(r)*, which turned it into a treſpaſs puniſhable by two years impriſonment, and ſo the ſtatute of *Weſtm.* 2. was but a reſtitution of the common law, and a ſetting aſide of the ſtatute of *Weſtm.* 1. and this ſeems to be the more warrantable opinion that it is burglary; but of this hereafter.

Now as to clergy in caſe of burglary.

If it be ſuch a burglary, as is alſo joined with actual theft or robbery, and that robbery or theft be ſo laid in the indictment, and proved upon evidence, as anſwers the ſtatute of 23 *H.* 8. *cap.* 1. or 1 *E.* 6. *cap.* 12. or 5 & 6 *E.* 6. *cap.* 9. whereof enough hath been ſaid before, then the principal in ſuch burglary is in thoſe caſes, which are within thoſe ſtatutes, ouſted of his clergy, and the acceſſaries *before* are ouſted of their clergy by the ſtatute of 4 & 5. *P.* & *M. cap.* 4. but the acceſſaries *after* have their clergy, as hath been ſaid; but in caſe of ſimple burglary, or burglary with theft, laid to be only *felonice* & *burglariter*, the principal is ouſted of clergy if outlawed or convict by verdict or confeſſion, but is not ouſted of clergy in caſe of ſtanding mute, not directly anſwering, or challenging above twenty, by the ſtatute of 18 *Eliz. cap.* 7. *(ſ)*

(*p*) 2 *Co. Inſtit.* 433.
(*q*) *New Edit. p.* 489.
(*r*) 2 *Co. Inſt.* 180.

(*ſ*) This defect is ſupplied by 3 & 4 *W.* & *M. cap.* 9.

But

But by the ſtatute of 1 *E.* 6. *cap.* 12. "If the breaking of the "houſe be in the day, or night time with intent to rob or ſteal, "any perſon being in the houſe and put in fear, tho nothing [563] "be ſtolen, yet he ſhall be ouſted of his clergy, if convict by verdict "or confeſſion, or ſtand mute, or challenge peremptorily above "twenty *(t)*;" for this ſtatute extends to this ſpecial kind of burglary, 11 *Co. Rep.* 36. *b. Poulter's* caſe, tho nothing be ſtolen, and ſo differs from the ſtatutes of 23 and 25 *H.* 8. which require a ſtealing, as well as a breaking the houſe.

(But tho in caſe of robbery in any dwelling-houſe, and therewith putting in fear, according to the ſtatute of 23 *H.* 8. *cap.* 1. or without putting in fear according to the ſtatute of 5 & 6 *E.* 6. *cap.* 9. the malicious commanding, hiring or counſelling of ſuch offenſe is put out of clergy, if ſo ſpecially laid in the indictment, *Dy.* 183. *b.* by the ſtatute of 4 & 5 *P.* & *M. cap.* 4. yet ſuch acceſſaries *before*, are not ouſt of clergy in caſe of breaking a houſe to commit a robbery putting in fear, tho the principal be ouſted of clergy by 1 *Eliz. cap.* 12.)

But acceſſaries before or after are not ouſted of clergy by this ſtatute, or the ſtatute of 4 & 5 *P.* & *M. cap.* 4.

And this ſtatute doth ouſt of clergy not only thoſe that actually break, or actually enter the houſe, but alſo all thoſe that are, in law, principals in burglary, all thoſe that are preſent, aiding and aſſiſting, or that ſtand to watch at the field-gate, while the others of the confederacy or company break and enter the houſe.

And ſo it differs from the caſe of robbing of a perſon in his dwelling-houſe, none being within, upon the ſtatute of 39 *Eliz. cap.* 15. for that ſtatute excludes from clergy only thoſe perſons that actually enter into the houſe, and not thoſe who, tho of the confederacy, and preſent aiding and abetting, yet never entred the houſe; *quod vide ſupra.*

But as to acceſſaries *before* or *after*, they are not ouſted of their clergy by the ſtatute of 18 *Eliz. cap.* 7. nor doth the ſtatute of 4 & 5 *P.* & *M.* extend to ouſt acceſſaries *before* of clergy in caſes of burglary *(u)*; but in caſes of robbing of houſes within the [564]

(*t*) This ſtatute does not exclude thoſe who challenge peremptorily above twenty; this, according to our author's opinion, (*vide poſtea, Lib.* II. *cap.* 48.) was needleſs; but they are ſince excluded by 3 & 4 *W.* & *M. cap.* 9.

(*u*) But they are ſince ouſted by 3 & 4 *W.* & *M. cap.* 9.

qualifications

qualifications and circumſtances of the ſtatute of 23 *H.* 8. *cap.* 1. or 5 & 6 *E.* 6. *cap.* 9. and not to burglary at large. *(x)*

[565] And thus far concerning larciny, robbery and burglary, which are felonies by the common law.

There are two exceptions, that are added hereunto.

(x) Since our author wrote, there have been other ſtatutes made to take away clergy in caſes of larciny committed in dwelling-houſes, &c.

By 3 & 4 *W.* & *M.* *cap.* 9. " Clergy is " ouſted from thoſe who ſhall felonioufly " take away any goods in any dwelling-" houſe, any perſon being therein and put " in fear, or ſhall rob any dwelling-houſe " in the day-time, any perſon being there-" in; or ſhall comfort, aid, counſel or " command any perſon to commit any of " the ſaid offenſes, or to break any dwel-" ling-houſe, ſhop or warehouſe thereto " belonging, and therewith uſed in the " day-time, and felonioufly to take away " any money or goods to the value of five " ſhillings, altho no perſon be within ſuch " dwelling-houſe, &c. or ſhall counſel, " hire or command any perſon to commit " any burglary, if they be convicted, " ſtand mute, or challenge peremptorily " above twenty."

The deſign of this clauſe was to deprive the acceſſaries *before* of the benefit of the clergy; but this ſtatute not mentioning booths nor out-houſes, leaves the acceſſaries in ſuch caſes to their clergy.

The ſame ſtatute enacts, " That perſons " indicted for a crime, of which being " convict they ſhould not have their clergy " by any former ſtatute, ſhall not have it " if they ſtand mute, or will not anſwer " directly, or challenge peremptorily a-" bove twenty, or be outlawed.

" Perſons indicted of felony for ſtealing " of goods, &c. if convicted, ſtand mute, " will not directly anſwer, or challenge " peremptorily above twenty, ſhall loſe " their clergy, if it appears upon evidence " or examination, that the goods were " taken in another county in ſuch a manner, " whereof, if convicted by a jury of that " county they ſhould not have their clergy.

This part of the ſtatute helps the ſeveral former acts, which were defective either as to the point of ſtanding mute, or challenging peremptorily, or being outlawed.

By 10 & 11 *W.* 3. *cap.* 23. " All per-" ſons, who by night or by day ſhall in " any ſhop, ware-houſe, coach-houſe or " ſtable privately and felonioufly ſteal any " goods, wares or merchandizes of the va-" lue of five ſhillings, or more, tho ſuch " ſhop, &c. be not broke open, and tho " the owner, or any other perſon be not " therein, or that ſhall aſſiſt, hire or com-" mand any perſon to commit ſuch offenſe, " being thereof convict or attainted by " verdict or confeſſion, or being indicted " thereof ſhall ſtand mute, or challenge " above twenty, ſhall be excluded from " the benefit of clergy.

The uſes of this ſtatute are theſe.

1. By the former ſtatutes (except the caſe of a booth in a fair or market, by 5 & 6 *E.* 6.) it was neceſſary, in order to take away clergy, that the robbery ſhould be in a dwelling-houſe, whereas this ſtatute extends to ſhops, ware-houſes, &c. tho they ſhould not be adjoining to, or be any part of, a manſion-houſe.

2. The former ſtatutes required there ſhould be an actual breaking or putting in fear, otherwiſe it would not be a robbery, which is the ſtealing intended by 39 *Eliz.* *cap.* 15. as appears from the preamble of that ſtatute; but by this ſtatute, if the goods ſtolen be of the value of five ſhillings, the offender is ouſted of clergy as to a ſhop, ware-houſe, coach-houſe, or ſtable, tho there be no breaking or putting in fear.

3. By 23 *H.* 8. and 1 *E.* 6. clergy was not taken away, unleſs there were ſome perſon in the houſe put in fear, nor by 5 & 6 *E.* 6. unleſs ſome of the family were in the houſe or booth; nor by 39 *Eliz.* unleſs it were in the day-time, and no perſon in the houſe; ſo that if the offenſe were committed when any perſon was in the houſe, if not put in fear, nor one of the family, or when no body was in the houſe, if it were in the night-time, in neither of thoſe caſes was clergy taken away by thoſe ſtatutes; but this ſtatute takes it away in both theſe caſes as to ſhops, &c.

But ſtill this ſtatute omitted to mention dwelling houſes or out-houſes, wherefore, to ſupply this omiſſion, another ſtatute was made, *viz.*

12 *Ann.* *cap.* 7. by which it is enacted, " That if any perſon ſhall felonioufly ſteal " any money, goods, or chattles, &c. of " the value of forty ſhillings in any dwel-" ling-houſe or out-houſe thereto belong-" ing, altho it be not broken, nor any " perſon therein, or ſhall aſſiſt any perſon " to commit ſuch offenſe, and ſhall be " convicted by verdict or confeſſion, or " ſtand mute, or will not anſwer directly, " or ſhall challenge peremptorily above " twenty, he ſhall be debarred from the " benefit of clergy.

But both theſe ſtatutes ſeem defective as to perſons outlawed.

1. The

1. The firſt is really true, namely when it is *tempus belli* within the kingdom, and one enemy either ſteals, robs, or plunders the houſe or goods of another, and therefore the book of 22 *Aſſiz.* 95. adds to the diſinition of burglary *in time of peace*, for in time of war, tho theſe kinds of offenſes committed by thoſe of the ſame party, or thoſe that are not in hoſtility one to another are felonies, yet in time of war, when done by an enemy, they put on another name, as acts of hoſtility, miſpriſions, and the like.

Juſque datum ſceleri.

2. The ſecond is only ſuppoſititious, namely when it is done in caſe of neceſſity *(y)*, as a poor perſon that in caſe of neceſſity for hunger ſhall break and enter a houſe for victuals under the value of twelve-pence, which is added as an exception to burglary, by *Crompt. fol.* 33. *a.* and *Dalt. cap.* 99. *p.* 255, 256. *(z)*, for tho I do agree a judge ought to be tender in ſuch caſes, and uſe much diſcretion and moderation, yet this muſt not paſs for law, for then we ſhall in a little time let looſe all the rules of law and government, and burglaries, robberies, yea murders themſelves ſhall be excuſable under pretenſe of neceſſity, and we ſhall fall within the wild doctrine of the *Jeſuitical* caſuiſts, who of late in *France* and elſewhere, upon thoſe general miſapplied maxims of *Quicquid neceſſitas cogit, defendit*, and *in caſu extremæ neceſſitatis omnia ſunt communia*, have adviſed ſervants and appprentices, that it is lawful in point of conſcience to [566] ſteal from their maſters, or rob them in caſe they make them not ſufficient allowances of meat, drink, or clothes: where laws are ſettled, there are other remedies appointed for the relief of ſervants againſt oppreſſing maſters, and of the poor, by complaint to the magiſtrates without violating the eſtabliſhed laws of kingdoms or ſtates. (*)

4 Blackſ. Com. ch. 16. p. 223. 228. Foſter. 38, 39. 76, 77. 107, 108, 109. See Index to 1 Hawk. P. C. Tit. Burglary. See Burn. Edit. 1776. Tit. Burglary, per tot.

(y) See *Grot. de jur. belli ac pacis, Lib.* II. *cap.* 2. §§. 6 & 7.

(z) *New Edit. p.* 489.

(*) What our author here obſerves is undoubtedly true, that the plea of neceſſity ought not in ſuch caſes to be allowd, and the reaſon is, becauſe the law ſuppoſes, that no man can in a well governd commonwealth be driven to ſuch a neceſſity; this ſuppoſition is the more reaſonable in *England*, where there are ſo many laws, and ſuch large ſums yearly collected for the relief of the poor, as are more than ſufficient for that purpoſe, if rightly applied; yet ſuch is the neglect in the execution of thoſe laws, that it were to be wiſhed ſome expedient were found out to render that relief more ſpeedy and effectual, leſt, while the neceſſity be real, the relief be only ſuppoſititious, which our author himſelf thought was oft-times the caſe, notwithſtanding the proviſions of the law; *(ſee his preface to his diſcourſe touching the proviſion for the poor,)* which makes it reaſonable it ſhould be allowd as an argument for mercy, tho not as a plea in juſtification.

CHAP.

CHAP. XLIX.

Of arſon, *or* wilful burning of houſes.

THE felony of arſon or wilful burning of houſes is deſcribed by my lord *Coke*, *cap.* 15. *p.* 66. to be the *malicious and voluntary burning the houſe of another* by night or by day.

This was felony at common law *(a)*, and one of the higheſt nature, and therefore by the ſtatute of *Weſtm.* 1. *cap.* 15. ſuch offenders were not repleviſable *(b)*; and by *Briton (c)* the offenders herein were burnt to death, but as to that the law is changed, they are to be hanged. *H.* 7 *E.* 2. *Coram Rege Rot.* 88. *Norf. (d).*

[567] By the ſtatute of 8 *H.* 6. *cap.* 6. diſperſing of bills of menace to burn houſes, if money be not laid down in a certain place, was made high treaſon, if the houſes were burned accordingly: *vide Rot. Par.* 15 *H.* 6. *n.* 23. but as to the treaſon it is repeald by the ſtatute of 1 *E.* 6. *cap.* 12. and 1 *Mar. cap.* 1. but the felony remains ſtill in caſe the houſes be burned. *(e)*

In caſes of wilful burning of houſes the indictment runs, *Quod felonicè, voluntariè & malitiosè combuſſit domum* without ſaying *domum manſionalem*, as in caſe of burglary. *Co. P. C. p.* 67.

And to examine this felony theſe things are inquirable, *viz.* 1. What ſhall be ſaid *domus*. 2. What *domus* of another. 3. What a malicious and wilful burning. 4. What kind of felony this is. 5. Whether and how clergy is allowable.

I. What ſhall be ſaid *domus*.

It extendeth not only to the very dwelling-houſe, but to all out-houſes, that are parcel thereof, tho not contiguous to it, or under the

(a) 3 *H.* 7. 10. *a.*

(b) 2 *Co. Inſtit.* 188.

(c) *cap.* 9.

(d) By the laws of *Ethelſtan* it was capital, *incendiariis capitis pœna eſto*; *vide Leg. Ethelſtan, l.* 6. and by the laws of *Canute* it was one of thoſe capital offenſes for which no ranſom was allowd. *Leg. Canuti, l.* 61.

(e) But ſince by the 9 *Geo.* I. *cap.* 22. it is made felony without benefit of clergy, knowingly to ſend any letter without a name ſubſcribed, or ſigned with a fictitious name demanding money, veniſon or other valuable thing. This ſtatute is amended by *Stat.* 27. *Geo.* 2. *c.* 15. knowingly to ſend any letter without a name, or with a fictitious name, demanding money, veniſon, or any other valuable thing, or threatening (without any demand) to kill any of the king's ſubjects, or to fire their houſes, out-houſes, barns, or ricks, is made felony without benefit of clergy.

ſame

ſame roof; as in caſe of burglary, the barn, ſtable, cow-houſe, ſheep-houſe, dairy-houſe, mill-houſe. *Co. P. C. p.* 67. 11 *H.* 7. 1. *b.* *(f)*

But if the barn or out-houſe be not parcel of a dwelling-houſe, it is not felony, unleſs the barn have hay or corn in it *(g)*, and then, tho it be no parcel of a dwelling-houſe, it is felony, 4 *Co. Rep.* 20. *a. Barham*'s caſe; but if the barn have only hay in it, and not corn, the offender ſhall have his clergy, but if it hath corn in it, he ſhall be excluded of clergy, tho not parcel of a dwelling-houſe. *Co. P. C. p.* 69.

The burning of a frame of a houſe was no felony by the common law, but was made felony by the ſtatute of 37 *H.* 8. [568] *cap.* 6. but that ſtands repeald by 1 *E.* 6. *cap.* 12. and 1 *Mar. cap.* 1.

The burning of a ſtack of corn was no felony by the common law, but the attempting of it was made felony by the ſtatute of 3 & 4 *E.* 6. *cap.* 5. *(h)*, but that is repeald by 1 *Mar. cap.* 1. *(i)*

But by the ſtatute of 43 *Eliz. cap.* 13. the wilful and malicious burning of any barn, or ſtack of corn, or grain within the counties of *Northumberland*, *Cumberland*, *Weſtmorland* or *Durham*, is made felony without benefit of clergy. *(k)*

II. What ſhall be ſaid the houſe of *another*.

A tenant for years of a houſe ſets fire to his own houſe, thereby intending maliciouſly to fire the houſe of *B.* if he burn his own houſe, and alſo thereby burn the houſe of *B.* this is felony; but if he burn not the houſe of *B.* according to his deſign, but only burn his own houſe, this is not felony, but a great miſdemeanor, for which he was ſet in the pillory, fined, and perpetually bound to the good behaviour, and yet it was of a houſe in the city of *London*, and laid that he did

(f) The words of the book are, *becauſe the barn was* adjoining *to the houſe, it was holden to be felony*; to make which ſerve our author's purpoſe we are not to underſtand thereby its being contiguous, but being ſo near the houſe, as to be parcel thereof.

(g) But by 22 & 23 *Car.* 2. *cap.* 7. "It "is felony maliciouſly to burn in the "night-time any rick or ſtack of corn, "hay or grain, *barns* or other out-houſes, "or buildings, or kilns whatſoever." So that now, tho the barn be empty, it is felony; and by 9 *Geo.* I. *cap.* 22. clergy is taken away from the offender.

(h) This ſtatute does not make the attempt felony generally, but only where divers perſons to the number of twelve are aſſembled for that purpoſe, and continue together for the ſpace of an hour after proclamation to depart, or where any above the number of two, and under twelve, ſhall after proclamation, as aforeſaid, in a forcible manner attempt the ſame.

(i) But it is made felony by 22 & 23 *Car.* 2. *cap.* 7. and by 9 *Geo.* I. *cap.* 22. it is felony without benefit of clergy to ſet fire to any houſe, barn or out-houſe, or to any hovel, cock, mow, or ſtack of corn, ſtraw, hay or wood.

(k) By 1 *Geo.* 1. *cap.* 48. it is felony maliciouſly to ſet on fire any wood, underwood or coppice. By this ſtatute clergy is not taken away; but by 9 *Geo.* I. *cap.* 22. it is felony without benefit of clergy to cut down or deſtroy any trees planted in any avenue, orchard, garden, or plantation.

it

it *eâ intentione* to burn the houſes of others. *M.* 10 *Car.* 1. *B. R. Croke* 377. *Holme*'s caſe, adjudged.

III. It muſt be a *burning* of a houſe of another; therefore if *A.* ſets fire to the houſe of *B.* maliciouſly to burn it, but either by ſome accident or timely prevention the fire takes not, this is no felony, tho it were a malicious attempt, for the words are *incendit & combuſſit*, but if he had burned part of the houſe, and the fire is quenched, or
[569] goes out before the whole houſe be burned, it is felony. *Co. P. C. p.* 66. *Dalt. cap.* 105. *(l)*

It muſt be a *wilful and malicious* burning, otherwiſe it is not felony, but only a treſpaſs.

And therefore if *A.* ſhoot unlawfully in a hand-gun, ſuppoſe it be at the cattle or poultry of *B.* and the fire thereof ſets another's houſe on fire, this is not felony, for tho the act he was doing were unlawful, yet he had no intention to burn the houſe thereby, againſt the opinion of *Dalt. cap.* 105. *p.* 270. *(m)*.

But if *A.* have a malicious intent to burn the houſe of *B.* and in ſetting fire to it burns the houſe of *B.* and *C.* or the houſe of *B.* eſcapes by ſome accident, and the fire takes in the houſe of *C.* and burneth it, tho *A.* did not intend to burn the houſe of *C.* yet in law it ſhall be ſaid the malicious and wilful burning of the houſe of *C.* and he may be indicted for the malicious and wilful burning of the houſe of *C. Co. P. C. p.* 67. *(n)*

An infant of about fourteen years of age or under may be guilty of malicious burning of houſes, if by circumſtances it can appear he knew it to be evil.

Before me at *Norfolk*, a boy about the age of fourteen years was arraigned upon two ſeveral indictments for malicious and wilful burning of two ſeveral houſes, the firſt was his own father's, and it appeared, that when he had ſecretly carried fire into the barn and fired it, he falſly charged another with the fact, and upon the boy's accuſation he was impriſoned, till it appeared clearly he was not the offender: this boy was afterwards together with his father and his other children entertained at a neighbour's houſe in charity, and the boy watching an opportunity, when none were in the houſe but a child in the cradle, carried fire out of the kitchen into a room of furzes, and ſet fire in it and went out, and thus burnt a ſecond houſe, and

(*l*) *New Edit. p.* 506.
(*m*) *Ibid.*
(*n*) See the caſe of *Coke* and *Woodburne*, *State Tr. Vol.* VI. *p.* 222.

the

the child in the cradle; for both theſe he was queſtioned, and at length confeſſed freely the whole circumſtances of both facts, he was indicted, and upon his arraignment pleaded, and upon his trial craftily inſiſted, that he was under fourteen years of [570] age; but I directed the jury, that it appeared by the circumſtances, that his malice ſupplied his age, for it appeared, that he underſtood the evil of the firſt offenſe when he did it ſo ſecretly, and yet charged another wrongfully; but if there had been any doubt of the firſt burning, yet he could not but be conuſant that the ſecond burning was a great crime, when he ſaw another formerly charged by him with the firſt burning committed as for felony; but yet for my farther ſatisfaction, and in reſpect the boy ſeemed very little, I took farther examination touching his age, and his father, being by, freely confeſſed and was content to ſwear, that he was above fourteen and near fifteen years of age, and he was convicted and executed.

IV. What felony this is.

And it ſeems unqueſtionable, that the burning of a dwelling-houſe, or any part thereof, or any out-houſe part thereof, was a felony at common law, and ſo was alſo the burning of a barn with hay or corn in it, tho not parcel of a dwelling-houſe, but ſtanding at a diſtance. *Co. P. C. p.* 67. 11 *H.* 7. 1. *b.*

V. But as to the point of the not allowance of clergy therein, there may be ſome matters to be examined: certain it is, that at this day clergy is not allowable to a party convicted of wilful and malicious burning of a dwelling-houſe, or of a barn with corn; *quod vide* 11 *Co. Rep.* 34. *Poulter's* caſe adjudged *per omnes Juſtic. Plow. Com.* 475. *Co. P. C. p.* 67. and the conſtant practice hath been to deny clergy to thoſe convict of this crime; *quod vide* in the reſolution of *Poulter's* caſe.

And the ſtatute of 4 & 5 *P. & M. cap.* 4. takes away clergy from all acceſſaries before to the offenſes of wilful burning any dwelling-houſe, or of any barn then having corn or grain in the ſame; and ſurely they took the law to be, that the principal was by law ouſted of his clergy, or otherwiſe they would not have ouſted the acceſſary of his clergy.

But then the queſtion remains, what it was that ouſted the principal of his clergy.

By the ſtatute of 23 *H.* 8. *cap.* 1. clergy was ouſted from all perſons found guilty of wilful burning of any dwelling- [571]

houſes

houſes or barn, wherein any grain or corn ſhould happen to be, and from all perſons found guilty of abetting, aiding or counſelling thereof, *viz.* acceſſaries before; except perſons in order of ſubdeacon, or above.

The ſtatute of 1 *E.* 6. *cap.* 12. as to divers offenſes therein particularly mentiond, which are for the moſt part alſo included in the ſtatute of 23 *H.* 8. carried the excluſion of clergy farther, *viz.* as to ſtanding mute, or not directly anſwering, but mentions not at all wilful burning of houſes, or barns with grain; and enacted, that in all other caſes of felony perſons indicted ſhall have their clergy, as they ſhould have had before 1 *H.* 8.

So that by the act of 1 *E.* 6. clergy was reſtored to burning of houſes and barns with corn, notwithſtanding the ſtatute of 23 *H.* 8. or any other ſtatute made ſince the firſt year of *Henry* VIII. and if the ouſting of the principal in arſon from his clergy reſted upon the ſtatute of 23 *H.* 8. then the ſtatute of 1 *E.* 6. had reſtored him to his clergy.

The ſolution therefore of this matter is upon two accounts.

1. Some have thought that the wilful burning of houſes was not within clergy by the common law, nor by the ſtatute of 25 *E.* 3. *cap.* 4. becauſe it was an hoſtile act (*o*), and therefore, as until the ſtatute of 4 *H.* 4. *cap.* 2. *Inſidiatores viarum & depopulatores agrorum* joined with another felony, and ſo found, were ouſted of their clergy, becauſe favouring of acts of hoſtility, ſo *incendiatores domorum* were even by the common law ouſted of clergy before the ſtatute of 23 *H.* 8. and ſo are not reſtored to clergy by the general clauſe of the ſtatute of 1 *E.* 6. and this I remember was delivered as the reaſon of the excluſion of clergy from wilful burning by Mr. Attorney *Noy*, 8 *Car.* 1 in the king's bench, and ſeemed to be aſſented to by the court.

But I think this will hardly help the matter, 1. Becauſe tho poſſibly clergy might not be allowd at common law to wilful burning, [572] yet the ſtatute of 25 *E.* 3. *cap.* 4. *pro clero* extends clergy to all treaſons and felonies touching other perſons than the king himſelf, and his royal majeſty. 2. Becauſe then as well a burning of a barn with hay, as a barn with corn, would be excluded from clergy, for the one is as hoſtile as the other.

(*o*) And ſo interpretatively *a felony touching the perſon of the king himſelf*, which by that ſtatute was ouſted of clergy.

2. Others

2. Others have thought that the ſtatute of 4 & 5 *P.* & *M. cap.* 4. taking away clergy from the acceſſaries before, doth take away by neceſſary conſequence the clergy from the principal, for it were not reaſon to think the acceſſary *before*, ſhould be in a worſe condition, than the principal offender, and therefore virtually and implicatively, and by neceſſary conſequence it takes away clergy from the principal in all thoſe caſes, where it takes it from the acceſſary *before*; and beſides, if the principal had his clergy, the acceſſary could not be arraigned, and this I think is true, tho this caſe needs not this help.

But I think, and ſo is the book of 11 *Co. Rep.* 34, 35. that the ſtatute of 25 *H.* 8. *cap.* 3. which extends to take away clergy in all thoſe caſes which were within 23 *H.* 8. *cap.* 1. and particularly recites that of burning houſes and barns with grain, and farther extends that excluſion to ſtanding mute, not directly anſwering, challenging above twenty, I ſay that ſtatute of 25 *H.* 8. was in great part repealed by the ſtatute of 1 *E.* 6. and is entirely revived by the ſtatute of 5 & 6 *E.* 6. *cap.* 10. not only as to the point of ouſting clergy upon examination *(p)*, but alſo as to the excluſion of clergy in thoſe caſes mentioned in the act of 25 *H.* 8. wherein burning of houſes and barns with corn is expreſly mentioned, ſo that conſequently this ſtatute of 5 & 6 *E.* 6. reviving the ſtatute of 25 *H.* 8. repeals the generality of that clauſe in 1 *E.* 6. whereby clergy was *let in*, in all caſes there not enumerated.

And conſequently the periods of this caſe of clergy in wilful burning ſtand thus. [573]

1. Before 23 *H.* 8. clergy was allowable therein by force of the ſtatute of 25 *E.* 3. *pro clero.*

2. After 23 *H.* 8. until 25 *H.* 8. clergy was allowable for the acceſſary in all caſes, and for the principal in all caſes, but finding him guilty.

3. After 25 *H.* 8. until 1 *E.* 6. clergy was taken away from the

(*p*) This relates to the ſecond clauſe of the 25 *H.* 8. *cap.* 3. whereby it is provided that if any perſons be indicted in one county for ſtealing goods in another, and ſtand mute, or challenge peremptorily above twenty, or will not directly anſwer, they ſhall be put from their clergy in like manner, as if they had been tried and found guilty in the ſame county, where the offenſe was committed, if it appear to the juſtices by the evidence or on examination, that it was ſuch a felony, as if found guilty thereof in the county where committed, they would have loſt their clergy by the 23 *H.* 8. *cap.* 1.

principal as well where he ſtands mute, not directly anſwers or challenges above twenty, as where he is found guilty.

But the acceſſaries as well before as after were to have clergy.

4. After 1 *E.* 6. till 5 & 6 *E.* 6. when the ſtatute of 25 *H.* 8. was revived, both principal and acceſſaries had their clergy in all caſes of burning.

5. After 5 & 6 *E.* 6. till 4 & 5 *P.* & *M. cap.* 4. the principal was excluded in all caſes, wherein he was excluded by the ſtatute of 25 *H.* 8. as well where he ſtood mute, challenged above twenty, did not directly anſwer, as where found guilty. *(q)*

But the acceſſaries *before*, as well as *after*, had their clergy.

6. By the ſtatute of 4 & 5 *P.* & *M. cap.* 4. until this day, acceſſaries *before* are excluded of clergy in all caſes, but acceſſaries *after* have their clergy.

But yet there ſtill remain two doubts.

1. Whereas the ſtatute of 4 & 5 *P.* & *M. cap.* 4. extends to ouſt clergy from the acceſſary, as well if he be attainted as convicted, and conſequently if outlawed, he ſhall not have clergy, becauſe it is an attainder; the ſtatute of 25 *H.* 8. extends only to finding guilty, challenging above twenty, ſtanding mute, or not directly anſwering, and it ſeems in attainder of the principal by outlawry he ſhall have his clergy; therefore *quære*, whether an attainder by outlawry ouſts the principal of clergy upon the ſtatute of 23 or 25 *H.* 8.

[574] 2. Whereas the ſtatute of 4 & 5 *P.* & *M. cap.* 4. hath no exception of perſons in the order of ſub-deacon; but acceſſaries *before* are ouſted of their clergy in all caſes by that ſtatute, tho in orders.

Yet by the ſtatute of 25 *H.* 8. which is relative to the ſtatute of 23 *H.* 8. principals in the order of ſub-deacon, or above, have their clergy in the caſe of arſon, for by the ſtatute of 23 *H.* 8. clergy is ſaved to men in orders, where found guilty; and by the ſtatute of 25 *H.* 8. in caſes of ſtanding mute, &c. they are ouſted of their clergy as if found guilty, in which caſe men in orders had their clergy, and ſo the reviving of the ſtatute of 25 *H.* 8. by that of 5 & 6 *E.* 6. *lets in* men in orders to their clergy in caſe of arſon, which ſeems to make this abſurdity, that the principal in arſon ſhall have the benefit of clergy if in orders, but the acceſſaries *before*, tho

(q) By 3 & 4 *W.* & *M.* clergy is taken away in caſe of outlawry alſo.

in

in orders, are excluded by the general penning of the act of 4 & 5 *P. & M.*

And herein there will ariſe a difference as to men in orders, in relation to the benefit of clergy, between the caſe of being principal in wilful burning of houſes, and the caſe of being principal in robbery in or near the highway, or robbing in a dwelling-houſe, putting the dweller in fear, or murder of malice prepenſe; for the act of 1 *E.* 6. *cap.* 12. excludeth them from their clergy generally without exception of men in orders, tho they were excepted by the ſtatutes of 23 and 25 *H.* 8.

But this ſtatute of 1 *E.* 6. making no mention of burning of houſes, the excluſion of them from clergy, if reſting upon the ſtatute of 25 *H.* 8. revived by 5 & 6 *E.* 6. excepts them.

Foſter. 113.—116. 192. 333, 334. 1 Hawk. P. C. ch, 39. Sec: 1, 2, 3. &c. See 4 Black. Com. Index. Tit. Arſon.

CHAP. L. [575]

Concerning felonies by the common law, *relating to the* bringing of felons to juſtice, *and the* impediments *thereof, as eſcape, breach of priſon, and reſcue; and firſt touching* arreſts.

I COME now, according to the method propounded, to conſider thoſe felonies that relate to the public juſtice of the kingdom in bringing malefactors to their due puniſhment, and the impediments thereof, and they are principally three, *viz.* 1. By the party arreſting or impriſoning, as voluntary eſcapes. 2. By the party arreſted, and impriſoned, as breach of priſon. 3. By a ſtranger, as reſcue of felons.

And in this order I ſhall examine theſe offenſes; but as a neceſſary preliminary thereunto, I ſhall firſt conſider of arreſts and impriſonment for capital offenſes, by whom it may be done, and where lawful.

Arreſts of malefactors are of two kinds, 1. Either by perſons thereunto by law deputed, or 2. By private perſons.

And the former is again of two kinds. Either, 1. By proceſs of law, or 2. *Virtute officii.*

The former again is of two kinds, 1. Either by proceſs in the king's name, 2. Or by warrant in the name of a judge or juſtice thereunto authorized, and that either in writing or *ore tenus*.

I ſhall purſue this order, and

I. Shall begin with the firſt of theſe, namely, arreſting by virtue of the king's writ.

Regularly no proceſs iſſues in the king's name and by his writ to apprehend a felon or other malefactor, unleſs there be an [576] indictment, or matter of record in the court upon which the writ iſſues.

Antiently the proceſs upon an appeal or an indictment of felony was only one *Capias*, and thereupon an *Exigent*. 22. *Aſſiz*. 81.

By the ſtatute of 25 *E*. 3. *cap*. 14. there are to be a *Capias* and an *Alias* with a command to the ſheriff to ſeize the goods of the felon, and then an *Exigent*.

But it ſhould ſeem by the book of 8 *H*. 5, 6. that this ſtatute extended not to felony of death, but that there ſhould be only one *Capias*, and then an *Exigent*.

But by the ſtatute of 6 *H*. 6. *cap*. 1. if *A. de B. in comitatu S*. be indicted in the king's bench in *Middleſex*, there ſhall go out one *Capias* into *Middleſex*, another into *S*. and each ſhall have ſix weeks at leaſt between the *Teſte* and return, and upon *Non inventus* returned then an *Exigent*.

But if he be not named of another county, then it ſeems only one *Capias* ſhall iſſue, where the party is indicted, and upon *that* an *Exigent*: this ſtatute was made during the king's pleaſure; but by the proviſo in the ſtatute of 8 *H*. 6. *cap*. 10. it ſeems to be made perpetual.

By the ſtatute of 8 *H*. 6. *cap*. 10. if *A. de B. in com. S*. be indicted or appealed *in com W*. before juſtices aſſigned, there ſhall go out firſt a *Capias in Com. W*. and upon *Non inventus* returned a *Capias*, with proclamations *in com. S*. having three months at leaſt between the *Teſte* and return, or otherwiſe no *Exigent* to iſſue; but the proceſs in the king's bench is excepted.

But this ſtatute only extends, where the party is indicted in another county, than where converſant.

By the ſtatute of 5 *E*. 3. *cap*. 11. juſtices of *oyer* and *terminer* may iſſue proceſs againſt felons in a foreign county, and theſe proceſſes ought, or at leaſt may and are moſt fit to iſſue in the king's name under

under the *Teſte* of the chief judge, for which purpoſe all clerks of aſſizes have a ſpecial ſeal, and iſſue their proceſs in the king's name in caſe of felony, where they go to the outlawry, tho ſome other warrants are made in the name of the judge.

And in all caſes the king's writs are directed to the ſheriff, and he executes the writ himſelf, or by his warrant under [577] ſeal to the bailiffs.

And upon theſe writs the ſheriff or his bailiff may break open doors to take the offenders, for they are for the king and preſervation of the peace, and therefore include a *non omittas propter aliquam libertatem*; *quod vide* 5 *Co. Rep.* 92. *a.*

And in this caſe the ſheriff or his bailiff may require any perſons preſent to aſſiſt him in execution of the writ, and he that refuſeth to aſſiſt him, is indictable and puniſhable by fine and impriſonment.

II. The ſecond kind of arreſt is by warrant under the ſeal of the juſtices thereunto authorized, as juſtices of *oyer* and *terminer*, or of gaol-delivery, or juſtices of peace.

And herein theſe things are conſiderable: I. What are the eſſentials of ſuch a warrant, without which it is void in law. 2. Who may grant a warrant to apprehend a felon. 3. To whom, and 4. In what order or method it is to be granted, or 5. Executed, and in what caſe.

1. As to the firſt of theſe,

It is neceſſary that ſuch warrant expreſs the name of the party to be taken: for a warrant granted with a blank and ſealed, and after filled up with the name of the party to be taken is void in law. *Dalt. cap.* 117. *p.* 329. *(a)*

It muſt be under ſeal, tho ſome have thought it ſufficient if it be in writing ſubſcribed by the juſtice, *Dalt. cap.* 117. *p.* 358. *vide* 2 *Co. Inſtit. ſupra ſtatutum de frangentibus priſonam, p.* 591. and the failing in theſe things will make the warrant void, and ſubject the officer to a falſe impriſonment; tho in ſome caſes the want of due formality may be blameable in him that makes the warrant, yet it will not therefore ſubject the officer to a falſe impriſonment, if the matter be within the juriſdiction of him that makes it; as for inſtance.

A warrant by a juſtice to apprehend *J. S.* to anſwer ſuch matters

(a) *New Edit. p.* 574.

as ſhall be objected againſt him, *ex parte domini regis*, without expreſſing the certainty of the crime, this is not regular, *Lambard's* juſtice 95, 96. 2 *Co. Inſtit.* 591. 615. tho Mr. *Dalt. cap.* 117. *p.* 329. gives inſtances of ſuch warrants granted by *Popham* chief juſtice.

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And therefore, if before commitment a perſon ſo apprehended ſhould be removed into the king's bench by *Habeas Corpus* upon ſuch a warrant, or ſhould be committed upon ſuch a general *Mittimus*, he ſhould be diſcharged; or in caſe he ſhould be reſcued upon ſuch an apprehenſion by ſuch a warrant, or be voluntarily let go by him that apprehends him, (tho it may be the true cauſe of the warrant were felony,) yet it not being expreſſed in the warrant, ſuch an eſcape or ſuch a reſcue would not be felony.

Yet it may excuſe the officer in falſe impriſonment, if the true cauſe were felony, or any miſdemeanor within the cognizance of him that makes the warrant, for it is but an erroneous, not a void warrant, and it is not reaſonable to ſuppoſe the officer ſhould be conuſant of the formalities of law, or adviſe with counſel upon all occaſions, whether the warrant were in ſtrictneſs of law regular, eſpecially in ſuch a caſe where the error of this nature hath been ſeconded with common practice; but of this more hereafter.

2. As to the perſons, that may grant a warrant for apprehending a felon.

The chief juſtice of the king's bench or any other judge of that court may iſſue a warrant in his own name, for the apprehending and bringing before him any perſon touching whom oath is made of a felony committed, or of ſuſpicion of felony upon him, into any county of *England* and *Wales*, for they are intruſted with the conſervation of the peace through all *England*, and are more than juſtices of peace or *oyer* and *terminer*; and this hath been uſual in all ages.

But to avoid the trouble to the country in bringing up offenders they uſually direct their warrants to apprehend the parties, and bring them before ſome juſtice of peace near adjoining, either to be examined or bound over to the ſeſſions, and farther to be proceeded againſt according to law.

And thus their warrants ought to run in caſes of ſurety of the peace or good behaviour againſt a perſon in another county, than where they are, by reaſon of the ſtatute of 21 *Jac. cap.* 8.

Juſtices

Juſtices of *oyer* and *terminer* may alſo iſſue their warrants in the counties within their commiſſion for apprehending felons or other malefactors, or for ſurety of the peace within their limits; *quære*, whether they may not iſſue their warrants for any indicted of felony within their precincts, tho they are abroad in a foreign county, by the ſtatute of 5 *E.* 3. before mentioned?

Juſtices of peace may alſo iſſue their warrants within the precincts of their commiſſion for apprehending perſons charged of crimes within the cognizance of the ſeſſions of the peace, and bind them over to appear at the ſeſſions, and this, tho the offender be not yet indicted.

And therefore the opinion of my lord *Coke*, 4 *Inſtit.* 177. is too ſtrait-laced in this caſe, and, if it ſhould be received, would obſtruct the peace and good order of the kingdom; and the book of 14 *H.* 8. 16. upon which he grounded his opinion, was no ſolemn reſolution, but a ſudden and extrajudical opinion, and the defendant had liberty to mend his plea as to the circumſtance of time, to the end it might be judicially ſettled by demurrer, which was never done; and the conſtant practice hath obtained contrary to that opinion; *quod vide Dalt. cap.* 117. *(b)*

And whereas my lord *Coke*, *ubi ſupra*, ſaith alſo, that a juſtice of peace upon oath made by *A.* of a felony committed, and that *A.* ſuſpects *B.* and ſhews his cauſe, cannot iſſue a warrant to bring *B.* before him for father examination, and thereupon commit or bind him over to the aſſizes or ſeſſions, becauſe it muſt be the proper ſuſpicion of *A.* himſelf, and *A.* may arreſt him upon the ſcore of his own ſuſpicion, but not by warrant of the juſtice; I think the law is not ſo, and the conſtant practice in all places hath obtained againſt it, and it would be pernicious to the kingdom if it ſhould be as he delivers it, for malefactors would eſcape unexamined and undiſcovered; for a man may have a probable and ſtrong preſumption of the guilt of a perſon, whom yet he cannot poſitively ſwear to be guilty.

Therefore I think, that if *A.* makes oath before a juſtice of peace of a felony committed in fact, and that he ſuſpects *B.* and ſhews probable cauſe of ſuſpicion, the juſtice may grant his [580] warrant to apprehend *B.* and to bring him before him, or ſome other juſtice of peace to be examined, and to be farther proceeded againſt,

(b) *New Edit. p* 576.

as to law ſhall appertain; and upon this warrant the conſtable, or he to whom the warrant is directed, may arreſt him, and if occaſion be may break doors to take him, if within a houſe, and will not upon demand render himſelf, as well as if it were an expreſs and poſitive charge of felony ſworn by *A.* againſt him, and ſo hath common practice obtained notwithſtanding that opinion: *vide* ſtatute *Weſtm.* 1 *cap.* 15. *(c)*, 13 *E.* 4. 9. *a.*

But a general warrant upon a complaint of a robbery to apprehend all perſons ſuſpected, and to bring them before, *&c.* was ruled void, and falſe impriſonment lies againſt him that takes a man upon ſuch a warrant, *P.* 24 *Car.* 1. upon evidence in a caſe of juſtice *Swallow*'s warrant before juſtice *Roll.*

If *A.* hath committed treaſon, tho the juſtices of the peace have no cognizance of it as treaſon, yet they have cognizance of it as a felony, and as a breach of the peace, and therefore a juſtice of peace upon information upon oath may iſſue his warrant to take him, and may take his examination, and commit him to priſon.

A. commits a felony in the county of *B.* and then goes into the county of *C.* upon information given to a juſtice of peace of the county of *C.* he may iſſue his warrant to take him, may take his examination, and commit him to gaol in the county of *C.* from whence he may be removed by *Habeas Corpus* to the county of *B.* for his trial.

If *A.* commit a felony in the county of *B.* and upon a warrant iſſued againſt him by a juſtice of peace in the county of *B.* he is purſued and flies into the county of *C.* and there is taken, he muſt not by virtue of that warrant be carried to a juſtice of peace of the county of *B.* where he committed the felony, but to a juſtice of peace in the county of *C.* where he was taken.

But if *A.* were taken by the warrant in the county of *B.* and break away into the county of *C.* and be there taken upon freſh [581] ſuit by them that firſt took him, he may be either brought to a juſtice of the county of *C.* where he was laſt taken, or before the juſtice of the county of *B.* by whoſe warrant he was firſt taken; for in ſuppoſition of law he was always in cuſtody; *vide dubitatur* 13 *E.* 4. 9. *a.*

If *A.* be in commiſſion of the peace in the county of *B.* and happen to be in the county of *C.* and there complaint is made to him of

(*c*) 2 *Co. Inſt. p.* 185.

a felony

a felony in the county of *B.* where he is in commiſſion, as he cannot iſſue a warrant out to apprehend the party, ſo neither can he impriſon in the county of *C.* becauſe an act of juriſdiction, but he may take an oath of a party robbed in purſuance of the ſtatute of 27 *Eliz.* or he may take an examination, or information, or recognizance in a foreign county, but cannot compel them by impriſonment. *P.* 7 *Car.* 1. *Croke, n.* 3 *Helyar's* caſe *(d)*, *Dalt. cap.* 6. and 117. *(e)*

But if *A.* be a juſtice of peace in two adjacent counties, tho by ſeveral commiſſions, as the recorder of *London* is, nothing is more uſual for him, that whilſt he lives in one county to ſend his warrants to apprehend malefactors in another, and to ſend them to *Newgate*, which is the common gaol of both counties, *London* and *Middleſex.*

3. Touching the perſons to whom a warrant may be directed.

The juſtice that iſſues the warrant, may direct it to a private perſon if he pleaſe, and it is good; but he is not compellable to execute it, unleſs he be a proper officer. 14 *H.* 8. 16. *Dalt. cap.* 117. *p.* 332. *(f)*

The warrant is ordinarily directed to the ſheriff or conſtables, and they are indictable, and ſubject thereupon to a fine and impriſonment if they neglect or refuſe it.

If directed to the ſheriff, he may make a warrant to his bailiff to execute it.

If to a conſtable, tithing-man, *&c.* he muſt execute it himſelf, and may not ſubſtitute another; but he may call any perſons to aſſiſt him, and they are bound to aſſiſt him, and are indictable if they neglect or refuſe to aſſiſt: *vide Dalt. ubi ſupra.*

If directed to the conſtable of *D.* he is not bound to execute the warrant out of the precincts of his conſtablewick, [582] but if he doth it out of his conſtablewick, it is good; and ſo it was ruled in *Norfolk* in an action of treſpaſs.

4. Touching the order in granting it.

1. It is convenient, tho not always neceſſary, to take an information upon oath of the perſon that deſires the warrant, that a felony was committed, that he doth ſuſpect or know *J. S.* to be the felon; and if ſuſpected, then to ſet down the cauſes of his ſuſpicion.

2. If the charge of the felony be poſitive and expreſs, then it is fit to bind the party by recognizance to proſecute, before the warrant be iſſued.

(d) Cro. Car. 211. *(e) New Edit. p.* 25 & 575. *(f) New Edit. p.* 577.

But

But if it be only a charge of ſuſpicion, and the buſineſs requires farther examination, then it is neither neceſſary nor fit to bind over the party to proſecute; for poſſibly upon the bringing *in* of the party accuſed, and farther examination of the fact, there may be cauſe to diſcharge him, and thus I think Mr. *Dalton* to be intended, *cap.* 117. *p.* 334. *(g)*, the caſe before chief juſtice *Flemming*.

3. The warrant may iſſue to bring the party before the juſtice that granted the warrant ſpecially, and then the officer is bound to bring him before the ſame juſtice; but if the warrant be to bring him before any juſtice, then it is in the election of the officer to bring him before what juſtice of the county he thinks fit, and not in the election of the priſoner. 5 *Co. Rep.* 59. *b. Foſter*'s caſe.

5. Touching the demeanor of the officer in executing the warrant.

If it be a warrant for felony, or a warrant for the ſurety of the peace, the officer may break open the door, if he be ſure the offender is there, if after acquainting them of the buſineſs, and demanding the priſoner, he refuſes to open the door, tho the party be not indicted; and this is the conſtant practice againſt the opinion of my lord *Coke*, 4 *Inſt.* 177. *quod vide Dalt. cap.* 117. *p.* 333. *(h)*

[583] And ſo it is if the warrant be only upon ſuſpicion of felony, as hath been ſaid before, for in both caſes the proceſs is for the king, and therefore a *Non omittas* is implied, and he that diligently conſidereth the ſtatute of *Weſt.* 1. *cap.* 15. *(i)*, and the ſtatute of 2 & 3 *P. & M. cap.* 10. will find that an impriſonment may be made by the juſtice, as well for ſuſpicion of felony, as for an abſolute charge of felony, and that as well before indictment as after.

And by the book of 13 *E.* 4. 9. *a.* A man that arreſts upon ſuſpicion of felony, may break open doors, if the party refuſes upon demand to open them, and much more may it be done by the juſtice's warrant.

If the officer be demanded he muſt ſhew his warrant, but if he doth it *virtute officii* as a conſtable, *&c.* it is ſufficient to notify that he is the conſtable, or that he arreſts in the king's name. *Dalt. ubi ſupra*, 6 *Co. Rep.* 54. *a.* 9 *Co. Rep.* 69. *a. Mackally*'s caſe.

Laſtly, What is to be done after the warrant ſerved, and when the perſon accuſed is brought before the juſtice thereupon.

(g) *New Edit. cap.* 19. *p.* 579. (h) *New Edit. p.* 578. (i) 2 *Co. Inſt.* 185.

If

If there be no cauſe to commit him found by the juſtice upon examination of the fact, he may diſcharge him.

If the caſe be bailable, he may bail them.

If he have no bail, or the caſe appears not to be bailable, he muſt commit him.

And being either bailed or committed, he is not to be diſcharged till he be convicted or acquitted, or delivered by proclamation. *Co P. C. cap.* 100. *p.* 209.

And this leads me to the *Mittimus*, or the warrant to the gaoler to receive him; and this is the ground of the felony in caſe of a breach of priſon.

My lord *Coke*, 2 *Inſt.* 591. makes three eſſential parts of the *Mittimus*.

1. That it be in writing ſealed by the juſtice that commits, and without this part the commitment is unlawful, the gaoler is liable to a falſe impriſonment, and the wilful eſcape by the gaoler, or breach of priſon by the priſoner, makes no felony.

But this muſt not be intended of a commitment in a court of record, as the king's bench, gaol delivery, or ſeſſions of [584] the peace, for there the record itſelf, or the memorial thereof, which may at any time be entered of record, are a ſufficient warrant without any warrant under ſeal.

2. That it expreſs the cauſe for which he is committed, namely felony, and what kind of felony.

This ſeems requiſite to make the voluntary eſcape or breach of priſon felony, and alſo it is neceſſary upon return of the *Habeas Corpus* out of the king's bench, becauſe that is in nature of a writ of right or writ of error to determine, whether the impriſonment be good or erroneous.

But it ſeems not to make the commitment abſolutely void, ſo as to ſubject the gaoler to a falſe impriſonment, but it lies in averment to excuſe the gaoler or officer, that the matter was for felony.

And alſo upon ſuch a general warrant without expreſſing any felony or treaſon, or ſurety of the peace, the conſtable cannot break open a door. *T.* 9 *Jac. B. R.* 1 *Bulſtrode* 146. *Foſter's* caſe.

3. That it have an apt concluſion, *viz. There to remain till delived by law.*

But if the concluſion be irregular, I think it makes not the warrant void, but the law will reject that which is ſurpluſage, and the reſt ſhall ſtand.

And

And therefore if the cauſe be expreſſed, and the concluſion irregular, as *till farther order given by a juſtice*, yet a breach of priſon under ſuch a warrant will be felony, yea, if the party be removed by *Habeas Corpus*, tho the concluſion be irregular, yet if the matter appears to be ſuch, for which he is to remain in cuſtody, or be bailed, he ſhall be bailed or committed as the caſe requires, and not diſcharged; but the idle concluſion ſhall be rejected.

And therefore I do think that ſuch a warrant is a good juſtification in a falſe impriſonment, tho the right concluſion be omitted, or tho the wrong concluſion be inſerted, if the matter of the *Mittimus* be otherwiſe ſufficient to charge him in cuſtody, and therefore it is a lawful warrant notwithſtanding the omiſſion or incongruity of
[585] the concluſion, ſo as to make the voluntary permiſſion of an eſcape or the breach of priſon felony.

By the ſtatute of 23 *H.* 8. *cap.* 2. the felons are to be ſent to the common gaol *(i)*: and by the ſtatute of 4 *E.* 3. *cap.* 10. the ſheriffs and gaolers are bound to receive them, whether committed by juſtices, or attached *ex officio* by conſtables.

Previous to the commitment of felons, or ſuch as are charged therewith, there are required three things, 1. The examination of the perſon accuſed, but without oath. 2. The farther information of accuſers and witneſſes upon oath. 3. The binding over of the proſecutor and witneſſes unto the next aſſizes or ſeſſions of the peace, as the caſe requires.

1. The examination of the perſon accuſed, which ought not to be upon oath, and theſe examinations ought to be put in writing, and returned or certified to the next gaol delivery or ſeſſions of the peace, as the caſe ſhall require, by the ſtatute of 2 & 3 *P.* & *M. cap.* 10. and being ſworn by the juſtice or his clerk to be truly taken, may be given in evidence againſt the offender. *(k)*

(i) *And not elſewhere*; ſo that it ſhould ſeem that commitments to *New Priſon* or the *Gate-houſe* are irregular; ſee 2 *Co. Inſt.* 43. *Cro. Eliz.* 830. and of this opinion was chief juſtice *Holt*, in the caſe of *Kendal* and *Roe*, *State Tr. Vol.* IV. *p.* 862. See alſo 5 *H.* 4. *cap.* 10. which ordains, "That "none be impriſoned by juſtices of the "peace, ſave only in the common gaol." 9 *Co. Rep.* 119. *b.*

(k) Altho they be not evidence againſt any other perſon named in them; it was therefore very irregular in the chief juſtice to refuſe reading the examinations of *Stern* and *Boroſki* at their trial; ſee *State Tr. Vol.* III. *p.* 470. But *quære* by ſerjeant *Wilſon*, if the chief juſtice was not right in ſuch refuſal? For by the opinion of ſome judges now living, the ſtatute doth not extend to the examination of the party accuſed, unleſs he ſigned his examination, but only to the witneſſes or perſons accuſing.

And

And in order thereunto, if by ſome reaſonable occaſion the juſtice cannot at the return of the warrant take the examination, he may by word of mouth command the conſtable, or any other perſon, to detain in cuſtody the priſoner till the next day, and then to bring him before the juſtice for farther examination; and this detainer is juſtifiable by the conſtable, or any other perſon without ſhewing the particular cauſe for which he was to be examined, or any warrant *in ſcriptis*. *T.* 37 *Eliz. Rot.* 244. *B. R. Broughton* and *Marſhaw*. *(l)*

But the time of the detainer muſt be reaſonable, therefore a juſtice cannot juſtify the detainer of ſuch a perſon ſixteen or twenty days in order to ſuch examination. *(m)* [586]

2. He muſt take information of the proſecutor or witneſſes in writing upon oath, and return or certify them at the next ſeſſions or gaol-delivery, and theſe being upon the trial ſworn to be truly taken by the juſtice or his clerk, *&c.* may be given in evidence againſt the priſoner, if the witneſſes be dead or not able to travel.

3. Before he commit the priſoner, he is to take ſurety of the proſecutor to prefer his bill of indictment at the next gaol delivery or ſeſſions, and likewiſe to give evidence; but if he be not the accuſer, but an unconcerned party that can teſtify, the juſtice may bind him over to give evidence; and upon refuſal in either caſe may commit the refuſer to gaol. *Stamf. P. C. p.* 163. *a. Dalt. cap.* 116. *p.* 326. *(n)*, 2 *&* 3 *P. & M. cap.* 10. and *Dalt. cap.* 20. *p.* 55. *(o)*

And thus far of arreſts by warrant in writing.

Next come to be conſidered arreſts by command *ore tenus*, or by order.

The chief juſtice, or other juſtice of the king's bench, may command *ore tenus* the marſhal or any of his deputies, commonly called tipſtaves, to arreſt any perſon, and ſuch command is a good juſtification in falſe impriſonment brought; altho 1. It be not in writing. 2. Altho no cauſe is expreſſed in the command, but only generally to anſwer ſuch things as ſhall be objected againſt him *ex parte domini regis*. 3. Altho the command be *ita quod habeas corpus coram capitali juſticiario, &c. quandocunque, &c.* for it ſhall be intended, *when the party complains*. 4. Altho the defendant declares not in his juſtification what he did with him in the mean time. *P.* 11 *Car. B. R. Throgmorton* and *Allen*, adjudged upon a demurrer. (*)

(l) This caſe is reported in *Moore* 408. by the name of *Broughton* and *Mulſhoe*.

(m) See the caſe of *Scavage* and *Tatebam*, *Cro. Eliz.* 829. where it was adjudged, that the time of detainer muſt not exceed three days.

(n) *New Edit. cap.* 168. *p.* 572.

(o) *New Edit. cap.* 40. *p.* 106.

(*) 2 *R. A. p.* 558.

Altho,

Altho, as hath been ſaid, a juſtice cannot grant a warrant to apprehend all perſons ſuſpected, but muſt name their names, yet I have known in the king's bench upon a riot committed in the [587] night by perſons diſguiſed, and whoſe names have not been known, the court hath made an order to apprehend perſons that the party, who was injured, ſuſpects, and to bring them into the court to be examined, and ſuch order of the court is a good warrant for the ſheriff or conſtable to do it; but what is thus done in the higheſt court of ordinary juſtice, is not to be a pattern for particular juſtices or inferior juriſdictions.

I have now done with arreſts by writs or warrants.

I come in the next place to arreſts, *ex officio*, without any warrant.

If an affray be made in the preſence of a juſtice of peace, or if a felon be in his preſence, he may arreſt him, and detain him *ex officio* till he can make a warrant to ſend him to gaol, but then the warrant muſt be in writing to the gaoler, *P.* 23 *Car. B. R. Sandford*'s caſe, and ſo he may by word command any preſent to arreſt. *Dalt. cap.* 117. *p.* 328. *(p)*

A conſtable may *ex officio* arreſt a breaker of the peace in his view, and keep him in his houſe, or in the ſtocks, till he can bring him before a juſtice of peace.

So if *A.* be dangerouſly hurt, and the common voice is, that *B.* hurt him, or if *C.* thereupon comes to the conſtable, and tells him that *B.* hurt him, the conſtable may impriſon him till he knows whether *A.* dies or lives, *T.* 43 *Eliz. B. R. Dumbleton*'s caſe, or can bring him before a juſtice.

So if a felony be committed, and *A.* acquaints him that *B.* did it, the conſtable may take him and impriſon him, at leaſt till he can bring him before ſome juſtice of peace.

But if there be only an affray, and not in view of the conſtable, it hath been held he cannot arreſt him without a warrant from the juſtice; but it ſeems he may to bring the offender before a juſtice, tho not compellible.

Laſtly, I come to the authority of every private perſon in relation to arreſts of felons.

If *A.* commit a felony, *B.* who is a private perſon, may arreſt him for that felony without any warrant; nay farther, if *A.* will not ſuffer

(p) *New Edit. cap.* 169. *p.* 574.

himſelf

himſelf to be taken, but either reſiſts or flies, ſo that he cannot be taken unleſs he be ſlain, if *B.* or any in aſſiſtance in that caſe of neceſſity kills him, it is no felony; *de quo antea, p.* 481.

If *A.* commit a felony in the ſight of *B.* and *B.* uſes not his beſt endeavours to apprehend him, or to raiſe hue and cry upon him, it is puniſhable by fine and impriſonment. *Co. P. C. p.* 53.

If *A.* ſtrike *B.* dangerouſly in the preſence of *C. C.* may juſtify the impriſoning of *A.* till he can bring him before a juſtice, or deliver him to the conſtable, tho it be not felony till death.

If a hue and cry be levied upon a felony, and come to the town, *B.* the conſtable, and thoſe of the town are bound to apprehend the felon if in the town, or if not in the town, then to follow the hue and cry, otherwiſe they are puniſhable upon an indictment. *Co. P. C. cap.* 52.

If the conſtable in purſuit of a felon require the aid of *J. S.* he is bound by law to aſſiſt him, and is finable for his neglect. *(q)*

If a felony be committed in fact, and *A.* ſuſpects *B.* did it, and hath probable cauſe of ſuſpicion, *A.* may arreſt *B.* for it, and juſtify it in an action of falſe impriſonment. 2 *E.* 4. 8. *b.*

The cauſes of ſuſpicion are many, as common fame finding goods upon him, and many more, *de quibus vide Dalt. cap.* 118. *(r)*

If a felony be committed, and *A.* ſuſpects *B.* and *B.* being in his houſe refuſe to open the doors, or render himſelf, it ſeems *A.* may break open the doors to take him; and ſo may the conſtable, if *A.* acquaint him therewith, eſpecially if *A.* be preſent, 13 *E.* 4. 9. *a* tho (as hath been ſaid) my lord *Coke*, 4 *Inſt.* 177. be to the contrary; yet the common practice and opinion hath obtained in that caſe againſt my lord *Coke*, *Dalt. cap.* 98. *p.* 249. *(ſ)*, *cap.* 78. *p.* 204. *(t)*, 7 *E.* 3. 16. *b.*

There are ſpecial caſes where a conſtable having received information of the miſdemeanors following, or any private perſon without a warrant may arreſt and break open doors to arreſt [589] if they within refuſe to open them upon demand, or to deliver up the party.

1. Where a felony or treaſon is committed, and the offender is within the houſe.

(q) 13 *H.* 7. 10. *b.*
(r) *New Edit. cap.* 1701
(ſ) *New Edit. p.* 482.
(t) *New Edit. p.* 426.

2. Where

2, Where a felony or treaſon is committed, and a man ſuſpects *J. S.* who is in the houſe, and hath probable cauſe of ſuch ſuſpicion. tho the party be not indicted. 7 *E.* 3. 16. *b.* 13 *E.* 4. 9. *a.*

3. Where *A.* hath dangerouſly wounded *B.* and then *A.* flies into the houſe, whether it were done in the preſence of the conſtable, or him that arreſts, or not. 7 *E.* 3. 16. *b. Crompt.* 171. *a.*

4. Where there is an affray made in a houſe, and the doors are ſhut, and are refuſed to be opened, during ſuch affray the conſtable or any other may break open the doors to preſerve the peace, and prevent blood ſhed; but after the affray, it cannot be done without a warrant, unleſs a man be dangerouſly wounded or killed in the affray.

Yet to avoid queſtion in theſe caſes, it is beſt to obtain the warrant of a juſtice, if the time and neceſſity will permit.

When a private perſon hath arreſted a felon, or one ſuſpected of felony, he may detain him in cuſtody till he can reaſonably diſmiſs himſelf of him; but with as much ſpeed as conveniently he can, he may do either of theſe things.

1. He may carry him to the common gaol, 20 *E.* 4. 6. *b.* but that is now rarely done.

2. He may deliver him to the conſtable of the vill, who may either carry him to the common gaol, *vide* 4 *E.* 3. *cap.* 10. or to a juſtice of peace to be examined, and farther proceeded againſt as caſe ſhall require. 10 *E.* 4. *(u)* 17 *b.*

3. Or he may carry him immediately to any juſtice of peace of the county where he is taken, who upon examination may diſcharge, bail, or commit him, as the caſe ſhall require.

[590] And the bringing the offender either by the conſtable or private perſon to a juſtice of peace is moſt uſual and ſafe, becauſe a gaoler will expect a *Mittimus* for his warrant of detaining.

And thus far of arreſts.

See Burn. Edit. 1776. Tit. Arreſt. per tot. and 1 Hawk. P. C. ch. 12, 13, 14. and 4 Blackſ. Com. ch. xxi. p. 289. ch. xxii. p. 300. &c. Foſter 136, 320.

(u) This is the ſame year with 49 *H.* 6. and is ſo printed in the year-book.

CHAP.

CHAP. LI.

Of felony by voluntary eſcapes, *and touching felony by* eſcapes of felons.

HAVING in the former chapter ſaid ſomewhat of arreſts, it remains that ſomewhat be ſaid touching thoſe felonies that relate to the eſcape of perſons arreſted or impriſoned.

And theſe eſcapes are of three kinds, 1. By the perſon that hath the felon in his cuſtody, and this is properly an eſcape; and 2. When the eſcape is cauſed by a ſtranger, and this is ordinarily called a reſcue of a felon. 3. By the party himſelf, which is of two kinds, *viz.* 1. Without any act of force, and this is a ſimple eſcape. 2. With an act of force, *viz.* by breach of priſon.

As to the *firſt*, touching an eſcape ſuffered by the perſon that hath a felon in cuſtody, which is properly an eſcape; and this is of two kinds, voluntary and negligent.

And *firſt* concerning the *voluntary eſcape*.

A voluntary eſcape is when any perſon having a felon lawfully in his cuſtody voluntarily permits him to eſcape from it, or go at large, and this is felony in caſe the perſon be impriſoned for felony, and treaſon in caſe the perſon be impriſoned for treaſon; for the latter enough hath been ſaid before; touching the former [591] in this place.

And altho Mr. *Stamford. Lib.* I. *cap.* 26, 27, 28, 29, 30, 31. hath collected almoſt all that can be well ſaid in this caſe, yet I ſhall proceed diſtinctly herein.

And therein I ſhall as near as I can obſerve this order.

1. I ſhall conſider who ſhall be ſaid a felon, whoſe eſcape makes a felony in him that voluntarily ſuffers it. 2. What ſhall be ſaid a having of ſuch a felon in his cuſtody. 3. Who ſhall be ſaid a perſon lawfully having ſuch a felon in his cuſtody. 4. What ſhall be ſaid a voluntary eſcape of ſuch a felon out of his cuſtody. 5. Who ſhall be ſaid voluntarily to ſuffer ſuch a felon to eſcape. 6. What is the offenſe of ſuch a voluntary permiſſion of an eſcape, and where, and how puniſhable.

And tho I apply theſe particulars to a voluntary eſcape, yet many of them are applicable unto, and uſeful for the learning of a negligent eſcape.

I. Who ſhall be ſaid a felon, whoſe voluntary eſcape is felony in him that ſo permits it.

If *A.* gives *B.* a mortal wound, and before *B.* dies the conſtable takes *A.* into cuſtody, either with or without a juſtice's warrant, and then lets him voluntarily eſcape before *B.* is dead, and then *B.* dies tho as between *A.* and *B.* or *A.* and the king, this is a felony from the ſtroke given, and the attainder of *A.* as to the forfeiture of his lands relates to the ſtroke; yet this is no felony in the conſtable, but only a miſdemeanor puniſhable by fine and impriſonment. 11 *H.* 4. 12 *b. Plowd. Com.* 258. *b.*

If *A.* be indicted for felony, and taken by *Capias*, or by the warrant of a juſtice, or by the conſtable *&c.* and committed to priſon, and he gaoler ſuffers *A.* to eſcape voluntarily, this is the eſcape of a felon, tho *A.* be not attainted at the time of the eſcape, but the gaoler ſhall not be arraigned thereupon till after the attainder of *A. de quo infra.*

If a felony be in fact committed, and the conſtable takes *A.* upon ſuſpicion of felony, and after voluntarily ſuffers him to go at large, tho *A* be not then indicted, yet this is a felonious eſcape in [592] the conſtable, tho 42 *Aſſiz.* 5. be otherwiſe *(a)*, yet 44 *Aſſiz.* 12. *Dy.* 99. *a.* 43 *E.* 3. 36. *a. accord. (b)*

And altho the conſtable be well aſſured after the arreſt by him made, that *A.* was not the perſon that did it, yet he may not by the law diſcharge him, but muſt bring him before a juſtice, who may upon due circumſtances diſcharge, bail, or commit him, as he ſees cauſe; but the conſtable, if he diſcharges him, is finable.

But if the conſtable after the arreſt finds certainly, that there was no felony committed, it is held he may diſcharge him both without danger of felony, (which is true,) and without any danger of fine and impriſonment, 13 *H.* 7. *Kelw.* 34. *a. b.* but then it is at his peril,

(a) That was the caſe of a negligent (not a voluntarily) eſcape, and for that reaſon could not be felony, tho it is there given as a reaſon, why it ſhould not be adjudged an eſcape, becauſe the thief was not taken with the *mainsuvre*, nor at the ſuit of the party, nor indicted of felony.

(b) This caſe is plainly the ſame with 44 *Aſſiz.* 12. and ſeems to be the caſe of a voluntary eſcape; it does not report any reſolution of the court, but only ſays, that the bailiffs who let the thief go, altho he were not indicted, were charged with an eſcape; and a *quære* is added at the end of the caſe: and as to the caſe in *Dyer*, that was not the caſe of the perſon arreſting letting the thief go, but of a third perſon's reſcuing him, and that is ſaid to be felony, altho he was not indicted. See 1 *E.* 3 16. *b.*

If

if in truth there were a felony committed, and the party be guilty; *ſed de his vide infra, Dalt. cap.* 106. *p.* 271. *accords. (c)*

If *A.* be committed for petit larciny, and ſo it appears by the charge of his *Mittimus*, and the gaoler lets him at large, this is a contempt, for which he ſhall be fined, but not felony in the gaoler; ſo if he were convicted of petit larciny before the eſcape. *Stamf. P. C. Lib.* I. *cap.* 27. *p.* 33. *b.* 8. *E.* 2. *Coron.* 430.

So if a man be originally committed for manſlaughter *per infortunium* or *ſe defendendo*, or were convict only *ſe defendendo* or *per infortunium*, and afterwards the gaoler ſuffers him voluntarily to eſcape, it is no felony; but if the commitment or indictment were for manſlaughter, tho in truth it were but *ſe defendendo*, yet *primâ facie* a voluntary eſcape is indictable as felony, tho *in eventu* it may fall out otherwiſe; *de quo infra.*

If *A.* be indicted of murder for the death of *B.* and par- [593]
doned or acquitted within the year, but left in gaol till the year be elapſed, upon the ſtatute of 3 *H.* 7. *cap.* 1. that the wife may bring her appeal if ſhe pleaſes, and after that acquittal, and within the year, the gaoler ſuffers him voluntarily to eſcape, it is felony *primâ facie*, and the gaoler may be indicted for it as felony; but if the wife brings not her appeal within the year, or bringing her appeal *A.* is acquitted, the gaoler ought to be acquitted: *vide infra, Plowd. Com.* 476. *b.*

If *A.* commits felony, and being convicted prays his clergy and the court take time to adviſe upon it till another ſeſſions, and in the mean time he is left in gaol. as he ought to be, and the gaoler voluntarily ſuffer him to make his eſcape, this is felony in the gaoler, for ſuch a priſoner ſtands yet under a conviction of felony, and therefore is not by law bailable; but if the felon be retaken, and hath his clergy, the felony in the eſcape is purged, and the gaoler is not indictable after, or if indicted before the clergy allowed, he is to be acquitted.

If *A.* be indicted of felony, and hath his clergy, but is continued for ſix months in cuſtody for his farther correction, according to the power given by the ſtatute of 18 *Eliz. cap.* 7. and the gaoler ſuffers him to eſcape voluntarily, it is a miſdemeanor puniſhable by fine and impriſonment, but no felony.

If a man be delivered to the ordinary as a clerk convict upon his own confeſſion, or as a clerk attaint, in which caſes he ought not to

(c) *New Edit. p.* 511.

be admitted to purgation, and the ordinary notwithſtanding admits him to his purgation, and ſets him at large, this, at common law, had been a miſdemeanor fineable; but it ſeems it had not been felony in the ordinary; for in thoſe times there was a pretenſion, that a clerk was not within the temporal juriſdiction; but the law concerning purgation is altered ſince by the ſtatute of 18 *Eliz. cap.* 7. and other ſtatutes; *de quo infra*, 21 *Aſſiz.* 12. 9 *E.* 4. 28.

Thus far what ſhall be ſaid a felony.

II. What ſhall be ſaid to be a having in cuſtody.

Every man is bound by law to purſue and take a felon; and if he makes not purſuit, he is fineable.

[594] But if *A.* commits a felony in the preſence of *B.* and *B.* never takes him, nor attempts it, this is not felony in B. for *B.* had him not in his cuſtody.

So it is if *A.* commits a felony, and *B.* receives him knowing him to be a felon, and then *B.* voluntarily ſuffers him to depart, tho the receipt makes him acceſſary after, yet it is no eſcape by *B.* becauſe he never arreſted him, and ſo had him not in cuſtody. 9 *H.* 4. 1. *(d)*

If *A.* being acquit of felony, judgment is given, that he ſhall go free paying his fees, tho the gaoler lets him go before fees paid, it is not felony, for by that judgment he is no longer in cuſtody as a felon. 21 *H.* 7. 17.

If the conſtable arreſts a man for felony, and brings him to the gaol, and the gaoler refuſes to receive him, yet in law he is in the cuſtody of the conſtable, and if he lets him go, he is chargeable in an eſcape. 10 *H.* 4. 7. a. *Eſcape* 8.

If *A.* have a franchiſe to have the cuſtody of felons in his gaol [for three days] *(e)*, and then to deliver over to the ſheriff or county-gaol, and after the three days he offers him to the county-gaol, and the gaoler do not receive him, he yet remains a priſoner to *A* and if he ſuffers a voluntary eſcape, it is felony, 27 *Aſſiz.* 27. yet in both theſe caſes the gaoler is puniſhable for not receiving the felon by 4 *E.* 3. *cap.* 10.

If *A.* arreſt *B.* of felony, and deliver him to the conſtable or to the vill, and they receive him, *A.* is diſcharged of the cuſtody, and the eſcape after is chargeable upon the conſtable or vill, and if the

(*d*) 24. *b.*

(*e*) Theſe words are not in the original *MS.* but yet are plainly ſuppoſed in the argument, and are mentioned in the caſe here quoted by our author, *viz.* 27 *Aſſiz.* 27.

conſtable