conſtable or vill delivers him to the ſheriff or his gaoler, and he receives him, the conſtable and vill are diſcharged of the cuſtody, and the ſheriff or gaoler is chargeable with the eſcape after. 3 *E.* 3. *Coron.* 328. 337.

As touching eſcapes without arreſts, they belong not to this title of voluntary eſcapes; *ſed hæc vide infra & ſupra.*

If *A.* the ſheriff of *B.* hath a felon in gaol, and then *C.* is made ſheriff, till the priſoner be turned over by indenture to the new ſheriff, the cuſtody of him remains in *A.* and he or his gaoler is chargeable for a negligent eſcape, and his gaoler chargeable for a voluntary eſcape. [595]

If the bailiff of a franchiſe, that hath a gaol, hath the cuſtody of a felon, he is chargeable for his eſcape, and not the ſheriff or his gaoler.

III. Who ſhall be ſaid a perſon lawfully having the cuſtody of a felon: this hath been touched in the former ſection, but now ſhall be farther proſecuted.

If *A.* a meer private man knows *B.* to have committed a felony, he may thereupon arreſt him of felony, and he is lawfully in the cuſtody of *A.* till he be diſcharged of him by delivering him to the conſtable or common gaol; and therefor eif he voluntarily ſuffers him to eſcape out of his cuſtody, tho he were no officer, nor *B.* indicted, it is felony in *A.*

So it is, if a felony be in fact committed, and *A.* hath a probable cauſe to ſuſpect *B.* and accordingly ſuſpects and arreſts him, *B.* is lawfully in the cuſtody of *A.* for ſuſpicion of felony; and if he voluntarily lets him eſcape, it is felony in *A. in eventu, viz.* if *B.* proves really guilty of the felony.

And accordingly if *A.* delivers the party ſo arreſted to the conſtable's cuſtody, he is lawfully in his cuſtody, and if he ſuffers the eſcape voluntarily, it is felony *in eventu.* 44 *Aſſiz.* 12.

If a juſtice of peace makes a *Mittimus* to the gaoler for felony with an unapt concluſion, as *till the juſtice give order for his delivery*, whereas it ſhould be *till he be delivered by due courſe of law*, tho this warrant be not formal, yet the felon is lawfully in his cuſtody, and if he lets him voluntarily eſcape, it is felony, for he is ſufficiently aſcertained of the crime with which he is charged.

And it ſeems to me, if the *Mittimus* be general and contains no certain cauſe, tho the gaoler is not bound to receive him upon ſuch a

*Mittimus*, yet if he be acquainted what the crime is for which he is committed, if he ſuffers him voluntarily to eſcape, it is felony.

For if a private perſon or a conſtable arreſts a man for felony, and carries him to the common gaol, (as he may do by law, 13 *E.* 4. 9. [596] and the gaoler is bound to receive him by the ſtatute *(f)* of 4 *E.* 3. *cap.* 10. if the conſtable or perſon that delivers him, acquaints the gaoler it is for felony, it is at the peril of the gaoler if he lets him eſcape, and yet there is no *Mittimus* in that caſe, but a notice *ore tenus*.

The ſtocks is the priſon of the conſtable, and ſo long as he is in the ſtocks he is in the conſtable's cuſtody, and therefore if the conſtable wilfully lets a felon eſcape out of the ſtocks, and go at large, it is felony in the conſtable, unleſs it be to bring him to a juſtice, or to a ſafer or more convenient cuſtody.

IV. What ſhall be ſaid a voluntary eſcape of a felon in cuſtody, for it muſt be a *voluntary* eſcape to make felony.

If the priſoner be reſcued, or reſcues himſelf againſt the will of him that hath him in cuſtody, this is no voluntary eſcape, nor is the gaoler, &c. puniſhable for the ſame.

If the priſon be fired, and the gaoler lets out the priſoners, there being no other means to ſave their lives, and uſes the beſt means he can by his officers and irons to keep them ſafe, and this without fraud, or if enemies force him to open the priſon doors, and he doth it to ſave his life, it excuſeth from felony.

And if it be done by rebels, tho this excuſe not the gaoler or ſheriff in civil actions, but he is liable to an action of debt, or upon the caſe for the eſcape, becauſe the ſheriff hath his remedy over, yet it excuſeth the gaoler from felony, and alſo from a fine, if it be *vis major, quam cui reſiſti poteſt*.

If a juſtice of peace bails a perſon not bailable by law. it excuſeth the gaoler, and it is not felony in the juſtice, but a negligent eſcape, for which he is fineable at common law, 25 *E.* 3. 39. *(g)*, and by the juſtices of gaol-delivery by the ſtatute of 1 & 2 *P.* & *M. cap.* 13.

And the like in caſe of a ſheriff, under-ſheriff, conſtable, bailiff of a liberty bailing one that is not by law bailable, it is not a voluntary

*(f)* This ſtatute obliges the gaoler to receive felons by the delivery of the conſtables or townſhips, but ſays nothing as to the delivery by private perſons.

*(g)* In the laſt edition of the year-books, which is in this place miſpaged, it is 25 *E.* 3. 82. *a*.

eſcape,

eſcape, at leaſt unleſs done by deſign to deliver the priſoner for ever, but it is a negligent eſcape puniſhable at common law, or according to the ſtatute of 3 *E.* 1. *cap.* 15. by loſs of office, [597] fine, and three years impriſonment.

And therefore I think, that if a juſtice of peace bails a perſon, that confeſſeth a felony before him, it is no voluntary eſcape, but fineable as above, for it is *error ſcientiæ*, 2 *R.* 3. 10. contrary to the opinion of *Crompt.* 39. *a Dalt. p.* 276. *(h)*

If a gaoler voluntarily licence a felon to wander out of the bounds of the priſon and to return again, if the priſoner returns again to the gaol before the gaoler be indicted, ſo as he be in cuſtody, it is held by ſome this will not excuſe a voluntary eſcape as to the point of felony, but certain it is that it is puniſhable as a miſdemeanor, and if he had never returned, it had been ſuch an eſcape, as would have been felony, tho perchance the licence were ſpecial to go out and come in at night. 22 *E.* 3. *Coron.* 242. 8 *E.* 2. *Coron.* 431. becauſe he cannot apportion his own wrong and breach of duty.

V. In whom the voluntary eſcape ſhall be.

In all civil cauſes the ſheriff is to be reſponſible, or the gaoler at election, as if the gaoler, or bailiff of a ſheriff ſuffer either voluntarily or negligently an eſcape of a perſon impriſoned for debt, the ſheriff is chargeable with an action upon the eſcape, for the gaoler or bailiff is the ſheriff's officer or miniſter, and gives him ſecurity. 14 *E.* 3. *cap.* 10. 19 *H.* 7. *cap.* 10.

But if the gaoler being placed there by the ſheriff voluntarily ſuffers a felon in his cuſtody to eſcape, this, in as much as it reacheth to life, is felony only in the gaoler that was immediately truſted with the cuſtody, not in the ſheriff.

But whether the eſcape was voluntary or negligent, yet the ſheriff may be indicted for it ſo as to ſubject him to a great fine and impriſonment for the offenſe of his gaoler, tho not to make him guilty of felony. *Dalt. cap.* 106. *p.* 273. *(i)*, *Doctor* and *Student* 42. *(k)*

For the eſcape muſt be voluntarily permitted in him that permitted it, which could not be in the high ſheriff, tho it were ſuch in the gaoler, for he was not privy to it, and therefore could not do it *felonicè*, but it was a negligent eſcape in him in truſting [598]

(*h*) *New Edit. p.* 512. (*i*) *New Edit. p.* 509. (*k*) *Dialog.* 2. *cap.* 42.

ſuch a perſon with the cuſtody of his priſoners, that would be falſe to his truſt, and therefore the ſheriff ſhall pay, but not corporally ſuffer, for the miſcarriage of his gaoler.

But if the gaoler were a gaoler in fee, as antiently conſtables of caſtles were, the ſheriff ſhould not anſwer in any kind for the default of ſuch gaoler or conſtable: but now by the ſtatutes of 14 *E.* 3. *cap.* 10 and 19 *H.* 7. *cap.* 10. gaols of counties are rejoined to the counties.

But for eſcapes committed by gaolers of gaols in particular franchiſes, as the *Gate-houſe* at *Weſtminſter* belonging to the dean and chapter of *Weſtminſter*, eſcapes there permitted concern not the ſheriff, but the particular gaoler and lord of the franchiſe.

VI. How and in what manner, and before whom felonious eſcapes ſhall be determined, tried and adjudged.

It is to be known, that I may ſay it once for all, altho the felony for breaking of priſon may be heard, tried and determined before the felony, for which he was committed, as ſhall be ſaid; yet in caſe of a felony for the wilful eſcape or reſcue of a perſon committed to priſon for felony, tho the party that voluntarily permits ſuch eſcape, or reſcues the priſoner, may be indicted for theſe offenſes as felonies before the principal felony in him that eſcapes or is reſcued be tried, yet he ſhall not be arraigned or put upon his trial, till the principal be convicted or attainted; and the reaſon is, becauſe poſſibly the perſon eſcaping may be found not guilty, or if guilty, yet of ſuch a fact as is not capital; as of petit larciny, *ſe defendendo*, *per infortunium*, in which caſe the reſcuer or officer ought to be diſcharged: nay, if the principal perſon be only convict and not attaint, but hath his clergy, I think the gaoler or reſcuer ſhall never be put to anſwer to the eſcape or reſcue, but be diſcharged, as the acceſſary, where the principal hath his clergy, ſhall be diſcharged thereby; for the reſcuer and officer, that permits the eſcape, are a kind of acceſſaries.

[599] But in theſe caſes the gaoler or reſcuer may be fined and impriſoned for their miſdemeanor, but ſhall not be charged with felony, where the principal is diſcharged. 2 *Co. Inſtit. p.* 592.

Again, it is to be remembered, that there is a voluntary eſcape before indictment, and a voluntary eſcape of a party indicted of felony.

1. If the party that eſcapes were not indicted at the time of the eſcape voluntarily permitted, the indictment of the gaoler (and ſo in caſe

caſe of a reſcue) ought to ſurmiſe, that *de facto* a felony was committed, and that the perſon eſcaping was impriſoned for that felony or ſuſpicion of it.

And I need not ſay this muſt be proved upon evidence againſt the gaoler, for, as I ſaid before, the gaoler cannot be arraigned till the principal be attainted by verdict, confeſſion, or outlawry, and the record of ſuch attainder muſt be ſhewed or proved.

2. But if the party that eſcaped were indicted, and ſo taken by *Capias*, and then eſcape, tho, as I ſaid before, the gaoler or reſcuer cannot be arraigned and tried till the principal be attainted, yet the indictment for the eſcape or reſcue need not ſurmiſe a felony done, but only recite the ſubſtance of the indictment againſt him that eſcapes. 1 *E.* 3. 16. *b.* 2 *E.* 3. *Coron.* 158.

And the like law is in caſe of felony for breach of priſon. 2 *Co. Inſtit. p.* 590.

Again it is to be known, that as to the voluntary ſuffering of an eſcape or reſcuing a felon, tho the felony be not within clergy, yet the eſcape or reſcue are within clergy, and tho the priſoner were indicted or attainted of ſeveral felonies, yet the eſcape or reſcue of ſuch a priſoner makes but one felony, and he ſhall be indicted but of one eſcape; but if *A.* and *B.* be indicted of one felony, and the gaoler voluntarily ſuffer both to eſcape, the gaoler may be indicted ſeverally for both.

The means of bringing an officer to judgment cannot be barely by the calling of the record of the priſoners over, as is uſually done in the king's bench, becauſe tho this may be a ſufficient cauſe to convict of a negligent eſcape, yet it cannot appear thereby that it is voluntary; the marſhal or gaoler may be fined upon a record thereof made, but he cannot be convict of a felony, 39 *H.* 6. [600] 33. but there muſt be an indictment or preſentment of the felonious and voluntary eſcape.

And tho by the ſtatute of *Weſtm.* 1. *cap.* 3. *(l)* amercements upon the country for the eſcapes of felons cannot be ſet but by the juſtices in *Eyre*, or by the king's bench, 21 *Aſſiz.* 12. 27 *Aſſiz.* 27. or, as it ſeems, by juſtices of general *oyer* and *terminer*; yet the hearing and determining of eſcapes is at this day within the juriſdiction of juſtices of peace, or any other juſtices, by the ſtatutes of 1 *R.* 3. *cap.* 3. 31 *E.* 3. *cap.* 14.

*(l)* 2 *Co. Inſtit.* 165.

And

And thus far concerning voluntary eſcapes of felons, where it is felony and where not.

In the next chapter I ſhall ſay ſomething concerning negligent eſcapes, tho this hath been before, *cap.* 50. in part handled.

4 Blackſ. Com. ch. 10. p. 129, 130. and 2 Hawk. P. C. ch. 18, 19. and Burn. tit. Eſcape.

## CHAP. LII.

*Touching* negligent eſcapes.

NEGLIGENT eſcapes of felons are not felony, but puniſhable by fine upon the parties that ſuffer them.

Theſe negligent eſcapes are of two kinds, 1. By an officer or ſome particular perſon or perſons, that hath a felon in cuſtody, 2. Or by vills or townſhips, whether the felon be taken and in cuſtody, or not taken.

I. Firſt as to negligent eſcapes by officers or particular perſons theſe things are conſiderable.

1. What ſhall be ſaid a negligent eſcape. 2. What the conviction of ſuch negligent eſcape. 3. What the puniſhment of it, and by whom.

[601] As to the firſt of theſe, what ſhall be ſaid a negligent eſcape hath been partly before deſcribed, only ſome things I ſhall add.

If a priſoner for felony break the gaol, this ſeems to be a negligent eſcape, becauſe there wanted either that due ſtrength in the gaol that ſhould have ſecured him, or that due vigilance in the gaoler or his officers to have prevented it, and therefore it is by law lawful for the gaoler to hamper them with irons to prevent their eſcape *(a)*, and if

*(a)* And therefore this liberty can only be intended, where the officer has juſt reaſon to fear an eſcape, as where the priſoner is unruly or makes any attempt to that purpoſe; but otherwiſe, notwithſtanding the common practice of gaolers, it ſeems altogether unwarrantable, and contrary to the mildneſs and humanity of the laws of *England*, by which gaolers are forbid to put their priſoners to any pain or torment; ſee *Co. P. C. p.* 34 & 35. *Cuſtodes gaolarum pœnam ſibi commiſſis non augeant, nec eos torqueant vel redimant, ſed omni ſævitiâ remotâ pietateque adhibitâ judicia debite exequantur, Flet. Lib.* I. *cap.* 26. and the *Mirror of Juſtices, cap.* 5. §. 1. *n.* 54. ſays, *It is an abuſe that priſoners ſhould be charged with irons, or put to any pain before they be attainted of felony*; and lord *Coke* in his comment on the ſtatute of *Weſtm.* 2. *cap.* 11. is expreſs, *that by the common law it might not be done.* 2 *Inſtit.* 381.

this

this ſhould not be conſtrued a negligent eſcape, gaolers would be careleſs either to ſecure their priſoners, or to retake them that eſcape, if he ſhould in ſuch a caſe be exempt from pecuniary puniſhment; and we ſee by daily experience in civil caſes of men in execution or arreſted for debt, if they break priſon the ſheriff is chargeable.

But if a private perſon arreſts a felon, and he eſcapes by force from him without any default in him, tho the townſhip ſhall be amerced, as ſhall be ſaid, yet it ſeems it excuſeth the party, for he being a private perſon cannot raiſe power to take or detain a felon.

But if a ſheriff, bailiff, conſtable, or other officer hath the cuſtody of a priſoner bringing him to the gaol, it ſeems that a ſimple eſcape by the reſcue of the priſoner himſelf doth not excuſe him *a toto*, though it may *a tanto*, becauſe he may take ſufficient ſtrength to his aſſiſtance; but if he be reſcued before he be brought to gaol, *quære*, whether it be not an excuſe of an eſcape, as in caſe where a man is arreſted upon a meſne proceſs, and in carrying to gaol be reſcued, the return of the reſcue excuſeth the ſheriff, 39 *Eliz. C. B. Croke, n.* 22. *Conyer's* caſe; but it is no excuſe if he be taken in execution [602] and reſcued, for there the ſheriff ſhall be anſwerable notwithſtanding the reſcue, but it ſeems the reſcue is no excuſe in caſe of felony. 3 *E.* 3. *Coron.* 328. 337. *(b)*

And upon the ſame reaſon it is, that if a felon be attaint and be carried to execution, and be reſcued from the ſheriff, the ſheriff is puniſhable notwithſtanding the reſcue, for there is judgment given, and the ſheriff ſhould have taken ſufficient power with him, and therefore in that caſe the townſhip is not fineable: *vide* 27 *Aſſiz.* 54.

If a priſoner for felony be in gaol and eſcape, and the gaoler purſue after him, he may take him ſeven years after, tho he were out of his view, 13 *E.* 4. 9. *a.* 14 *H.* 7. 1. *a.* but that will not excuſe the gaoler from a negligent eſcape, tho it may excuſe *a tanto*; for if the gaoler hath once loſt the view of his priſoner, tho he take him after, it is an eſcape, but if he retake him upon a freſh purſuit, and hath ſtill the view of him, it is no eſcape, nor puniſhable. 8 *E.* 2. *Coron.* 400. 22 *E.* 3. *Coron.* 236. *M.* 28 *E.* 3. *Rot.* 32. *Rex. Hertf. Caſus Abbatis Sancti Albani. M.* 45 *E.* 3. *Rot.* 17. *in dorſ. Rex. Eſſex.*

But if a man be arreſted for felony, and in bringing to gaol by the ſheriff's bailiff or conſtable he makes his eſcape, and they follow him

*(b)* Theſe caſes, as alſo *Conier's* caſe here mentiond, prove nothing particularly as to a reſcue, but only in general, that a ſheriff ſhall be liable in caſe of an eſcape.

and

and keep the view of him, but cannot take him without killing him, whereby he is kild in the purſuit, yet the ſheriff or conſtable, or townſhip, that let him eſcape, ſhall be fined for the eſcape, becauſe tho the party be kild in the freſh purſuit, he cannot now be brought to judgment, and yet by his flight, if preſented by the coroner, he forfeits his goods. 3 *E.* 3. *Coron.* 328 and 346.

If a felon eſcape out of the gaol by negligence, tho the gaoler be fined for it, he may retake the felon at any time after, for the felon ſhall not take the advantage of his own wrong, or the gaoler's puniſhment, but his retaking ſhall not diſcharge the gaoler's fine, and ſo is the book to be intended. 13 *E.* 4. 9. *a.*

[603] 2. Touching the conviction of a negligent eſcape.

The proper way of conviction is by preſentment and trial thereupon.

Yet where the priſoners be of record in a court, if the gaoler being called cannot give an account where a priſoner is, this is a conviction of an eſcape, but ſeems not to be preſently a conviction of a *voluntary* eſcape, unleſs the gaoler confeſs it: *vide* 27 *H.* 6. 7. 39 *H.* 6. 33. ſo in ſome caſes the coroner's roll is a conviction of an eſcape, *vide* 3 *E.* 3. *Coron.* 352. ſo if the dozeners preſent a felon taken and delivered to the ſheriff by the vill, but ſhew not what ſheriff. 3 *E.* 3. *Coron.* 345. *(c)*

Where an officer is to be charged either with a voluntary or negligent eſcape, the bare preſentment of the eſcape by the grand inqueſt or the dozeners in *Eyre*, or upon commiſſion of *Oyer* and *Terminer*, or in the king's bench, is not alone ſufficient to convict the officer, becauſe upon his conviction, tho but of a negligent eſcape, he is to be fined.

But if the dozeners in *Eyre* or in the king's bench preſent the eſcape of a felon, whereby the vill is to be amerced, becauſe this is but an amercement, and the juſtices may [not in this caſe *(d)*] ſet a fine but an amercement, *de minimis non curat lex*, and therefore the preſentment is not traverſable: *vide* 3 *E.* 3. *Coron.* 291. & *ibidem* 3 *E.* 3. *Coron.* 328. 346. *Stamf. P. C. Lib.* I. *cap.* 33. *fol.* 35. *b.*

*(c)* The words of the book are, "When "the dozen preſent, that a felon is taken "for felony and delivered to the ſheriff, "they adjudge it for an eſcape in *Eyre*, "if they do not ſay to what ſheriff by "name, for a man may inquire his rolls "to ſee whence the priſoner comes, &c. "and if they do not find in the ſheriff's "roll, that he was charged with him, or "if they do not find how he got out of "his cuſtody according to the law of the "land, it ſhall be adjudged an eſcape in "the ſheriff.

*(d)* Theſe words are wanting in the *MS.* but the ſenſe of the place ſeems plainly to require them.

An

An eſcape is preſentable in a leet, but they cannot ſet a common fine or amercements there, but it ought to be ſent to the next *Eyre*, &c. or may be removed into the king's bench by *Certiorari*, and there the common fine or amercement ſet; and this by the ſtatute of *Weſtm.* 1. *cap.* 3.

3. As to the puniſhment of a negligent eſcape by an officer or other that hath the felon in cuſtody, it is by fine and impriſonment.

If the felon be attainted, it is ſaid that the fine is to be an hundred pounds, and if he be only indicted, then an hundred ſhillings, *Stamf. P. C. p.* 35. but the fine in truth is more or leſs according to the quality of the offenſe, and ſometimes of the offender: *vide* 3 *E.* 3. *Coron.* 370. a biſhop fined one hundred pounds for an eſcape. [604]

*Communia Scaccario*, *M.* 36 *E.* 3. *n.* 5. The conſtable of a caſtle under the duke of *Lancaſter* permitted a negligent eſcape: It was ruled, 1. That in default of the conſtable of the duke of *Lancaſter*, that put him in, ſhould be fined. 2. That tho the duke were dead, yet his executors ſhould be fined *(e)*, and they were fined five pounds for negligent eſcape.

II. I come to thoſe fines, that are for eſcapes of felons either before or ſometimes after arreſt.

And this is that which is ſet upon vills, towns, cities, and ſometimes upon hundreds and counties, and is uſually called *eſcapium*, and thoſe that have franchiſes to be quit *de murdro*, *latrocinio*, *eſcapiis*, are intended of thoſe common fines ſet upon vills or hundreds for thoſe offenſes, and then he that hath ſuch a liberty granted by the king to be quit *de eſcapiis*, hath a diſcharge for the rate or portion of ſuch a common fine or amercement that comes to his ſhare; and this franchiſe or liberty generally granted to be quit *de eſcapiis* extends not to voluntary eſcapes by officers or others, but as I ſaid to the rate or portion chargeable upon them by ſuch common fine or amercement for negligent eſcapes.

If a murder, manſlaughter, or killing of a man *ſe defendendo* be committed in a vill not incloſed in the day-time, and the murderer, &c. be not taken, the vill ſhall be amerced, altho it be done after ſunſet, before day-light be gone. 22 *E.* 3. *Coron.* 238. 3 *E.* 3. *Coron.* 293, 302. 3 *H.* 7. *cap.* 1.

(*e*) See 2 Co. *Inſtit.* 382.

And

And if the murder be committed in a town incloſed in the day or night, and the murderer or manſlayer eſcapes, the town ſhall be amerced, becauſe by the ſtatute of *Winchester*, they ought to keep their gates ſhut from ſun-ſet to ſun-riſing. 3 *E.* 3. *Coron.* 299. 3 *H.* 7. *cap.* 1.

[605] If a felony be committed in a vill, and they take the felon, and commit him to four men to carry him to gaol, and they ſuffer him to eſcape, the vill ſhall be amerced. 3 *E.* 3. *Coron.* 346.

If a felony be committed in a vill, and the felon taken by them of the vill, and he eſcapes from them to the church of the ſame vill, and from thence before abjuration he eſcapes again, the vill ſhall be amerced for two eſcapes at common law, for they ſhould have kept him in the church till abjuration, &c. 8 *E.* 2. *Coron.* 422.

But if a perſon attaint, as they are carrying him to execution, eſcapes to a church, and from thence makes an eſcape, the vill were not amerceable, becauſe he could not abjure being attaint, and therefore the vill were not bound to watch him, 27 *Aſſiz.* 54. *vide Rot. Parl.* 45 *E.* 3. *n.* 25. 50 *E.* 3. *n.* 183. But now abjuration and ſanctuary are ouſted *(f)*, and with it much of this old learning of eſcapes is antiquated.

If a priſoner for ſuſpicion of felony be brought to the hundred court, and the court grant him liberty to ſeek his voucher or warrant, and he eſcapes, the hundred ſhall be amerced. 3 *E.* 3. *Coron.* 316. and ſo it is if a manſlaughter be committed out of any vill. *Stamf. P. C.* 34. *a.*

If the vill anſwers not the amercement for an eſcape, the hundred ſhall be diſtrained, and if the hundred anſwers not, the county ſhall be charged therewith and diſtrained. *Stamf. P. C. p.* 34. *b.*

And thus far touching eſcapes both voluntary and negligent.

4 Blackſ. Com. ch. 10. p. 129, 130. and 2 Hawk. P. C. ch. 19. and Burnt. tit. Eſcape.

*(f)* By 21 *Jac. cap.* 28. §. 7.

CHAP.

## CHAP. LIII.

*Concerning* reſcues *of priſoners in cuſtody for felony.*

RESCUE of a perſon impriſoned for felony is alſo felony by the common law.

To make a reſcue a felony, 1. It is neceſſary that the felon be *in cuſtody, or under arreſt* for felony, and therefore if *A.* hinder an arreſt, whereby the felon eſcapes, the townſhip ſhall be amerced for the eſcape, and *A.* ſhall be fined for the hindrance of his taking; but it is not felony in *A.* becauſe the felon was not taken. 3 *E.* 3. *Coron.* 333. *Stamf. P. C. p.* 31. *a.*

2, Again, to make a reſcue felony, the party reſcued muſt be under cuſtody *for felony or ſuſpicion of felony*, and it is all one, whether he be in cuſtody for that account by a private perſon, or by an officer or warrant of a juſtice, for where the arreſt of a felon is lawful, the reſcue of him is a felony.

It ſeems that it is neceſſary that he ſhould have knowledge that the perſon is under arreſt for felony, if he be in the cuſtody of a private perſon.

But if he be in the cuſtody of an officer, as conſtable or ſheriff, there at his peril he is to take notice of it; and ſo it is if there be felons in a priſon, and *A.* not knowing of it, breaks the priſon, and lets out the priſoners, tho he knew not that there were felons there, it is felony, and if traitors were there, it is treaſon. *P.* 16 *Car.* 1. *Croke p.* 583. *Benſtead's* caſe *per omnes juſticiarios.*

A return of a reſcue of a felon by the ſheriff againſt *A.* is not ſufficient to put him to anſwer for it as a felony, without indictment or preſentment, by the ſtatute of 25 *E.* 3. *cap.* 4. 1 *H.* 7. 6. *a. per curiam*, 2 *E.* 3. 1 *Coron.* 149.

As in caſe of an eſcape, ſo in caſe of a reſcue, if the party reſcued be impriſond for felony, and be reſcued before indictment, the indictment muſt ſurmiſe a felony done as well as an impriſonment for felony or ſuſpicion thereof; but if the party be indicted and taken by a *Capias* and reſcued, then there needs only a recital that he was indicted *prout*, and taken and reſcued. [607]

The

But tho the reſcuer may be indicted before the principal be convicted and attainted, yet he ſhall not be arraigned or tried before the principal be attaint for the reaſon given, *cap.* 51.

The reſcuer of a priſoner for felony, tho not within clergy, yet ſhall have his clergy.

*Vide plus capite proximo*, for many things there ſaid are applicable to the caſe of a reſcue.

4 Blackſ. Com. ch. 10. p. 131. Foſter. 344. Burn. tit. Reſcue. 2 Hawk. P. C. ch. 21.

## CHAP. LIV.

*Concerning* eſcapes and breach of priſon, *by the party himſelf that is impriſoned for felony.*

AT common law it was held, that if any impriſoned for a miſdemeanor, tho not felony, had broke the priſon and eſcaped, it had been felony. *Bract. Lib.* II. *(a). Stamf. P. C. p.* 30. *b.* 2 *Co. Inſtit. p.* 589. *(b)*

[608] But by the ſtatute of 1 *E.* 2. *de frangentibus priſonam* the ſeverity of the common law is moderated, *viz. Nullus de cætero, qui priſonam fregerit, ſubeat judicium vitæ vel membrorum pro fractione priſonæ tantùm, niſi cauſa, pro quâ captus & impriſonatus fuerit, tale judicium requirit, ſi de illâ ſecundùm legem & conſuetudinem terræ fuerit convictus, licèt temporibus præteritis aliter fieri conſuevit.*

Upon this ſtatute, therefore, to make a felony by breach of priſon theſe things muſt concur: 1. The party muſt be in priſon. 2. He muſt be in priſon for felony. 3. He muſt break that priſon. Many of theſe things have been diſcuſſed before. I ſhall reſume and add what ſhall be neceſſary for the explication of this felony.

I. What is a priſon, and who ſhall be ſaid a perſon in priſon.

If a man be impriſoned for felony in the priſon of a franchiſe, and breaks and eſcapes, this is a breaker of priſon, and it is as to

(*a*) This ſhould be *Lib.* III. *tract.* 2. *de Corona, cap.* 9. *f.* 124. *a.* In this place *Bracton* carries the matter very far; for he ſays, tho the party were innocent, and had only *conſpired* to eſcape, he was *ultimo ſupplicio puniendus.*

(*b*) But this ſeverity is complained of as an abuſe, *Mirror, cap.* 5. §. 1. and it was the opinion of *Billing*, chief juſtice, and the reſt of the judges, 1 *H.* 7. 6. *a.* that a reſcue of a felon was felony at common law, but not in the perſon himſelf, till the ſtatute of 1 *E.* 2. This lord *Coke* ſays muſt be intended, where others break the priſon without his privity. 2 *Inſt.* 589.

this

this purpoſe the king's priſon *(c)*, tho the franchiſe or profit be the lord's. 2 *E.* 3. 1 *Coron.* 149. *Stamf. P. C.* 31. *a.* 2 *Co. Inſtit.* 589.

So at common law when ſanctuary was in uſe, if a felon had eſcaped to a church, and there had been watched by the vill where the church is, and he had broken the church and eſcaped, this had been a felony within this ſtatute. *Stamf. P. C. p.* 30. *b.* 3 *E.* 3. *Coron.* 290.

Whether the breach of the priſon of the ordinary by a clerk convict or attaint before purgation had been felony, *vide Stamf. P. C. p.* 31, 32. but that learning is now antiquated, becauſe by the ſtatute of 18 *Eliz. cap.* 7. the priſoner is not now delivered to the ordinary; and therefore I ſhall not farther examine it.

If a perſon be taken for felony, and put in the ſtocks and breaks it, this is a breaking of priſon, and felony within the law. *Dy.* 99. *a.* 2 *Co. Inſt.* 589. *Stamf. P. C. p.* 30. *b.* [609]

So it is if the conſtable or any other ſecures a felon in the houſe of him that makes the arreſt, or in the houſe of any other, and he breaks it and eſcapes, it is felony.

Yet farther, if *A.* arreſts *B.* for felony or ſuſpicion of felony. there being *de facto* a felony committed, and being in the hands of *A.* he violently reſcueth himſelf and eſcapeth, this is a breach of priſon and a felony, for ſo are the words of my lord *Coke*, 2 *Inſtit.* 589. "*Nota*, He that is in the ſtocks, or under lawful arreſt, is ſaid to "be in priſon, tho he be not *infra carceris parietes.*" And *Stamford ubi ſupra p.* 30. *b.* *Et* nota *quant a ceo que cheſcun que eſt ſoubs arreſt pour felony eſt priſoner auxy bien hors de gaol come deins, iſſint que ſil ſoit lorſque in cippes in le haut ſtreet ou hors de cippes in le poſſeſſion d' aſcun, que lui aver arreſt, & faite eſcape ceo eſt debruſement de priſon in le priſoner*, which muſt be intended, as it ſeems, of a violent eſcape, *viz.* reſcuing himſelf out of cuſtody.

II. What ſhall be ſaid a being in priſon for ſuch a cauſe, as requires *judicium vitæ vel membrorum.*

(c) *Stamford* in the place here mentioned thinks it is not the king's priſon, and therefore at common law the breaking of it would not be felony; but by the ſtatute of 1 *E.* 2. it matters not whether it be the king's priſon or no, for it ſpeaks *de priſona* generally, and not *de priſona noſtra*; however, as it muſt be intended a legal priſon, which cannot be without a grant from the crown, our author's conſtruction is very reaſonable, that all ſuch priſons ſhould be taken as to this purpoſe to be the king's priſons.

It ſeems it is intended only of capital offenſes, as felony, and therefore if a man be committed for petit larciny, or homicide *ſe defendendo*, or *per infortunium*, and breaks priſon, this is not felony, for the principal offenſe *non requirit tale judicium*. 2. *Co. Inſtit.* 590.

But if the commitment expreſſes larciny above value or manſlaughter, tho *de facto* it were but petit larciny, or *per infortunium* or *ſe defendendo*, and poſſibly would appear ſo upon the evidence, yet this eſcape will be felony.

Touching my lord *Coke*'s opinion of the form of the *Mittimus*, that it muſt particularly expreſs the nature of the felony, and muſt have an apt concluſion, I have ſaid enough before; I think it is ſufficient if it be generally for felony, altho it wants that regular concluſion *(till he be delivered by due courſe of common law)*; yet theſe defaults will not excuſe the breach of priſon from felony: but poſſibly if it expreſs no cauſe, the caſe may be otherwiſe, becauſe the [610] ſubſtance of the *Mittimus* muſt be recited in the indictment.

For it is very plain, that antiently there were more felons committed to the common gaol without *Mittimus* in writing than were with it; ſuch were all the commitments by conſtable, watchmen, and private perſons arreſting for felony and bringing to the common gaol; and *Mittimus*'s were not of ſo antient a date as juſtices of peace, and they were not before 1 *E.* 3. *(d)*, and yet breach of priſon by felons was felony even from 2 *E.* 1. and not only from 1 *E.* 2.

It is therefore enough if the gaoler have a ſufficient notification of the nature of the offenſe, for which he was committed, and the priſoner of the offenſe whereof he was arreſted, and commonly they know their own guilt, if they are guilty, without much notification.

And again, by what hath been ſaid, breach of priſon is not only where the felon is formally committed to gaol by a *Mittimus*, but if he be put in the ſtocks, kept in the conſtable's houſe, nay, under the cuſtody of him that makes the arreſt, and he breaks priſon, it is a felony, tho in theſe caſes there neither are nor can be *Mittimus*'s.

If *A.* arreſts *B.* for ſuſpicion of felony, and carries him to the common gaol, and there delivers him, as he may do, 13 *E.* 4. 9. *a.* 4 *E.* 3. *cap.* 10. and he breaks priſon, if he be indicted upon it there muſt be an averment in the indictment, that there was a felony

(*d*) See 1 *E.* 3. *cap.* 16.

committed,

committed, and *A.* having probable cauſe did ſuſpect *B.* and arreſted him and committed him, and that he broke the priſon, and this muſt be all proved upon the evidence.

But if *B.* be indicted or appealed and taken by *Capias*, and committed, and breaks priſon, there needs no avernment or proof that a felony was done, but only that there was an indictment or appeal, and a *Capias* thereupon, becauſe all appears by matter of record. 2 *Co. Inſtit.* 590.

But a lawful commitment may be for ſuſpicion of felony, and this is within this ſtatute; yet no perſon can be indicted barely of ſuſpicion of felony, but of the felony itſelf. 43 *E.* 3. [611] *Coron* 454. 44 *Aſſiz.* 12. 2. *Co. Inſtit.* 592.

If a felony be made by act of parliament ſubſequent to 1 *E.* 2. and a perſon be committed for ſuch a felony and breaks priſon, yet this is felony. 2 *Co. Inſtit.* 592.

III. What ſhall be ſaid a breaking of priſon by a perſon committed for felony to make a felony.

If the priſon be fired by accident. and there be a neceſſity to break priſon to ſave his life, this excuſeth the felony; but if the priſon were fired by the priſoner himſelf, or by his procurement, the breaking to ſave his life is nevertheleſs felony, for it was a neceſſity of his own creating. 2 *Co. Inſtit.* 590.

If the gaoler ſets open the priſon doors, and the felon eſcapes, this may be a felony in the gaoler, but is no breach of priſon to make felony in the priſoner.

If *A.* be arreſted or impriſoned for felony, and *B.* and others without the conſent of *A.* reſcues *A.* this is felony in the reſcuers, but not felony in *A.* But if *A.* were of confederacy with *B.* to do it, then it is felony in *B.* as a reſcue, and in *A.* as a breach of priſon.

And ſo it is if *B.* had broken the priſon doors, and they being open, *A.* had gone away, this had been felony in *B.* but not felony in *A.* unleſs it were done by his confederacy, or procurement, for *A.* did not actually break priſon 2 *Co. Inſtit.* 589. 1 *H.* 7. 6. *a.*

IV. Touching the proceeding for felony by breach of priſon.

*A.* is committed for felony, or ſuſpicion thereof, and breaks priſon, he may be indicted, arraigned, convicted, and have judgment for the eſcape, altho the principal felony be not tried, and he may be not guilty of the felony; and ſo it differs from the caſe of a reſcue or eſcape before, and the reaſon is, becauſe here it is the ſame per-

ſon, there they are divers, and therefore in the latter caſe the principal felony ſhall be firſt tried. 2 *Co. Inſtit.* 592.

And yet I hold, that if *A.* be indicted of felony and committed, and then breaks priſon, and then be arraigned of the principal felony and found not guilty, now *A.* ſhall never be indicted for the breach of priſon; or if indicted for it before the acquittal, and then he is acquitted of the principal felony, he may plead *that* acquittal of the principal felony in bar to the indictment for the felony for breach of priſon.

[612]

And ſo it was pleaded by myſelf in the caſe of one Mrs. *Samford*, who was ſeverely proſecuted by the earl of *Leiceſter*, upon a ſuſpicion that ſhe had ſtolen his jewels; for tho while the principal felony ſtood untried, it ſtood indifferent whether ſhe were guilty of the principal felony, or rather the breach of priſon was a preſumption of the guilt of the principal offenſe, yet now it be cleared, that ſhe was not guilty of the felony, ſhe is now in law as a perſon never committed for felony, and ſo her breach of priſon is no felony.

The felony of breach of priſon is a felony within clergy, tho the principal felony for which the party was convicted were out of clergy, as robbery or murder.

4 Blackſ. Com. ch. 10. p. 130. 2 Hawk. P. C. ch. 18. Burn. tit. Priſon Breaking.

## CHAP. LV.

*Of principals and acceſſaries in felony, and firſt* of acceſſaries before the fact.

HAVING gone through the conſiderations of the offenſes of treaſons, and alſo of felonies at the common law, it will be ſeaſonable in this place to conſider of thoſe different relations of principals and acceſſaries, whereof tho much hath occaſionally been mentioned, yet I ſhall now proceed to the diſcuſſion of this matter diſtinctly and apart, and ſhall put together all the learning that occurs to me concerning this matter.

In the higheſt capital offenſe, namely, high treaſon, there are no acceſſaries neither *before* nor *after*, for all conſenters aiders [613]

aiders, abettors, and knowing receivers and comforters of traitors, are all principals, as hath been ſaid, 3 *H.* 7. 10. *a. Stamf. P. C. p.* 40. *a. Co. P. C. p.* 20.

But yet as to the courſe of proceeding, it hath been and indeed ought to be the courſe, that thoſe who did actually commit the very fact of treaſon, ſhould be firſt tried before thoſe that are principals in the ſecond degree, becauſe otherwiſe this inconvenience might follow, *viz.* that the principals in the ſecond degree might be convicted, and yet the principals in the firſt degree may be acquitted, which would be abſurd: *vide Somervill's* caſe *(a)* before, *cap.* 22. *p.* 238.

In caſes that are criminal, but not capital, as in treſpaſs, mayhem, or *præmunire.* there are no acceſſaries, for all the acceſſaries *before*, are in the ſame degree as principals, *Stamf. Lib.* I. *cap.* 48. *& libros ibi*; and acceſſaries *after*, by receiving the offenders, cannot be in law under any penalties as acceſſaries, unleſs the acts of parliament that induce thoſe penalties, do expreſly extend to receivers or comforters, as ſome do.

*Note* the word *maintainers* in the ſtatute of 27 *E.* 3. *cap.* 1. and 16 *R.* 2. *cap* 5. denotes the maintainers of the offenſe, and not (as it ſeems) of the parties.

It remains, therefore, that the buſineſs of this title of principal and acceſſary refers only to felonies, whether by the common law, or by act of parliament.

As to felonies by act of parliament, regularly if an act of parliament enacts an offenſe to be felony, tho it mentions nothing of acceſſaries *before* or *after*, yet virtually, and conſequently thoſe that counſel or command the offenſe are acceſſaries *before*, and thoſe that knowingly receive the offender are acceſſaries *after*, as in the caſe of rape made felony by the ſtatute of *Weſtminſt.* 2. *cap.* 34. *(b)*, *Stamf. P. C. Lib.* I. *cap.* 47. 11 *H.* 4. 14. in caſe of multiplication, *Co. P. C. cap.* 20. tho *Dy.* 88. makes it a *quære.* [614]

But if the act of parliament that makes the felony, in expreſs terms comprehend acceſſaries *before*, and makes no mention of acceſſaries *after*, namely, receivers or comforters, there it ſeems there can be no

*(a)* 1 *And.* 109. But it was ruled in that caſe, that upon that branch of treaſon, which relates to the compaſſing the death of the king, there is no need that the principal in the firſt degree, (*viz.* he who undertook to do the act) ſhould be firſt tried, for the movers or procurers are guilty of compaſſing the death of the king, altho he that was procured ſhould never aſſent thereto.

*(b)* 2 *Co. Inſtit.* 434.

acceſſaries *after*, for the expreſſion of procurers, counſellers, abettors, all which import acceſſaries *before*, make it evident, that the law-makers did not intend to include acceſſaries *after*, which is an offenſe of a lower degree than acceſſaries *before*, as the ſtatute of 8 *H.* 6. *cap.* 12. for ſtealing of records, the ſtatute of 33 *H.* 8. *cap.* 8. for witchcraft, *&c. Stamford's P. C. ubi ſupra.*

It is true my lord *Coke*, *P. C. cap.* 19. *p.* 72, 73. denies the opinion of *Stamford*, and affirms, that tho the ſtatute of 8 *H.* 6. *cap.* 12. mentions only acceſſaries *before*, yet virtually and conſequentially acceſſaries *after* are included, as well as in felonies at common law; but he neither allegeth any reaſon or authority for that opinion, and therefore the authorities being equal, the greater reaſon ſeems to be with *Stamford*'s opinion, *Expreſſum facit ceſſare tacitum*, and no weight can be laid upon the ſtatute of 3 *H.* 7. *cap.* 2. for that in expreſs terms makes acceſſaries *before* and *after* to ſtand as principals.

And upon the ſame reaſon it is, that many of theſe acts of parliament mentioned before, *cap.* 22. *p.* 236. that make certain offenſes, their counſellers, abettors, and procurers, to be treaſon, do not extend to make receivers guilty of treaſon, tho if the act had been general that ſuch an offenſe ſhall be treaſon, it had conſequentially made knowing receivers as well as abettors guilty of treaſon: *vide Co. P. C. cap.* 64. *p.* 138.

Tho generally an act of parliament creating a felony renders conſequentially acceſſaries *before* and *after* within the ſame penalty, yet the ſpecial penning of the act of parliament in ſuch caſes ſometimes varies the caſe.

The ſtatute of 3 *H.* 7. *cap.* 2. for taking away maidens, *&c.* makes the offender, and the procuring and abetting, yea, and wittingly receiving alſo, to be all equally principal felonies, and excluded of clergy.

[615] Again, the ſtatute of 27 *Eliz. cap.* 2. makes the coming in of a jeſuit treaſon, the receiving or relieving of him felony, the contributing of money to his relief a *præmunire*, ſo that acts of parliament may diverſify the offenſes of acceſſary or principal according to the various penning thereof, and ſo have done in many caſes.

And thus much as to acceſſaries to felonies made by act of parliament, which being general directions may be applicable almoſt to all caſes.

I come

I come to conſider of principals and acceſſaries in felony, and their differences among themſelves, and with relation to felonies at common law.

By what hath been formerly delivered, principals are in two kinds, principals in the firſt degree, which actually commit the offenſe, principals in the ſecond degree, which are preſent, aiding, and abetting of the fact to be done.

So that regularly no man can be a principal in felony, unleſs he be preſent, unleſs it can be in caſe of wilful poiſoning, wherein he that layeth or infuſeth poiſon with intent to poiſon any perſon, and the perſon intended, or any other takes it in the abſence of him that ſo layeth it, yet he is a principal, and he that counſelleth or abbetteth him ſo to do, is acceſſary *before*. *Co. P. C. cap.* 64. *p.* 138.

Who ſhall be ſaid preſent, aiding, and abetting in caſe of felony, hath been ſufficiently declared in *cap.* 34. in caſe of murder, in *cap.* 48. in caſe of burglary, in *cap.* 46. in caſe of robbery, and need not again be repeated.

Acceſſaries again are of two kinds, acceſſaries *before* the fact committed, and acceſſaries after.

An acceſſary *before*, is he, that being abſent at the time of the felony committed, doth yet procure, counſel, command, or abet another to commit a felony, and it is an offenſe greater than the acceſſary *after*; and therefore in many caſes clergy is taken away from acceſſaries *before*, which yet is not taken away from acceſſaries *after*, as in petit treaſon, murder, robbery, and wilful burning, by 4 & 5 *P. & M. cap.* 4.

Thoſe offenſes, which in the conſtruction of law are ſudden and unpremeditated, cannot have any acceſſaries before, as killing a man *per infortunium*, *ſe defendendo*, or manſlaughter. [616]

And therefore if *A.* be indicted of murder, and *B.* as acceſſary *before*, if the jury find *A.* guilty only of manſlaughter, there ſhall be no inquiry of *B.* but he ſhall be forthwith diſcharged, becauſe bare homicide is always ſudden: for if it were premeditated, it had been murder, and not barely homicide, *Bibith*'s caſe *(c)*, but there may be an acceſſary *after*.

Again, the exility of the offenſe, tho it be felony, yet becauſe it is not capital, excludeth acceſſaries *before* or *after*, and therefore in petit larciny there can be no acceſſary, *Anne Laſſington*'s caſe, *P.* 42 *Eliz.*

(c) 4 *Co. Rep.* 43. *b.*

*B. R. (d)*; and this is alſo the reaſon why there can be no acceſſary neither *before* nor *after* in manſlaughter *per infortunium* or *ſe defendendo*, becauſe there is no judgment of death in that caſe.

*That* which makes an acceſſary *before* is *command*, counſel, abetment, or procurement by one to another to commit a felony, when the commander or counſellor is abſent at the time of the felony committed, for if he be preſent he is principal.

And therefore words that found in bare permiſſion, make not an acceſſary, as if *A.* ſays he will kill *J. S.* and *B.* ſays you may do your pleaſure for me, this makes not *B.* acceſſary. 21 *H.* 7. 36, 37. *Crompt.* 41. *b.*

If *A.* hires *B.* to mingle or lay poiſon for *C. B.* doth it accordingly, and *C.* is poiſoned, *B.* tho abſent, is principal, *A.* is acceſſary; but if *A.* were preſent at the mingling or laying of the poiſon, tho both were abſent at the taking of it, yet both are principals, for they are both equally acting in the poiſoning.

But if *A.* buys the materials of the poiſon, knowing and conſenting to the deſign, and delivers them to *B.* to mingle and apply it, or lay it in the abſence of *A.* here it ſeems *A.* is only acceſſary before: *quod vide Co. P. C. cap.* 7. *p.* 50. *Franklin*'s caſe. *(e)*

If *A.* commands or counſels *B.* to commit felony of one kind, and
[617] *B.* commits a felony of another kind, *A.* is not acceſſary, as if *A.* commands *B.* to ſteal a plate, and *B.* commits burglary to ſteal the plate, *A.* is acceſſary to the theft, but not to the burglary. *Co. P. C. cap.* 7. *p.* 51.

If *A.* commands *B.* to take *C.* and *B.* takes *C.* and robs him, *A.* is not acceſſary to the robbery.

But if *A.* commands *B.* to beat *C.* and *B.* beats *C.* ſo that he dies, *A.* is acceſſary, becauſe it may be a probable conſequence of his beating, 3 *E.* 3. *Coron.* 314. *Stamf. P. C. Lib.* 1. *cap.* 45. *fol.* 41. *a.* the like it is if he commands *B.* to rob him, and in robbing him *B.* kills him, *A.* is acceſſary to the murder. *Plowd. Com.* 475. *Crompt.* 43. *b.*

*A.* commands *B.* to burn the houſe of *C. B.* kills, robs, or ſteals from *C. A.* is not acceſſary, for it is an offenſe of another kind; ſo if *A.* commands *B.* to ſteal the horſe of *C.* and he ſteals his cow, *A.* is not acceſſary. *Plowd. Com.* 475. *Saunder*'s caſe.

*(d) Cro. Eliz.* 750. *(e) State Tr. Vol.* 1. *p.* 329

But

But if *A.* command *B.* to ſteal generally from *C.* then he is acceſſary to any kind of theft from *C.* tho it were done by robbery, for that varies the offenſe only in degree.

*A.* commands *B.* to poiſon *C. B.* kills him with a ſword, yet *A.* is acceſſary, for the ſubſtance of the thing commanded was the death of *C.* and the differing in the manner of its execution from the command doth not excuſe *A.* from being acceſſary.

But if *A.* command *B.* to kill *C.* and *B* by miſtake kills *D.* or elſe in ſtriking at *C.* kills *D.* but miſſeth *C. A.* is not acceſſary to the murder of *D.* becauſe it differs in the perſon. *Co. P. C. cap.* 7. *p.* 51. *Plowd. Com.* 475. *Saunder*'s caſe.

*A.* gets *B.* with child, and before the birth counſels *B.* to kill it, the child is born, *B.* murders it, *A.* is acceſſary to the murder, yet at the time of the counſel given the child was not *in rerum naturâ. 2 Eliz. Dy.* 186. *a.*

*A.* lets out a wild beaſt, or employs a madman to kill others, whereby any is killed, *A.* is principal in this caſe, tho abſent, becauſe the inſtrument cannot be a principal. *Dalt. cap.* 108. *(f)*

*A.* commands *B.* to kill *C.* but before the execution thereof *A.* repents, and countermands *B.* and yet *B.* proceeds in [618] the execution thereof, *A.* is not acceſſary, for his conſent continues not, and he gave timely countermand to *B. Co. P. C. cap.* 7. *p.* 51. *Plowd. Com.* 474. *Saunder*'s caſe; but if *A.* had repented, yet if *B.* had not been actually countermanded before the fact committed, *A.* had been acceſſary.

*(f) New Edit. p.* 529.

4 Blackſ. Com. ch. 5 of Principals and Acceſſaries, *per totum*, and Foſter in the table of principal matters, tit. Acceſſaries and Principals; and Burn, tit. Acceſſary; and Index to 2 Hawk. P. C. tit. Acceſſary and Principal.

## CHAP. LVI.

### Of acceſſaries after the fact.

THIS kind of acceſſary after the fact is, where a perſon knowing the felony to be committed by another, receives, relieves, comforts, or aſſiſts the felon.

This,

This, as hath been ſaid, holds place only in felonies, and in thoſe felonies, where by the law judgment of death regularly ought to enſue, and therefore there is no acceſſary in petit larciny, homicide *per infortunium*, or homicide *ſe defendendo*. 15 *E.* 3. *Coron.* 116.

I ſhall conſider, 1. What ſhall not be a receiving or relieving to make an acceſſary *after*; and 2. What ſhall be ſuch a receiving or relieving to make an acceſſary *after*.

If *A.* knows that *B.* hath committed a felony, but doth not diſcover it, this doth not make *A.* an acceſſary *after*, but it is miſpriſion of felony, for which *A.* may be indicted, and upon his conviction fined and impriſoned.

If *A.* ſees *B.* commit a felony, but conſents not, nor yet takes care to apprehend him, or to levy hue and cry after him; or upon hue and cry levied doth not purſue him, this is a neglect puniſhable by fine and impriſonment, but it doth not make *A* an acceſſary *after*. 8 *E.* 2. *Coron.* 395. 3 *E.* 3. *Coron.* 298. *Stamf. P. C. Lib.* I. *cap.* 45. *f.* 40. *b.* 14 *H.* 7. 31. *b.* and the contrary opinion of ſome old books in this caſe is therefore rejected.

[619]

If *B.* commits a felony, and comes to the houſe of *A.* before he be arreſted, and *A.* ſuffers him to eſcape without arreſt, knowing him to have committed a felony, this doth not make *A.* acceſſary; but if he takes money of *B.* to ſuffer him to eſcape, this makes him acceſſary, 9 *H.* 4. 1. and ſo it is if *A.* ſhuts the fore-door of his houſe, whereby the purſuers are deceived, and the felon hath opportunity to eſcape, this makes *A.* acceſſary; for here is not a bare omiſſion, but an act done by *A.* to accommodate his eſcape. 8 *E.* 2. *Coron.* 427.

*A.* hath his goods ſtolen by *B.* if *A.* receives his goods again ſimply without any contract to favour him in his proſecution, or to forbear proſecution, this is lawful; but if he receives them upon agreement not to proſecute, or to proſecute faintly, this is theft-bote, puniſhable by impriſonment and ranſom *(a)*, but yet it makes not *A.* an acceſſary, 42 *Aſſiz.* 5. *b.* 3 *E.* 3. *Coron.* 353. *Stamf. P. C. f.* 40. *a.* but if he takes money of *B.* to favour him, whereby he eſcapes, this makes him acceſſary. *Dalt.* 263. *(b)*, *Crompt.* 41. *b.*

*A.* hath his goods ſtolen by *B.* who ſells them to *C.* upon a juſt value, tho *C.* knows them to be ſtolen, this makes not *C.* acceſſary, unleſs he receives the felon. *Dalt. cap.* 108. *p.* 288. *(c)*

*(a) Vide antea, p.* 546. *& notas ibid.*
*(b) New Edit. p.* 531.
*(c) New Edit. ibid.*

But

But by ſome opinions, if he buy them at an under value, it makes him acceſſary, *per Crompt.* 43. *b.* and Sir *Nich. Hyde, Dalt. ubi ſupra*; but it ſeems this makes not an acceſſary, for if there be any odds, he that gives more, benefits the felon more than him that gives leſs than the value, but it may be a miſdemeanor puniſhable by fine and impriſonment, and the buying at an under value is a preſumptive evidence, that he knew they were ſtole, but makes him not acceſſary.

If *A.* hath his goods ſtolen by *B.* and *C.* knowing they were ſtolen, receives them, this ſimply of itſelf makes not an acceſſary, and therefore it hath been often ruled *(d)*, that to ſay, *J. S. hath received ſtolen goods, knowing them to be ſtolen*, is not actionable, be- [620] cauſe it imports not felony, but only a treſpaſs or miſdemeanor, puniſhable by fine and impriſonment *(e)*, for the indictment of an acceſſary *after*, is that he received and maintained *the thief*, not *the goods (f)*.

But yet it ſeems to me, that if *B.* had come himſelf to *C.* and had delivered him the goods to keep for him, *C.* knowing that they were ſtolen, and that *B.* ſtole them, or if *C* receives the goods to facilitate the eſcape of *B.* or if *C.* knowingly receives them upon agreement to furniſh *B.* with ſupplies out of them, and accordingly ſupplies him, this makes *C.* acceſſary *(g)*; and with this ſeems to agree the preamble of the ſtatute of 2 & 3 *E.* 6. *cap.* 24. *Crompt.* 41. *b.* for it is relieving and comforting.

But the bare receiving of ſtolen goods, knowing them to be ſtolen, makes not an acceſſary; for he may receive them to keep for the true

(*d*) *Dawſon*'s caſe, *Yelv.* 4.

(*e*) By 3 & 4 *W.* & *M. cap.* 9. "Receivers of ſtolen goods, knowing them "to be ſtolen, are to be deemed acceſſaries "after the fact, and ſuffer as ſuch;" but becauſe theſe receivers often concealed the principal felons, and thereby eſcaped being puniſhed as acceſſaries; therefore by 1 *Ann. cap.* 9. "Whoſoever ſhall buy or receive "ſtolen goods, knowing them to be ſtolen, "may be proſecuted for a miſdemeanor, "and puniſhed by fine and impriſonment, "tho the principal felon be not convicted;" and this ſhall exempt them from being puniſhed as acceſſaries, if the principal ſhall afterwards be convicted.

(*f*) But by 5 *Ann. cap.* 31. "If any "perſon ſhall receive or buy knowingly "any ſtolen goods, or knowingly harbour "or conceal any felon, he ſhall be taken "as acceſſary to the felon, and ſhall ſuf- "fer as a felon;" this ſtatute does not take away the benefit of clergy; but by 4 *Geo.* I. *cap.* 11. ſuch perſon may be tranſported for fourteen years.

(*g*) But becauſe this was difficult to prove, the confederates of ſuch thieves frequently diſpoſing of ſuch goods to the owners for a reward, under the notion of helping them again to their ſtolen goods, it is provided by 4 *Geo.* I. *cap.* 11. "That "whoſoever ſhall take a reward under the "pretence of helping any one to ſtolen "goods, ſhall ſuffer as a felon, as if he "himſelf had ſtolen the ſaid goods, unleſs "he cauſe ſuch felon to be apprehended "and brought to trial, and give evidence "againſt him;" upon this clauſe the famous *Jonathan Wild* was convicted and executed. 10 *Geo.* I. ——See ſtatute 6 *Geo.* I. ch. 23. for pretending to help one to ſtolen goods. Receivers of linen goods ſtolen from the bleaching-grounds, are by the ſtatute 18 *Geo.* II. declared felons, without benefit of clergy.

owner,

owner, or till they are recovered or reſtored by law; and ſo it ſeems are the books to be intended of 27 *Aſſiz.* 69. 25 *E.* 3. 39. *(h)*, 9 *H.* 4. 1. *a.*

If a felon be in priſon, he that relieves him with neceſſary meat, drink, or clothes for the ſuſtentation of life, is not acceſſary.

So if he be bailed out till the next ſeſſions, *&c.* it is lawful to relieve and maintain him, for he is *quodammodo* in cuſtody, and [621] is under a certainty of coming to his trial. *Crompt.* 42. *b. Dalt. p.* 286. *(i)*

And therefore it is not treaſon thus to relieve a traitor, while he is in cuſtody or under bail, and therefore the ſtatute of 27 *Eliz. cap.* 2. that makes it felony to relieve a Jeſuit, hath yet this qualification, *being at liberty and out of hold.*

But if a felon be in gaol, for a man to convey inſtruments to him to break priſon to make an eſcape, or to bribe the gaoler to let him eſcape makes the party an acceſſary, for tho common humanity allows every man to afford them neceſſary relief, yet common juſtice prohibits all men unlawful attempts to cauſe their eſcapes.

If *A.* ſpeaks or writes in favour of a priſoner for his favour and deliverance, this makes him not an acceſſary. 26 *Aſſiz.* 47.

To inſtruct a felon to read thereby to ſave him by his clergy makes not an acceſſary. *M.* 7 *R.* 2. *(k)*, *Co. P. C. cap.* 64. *p.* 139.

If *A.* be committed for felony, and *B.* an attorney adviſe the friends of *A.* to write to the witneſſes not to appear againſt him, who writes accordingly, this makes neither *B.* nor the friends acceſſary, but is a miſdemeanor puniſhable by fine and impriſonment. *Co. P. C. ubi ſupra.*

A feme covert cannot be an acceſſary for the receipt of her huſband, for ſhe ought not to diſcover him.

But the huſband may be an acceſſary for the receipt of his wife. *Stamf. P. C. Lib.* I. *cap.* 19. *fol.* 26. *a.*

If the wife alone, her huſband being ignorant, do knowingly receive *B.* a felon, the wife is acceſſary and not the huſband. 15 *E.* 2. *Coron.* 383.

But if the huſband and wife both receive a felon knowingly, it

*(h)* In the laſt edition of the year-books, Which is in this place miſpaged, it is 25 *E.* 3. 82. *b.*

*(i) New Edit. p.* 530.

*(k) Rot.* 3°. *Rex Cant.*

ſhall

ſhall be judged only the act of the huſband, and the wife acquitted. *M.* 37 *E.* 3. *Rot.* 34. *in dorſ. Rex. Coram Rege.* *(l)*

To make an acceſſary to felony there muſt be a felony committed by him, to whom he is acceſſary. [622]

*A.* gives *B.* a mortal ſtroke, *C.* receives or relieves *A.* or helps him to eſcape, and then *B.* dies, *C.* ſhall not be an acceſſary to the felony, becauſe when he received him no felony was done.

But a man may be acceſſary to an acceſſary by the receiving of him knowing him to be an acceſſary to felony. *Stamf. P. C. cap.* 46. *f.* 43. *b.* 22 *Aſſiz.* 52.

There can be no acceſſary in receipt of a felon, unleſs he know him to have committed a felony: *vide Stamford's P. C.* 41. *b.*

But yet it hath been held, that if the party be attaint of felony by outlawry or otherwiſe in the county of *A.* if any one of the county receive him, he is acceſſary, whether he had notice or not, becauſe he is a felon by matter of record, whereof all in the ſame county ought to take notice. 12 *E.* 2. *Coron.* 377. *Stamf. P. C. cap.* 46. *fol.* 41. *b.*

But it ſeems to me neceſſary to make an acceſſary after, that there be notice, altho the felon were attaint in the ſame county, for preſumption ſhall not make men criminal, where the puniſhment is capital.

See *antea*, 612. ch. 55.

*(l)* This was the caſe of *Richard Day* and *Margery* his wife, *(vide ſupra p.* 47.*)* who had been indicted before the ſheriff of *Lincoln pro receptamento felonum*; the indictment was ſent *coram rege*: *Richard* ſurrendered himſelf and alleged, that he had been tried and acquitted on the ſaid indictment before the juſtices of gaol-delivery at *Lincoln*, and was admitted to bail; after which the judge of gaol-delivery ſent the record of *Richard's* acquittal; *Margery* the wife pleaded, that ſhe alſo had been tried and acquitted, and was alſo bailed, but afterwards ſhe not appearing a *Capias* was awarded againſt her and her bail: upon this her huſband and one *John Hode* two of her bail come into court, *Et petunt ipſos admitti ad finem cum domino rege occaſione prædictâ faciendum, & admittuntur*; ſometime afterwards the ſaid *John Hode* came into court and alleged, that he had been unjuſtly fined, "Quia prædictum indictamentum ſuper "prædictam *Margeriam* factum minus ſufficiens eſt, eo quod prædicta *Margeria* "tempore, quo ipſa dicitur felones recepta"ſſe ſeu eis conſentire debuiſſet, fuit "cooperta prædicto *Ricardo* viro ſuo, & "adhuc eſt & omnino ſub poteſtate ſua "[ejus], cui ipſa in nullo contradicere "potuit, & ex quo non inſeritur in in"dictamento prædicto, quod ipſa aliquod "malum fecit, nec eis conſentivit, ſeu "ipſos felones receptavit ignorante viro "ſuo, petit judicium, ſi ipſa vivente viro "ſuo de aliquo receptamento in præſentia "viri ſui occaſionari poſſit." The court took time to conſider of this plea, and in *Michaelmas* term *anno* 2to gave the following judgment, "Viſo & diligenter ex"aminato indictamento prædicto ſuper "præfatam *Margeriam* facto videtur curiæ, "quod indictamentum illud minus ſuf"ficiens eſt ad ipſam inde ponere reſpon"ſuram. Ideo ceſſit proceſſus verſus eam "omnino. See *Co. P. C. p.* 108.

CHAP.

## CHAP. LVII.

*Concerning* the order of proceeding *againſt acceſſaries.*

THE acceſſary may be indicted in the ſame indictment with the principal, and that is the beſt and moſt uſual way; but he may be indicted in another indictment, but then ſuch indictment muſt contain the certainty and kind of the principal felony.

If a man were acceſſary before or after in another county, than where the principal felony was committed, at common law it was diſpuniſhable, but now by the ſtatute of 2 & 3 *E.* 6. *cap.* 24. the acceſſary is indictable in that county, where he was acceſſary, and ſhall be tried there, as if the felony had been committed in the ſame county; and the juſtices, before whom the acceſſary is, ſhall write to the juſtices, *&c.* before whom the principal is attainted, for the record of the attainder.

This writing is to be by writ in the king's name under the *teſte* of the juſtice ſo ſending it. *Dy.* 253. *b.*

If the acceſſary be indicted either alone or together with the principal, proceſs of outlawry ſhall not go againſt the acceſſary till the principal be attainted or outlawed, neither ſhall he be put to plead till the principal appear, but ſhall be bailed till the principal appear: *vide Weſtm.* 1. *cap.* 14. *(a)*

The acceſſary ſhall not be conſtrained to anſwer to his indictment, till the principal be tried, 9 *E.* 4. 48. *a.* but if he will wave that benefit, and put himſelf upon his trial before the principal be tried he may, and his acquittal or conviction upon ſuch trial is good. *Stamf. P. C. Lib.* I. *cap.* 49. *f.* 46. *b.*

But it ſeems neceſſary in ſuch caſe to reſpite judgment till the principal be convicted and attaint, for if the principal be after acquitted, that conviction of the acceſſary is annulled, and no judg-
[624] ment ought to be given againſt him; but if he be acquitted of the acceſſary, that acquittal is good, and he ſhall be diſcharged. 8 *H.* 5. 6. *b. Coron.* 463.

If *A. B.* and *C.* be indicted as principals, and *D.* is indicted as acceſſary to them all, *D.* ſhall not be arraigned till all the principals be

(*a*) 2 *Co. Inſtit.* 183. This is now altered by 1 *Ann. cap.* 9.

attaint

attaint or outlawed, for if *A.* and *B.* be tried, and acquit or attaint, yet *D.* may be acceſſary to *C.* and not to *A.* nor *B.* but if *A. B.* and *C.* be indicted as principals, and *D.* indicted as acceſſary to *A.* only, there if *A.* be attaint, tho *B.* and *C.* be not, yet *D.* ſhall be arraigned. 40 *Aſſiz.* 25. *Coron.* 216. 7 *H.* 4. 36. *b. Stamf. ubi ſupra.*

But yet the court may if they pleaſe arraign the acceſſary in the firſt caſe *(b)*, for if he be found acceſſary he ſhall have judgment, but if acquitted of being acceſſary to *A.* yet that acquittal diſchargeth him not of being acceſſary to *B.* or *C.* and therefore when they come in and plead and are attaint, *D.* may be arraigned *de novo* as acceſſary to *B.* and *C. Plowd. Com.* 98. *b. Gittin*'s caſe. So that it is in the diſcretion of the court to arraign him or not before *B.* and *C.* be attaint, tho it be the ſafer courſe to reſpite the arraignment of the acceſſary till *B.* and *C.* appear or are outlawed.

If *A.* be indicted or appealed as principal, and *B.* as acceſſary *before* or *after* by the ſame indictment, and the principal plead in bar or abatement, or *autrefoits acquit*, the acceſſary ſhall not be forced to anſwer, till that plea be determined, for if it be found for *A.* the acceſſary is diſcharged, if againſt *A.* yet he ſhall after plead over to the felony, and may be acquitted. 9 *H.* 7. 19. *b.*

If *A.* be indicted as principal, and *B.* as acceſſary, they may be both arraigned together, and plead together, and put upon their trial by the ſame jury, and the jury ſhall be charged to inquire firſt of the principal, and if they find him not guilty, then to acquit the acceſſary; but if they find him guilty, then to inquire of the acceſſary. *Seigneur Sanchar*'s caſe *(c)*, 40 *Aſſiz.* 8. 7 *H.* 4. 36. *b. Coke ſuper* ſtatute *Weſtm.* 1. *cap.* 14. *(d)*; but in that caſe judg- [625] ment muſt be firſt given of the principal, for if any thing obſtruct judgment, as clergy, a pardon, *&c.* the acceſſary is to be diſcharged.

If *A.* be attaint of murder upon an appeal, and then *A.* is indicted of murder as principal, and *B.* as acceſſary, the principal pleads the the former attainder, *B.* ſhall not be put to anſwer as acceſſary, becauſe he is not attaint upon the ſame ſuit, and ſo it is if the attainder of *A.* were firſt upon the appeal. 7 *H.* 4. 36. *a. Stamf. P. C.* 47. *a. Coke ubi ſupra.*

*(b)* To make this conſiſtent with what goes before, we muſt underſtand the *former* paſſage to mean, that where he is indicted as acceſſary to all, he ſhall not be arraigned *as acceſſary to them all* till all be attaint or outlawed, and *this*, that the court may in ſuch caſe, if they pleaſe, arraign him only *as acceſſary to him who is attaint*, tho the others do not appear.

*(c)* 9 *Co. Rep.* 119. *a.*

*(d)* 2 *Co. Inſt.* 184.

If

If the principal be attainted and hath his clergy, or be pardoned after attainder, the acceſſary ſhall be put to anſwer; but if the principal be only convict and hath his clergy, or be pardoned, or ſtands mute, or dies in priſon before judgment, or challenges above thirty-ſix peremptorily, the acceſſary ſhall not be put to anſwer, for the principal was never attainted *(e)*, and altho formerly there were diverſity of opinions in the books in theſe caſes *(f)*, yet the law is now ſettled as above *(g)*, 4 *Co. Rep.* 43, 44. *Bibith*'s caſe and *Syer*'s caſe, *Coke ſuper Weſtm.* 1. *cap.* 14.

If the principal be erroneouſly attaint, the acceſſary ſhall be put to anſwer, and ſhall not take advantage of the error in that attainder, 2 *R.* 3. 21, 22. but the principal reverſing the attainder, reverſeth the attainder of the acceſſary. 18 *E.* 4. 9. *b.*

If *A.* be indicted as principal, and *B.* as acceſſary *before* or *after*, and both be acquit, yet *B.* may be indicted as principal, and the former acquittal as acceſſary is no bar. 4 *E.* 6. *B. Coron.* 186. *Knightley*'s caſe, *Crompt. f.* 43. *a.*

[626] But if *A.* be indicted as principal and acquitted, he ſhall not be indicted as acceſſary *before*, and if he be, he may plead his former acquittal in bar, for it is in ſubſtance the ſame offenſe, *Stamf. P. C. Lib.* II. *cap.* 36. *fol.* 105. *a.* 2 *E.* 3. *Coron.* 150 & 282. but the antient law was otherwiſe. 8 *E.* 2. *Coron.* 424.

But if he be indicted as principal and acquitted, he may yet be indicted as acceſſary *after*, for they are offenſes of ſeveral natures. 27 *Aſſiz.* 10. 8 *H.* 5. *Coron.* 463. *Stamf. P. C. ubi ſupra.*

And ſo it is if he be indicted as acceſſary *before* and acquitted, yet for the ſame reaſon he may be indicted as acceſſary *after*.

(*e*) It was for this reaſon, that *Weſton* the principal actor in the murder of Sir *Thomas Overbury* could not for a long while be prevailed with to plead, that ſo the earl and counteſs of *Somerſet*, who were the movers and procurers might eſcape. See *State Tr. Vol.* I. *p.* 314.

(*f*) See *Coron* 51, 58.

(*g*) But ſince our author wrote, it is ſettled quite otherwiſe by 1 *Ann. cap.* 9. for by that ſtatute, "If any principal offender ſhall be convicted of felony, ſtand "mute, or challenge above twenty, it "ſhall be lawful to proceed againſt the "acceſſary, either before or after the fact, "in the ſame manner as if ſuch principal "felon had been attainted thereof, notwithſtanding ſuch principal felon be admitted to his clergy, or otherwiſe deliverd before attainder; and every ſuch "acceſſary, if convicted, ſtand mute, &c. "ſhall ſuffer the ſame puniſhment, as if "ſuch principal had been attainted.

CHAP.

## CHAP. LVIII.

*Concerning* felonies by act of parliament, *and firſt concerning* rapes.

HAVING thus conſidered the felonies that are by the common law, I now proceed to the handling of felonies by act of parliament, and becauſe it is hardly poſſible to reduce the titles of them under any dependent method, and difficult to digeſt them under heads, I ſhall take them up in order of time, according to the ſeries and order of the reigns and years of the ſeveral kings wherein they were enacted, only where I meet with any felony in the time of any king's reign, I ſhall as near as I can bring together thoſe Acts of Parliament both before and after, that concern that ſubject.

And firſt concerning rape.

Rape was antiently a felony, as appears by the laws of *Adleſtane* mentiond by *Bracton*, *Lib.* III. *(a)*, and was puniſhed by loſs of life. [627]

But in proceſs of time that puniſhment ſeemed too hard; but the truth is, a ſevere puniſhment ſucceeded in the place thereof, *viz.* caſtration and the loſs of eyes *(b)*, as appears by *Bracton* (who wrote in the time of *Henry* III.) *Lib.* III. *cap.* 28. but then, tho the offender were convict at the king's ſuit, the woman that was raviſhed (if ſingle) might, if ſhe pleaſed, redeem him from the execution, if ſhe elected him for her huſband, and the offender conſented thereunto, as appears by *Bracton ubi ſupra*.

This kind of puniſhment it ſeems continued till 3 *E.* 1. and then by the ſtatute of *Weſtm.* 1. *cap.* 13. *(c)*, it was enacted, "That none "raviſh or take with force a damſel within age with her conſent "nor againſt her conſent, nor no dame, damſel of age, nor any other "woman againſt her will; and if any do it, the party may ſue with- "in forty days, and common right ſhall be done; and if none ſue "within forty days, the king ſhall have the ſuit, and the party con- "vict ſhall ſuffer two years impriſonment, and be ranſomed at the "king's pleaſure.

(*a*) *De Corona, cap.* 28. *f.* 147. *a.*
(*b*) By the laws of *William* 1. this offenſe was puniſhed with caſtration. *Vide Leges Gul. I. l.* 19. *Wilk. Leg. Anglo-Sax. p.* 222 & 290.
(*c*) 2 *Co. Inſtit.* 180.

This ſtatute gives a puniſhment by impriſonment and ranſom only, if attaint at the king's ſuit, and takes away caſtration and putting out of eyes; but it ſeems as to the ſuit of the party, if commenced within forty days, it alters not the puniſhment before, *Le roy lui ferra common droiture.*

But by the ſtatute of *Weſtm.* 2. *cap.* 34. *(d)* the offenſe of rape is made felony, "If a man raviſh a married woman, dame, or damſel, "where ſhe neither aſſented before nor after, *Eyt judgment de vy & "member*; if ſhe aſſent after, yet the king ſhall have the ſuit.

This created rape a felony, and therefore it was not inquirable in a leet, for it was made felony *de novo* by this ſtatute, 22 *E.* 4. 22. *a.* 6 *H.* 7. 4. *b.*

[628] Rape is the carnal knowledge of any woman above the age of ten years againſt her will, and of a woman-child under the age of ten years with or againſt her will. *Co. P. C. cap.* 11. *p.* 60.

The eſſential words in an indictment of rape are *rapuit & carnaliter cognovit*, but *carnaliter cognovit*, nor any other circumlocution without the word *rapuit* are not ſufficient in a legal ſenſe to expreſs rape. 1 *H.* 6. 1. *a.* 9 *E.* 4. 26. *a.*

To make a rape there muſt be an actual penetration or *res in re*, (as alſo in buggery) and therefore *emiſſio ſeminis* is indeed an evidence of penetration, but ſingly of itſelf it makes neither rape nor buggery, but it is only an attempt of rape or buggery, and is ſeverely puniſhed by fine and impriſonment. *Co. P. C. cap.* 10. *p.* 59.

But the leaſt penetration maketh it rape or buggery, yea altho there be not *emiſſio ſeminis. Co. P. C. ubi ſupra*; the old expreſſion was *abſtulit ei virginitatem*, and ſometimes *pucellagium ſuum. Bract. Lib.* III. *(e)*

And therefore I ſuppoſe the caſe in my lord *Coke*'s 12 *Rep.* 36. 5 *Jac.* that ſaith, there muſt be both, *viz. penetratio & emiſſio ſeminis* to make a rape or buggery, is miſtaken, and contradicts what he ſaith in his pleas of the crown; and beſides, it is poſſible a rape may be committed by ſome, *quibus virgæ erectio adſit, & emiſſio ſeminis ex quodam defectu deſit*, as phyſicians tells us.

If *A.* actually raviſh a woman, and *B.* and *C.* were preſent, aiding, and abetting, they are all equally principal, and all ſubject to the

*(d)* 2 *Co. Inſt.* 433. *(e)* *De corona, cap.* 28. *f.* 147. *b.*

ſame

ſame puniſhment both at common law and ſince the ſtatute of *Weſtm.* 2. *de quo infra.*

It appears by *Bracton ubi ſupra*, that in an appeal of rape it was a good exception, *quod ante diem & annum contentas in appello habuit eam ut concubinam & amicam, & inde ponit ſe ſuper patriam*, and the reaſon was, becauſe that unlawful cohabitation carried a preſumption in law, that it was not againſt her will.

But this is no exception at this day, it may be an evidence of an aſſent, but it is not neceſſary that it ſhould be ſo, for the woman may forſake that unlawful courſe of life. [629]

But the huſband cannot be guilty of a rape committed by himſelf upon his lawful wife, for by their mutual matrimonial conſent and contract the wife hath given up herſelf in this kind unto her huſband, which ſhe cannot retract.

*A.* the huſband of *B.* intends to proſtitute her to a rape by *C.* againſt her will, and *C.* accordingly doth raviſh her, *A.* being preſent, and aſſiſting to this rape: in this caſe theſe points were reſolved, 1. That this was a rape in *C.* notwithſtanding the huſband aſſiſted in it, for tho in marriage ſhe hath given up her body to her huſband, ſhe is not to be by him proſtituted to another. 2. That the huſband being preſent, aiding and aſſiſting, is alſo guilty as a principal in rape, and therefore, altho the wife cannot have an appeal of rape againſt her huſband, yet he is indictable for it at the king's ſuit as a principal. 3. That in this caſe the wife may be a witneſs againſt her huſband, and accordingly ſhe was admitted, and *A.* and *C.* were both executed. 8 *Car.* 1. *Caſus comitis Caſtlehaven.* (*f*)

If *A.* by force take *B.* and by force and menace compel her to marry him, and then with force *A.* hath the carnal knowledge of *B.* againſt her will, tho this marriage be voidable, yet it is not ſo ſimply void as to enable her to maintain an appeal of rape againſt *A.* for ſhe may by her conſent affirm this voidable marriage, and therefore in the like caſe, *Rot. Parl.* 15 *H.* 6. *n.* 15. there was a ſpecial act of parliament to enable the lady *Iſabel Butler* to bring an appeal of rape againſt *William Pull* in that caſe notwithſtanding that marriage; but that marriage had been diſſolvable by a declaratory ſentence in court chriſtian, becauſe obtained by a plain force; and if ſuch a diſſolution of the marriage had been obtained, then it ſeems to me, that, if the

(*f*) See *Hut.* 115. *Ruſh. Coll. Vol.* II. *p.* 93.—101. *State Tr. Vol.* I. *p.* 365.

carnal knowledge of her were forcible and againſt her will as well as the marriage, that rape was puniſhable as well by appeal at the ſuit of the lady, as by indictment at the ſuit of the king, without the aid of an act of parliament, for it was really a rape, only the marriage
[630] *de facto* was an impediment of its puniſhment ſo long as *de facto* the marriage continued, but now that impediment being removed by the declaratory ſentence, and the marriage made void *ab initio*, it is all one as if it had never been, and tho relation be a legal fiction and *intenta ad unum*, yet in this caſe the marriage and carnal knowledge being one intire act of force, and conſecutive one upon another, in the real effect of that firſt force, it ſhall remain puniſhable as if there had been no marriage at all; but the ſtatute of 3 *H.* 7. *cap.* 2. *(g)* hath provided a remedy in this caſe, ſo that this difficulty need not come in queſtion.

An infant under the age of fourteen years is preſumed by law unable to commit a rape, and therefore it ſeems cannot be guilty of it, and tho in other felonies *malitia ſupplet ætatem* in ſome caſes as hath been ſhewn, yet it ſeems as to this fact the law preſumes him impotent, as well as wanting diſcretion.

But he may be a principal in the ſecond degree, as aiding and aſſiſting, tho under fourteen years, if it appear by ſufficient circumſtances, that he had a miſchievous diſcretion, as well as in other felonies.

Thus far of the nature of rape, and who may be culpable of it. Now we will conſider upon whom it may be committed, and ſome other conſiderations touching this fact.

It was doubted, whether a rape could be committed upon a female child under ten years old, *Mich.* 13 & 14 *Eliz. Dy.* 304. *a.* By the ſtatute of 18 *Eliz. cap.* 7. it is declared and enacted, "That if "any perſon ſhall unlawfully and carnally know and abuſe any wo-"man child under the age of ten years, it ſhall be felony without the "benefit of clergy.

My lord *Coke* adds the words, *either with her will or againſt her will*, as if were ſhe above the age of ten years, and with her will, it ſhould not be rape; but the ſtatute gives no ſuch intimation; only declares that ſuch carnal knowledge is rape.

[631] And therefore it ſeems, if ſhe be above the age of ten years and under the age of twelve years, tho ſhe conſent,

*(g)* By this ſtatute a forcible taking away and marrying a woman againſt her will is made felony.

it is rape. 1. Becauſe the age of conſent of a female is not ten but twelve. 2. By the ſtatute of *Weſtm.* 1 *cap.* 13. *Roy defend, que nul ne raviſe ne prigne a force damſel deins age, ne per ſon gree ne ſans ſon gree*; and my lord *Coke* in his expoſition upon that ſtatute *(h)* declares, that theſe words *deins age* muſt be taken for her age of conſent, *viz.* twelve years, for that is her age of conſent to marriage, and conſequently her conſent is not material in rape, if ſhe be under twelve years old, tho above ten years old, altho thoſe words are by ſome miſtake crept into my lord *Coke*'s definition of rape, *Co. P. C. cap.* 11. but if ſhe be above the age of twelve years, and conſenting at the time of the fact committed, it is not felony.

But if ſhe were above the age of twelve years, and conſented upon menace of death, if ſhe conſented not, this is not a conſent to excuſe a rape. 5 *E.* 4. 6. *a. Dalt. cap.* 107. *(i)*

And therefore that opinion of Mr. *Finch* cited by *Dalton ubi ſupra*, and by *Stamford*, *cap.* 14. *fol.* 24. out of *Britton*, that it can be no rape, if the woman conceive with child, ſeems to be no law, *mulier enim vi oppreſſa concipere poteſt.*

If the woman conſented not at the time of the rape committed, but conſented after, ſhe ſhall not have an appeal of rape by the ſtatute of *Weſtm.* 2. *cap.* 34. but yet the king ſhall have the ſuit by indictment, and by the ſtatute of 6 *R.* 2. *cap.* 6. if ſhe have a huſband, he ſhall have an appeal, and if ſhe have none, then her father or other next of blood ſhall have an appeal of ſuch rape; and by the ſame ſtatute as well the raviſher as the raviſhed, that ſo aſſented, are diſabled to have any dower, inheritance or jointure; and the next of blood of ſuch raviſher or aſſenting raviſhed, to whom their lands ſhould revert, remain or fall after their death, ſhall enter upon the ſame, and hold it as an eſtate of inheritance.

But an aſſent after through menace of death is not ſuch an aſſent, as incurs this penalty; *quod vide* 5 *E.* 4. 6. *a.*

As in other felonies, ſo in this there are or may be acceſſaries *before* and *after*, for tho this be a felony by act of par- [632] liament, that ſpeaks only of thoſe that commit the offenſe, yet conſequentially and incidentally acceſſaries *before* and *after* are included, and ſo in every new ſtatute making a felony without ſpeaking of acceſſaries *before* or *after*. *Co. P. C. cap.* 10. *p.* 59. and ſo in buggery.

*(h)* 2 *Inſtit.* 182. *(i)* *New Edit. cap.* 160. *p.* 524.

And note, that at the time of the making of the ſtatute of 13 *E.* 1. rape was not felony, for it had long continued under the nature only of a miſdemeanor and not a felony, and therefore it is not at this day inquirable in a leet, becauſe it is a felony newly created. 6 *H.* 7. 4. *b.* 22 *E.* 4. 22. *a.*

The regular means of bringing this offenſe to judgment was either at the ſuit of the king by indictment, or at the ſuit of the party by appeal.

The indictment ought to have theſe ingredients, 1. It muſt be *felonicè.* 2. It muſt be *rapuit & carnaliter cognovit.* 3. It muſt conclude *contra formam ſtatuti* 13 & 14 *Eliz. Dy.* 304. *a.*

It may be proſecuted by indictment at any time, *for nullum tempus occurrit regi.*

An appeal of rape lies for the party raviſhed, and if ſhe conſent after the rape, ſhe is barred of her appeal, and her huſband, if married, or the next of kin, if ſingle, may have the appeal by the ſtatute of 6 *R.* 2. *cap.* 6.

If the next of kin were the raviſher, his next of kin ſhall have the appeal by the equity of the ſtatute of 6 *R.* 2. 28 *H.* 6. *Coron.* 459.

As to the appeal of the party raviſhed two things are neceſſary, 1. That ſhe make freſh diſcovery and purſuit of the offenſe and offender, otherwiſe it carries a preſumption that her ſuit is but malicious and feigned; this *Bracton* at large deſcribes *Lib.* III. *cap.* 28. *f.* 147. *a. Cum igitur virgo corrupta fuerit & oppreſſa, ſtatim cum factum recens fuerit cum clamore & hutesio debet accurrere ad villas vicinas, & ibi injuriam ſibi illatam probis hominibus oſtendere, ſanguinem & veſtes ſuas ſanguine tinctas & veſtium ſciſſuras, & ſic ire debet ad præpoſitum hundredi & ad ſervientem domini regis, & ad coronatores & vicecomitem, & ad primum comitatum faciat appellum, &c.*

[633] 2. That the appeal be ſpeedily proſecuted, for it ſeems, that a year and a day be not allowd in this appeal, but ſome ſhort time, tho it be not defined in law what time, but lies much in the diſcretion of the court upon the circumſtances of the fact, yet the ſtatute of *Weſtm.* 1. *cap.* 13. allowd but forty days: long delay of proſecution in ſuch a caſe of rape always carries a preſumption of a malicious proſecution. 3. If the wife hath once conſented after, her appeal is barred.

By the ſtatute of 18 *Eliz. cap.* 7. the principals in rape are ouſted of clergy, whether they be principals in the firſt degree, *viz.* he that com-

committed the fact, or principals in the ſecond degree, *viz.* preſent aiding, and aſſiſting; but acceſſaries *before* and *after* have their clergy.

Touching the evidence in an indictment of rape given to the grand jury or petit jury.

The party raviſhed may give evidence upon oath, and is in law a competent witneſs; but the credibility of her teſtimony, and how far forth ſhe is to be believed, muſt be left to the jury, and is more or leſs credible according to the circumſtances of fact that concur in that teſtimony.

For inſtance, if the witneſs be of good fame, if ſhe preſently diſcovered the offenſe made purſuit after the offender, ſhewed circumſtances and ſigns of the injury, whereof many are of that nature, that only women are the moſt proper examiners and inſpectors, if the place, wherein the fact was done, was remote from people, inhabitants or paſſengers, if the offender ſled for it; theſe and the like are concurring evidences to give greater probability to her teſtimony, when proved by others as well as herſelf.

But on the other ſide, if ſhe concealed the injury for any conſiderable time after ſhe had opportunity to complain, if the place, where the fact was ſuppoſed to be committed, were near to inhabitants, or common recourſe or paſſage of paſſengers, and ſhe made no outcry when the fact was ſuppoſed to be done, when and where it is probable ſhe might be heard by others; theſe and the like circumſtances carry a ſtrong preſumption, that her teſtimony is falſe or feigned.

If the rape be committed upon a child under twelve years old, whether or how ſhe may be admitted to give evidence may be conſiderable. (*) [634]

(*) For ſhe might at that age maintain an appeal *pro raptu*, *Paſch.* 33 *E.* 1. *Rot.* 16. *in dorſo. London. Coram Rege. James Pochin* merchant was attached, and brought *Coram Rege* to anſwer to *Iſabel* daughter of *Emma de Langeleye de raptu & pace regis fractâ*, who appeal'd him after this manner, *per quendam narratorem ſuum dicens*,—Iſabella *filia* Emmæ de Langeleye, *de ætate novem annorum & dimidii dicit, quòd prædictus* Jacobus *die dominicâ proximâ poſt feſtum ſancti* Martini, *anno R. R. E.* 33, *apud* London *in aliâ ſtratâ regis ex oppoſito eccleſiæ ſancti* Benedicti de Scherhog *horâ veſpertinâ ipſam* Iſabellam *cepit, & in quâdam tabernâ ſuâ portavit, & contra pacem domini regis cum eâ concubuit, & virginitatem ſuam rapuit; & petit quòd juſtitiarii domini regis ſuper hoc ſibi faciant juſtitiam & remedium. Et queritur, quòd prædicta tranſgreſſio ſibi facta fuit die & anno prædictis ad dampnum ipſius* Iſabellæ *centum librarum, &c. Et prædictus* Jacobus *venit, & defendit omnem feloniam, raptum, &c. Et petit allocutiam de appello ipſius* Iſabellæ, *deficut ipſum* Jacobum *per verba in appello uſualia, & neceſſaria, ac convenientia, non appellat. Et quia conſtat curiæ quòd appellum, &c. inſufficiens eſt, conſideratum eſt, quòd prædicta* Iſabella *committatur mareſcallo; & poſtea ei remittitur priſona, & prædictus* Jacobus *quoad appellum ipſius* Iſabellæ *eat inperpetuum quietus, &c.* He was then arraigned at the king's ſuit *de raptu prædicto*, and was tried, and convicted; but the king afterwards *remiſit prædicto* Jacobo *judicium vitæ & membrorum; & quòd faciat redemptionem pro delicto prædicto, & finem facit cum domino rege per centum libras.*

It ſeems to me, that if it appear to the court, that ſhe hath that ſenſe and underſtanding that ſhe knows and conſiders the obligation of an oath, tho ſhe be under twelve years, ſhe may be ſworn; thus we find it done in caſe of evidences againſt witches, an infant of nine years old was ſworn. *Dalt. cap.* 111. *p.* 297. *(k)*

But if it be an infant of ſuch tender years, that in point of diſcretion the court ſees it unfit to ſwear her, yet I think ſhe ought to be heard without oath to give the court information, tho ſingly of itſelf it ought not to move the jury to convict the offender, nor is it in itſelf a ſufficient teſtimony, becauſe not upon oath, without concurrence of other proofs, that may render the thing probable; and my reaſons are, 1. The nature of the offenſe, which is moſt times ſecret, and no other teſtimony can be had of the very doing of the fact, but the party upon whom it is committed, tho there may be other concurrent proofs of the fact when it is done. 2. Becauſe if the child complains preſently of the wrong done to her to the mother or other relations, their evidence upon oath ſhall be taken, yet it is but a narrative of what the child told them without oath, and there is [635] much more reaſon for the court to hear the relation of the child herſelf, than to receive it at ſecond-hand from thoſe that ſwear they heard her ſay ſo; for ſuch a relation may be falſified, or otherwiſe repreſented at the ſecond-hand, than when it was firſt delivered.

But in both theſe caſes, whether the infant be ſworn or not, it is neceſſary to render their evidence credible, that there ſhould be concurrent evidence to make out the fact, and not to ground a conviction ſingly upon ſuch an accuſation with or without oath of an infant.

For in many caſes there may be reaſon to admit ſuch witneſſes to be heard, in caſes eſpecially of this nature, which yet the jury is not bound to believe; for the excellency of the trial by jury is in that they are the triers of the credit of the witneſſes as well as the truth of the fact; it is one thing, whether a witneſs be admiſſible to be heard, another thing, whether they are to be believed when heard.

It is true rape is a moſt deteſtable crime, and therefore ought ſeverely and impartially to be puniſhed with death; but it muſt be remembered, that it is an accuſation eaſily to be made and hard to be proved, and harder to be defended by the party accuſed, tho never ſo innocent.

(*k*) *New Edit. p.* 541.

I ſhall

I ſhall never forget a trial before myſelf of a rape in the county of *Suſſex*.

There had been one of that county convicted and executed for a rape in that county before ſome other judges about three aſſizes before, and I ſuppoſe very juſtly: ſome malicious people ſeeing how eaſy it was to make out ſuch an accuſation, and how difficult it was for the party accuſed to clear himſelf, furniſhed the two aſſizes following with many indictments of rapes, wherein the parties accuſed with ſome difficulty eſcaped.

At the ſecond aſſizes following there was an antient wealthy man of about ſixty-three years old indicted for a rape, which was fully ſworn againſt him by a young girl of fourteen years old, and a concurrent teſtimony of her mother and father, and ſome other relations. The antient man, when he came to his defenſe, alledged that it was true the fact was ſworn, and it was not poſſible for [636] him to produce witneſſes to the negative; but yet, he ſaid, his very age carried a great preſumption that he could not be guilty of that crime; but yet he had one circumſtance more, that he believed would ſatisfy the court and the jury, that he neither was nor could be guilty: and being demanded what that was, he ſaid, he had for above ſeven years laſt paſt been afflicted with a rupture ſo hideous and great, that it was impoſſible he could carnally know any woman, neither had he upon that account, during all that time carnally known his own wife, and offered to ſhew the ſame openly in court; which for the indecency of it I declined, but appointed the jury to withdraw into ſome room to inſpect this unuſual evidence; and they accordingly did ſo, and came back and gave an account of it to the court, that it was impoſſible he ſhould have to do with any woman in that kind, much leſs to commit a rape, for all his bowels ſeemed to be fallen down in thoſe parts, that they could ſcarce diſcern his privities, the rupture being full as big as the crown of a hat, whereupon he was acquitted.

Again, at *Northampton* aſſizes, before one of my brother juſtices upon the *Niſi prius*, a man was indicted for the rape of two young girls not above fourteen years old, the younger ſomewhat leſs, and the rapes fully proved, tho' peremptorily denied by the priſoner, he was therefore to the ſatisfaction of the judge and jury convicted; but before judgment it was moſt apparently diſcovered, that it was but a malicious

malicious contrivance, and the party innocent; he was therefore reprieved before judgment.

I only mention theſe inſtances, that we may be the more cautious upon trials of offenſes of this nature, wherein the court and jury may with ſo much eaſe be impoſed upon without great care and vigilance; the heinouſneſs of the offenſe many times tranſporting the judge and jury with ſo much indignation, that they are over haſtily carried to the conviction of the perſon accuſed thereof, by the confident teſtimony ſometimes of malicious and falſe witneſſes.

See 4. Black. Com. ch. 15. page 210—215. Burn. Tit. Rape. 1 Hawk. P. C. 108. Poulton de pace Regis 134. a.

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[637] CHAP. LIX.

*Concerning the felony* de uxore abductâ ſive raptâ cum bonis viri, *ſuper ſtatutum Weſtm. 2. cap.* 34.

THE words of the ſtatute are, *De mulieribus abductis cum bonis virorum ſuorum habeat rex ſectam de bonis ſic aſportatis.*

This part of the ſtatute hath affinity with what goes before in the ſame ſtatute concerning rape; and tho this learning hath been long antiquated, yet it is of uſe to be known.

If a wife goes away of her own conſent with another man, and takes with her the goods of the huſband, this ſeems to be felony neither in the man nor in the wife, tho *Dalt. cap.* 108. *p.* 266. *(a)* takes it to be a felony in the man that takes her and the goods; but it is a treſpaſs, for which at common law the huſband may have an action of treſpaſs, *quare uxorem ſuam cepit & abduxit cum bonis viri.*

But if *A.* takes the wife of *B.* againſt her will with the goods of her huſband, but doth not actually raviſh the wife, it is felony as to the goods, for which the party may be indicted; but as to the taking away of the wife it is but a treſpaſs, for which the huſband may have his action of treſpaſs at common law, *quare uxorem ſuam rapuit & eam cum bonis & catallis ad valent', &c. abduxit & adhuc detinet*, and in that action ſhall recover damages for the taking of his wife and goods at common law.

(a) *New Edit. p.* 504

But

But it ſhould ſeem, that he might have his action grounded upon the ſtatute of *Weſtm.* 2. which differs only in this from a treſpaſs at common law, 1. That the treſpaſs at common law is *pone per vadios, &c.* but this is *attachies*, 14 *H.* 6. 2. *b.* Again, 2. The writ at common law is general, but this upon the ſtatute concludes *contra formam ſtatuti, quod vide Fitz. N. B.* 89. 9 *H.* 6.2. *a.* [638]

But without queſtion, if the wife were actually raviſhed and the goods taken, this action lies for the huſband, and he ſhall recover damages for the rape as well as the goods, tho the wife were dead or divorced after the rape. 44 *Aſſiz.* 13. 47 *E.* 3. *Action ſur ſtatute* 37.

And it ſeems ſuch an action was antiently in the nature of an appeal of rape and robbery grounded upon the ſtatute of *Weſtm.* 2.

And by the antient law [the defendant being convicted in a writ founded upon this ſtatute, as before, was to have judgment of death, which appears moſt evidently by the ordinance of parliament, *Rot. Parl.* 8. *E.* 2. *M.* 3. and afterwards ſent by *Mittimus* into the king's bench, *T.* 11 *E.* 2. *Rot.* 4. *London*, which recites, that in ſuch caſe the defendant was not bailable, *Eo quod idem implacitatus, ſi hujuſmodi tranſgreſſione convictus fuiſſet, ſuſpenſioni adjudicari deberet*, and therefore provides, that the defendant, if of good fame, ſhall be bailed.

And according to this are the books 13 *Aſſiz.* 5. 15. *E.* 3. *Utlagarie* 49. *Coron.* 122. 18 *E.* 3. 32. *a.* and a caſe of a vicar cited to be 13 *E.* 2. who had his clergy in this caſe, but it ſhould ſeem it was intended, 1. When a rape was actually committed, *vide* 44 *Aſſiz.* 13. and 2. When the action was grounded upon the ſtatute, and not barely at common law.

But the law hath been long diſuſed to give a capital judgment upon this writ, and in proceſs of time nothing, as it ſeems, was recovered but damages, tho the writ were brought upon the ſtatute, for *rapuit* is now intended of a ſimple taking. 9. *Eliz. Dy.* 256. *b.* 2 *Co. Inſtit.* 435. *ſuper Weſtm.* 2. *cap.* 34. 43 *E.* 3. 23. *a.*

And it ſeems the law was accordingly taken, for the ſtatute of 6 *R.* 2. *cap.* 6. gives an appeal to the huſband for the rape of his wife in ſome caſes, which it needed not have done, if by the law, as it was then uſed, the huſband might upon ſuch a writ convict the party, and obtain judgment of death againſt him.

And beſides, it was very inconvenient, that in a civil action formed for damages, and that wants the material [639]

terms

terms of law to expreſs a felony, (namely *carnaliter cognovit* and *felonicè*) judgment of death ſhould be given, and ſo this courſe expired of itſelf.

## CHAP. LX.

*Of felony by* purveyors taking victuals without warrant.

BY the ſtatute of *Articuli ſuper Cartas*, *cap.* 2. It is enacted, *Si nul face priſes ſans garrant, & les emport encountre volunt de celui, a qe les biens ſont, ſoit maintenant arreſt per le vill, ou le priſe ſerra fait, & ameſne al prochein gaol: Et ſi de ceo ſoit attaint, ſoit fait de lui, come de laron, ſi la quantite de biens le demand.*

If *A.* having no commiſſion take goods by pretenſe of a commiſſion as purveyor, and the party not knowing that he hath no commiſſion ſell and ſuffer him to take it, yet this is felony; but if the owner knew he had no commiſſion, and yet willingly ſell it to him as a purveyor, and he take and carry it away, this is not a carrying away againſt the conſent of the owner to make a felony within this ſtatute. 2 *Co. Inſtit. p.* 546. *ſuper Articulis*, *cap.* 2.

This point of felony is confirmed by the ſtatute of 18 *E.* 3. *cap.* 7. and 4 *E.* 3. *cap.* 4.

Afterwards by the ſtatute of 5 *E.* 3. *cap.* 2. and 25 *E.* 3. *cap.* 1. " If a purveyor ſhall take goods above the value of twelve-pence " without teſtimony and appraiſement of the conſtable, or without " tallies given, this is alſo felony.

[640] Again, by the ſtatute of 25 *E.* 3. *cap.* 15. " If a purveyor " take ſheep and their wool betwixt *Eaſter* and *Midſummer*, " it is felony, if he ſhore them at his own houſe.

Again, by the ſtatute of 36 *E.* 3. *cap.* 2. " If any purveyor take " goods or carriage, otherwiſe than is contained in their com- " miſſion, it is felony.

But in all theſe felonies the offender is not ouſted of clergy, but he ſhall have it: *vide Co. P. C. cap.* 24.

But theſe acts of parliament and the puniſhment of purveyors is now out of date, becauſe by the ſtatute of 12 *Car.* 2. *cap.* 24. all purveyance is taken away.

Only

Only by two ſubſequent acts, namely 13 *Car.* 2. *cap.* 8. and 14 *Car.* 2. *cap.* 20. there is a ſpecial purveyance of carriage ſettled for the king's houſhold, and for the navy and carriage of ordnance; but the ſtatute of *Articuli ſuper cartas*, and the other ſtatutes making felony in caſe of undue purveyance do not concern this new eſtabliſhed purveyance, becauſe ſettled in another way; and therefore I ſhall ſay no more touching this matter.

## CHAP. LXI.

*Concerning the* new felonies *enacted in the times of* E. 2. E. 3. *and* R. 2.

IN the times of thoſe kings there were but few new felonies enacted other than thoſe touching purveyors, whereof in the former chapter.

By the ſtatute of 1 *E.* 2. *De frangentibus priſonam*, the law was ſettled in that point, whereof I have ſaid ſufficient *ſupra*, *cap.* 54.

By the ſtatute of 14 *E.* 3. *cap.* 10. "If a gaoler or under keeper "by too great dureſs of impriſonment, and by pain make "any priſoner in his ward to become an appellor againſt [641] "his will, and thereof be attaint, he ſhall have judgment of life and "member.

Theſe words in any act of parliament *Eit judgment de vy & member* create a felony.

This act extends to a gaoler *de facto*, tho he be not a gaoler *de jure*.

The offender hath the benefit of clergy: *vide Co. P. C. cap.* 29. *p.* 91. touching this felony.

By an act *Rot. Par.* 17 *E.* 3. *n.* 15. but not printed, the importation of falſe and evil money is prohibited under pain of life and member, and the exportation of coin or bullion prohibited under pain of forfeiture, and if the ſearcher be of confederacy with the exporter, it is enacted to be felony in the ſearcher.

If it be ſaid this act was needleſs to make importation of falſe money felony, becauſe declared treaſon by the ſtatute of 25 *E.* 3. the anſwer is obvious. By the act of 17 *E.* 3. before-mentioned licence

was

was granted to *Dutch* merchants and others to import their own coin ſo it were as good as ſterling, and that, if they pleaſed, the merchants might trade between themſelves with that foreign money; and it was neceſſary in reſpect of that foreign money to impoſe a new penalty upon the importers of falſe money of that kind, becauſe *that* foreign coin was not within the ſtatute of 25 *E.* 3.

But this ſeems to be but a temporary law during that ſpecial intercourſe between the *Engliſh* and *Dutch*, and beſides by ſubſequent ſtatutes the penalty of treaſon is annexed to the importation of counterfeit coin made current by proclamation: *quod vide ſupra, cap.* 20. *p.* 225.

By the ſtatute of 27 *E.* 3. *cap.* 3. of the ſtaple, the exportation of wools, wool-fells, leather or lead by any *Engliſh*, *Iriſh*, or *Welchman*, is prohibited under pain of loſs of life and member, and forfeiture of lands and goods *(a)*, but this was repealed by the ſtatute of 36 *E.* 3. *cap.* 11. whereby it was enacted, that merchants denizens may paſs with their wool as well as foreigners without being reſtrained.

[642] But yet this was not full enough, and therefore by the ſtatute of 38 *E.* 3. *cap.* 6. there was a fuller repeal of the ſtatute of 27 *E.* 3. as to the point of felony, yet the forfeiture of lands and goods continued upon merchants denizens, and the ſtatute of the ſtaple was confirmed in all points by 38 *E.* 3. *cap.* 7.

But by the ſtatute of 43 *E.* 3. *cap.* 1. the ſtaple of *Calais* was aboliſhed, yet by 14 *R.* 2. *cap.* 5. exportation of wool, wool-fells, leather and lead are prohibited to denizens under pain of forfeiture of them.

By the ſtatute of 27 *E.* 3. *de proviſoribus*, *cap.* 5. ingroſſing of *Gaſcoign* wines made felony, but that penalty repealed by the ſtatute 37 *E.* 3. *cap.* 16.

So that theſe ſtatutes ſtand now repealed.

But yet by the ſtatute of 18 *H.* 6. *cap.* 15. the carrying of wool or wool-fells out of the realm to other places than to the ſtaple of *Calais* without the king's licence is felony, excepts wools carried to the ſtreights of *Morocco*.

This ſtatute is ſuppoſed by my lord *Coke*, *P. C. cap.* 32 to be in force, but that being doubted, becauſe the ſtaple of *Calais* then in uſe hath been long ſince aboliſhed, a new proviſion and a better is made by acts of this preſent parliament *(b)*.

(a) *Co. P. C. p.* 95. (b) 12 *Car.* 2. *cap.* 32. 13 & 14 *Car.* 2. *cap.* 18.

But

But whether that act be in force or not, the offender was not thereby excluded of the benefit of clergy.

By the ſtatute of 34 *E.* 3. *cap.* 22. the concealing and taking away of an hawk was two years impriſonment; but by the ſtatute of 37 *E.* 3. *cap.* 19. the ſtealing of a faulcon, tercelet, lanner, or laneret is made felony.

See the commentary *Co. P. C. cap.* 34. where it is declared, that this act extends only to faulcons, and thoſe of that kind.

The proof intended by this act is not by jury but by circumſtances, as varvels, *&c.*

The offender is within benefit of clergy.

As to the laws in the time of *Richard* II.

6 *R.* 2. *cap.* 6. concerning the puniſhment of rape, *de quo ſatis, cap.* 58.

7 *R.* 2. *cap.* 8. of purveyors, *de quo ſupra, cap.* 60.

By the ſtatute of 13 *R.* 2. *cap.* 3. " If any man bring [643]
" or ſend into this realm or the king's power any ſummons,
" ſentence or excommunication againſt any perſon for the cauſe of
" making motion, aſſent or execution of the ſtatute of proviſors, he
" ſhall be taken, arreſted, and put in priſon, and forfeit all his lands,
" tenements, goods and chattels for ever, and incur the pain of life
" and member; and if any prelate makes execution of ſuch ſummons,
" ſentence or excommunication, his temporalties ſhall be taken and
" abide in the king's hands till due redreſs made.

" And if any perſon of leſs eſtate than a prelate makes ſuch execu-
" tion, he ſhall be taken and arreſted and impriſoned, and make fine
" and ranſom by the diſcretion of the king's council.

The bringing *in* of bulls of this nature is againſt the common law, and ſometimes antiently puniſhed as high treaſon, *Vide Co. P. C. cap.* 36. *& libros ibi.*

But now by the ſtatute of 13 *Eliz. cap.* 2. the offenſe as well in the bringers *in*, as executors of theſe bulls, *&c.* is made high treaſon, as well in perſons eccleſiaſtical as temporal.

There is nothing elſe in theſe kings reigns that enacts a new felony, only ſome ſtatutes directing the proceſs and juriſdiction, whereby felonies may be tried, as 13 *R.* 2. *cap.* 2. of the conſtable and marſhal, *&c.*

CHAP.

## CHAP. LXII.

*Concerning the* new felonies *enacted in the times of* H 4. H. 5. H. 6. E. 4.

BY the ſtatute of 5 *H.* 4. *cap.* 4. it is ordained, "That none from "thenceforth ſhall uſe to multiply gold or ſilver, nor uſe the "craft of multiplication, and if any do, he ſhall incur the pain of "felony in this caſe *(a)*.

And the reaſon of this act was not becauſe they thought the real tranſmutation of metals into gold or ſilver was feaſible, but the reaſon is given in the petition of the commons. *Rot. Car.* 5. *H.* 4. *n.* 63.

*Car pluſers homes par colour de ceſt multiplication font faux mony a grand deceit du roy & damage de ſon people: vide tamen Co. P. C. cap.* 20. diſpenſations granted to particular perſons by 34 & 35 *H.* 6. for the uſing of this art with a *non obſtante* of the ſtatute of 5 *H.* 4.

The offender is to have his clergy.

And altho the ſtatute mentions not acceſſaries *before* or *after*, yet this ſtatute making the fact felony doth conſequentially ſubject acceſſaries *before* and *after* to the penalty, tho this be made a *quære*. *Dy.* 88. in *Eden*'s caſe; yet it ſeems now ſettled according to the opinion of my lord *Coke*, *P. C. cap.* 20. that there may be acceſſaries to this new felony *before* and *after*.

[645] By the ſtatute of 5 *H.* 4. *cap.* 5. cutting the tongues or putting out the eyes of the king's ſubjects of malice prepenſed is enacted to be felony.

This was extended to other diſmembring, as cutting off ears, by 37 *H.* 8. *cap.* 6, but by an act of this preſent parliament *(b)* this and

(*a*) The offenſe prohibited by this act was not the extracting gold or ſilver out of lead or other metals, which is now known by the name of refining, for that is not the multiplication of gold or ſilver, but only a ſeparation thereof from the coarſer metal, but the deſign of the act was to prohibit the tranſmutation of one metal into another, which was pretended to be done by the philoſopher's ſtone or elixir, whereby great numbers were bubbled and cheated; but however, becauſe ſome perſons were (groundleſly) afraid to exerciſe the art of ſmelting and refining metals, leſt they ſhould fall under the penalty of this ſtatute, it was therefore repealed by 1 *W.* & *M. cap.* 30. provided that the gold or ſilver extracted by the ſaid art be carried to the *Tower* of *London* for the making of monies, and be not otherwiſe diſpoſed of.

(*b*) 22 & 23 *Car.* 2. whereby the cutting out or diſabling the tongue, putting out an eye, ſlitting the noſe, cutting off a noſe or lip, cutting off or diſabling any limb or member, if done with an intention to maim or diſfigure, is felony without benefit of clergy; upon this ſtatute *Coke* and *Woodburne* were convicted and executed for ſlitting the noſe of Mr. *Criſpe*, 8 *Geo.* I. See *State Tr. Vol.* VI. *p.* 212.

ſome

ſome other diſmembrings are made felonies out of the benefit of the clergy.

By the ſtatute of 3 *H.* 5. *cap.* 1. "If any perſon do make, buy, "coin, or bring into the kingdom *Galli-half-pence*, *Suſkins* or *Dod-*"*kins*, to ſell, or put them in payment in this realm, it is felony.

And by the ſtatute of 2 *H.* 6. *cap.* 9. If any man pay or receive the money called *Blanks*, it is alſo felony; but both theſe are within clergy, and by the whole diſuſer of theſe coins theſe ſtatutes are of little uſe.

By the ſtatute of 3 *H.* 5. *cap.* 3. it is enacted, "That procla-"mation ſhall iſſue, that all *Britons* depart out of the realm before "the feaſt of St. *John Baptiſt* next, upon pain of loſs of life and "member.

But this was but a temporary law and expired.

By the ſtatute of 3 *H.* 6. *cap.* 1. it is enacted, "That no congre-"gations or confederacies be made by maſons in their aſſemblies, "whereby the good order of the ſtatute of *Labourers* is violated; "and they that cauſe ſuch aſſemblies to be holden, ſhall be adjudged "felons.

But the ſtatute of *Labourers* being repeald by the ſtatute of 5 *Eliz.* *cap.* 4. this law is conſequentially repeald. *Co. P. C. cap.* 35. *p.* 99.

By the ſtatute of 8 *H.* 6. *cap.* 12. it is enacted, "That if any "record or parcel of the ſame, writ, return, panel, proceſs, or war-"rant of attorney in the king's courts of chancery, exchequer, the "one bench or the other, or in the treaſury, be willingly ſtolen, "taken away, withdrawn, or avoided by any clerk, or by any other "perſon, by cauſe whereof the judgment ſhall be reverſed; "that ſuch ſtealer, taker away, withdrawer, or avoider, [646] "their procurators, counſellors, and abetters thereof indicted, and by "proceſs thereupon made, duly convict upon their own confeſſion, "or inqueſt thereupon taken of lawful men, half whereof ſhall be "of men of any court of the ſame courts, and the other half of "others, ſhall be judged for felons; and that the judges of the ſame "courts, or of the one bench or the other, have power to hear and "determine ſuch defaults before them, and thereof to make due pu-"niſhment, as is aforeſaid.

In the conſideration of this ſtatute, it will be convenient to examine. 1. How the law ſtood in reference to the matters aboveſaid before this act made. 2. What is the import of the ſeveral parts of this act.

At the common law, the undue raſure, or embezzling of a record, was a great offenſe, for which even a judge himſelf was puniſhable by fine and impriſonment. 2 *R.* 3. 10. *Hengham* a judge was fined eight hundred marks for raiſing the record of a fine of thirteen ſhillings and four pence impoſed upon a poor man, and reducing it to ſix ſhillings and eight pence. *(c)*

By the ſtatute of *Weſtm.* 1. *viz.* 3 *E.* 1. *cap.* 29. it is enacted, "That if any ſerjeant, pleader or other, do any manner of deceit or "colluſion to the king's court, or conſent to it in the deceit of the "court, or to beguile the court or the party, and be thereof attaint, "he ſhall be impriſoned for a year and a day, and from thenceforth "ſhall not be heard to plead in that court.

And if he be no pleader, he ſhall be impriſoned in like manner, and if the treſpaſs requires greater puniſhment, it ſhall be at the king's pleaſure. *(d)*

[647] Upon this act it was that *Robert de Greſhope* a common attorney was impriſond for a year and a day, and baniſhed the court of common pleas, for embezzling a part of a record, *viz.* *T.* 19 *E.* 1. *Rot.* 57. *in dorſo*, *C. B.* mentiond in *Co. P. C. cap.* 19. *p.* 71. *vide ſimile*, *H.* 22 *E.* 1. *Rot.* 33. *in dorſo. Cant. Coram Rege.* (*)

*T.* 5 *E.* 3 *Rot.* 13. *in dorſo. Rex. B. R. Thomas* of *Carleton* convict of the raſure of the word *et* in a writ, is committed to the marſhal, *& inhibitum eſt ei, ne amodo deſerviat in officio ſive ſervitio vicecom', periculo quod incumbit*, and this it ſeems was upon the ſame act of 3 *E.* 1. *(e)*

If a clerk had made a miſentry of record, the judge, before whom it was, might, *ore tenus*, rectify that miſentry, tho a conſiderable time after.

*M.* 24 *E.* 3. *Rot.* 41. *Kanc. Rex.* it was preſented before *Richard de Kelleſhull*, and his fellow juſtices of *oyer* and *terminer*, 18 *E.* 3.

*(c) Hengham* was a judge in the reign of *Edward* 1. and his fine was employed for building a clock-houſe at *Weſtminſter*, and furniſhing it with a clock, which made *Southcot* (one of the judges of the king's bench in the reign of queen *Elizabeth*), when preſt by the chief juſtice to conſent to a raſure of the roll, ſay, that he would not do it, *for he meant not to build a clock-houſe.* Co. *P. C. p.* 72.

*(d)* 2 Co. *Inſtit.* 213.

(*) This was the caſe of *Giles de Berton*, who was convict, *eo quòd ſcienter procuravit omiſſionem dici in proceſſu & recordo coram juſticiariis de banco, quod coram rege venire fecit*; on account of which omiſſion the judgment of the court of common pleas had been reverſed, *pro deceptione prædictâ committitur mareſcallo, & poſtea finem fecit cum domino rege pro* 10 *ſolidis.*

*(e)* It does not appear from the record, whether the judgment was grounded on ſtatute 3 *E.* 1. or on the common law.

that

that one *Wareſius atte Capele* had treſpaſſed in the free warren of the earl of *Huntingdon*, and the abbot of *Battel*, and he was convicted by his own confeſſion, and the clerk had entred the fine ten ſhillings. The record being ſent into the king's bench, *Richard de Kelleſhulc* came into court, & *inſpecto irrotulamento*, ſaid, *Quòd clericus ſuus finem illum ſurreptivè & contra recordum ſuum intravit, & dicit quòd finis ille aſſeſſus fuit per ipſum & ſocios ſuos pro quolibet articulo ad decem libras, & ſic finis ejus ejuſdem* Wareſii *ſummatus fuit ad viginti libras, & illud expreſsè ore tenus hic recordatur*, and prayed for the king, *quòd finis ille ſecundùm recordum ſuum intretur in rotulis extractorum*, and it was accordingly entred; ſo that a judge of record is as it were a living record, and controuls the entry of the clerk.

In the time of *Richard* II. there happened two great complaints againſt the judges and clerks for the miſentry of a record: the one *Rot. Par.* 7 *R.* 2. *pars* 1. *n.* 57. for the lady *Spencer*, who pleaded to a *Quare Impedit* brought againſt her by the king; [648] but at the end of *Trinity* term laſt, the record of her plea was raſed in a material place to her great diſadvantage, and the judges refuſed to amend it, becauſe after the term: the anſwer was—

*Tiel plee come les juſtices voillent recorder qe ent eſtoit pledez, ſoit de novel entre en le lieu de la raſure, nient contreſteant qe le terme, en qel le dit plee fuit pled, ſoit ja paſs, & roy voit qe celui, qe fiſt la raſure, ſoit puniſh pur ſon malfait.*

The other was *Rot. Par.* 7 *R.* 2. *pars* 2. *n.* 20. at the complaint of the prior of *Mountague*, That whereas in a writ of right brought againſt him he prayed in aid of the king, and was ouſted of aid by the court, who entred *quæſitum eſt a Priore, ſi quid, &c.* the judgment that was given was *dictum eſt Priori, quòd reſpondeat ſine auxilio*; and accordingly the judges came into parliament and agreed, that new entries ſhould be made, as was deſired by the prior, and thereupon the prior brought a writ of error in parliament upon the record ſo amended.

Theſe occurrences did the next parliament following, *viz.* 8 *R.* 2. draw on the act of 8 *R.* 2. *cap.* 4. againſt the raſing of records, and the falſe entring of pleas, whereby it is enacted, "That if any judge "or clerk be of default (ſo that by the ſame default enſueth diſhe- "riſon of any of the parties) ſufficiently convict before the king and "his council, in that way that the king and his council ſhall deem "reaſonable, within two years after the default made, &c. he ſhall

" be puniſhed by fine and ranſom at the king's will, and ſatisfy the " party.

Thus this act ſettled it, and ſo it ſtood till 8 *H.* 6. but in this act there occurred ſome inconveniences. 1. The way of trial before the king and council was difficult and inconvenient. 2. The puniſhment as to the clerks ſeemed too gentle. 3. It did not meet with the inconveniences of ſtealing records. 4. It was found of great inconvenience to the due adminiſtration of juſtice; for the judges have often occaſion upon their own memory of the record, and ſometimes upon examination, to rectify undue entries, and were [649] required in ſome caſes to amend the miſentries, or ſmall miſtakes in records by the ſtatute of 14 *E.* 3. *cap.* 6. and other ſtatutes, which could not be done without raſures and alterations of the record and roll.

To remedy the latter of theſe inconveniences in the beginning of this very ſtatute of 8 *H.* 6. *cap.* 12. and farther by the ſtatute of 8 *H.* 6. *cap.* 15. a liberal power is given to the juſtices to amend records, in the purſuance of which power they were by theſe acts of 8 *H.* 6. protected againſt the dangers and ſeverity of the act of *R.* 2.

And then this act proceeds to inflict puniſhment of felony againſt clerks and others, that willingly avoid records, *&c.* which penal law did not at all extend to judges upon three apparent reaſons. 1. Becauſe by this very law, judges had power upon examination to amend records. 2. Becauſe the judges of the ſeveral courts are made the judges to hear and determine theſe offenſes. And, 3. This clauſe not mentioning judges (as that of 8 *R.* 2. did), but beginning with clerks and other perſons, judges ſhall not be included, who are ſuperior officers, upon the reaſon given in the 2 *Co. Rep. caſus archiepiſcopi Cant'*, and accordingly it is agreed by my lord *Coke*, *P. C. cap.* 19. *p.* 72.

Now I come to the conſideration of the ſtatute itſelf, wherein my lord *Coke*, *P. C. cap.* 19. hath made a full collection, to which I can add little.

1. It extends only to the four great courts of *Weſtminſter*, and not to inferior courts.

But as to the *Engliſh* part of the court of chancery, it extends not, becauſe as to the *Engliſh* proceeding it is no court of record.

But yet it ſeems it doth extend to thoſe proceſſes, that iſſue out of that court under the great ſeal, tho they be proceſſes in order to the

*Engliſh*

*Engliſh* proceeding, as *ſubpœna*'s, attachments, commiſſions to examine witneſſes, becauſe theſe being under the great ſeal, are matters of record.

2. The *Treaſury* is added, which doth not only extend to the records of the treaſury of the courts of king's bench and common pleas, but alſo to the records in the receipts of the exchequer, under the cuſtody of the treaſurer and chamberlains [650] of the exchequer: and alſo to the records in the *Tower*, and in the chapel of the rolls, yea, and the records in the cuſtody of the clerk of the lords houſe in parliament, (but not to the journals,) for thoſe are the king's treaſuries of records of the higheſt moment.

3. The offenſes mentioned are four, *ſtealing*, *carrying away*, *withdrawing*, or *avoiding*; and this laſt word *avoiding* is comprehenſive, for it extends to raſing, cutting off, clipping, yea, and cancelling a record.

4. But theſe muſt be done *voluntarily*, as well as *felonicè*, and both theſe words muſt be contained in the indictment upon this ſtatute.

A raſing or cancelling of a record by the order of that court in whoſe cuſtody the record is, is no felony in him that doth it, nor in the court that commands it, for the court hath a ſuperintendence, as well over the record as over the clerks.

5. It extends not to judges for the reaſons before given.

6. It muſt be ſuch an embezzling or avoiding of the record, by reaſon whereof a judgment is reverſed, and therefore it extends only to judicial records in any of thoſe four courts or treaſuries, be the judgment in a caſe criminal or civil.

And therefore it is equally an offenſe againſt this ſtatute whether the avoiding, *&c.* be after judgment given or before, in caſe judgment be given after the offenſe; and it is held, that an outlawry, tho it be *per judicium coronatorum*, is a judgment within this ſtatute.

If the judgment be not actually reverſed by ſuch embezzling, *&c.* yet if it be reverſible by reaſon thereof, it is within this ſtatute, 2 *R.* 3. 10.

And it extends not only to a reverſibleneſs by writ of error, but a reverſibleneſs or avoidableneſs of judgment by plea, by reaſon of ſuch embezzling, *&c.* is within this ſtatute, 2 *R.* 3. 10.

But what if the offenſe of embezzling, avoiding, or raſing, be ſuch as goes in affirmance of the judgment, and makes it good,

which otherwiſe were reverſible, if it ſtood as before that offenſe committed? tho this in ſome caſes be puniſhable by the court as a miſdemeanor in the clerk, yet it ſeems not felony within this act.

And the common practice at this day is, if the *Venire facias* or *Diſtringas* be erroneous, and would make the judgment erroneous, if filed, but being not filed, is aided by the ſtatute of 18 *Eliz. cap.* 14. the court never compels the clerk to file ſuch writs after verdict, much leſs puniſhes them for not doing it.

But if *A. B.* be ſued by the original to the *exigent* and outlawed, and afterwards the *exigent* is made *C. B.* and the original is alſo made *C. B.* to make all agree, this is felony as well in the clerk that raſeth the original, as him that raſeth the exigent. 2 *R.* 3. 10.

7. If the offenſe riſeth in two counties, then it is diſpuniſhable. 2 *R.* 3. 10.

8. The trial is to be one half by the clerks of the court, and the other half by others.

9. The judges of the court of the one bench and the other are by this ſtatute enabled to hear and determine it without any other commiſſion, and each of theſe courts have a concurrent juriſdiction, and where it firſt begins there it is to proceed.

So that it ſeemeth, if the offenſe were in the record of the king's bench, the juſtices of the common bench may hear and determine the offenſe, if it be there firſt indicted.

This power is to hear and determine; the conſequence whereof is, that it enables theſe reſpective courts to take indictments of theſe offenſes; this, tho it be intrinſical to the court of king's bench, (for they ſwear a grand inqueſt and take indictments every term,) yet it is a new power in the common bench.

And altho the trial of the offenſe is to be a party-jury of clerks and others, yet the indictment may be taken either of clerks alone, or of foreigners alone, or of both, for it is only the trial that is to be by a party-jury.

[652] In the caſe of *Danby* and others, 2 *R.* 3. 10. theſe points were reſolved upon this ſtatute, 1. If the offenſe be entirely committed in the county where the court of king's bench or common pleas ſit, it may be tried, heard and determined by either court without a ſpecial commiſſion, for the act of parliament is a commiſſion. 2. If it be committed entirely in a foreign county, or be committed in the county where the court ſits, and then the court remove

move into another county, it muſt be heard and determined in the county where the fact was committed, and cannot be indicted, heard or determined in another county than where it was done. 3. That therefore in that caſe there muſt be a ſpecial commiſſion to the juſtices of the one court, or to the juſtices of the other, to hear and determine the offenſe in that other county, and then they may there take the indictment and try the offender by a party-jury according to the act; but it ſeems, if the indictment be taken by virtue of ſuch commiſſion, it may be removed into the king's bench by *Certiorari*, if indicted before them, and then tried according to the direction of the act. 4. If the offenſe were committed in *London*, where, by privilege and charter of the city, the mayor is to be one in commiſſion and of the *quorum*; yet in this caſe the mayor muſt not be named in the commiſſion, but only the juſtices of one of the courts. 5. If the offenſe be mixt, and partly in *Middleſex*, where the court ſits, and partly in *London*, or any other foreign county, the felony is diſpuniſhable, and ſo it remains at this day, notwithſtanding the ſtatute of 2 & 3 *E.* 6. *cap.* 24. 6. But yet in this caſe the offender committing part of the offenſe in *Middleſex*, may be indicted of miſpriſion of felony in *Middleſex*, or committing part of the offenſe in *London*, may be indicted of miſpriſion of felony in *London*, and thereupon fined and imprifoned: and accordingly it was done by the advice of all the judges, and the parties fined, for every felony includes miſpriſion.

And yet obſerve, 1. The felony was one entire felony committed in two counties, and therefore neither enquirable nor determinable in one county; for the jury of that county cannot take notice of part of the fact committed in another, and yet the miſpriſion [653] of that felony was inquirable and puniſhable in either county, where but part of the felony was committed, and yet the jury in that caſe muſt take notice of the entire felony, part whereof was committed in another county. 2. Altho the felony itſelf is by the act limited to ſpecial juriſdiction and manner of trial, yet the miſpriſion of that felony was tried by a common jury, and before the general commiſſioners of *oyer* and *terminer* in the county where the offenſe was committed. In this offenſe the offender hath the benefit of clergy.

11 *H.* 6. *cap.* 14. It was made felony for three years to ſhip merchandizes of the ſtaple in any creeks; but this is expired.

18 *H.* 6. *cap.* 15. Exportation of wools, other than to the ſtaple of *Calais* or ſtraights of *Morocco*, felony. *Vide ſupra, cap.* 61. *p.* 642. & *infra.*

18 *H.* 6. *cap.* 19. Soldiers departing from their captain without licenſe, felony. This, together with thoſe other ſtatutes, of the ſame kind, as 7 *H.* 7. *cap.* 1. 3 *H.* 8. *cap.* 5. I ſhall refer to the ſtatute of 2 *E.* 6. *cap.* 2. where I ſhall take the whole matter of ſoldiers departing into conſideration.

28 *H.* 6. *cap.* 4. It is felony to take a diſtreſs in the counties and royal ſeignories in *Wales* or dutchy of *Lancaſter*, and carry them out of the ſaid counties, dutchy or ſeignories, *&c.* ſaving for the lords of fees diſtraining. This act was to continue only five years, and then expired.

33 *H.* 6. *cap.* 1. If houſhold ſervants, after the death of their maſter, violently and riotouſly take and ſpoil the goods of their maſter, and the ſame diſtribute among themſelves, upon complaint made by the executors, or two of them, to the chancellor, the chancellor with the advice of the chief juſtices and the chief baron, or two of them, ſhall direct writs of proclamation to the ſheriff for the offenders to appear in the king's bench upon ſome day certain, fifteen days at leaſt after the proclamation.

[654] And if he appear, he ſhall be committed to anſwer the ſuit of the executors by bill or writ; but if he appear not at the return of the writ, after proclamation ſo made, he ſhall be attaint of felony.

This ſtatute extends to one executor, if but one, and to adminiſtrators, if no executors, to a lord keeper of the great ſeal, when no chancellor.

This was a proceſs much in uſe in caſe of great offenſes, eſpecially about this king's reign, to convict men ſometimes in civil offenſes, ſometimes in caſes criminal upon default of appearance at the return of the proclamation. *Vide Stat.* 5 *H.* 4 *cap.* 6. 11 *H.* 6. *cap.* 11.

But this attainder doth not exclude the offender from clergy: *Co. P. C. cap.* 43. *p.* 104.

12 *E.* 4. *cap.* 5. All wools, woolfells, morling and ſhorling of *Weſtmoreland*, *Cumberland*, *Northumberland*, and *Durham*, to be ſhipped out, ſhall be ſhipped at *Newcaſtle* upon *Tine*, and thence to *Calais* or *Middleborough*, there to be ſtapled and uttered, and all other wools, woolfels, morling and ſhorling, to be conveyed only to the ſtaple of *Calais*; if any attempt to the contrary, it ſhall be felony, ſaving the king's prerogative to licenſe tranſportation elſewhere. This act to continue for five years only, and ſo it expired.

17 *E.* 4. *cap.* 1. If any ſhall carry or cauſe to be carried out of this realm or *Wales*, any manner of money of the coin of this realm, or any other realm, plate, veſſel, maſs bullion, jewels of gold wrought or unwrought, or ſilver without the king's licenſe, except the perſons diſpenſed with by the ſtatute of 2 *H.* 6. *cap.* 6. it ſhall be felony.

This act was to continue only for ſeven years.

And by the act of 4 *H.* 7. *cap.* 23. it was re-enacted again to continue twenty years; and by the ſtatute of 1 *H.* 8. *cap.* 13. it was continued till the next parliament, *(f)* and then diſcontinued; but by the act of 7 *E.* 6. *cap.* 6. it was revived for twenty years, and then expired; ſo that at this day the exportation of gold and ſilver is not felony, but remains only under the penalty of thoſe ſtatutes that prohibit its exportation under pains of forfeiture; for the act of 17 *E.* 3. did not make exportation felony. *(g)* And having [655] this occaſion I ſhall here once for all give an account of the laws in force againſt the exportation of money and bullion.

By the ſtatute of 9 *E.* 3. *cap.* 1 None are to carry any ſterling out of the realm of *England*, nor ſilver in plate, nor veſſel of gold or ſilver, upon pain of forfeiture of the ſame, that he ſhall ſo carry, without the king's licenſe; this is confirmed in ſubſtance by 38 *E.* 3. *cap.* 2. 5 *R.* 2. *cap.* 2.

By the ſtatute of 2 *H.* 4. *cap.* 5. If any gold or ſilver be found in the keeping of any upon his paſſage over ſea, in any ſhip or veſſel to go out of any port or creek without the king's licenſe, it ſhall be forfeit, ſaving his reaſonable expenſes.

Merchants ſtrangers to lay out one half of the proceed of their merchandize upon *Engliſh* merchandize, and may carry over the other moiety.

By the ſtatute of 4 *H.* 4. *cap.* 15. All merchants, and ſtrangers, and others, that ſell merchandizes here, ſhall lay out the money thereby ariſing in other merchandizes of *England*, to carry the ſame without carrying any gold or ſilver in coin, plate or maſs out of this realm, upon pain of forfeiting all the ſame, ſaving always their reaſonable expenſes.

This act is ſtill in force, and received a farther confirmation by the ſtatute of 5 *H.* 4 *cap.* 9. 9 *H.* 5. *cap.* 1.

(*f*) But not as to the penalty of felony, for that is excepted in the act.
(*g*) Except in the ſearcher, if he confederated with any to export it.

2 *H.* 6. *cap.* 6. No gold or ſilver to be carried out of the realm contrary to the former ſtatutes, except for payment of the king's ſoldiers, upon pain of forfeiture of the value of the ſum ſo carried, one fourth part to the diſcoverer, except ranſom of priſoners, and money that ſoldiers carry for their neceſſary coſts, and for horſes and ſheep bought in *Scotland*.

3. *H.* 7. *cap.* 8. All foreign merchants ſhall employ their money received in ports, *&c.* upon merchandize or commodities of this real, the proof to lie upon the merchant, upon pain of forfeiture of all his goods, and a year's impriſonment. This clauſe of the ſtatute of 17 *E.* 4. made perpetual.

[656] 19 *H.* 7. *cap.* 5. None to convey any coin, bullion, or plate, above the value of 6*s.* 8*d.* out of this realm into *Ireland*, nor convey ſuch bullion, plate or coin into any ſhip, boat or other veſſel, upon pain of forfeiture thereof, and making fine and ranſom at the king's will.

So theſe ſeveral ſtatutes lie in the way of tranſportation of bullion or coin, tho the act of 17 *E.* 4. and other acts making it felony are now expired. *(h)*

## CHAP. LXIII.

*Concerning the* new felonies *enacted in the times of* R. 3. H. 7. H. 8. E. 6. *and Queen* Mary.

I Find no new felony enacted in the ſhort reign of *R.* 3.

By the ſtatute of 1 *H.* 7. *cap.* 7. "At every time as informa-"tion ſhall be made of any unlawful hunting in any foreſt, park or "warren by night, or with painted faces, to any of the king's council, "or to any of the juſtices of peace in the county where any ſuch "hunting ſhall be had, of any perſon ſo ſuſpected thereof, it ſhall be

(*b*) By 13 & 14 *Car.* 2. *cap.* 31. The melting down the ſilver money of this realm is prohibited, on pain of forfeiting it, and double the value; and by 15 *Car.* 2. *cap.* 7. it is lawful to export foreign coin or bullion, provided an entry be made thereof at the cuſtom-houſe: but by 6 & 7 *W.* 3. *cap.* 17. and 7 & 8 *W.* 3. *cap.* 19. before the ſame be ſhipt, it is neceſſary there ſhould be a certificate from the lord mayor and court of aldermen of *London*, that oath had been made before them by the owner of the ſaid bullion, and by two or more credible witneſſes, that the ſaid bullion, and every part thereof, is foreign bullion, and that no part thereof was the coin of this kingdom, or clippings thereof, or plate wrought within this kingdom.

"lawful

" lawful to any of the ſame council or juſtices of peace, to whom " ſuch information ſhall be made, to make a warrant to the " ſheriff of the county, conſtable, bailiff, or other officer [657] " within the ſame county, to take and arreſt the ſame perſon or per- " ſons, of whom ſuch information ſhall be made, and to have him or " them before the maker of the ſaid warrant, or any other of the " king's ſaid council or juſtices of peace of the ſaid county; and that " the ſaid counſellor or juſtice of peace, before whom ſuch perſon or " perſons ſhall be brought, by his diſcretion have power to examine " him or them ſo brought of the ſame hunting, and of the ſaid doers " in that behalf; and if the ſame perſon wilfully conceals the ſame " hunting, or any perſon with him defective therein, that then the " ſame concealment be againſt every perſon ſo concealing, felony; " the ſame felony to be inquired of and determined as other felonies " within this realm have uſed to be; and if he *then* confeſs the truth, " and all that he ſhall be examined of and knoweth in that behalf, that " then the ſaid offenſes by him done be againſt the king our ſovereign " lord but treſpaſs fineable, by reaſon of the ſaid confeſſion, at the " next ſeſſions of the peace to be holden for the ſame county by the " king's juſtices of the ſame ſeſſions to be there ſeſſed; and if any reſ- " cous or diſobeyance be made by any perſon, the which ſo ſhould " be arreſted, ſo that the execution of the ſame warrant thereby be " not had, then the ſame reſcous and diſobeyance be felony inquitable " and determinable, as is aforeſaid; and if any perſon be convict of " ſuch hunting with painted faces, vizors, or otherwiſe diſguiſed, to " the intent he ſhould not be known, or of any unlawful hunting in " the night, then the ſame perſon ſo convict to have ſuch puniſhment, " as he ſhould have, if he were convict of felony. *(a)*

My lord *Coke*, *P. C. cap.* 21. hath given us the whole learning of this ſtatute, *viz.*

1. The hunting with vizors or painted faces in the day-time, and the hunting in the night with or without ſuch vizors, is [658] felony; but the party may make it treſpaſs only, if he pleaſes. *Dy.* 50. *a.*

*(a)* But now by 9 *Geo.* 1. *cap.* 22. (continued by 6 *Geo.* 2. *cap.* 37.) it is made felony without benefit of clergy for any perſon being armed with any offenſive weapons, and having their faces blacked or diſguiſed, to appear in any foreſt, chaſe, &c. or unlawfully to hunt, kill or ſteal any deer, or rob any warren, or ſteal fiſh out of any river or pond, or for any perſon unlawfully to hunt any deer in the king's foreſts, &c. or maliciouſly to break down the head of any fiſh-pond, whereby the fiſh ſhall be loſt or deſtroyed.

2. It

2. It doth not extend to the foreſt, or chaſe, or park of the king's *(b)*, nor to foreſts, parks, or warrens in reputation only, and not in right.

3. The complaint may be made to any one juſtice of peace or of the council, and the warrant may be granted by any one.

4. The warrant muſt be in writing under ſeal, and grounded upon an examination ſhewing a probable cauſe of ſuſpicion.

5. When the offender is brought, he muſt be examined of the fact done by himſelf, and then of the fact done by others, but not upon oath.

6. A hunting without killing is within the penalty.

7. Tho the hunting be not felony, yet the reſcue or diſobeyance is felony.

8. But the reſcue or diſobeyance made felony is only that which is done by the party, not by a ſtranger.

And altho the party reſcue himſelf, yet if he be re-taken, ſo as execution of the warrant be had, it is no felony.

9. If the party plead not guilty, and is convict of the fact, it is felony; but if he confeſs upon his arraignment, it then becomes only a treſpaſs finable, tho he denied it upon his firſt examination.

10. It is held, that if he confeſs not but conceals upon his examination before the juſtice, this alone makes it not felony, neither can he be indicted upon this ſtatute for ſuch concealment; but it muſt be a judicial concealment, namely, if being indicted for the hunting he upon his arraignment conceals, then he ſhall be indicted *de novo* for ſuch concealment; and if convict thereof, he ſhall be attaint of
[659] felony for concealment, tho this ſeems a difficult expoſition; *(c)* for upon his arraignment for the hunting he only anſwers to that indictment, and is not examined touching others; and beſides, if he be indicted for the hunting, if there be evidence to convict him of the fact, he is convict of felony before the indictment for conceal-

*(b)* As to this caſe, a remedy was provided by 31 *H.* 8. *cap.* 12. whereby this offenſe, if committed in the king's foreſts, &c. is abſolutely made felony; but that ſtatute being repealed by the general clauſe of 1 *E.* 6. *cap.* 12. a remedy was again provided by the ſtatute of 9 *Geo.* 1. abovementioned.

*(c)* This difficulty ariſes from the aforeſaid conſtruction of the act, that it muſt intend a judicial concealment, whereas the act ſeems plainly to mean a concealment upon his examination before the juſtice; for after the act had given power to the juſtice to examine the ſuſpected perſon, it immediately adds, *and if the ſame perſon wilfully conceals*, &c. *the ſaid concealment ſhall be felony*; *and if he* then *confeſs the truth, and all that he ſhall be examined of, his offenſe ſhall be but treſpaſs*; the word *then* ſhews the time of confeſſion to be at the examination, and therefore the concealment likewiſe muſt be intended to be at that time.

ment

ment comes; and if there be not evidence to convict him of the principal, how ſhall there be evidence to convict him of the concealment?

11. The concealment that makes a felony, muſt be a wilful concealment.

By the ſtatute of 3 *H.* 7. *cap.* 2. It is enacted, "That whereas "women, as well maidens, as widows and wives having ſubſtances, "ſome in moveable goods, ſome in lands and tenements, and ſome "being heirs apparent to their anceſtors, had been often taken by "raiſdoers contrary to their wills, and after married to ſuch miſdoers, "or to others by their aſſent, or defiled to the great diſpleaſure of "God, contrary to the king's laws, and diſparagement of the ſaid "women, and utter heavineſs and diſcomfort of their friends, and to "evil example of others, it is therefore ordained, eſtabliſhed and "enacted by our ſovereign lord the king, by the advice of the lords "ſpiritual and temporal, and commons in the ſaid parliament aſſem-"bled, and by authority of the ſame, That what perſon or perſons "from henceforth taketh any women *ſo* againſt her will unlawfully, "that is to ſay, maid, widow, or wife, that *ſuch* taking, procuring, "abetting to the ſame, and alſo receiving wittingly the ſame woman "*ſo* taken againſt her will, and knowing the ſame, be felony; and "that ſuch miſdoers, takers, and procurators to the ſame, and re-"ceivers, knowing the ſame offenſe in form aforeſaid, be henceforth "reputed and judged as principal felons. Provided that this act extend "not to any perſon taking any woman, only claiming her [660] "as his ward or bond-woman.

For the making of a felony within this ſtatute, there muſt be theſe circumſtances on the part of the woman: 1. That the maid, wife, or widow, have ſubſtance of goods or land, or be heir apparent. 2. That ſhe be taken away againſt her will. 3. That ſhe be married to, or defiled by the miſdoer, or ſome others by his conſent. Without theſe three concurring, it makes no felony within this ſtatute, 3 & 4 *P.* & *M. Dalliſon* 22. 4. That ſhe be not in ward, or a bond-woman to the perſon that taketh her, or cauſeth her to be taken only as his ward or bond-woman. *Co. P. C. cap.* 12. *p.* 61.

In *Fulwood*'s caſe, *M.* 13. *Car.* 1. *B. R. Cro. p.* 482. 484. 488. 492. theſe points were reſolved: 1. That if a woman be taken away forceably in the county of *Middleſex*, and married in the county of *Surrey*, the fact is indictable in neither county; for the taking without the marriage, nor the marriage without the taking, make not felony.

2. But

2. But if ſhe were taken in the county of *Middleſex*, and carried into the county of *Surrey*, ſo that it is a continuing force in *Surrey*, tho begun in *Middleſex*, and then ſhe is married in *Surrey*, there the offender may be indicted upon this ſtatute in *Surrey*. 3. Tho poſſibly the marriage or the defilement might be by her conſent, being won thereunto by flatteries after the taking, yet this is felony, if the firſt taking away were againſt her will *(d)*. 4. That if as well the marriage as the taking away were againſt her will, ſo that the marriage was voidable, yet it is a marriage *de facto*, and therefore being taken away againſt her will, and alſo married againſt her will, it is felony within this ſtatute. 5. That it is not neceſſary in the indictment to ſay, that ſhe was taken *eâ intentione* to marry or defile her, becauſe the ſtatute hath no ſuch words of *eâ intentione*. But farther, he marrying her the ſame day he took her, it muſt needs appear, that it was *eâ intentione*; yet theſe words, *eâ intentione ad ipſam maritand'*, are uſually added in indictments upon this ſtatute, and it is ſafeſt ſo to do. 6. That the woman thus taken away and married may be ſworn and give evidence againſt the offender, who ſo took and married her, tho ſhe be his wife *de facto*.

[661]

And all theſe points were accordingly reſolved, *H.* 24 & 25 *Car.* 2. in *Brown*'s caſe *(e)*, upon this ſtatute, only the indictment ran, *cepit eâ intentione ad ipſam maritandam:* the offender was convict and executed: and the reaſons why the woman was ſworn and gave evidence in the caſe of *Brown* were, 1. Becauſe the taking away of the woman and marrying were the ſame day, and ſhe was reſcued out of their hands, and the offender taken the next day, and ſo all done *flagrante crimine*. 2. It was but a forced marriage, and ſo no marriage *de jure*. 3. There was no cohabitation. 4. Concurring evidence to prove the whole fact. But had ſhe freely without conſtraint lived with him that thus married her, any conſiderable time, her examination in evidence might be more queſtionable.

By the ſtatute of 39 *Eliz. cap.* 9. Clergy is taken away from the principals, procurers, and acceſſaries before the offenſe committed.

By this act of 3 *H.* 7. the procurers, as well as the miſdoers themſelves, and any perſon that receives the woman thus taken away, are principals by this ſtatute, and ſo ouſted of clergy; but he that receives the offender knowingly, is only acceſſary *after*, and not excluded from clergy.

*(d)* And ſo it was reſolved in *Swendſen*'s caſe, *M.* 1 *Ann. State Tr. Vol.* V. *p.* 468. in which caſe moſt of the other points here mentioned were likewiſe ruled.

*(e)* 3 *Keb.* 193. 1 *Ven.* 243.

*Quære,*

*Quære*, Whether tho the receiver of the woman be made principal by the act of 3 *H.* 7. he were intended to be ouſted of clergy by 39 *Eliz. cap.* 9.

The ſtatute of 3 *H.* 7. *cap.* 14. recites, "That foraſmuch as by "quarrels made to ſuch as have been in great authority, office, and "of council with the kings of this realm, hath enſued the deſtruc-"tion of the kings and undoing of this realm, ſo as it hath appeared "evidently, when compaſſing of the death of ſuch as were the "king's true ſubjects was had, the deſtruction of the prince was "imagined thereby, and for the moſt part it hath grown by the "malice of the king's own houſhold ſervants, as now of late ſuch "a thing was like to have enſued; and foraſmuch as by [662] "the law of this land, if actual deeds be not had, there is "no remedy for ſuch falſe compaſſings, imaginations, and con-"federacies had againſt any lord, or any of the king's council, or "any of the king's great officers in his houſhold, as ſteward, trea-"ſurer, comptroller, and ſo great inconveniences might enſue, if "ſuch ungodly demeaning ſhould not be ſtraitly puniſhed before "that actual deed were done; therefore it is ordained by the king, "and the lords ſpiritual and temporal, and the commons of the ſaid "parliament aſſembled, and by authority of the ſame, that from "henceforth the ſteward, treaſurer, and comptroller of the king's "houſe for the time being, or one of them, ſhall have full power "and authority to inquire by twelve ſad men and diſcreet perſons of "the exchequer roll of the king's houſhold, if any perſon admitted "to be his ſervant, ſworn, and his name put into the chequer roll "of his houſhold, whatſoever he be, ſerving in any manner, office "or room, reputed, had or taken, under the ſtate or degree of a lord, "make any conſpiracies, compaſſing, confederacies or imaginations "with any perſon or perſons to deſtroy or murder the king, or any "lord of this realm, or any other perſon ſworn to the king's council, "ſteward, treaſurer, or comptroller of the king's houſe, that if it be "found before the ſaid ſteward for the time being by the ſaid "twelve ſad men, that any ſuch of the king's ſervants as is above-"ſaid, hath confederated, compaſſed, conſpired, or imagined, as is "abovesaid, that he ſo found by that inquiry be put thereupon to "anſwer, and the ſteward, treaſurer, and comptroller, or two of "them, have power to determine the ſame matter according to the "law; and if he put him in trial, that then it be tried by other

"twelve

" twelve ſad men of the ſame houſhold; and that ſuch miſdoers have " no challenge but for malice. And if ſuch miſdoers be found guilty " by confeſſion or otherwiſe, that the ſaid offenſe be judged felony, " and they to have judgment and execution as felons attaint ought " to have by the common law.

[663] *Vide* the obſervations of my lord *Coke* upon this act, *Co. P. C. cap.* 4. where on the part of the offender there muſt be theſe qualifications, *viz.* 1. He muſt be the king's ſworn ſervant. 2. His name muſt be in the chequer roll. 3. He muſt be under the degree of a lord. 4. Tho his conſpiring with another not of the houſhold be an offenſe, yet he only of the houſhold is the felon.

On the part of the perſon againſt whom the conſpiracy is, are theſe requiſites: 1. The conſpiracy to murder the king; or 2. A lord of the realm, but yet only ſuch as is ſworn of the king's privy council. 3. Any other of the king's privy council, tho under the degree of a lord. 4. The ſteward, treaſurer, or comptroller of the king's houſe, tho neither a lord nor of the privy council.

The power to hear and determine. 1. The ſteward, treaſurer, and comptroller, [or any two of them, have power to determine,*] tho the act ſaith, they or any one of them may inquire. 2. If a ſervant of the king's houſe, *ut ſupra*, conſpire the death of the ſteward, treaſurer, and comptroller, yet they remain the only judges in this cauſe by this act, tho they may take others to their aſſiſtance, yet none but they ſit as judges. 3. The preſentment and trial muſt be only by the ſervants of the houſhold. 4. The inquiry may be by twelve or more, but the trial only by twelve. 5. No challenge but for malice. 6. The conſpiracy muſt be plotted in the king's houſhold. 7. The offender is to have his clergy.

And *note*, this being a new made felony, and the manner of its determination particularly limited, it is not determinable before any other judges, or in any other courts, neither in the king's bench, oyer and terminer, or gaol delivery. *Quære*, whether their ſeſſion muſt not be in the king's houſe.

By the ſtatute of 7 *H.* 7. *cap.* 1. There is proviſion of felony againſt captains and ſoldiers leaving their ſervice; but this I ſhall take up

* The words here in the MS. are, *Or any one or any two of them have power to inquire*, but they ſeem plainly to have been ſo written by miſtake, the ſenſe requiring them to be as above.

here-

hereafter, as alſo the ſtatute of 3 *H.* 8. *cap.* 5. which I ſhall refer to 4 & 5 *P.* & *M. cap.* 3.

I come to the time of *H.* 8. which was fruitful in enacting new treaſons and new felonies, and new offenſes as [664] to *Præmunire.*

But there were two acts of parliament, that repeald as all new treaſons and miſpriſions of treaſons, ſo all new felonies enacted at any time after the firſt day day of the reign of *Henry* 8. *viz.*

1 *E.* 6. *cap.* 12. Whereby it is enacted, " That all offenſes made " felony by any act or acts of parliament made ſince the 23d day of " *April,* in the firſt year of the reign of king H. 8. not being felony " before, and alſo all and every the branches and articles mentiond, " or in any ways declared in any of the ſaid ſtatutes concerning the " making of any offenſe or offenſes to be felony, not being felony " before; and all pains and forfeitures concerning the ſame, or any " of them, ſhall from henceforth be repeald, and utterly void and of " none effect.

1 *Mar. cap.* 1. Whereby it is enacted, " That all offenſes made " felony, or limited to be within the caſe of *Præmunire,* by any act " or acts of parliament, ſtatute or ſtatutes made ſince the firſt day " of the firſt year of the reign of king *Henry* 8. not being felony " before, nor within the caſe of *Præmunire,* and all and every branch, " article and clauſe mentiond, or in any ways declared in any of the " ſaid ſtatutes concerning the making of any offenſe or offenſes to " be felony, or within the caſe of *Præmunire* before, and all pains " and forfeitures concerning the ſame, or any of them, ſhall from " henceforth be repeald and utterly void, and of none effect.

The former of theſe ſtatutes, and alſo the latter repeald all new felonies enacted in the time of *H.* 8. who began his reign *April* 22. 1509. and the latter of theſe ſtatutes repeald alſo the new created felonies in the reign of *E.* 6.

But neither of theſe ſtatutes did extend to piracy or robbery upon the ſea, nor any ſuch act as concerned matter of proceedings touching felonies, that were ſuch before the time of *H.* 8. and therefore thoſe ſtatutes in the time of *H.* 8. that concerned clergy, ſanctuary, peremptory challenge, place or manner of trial of felons, or [665] the erecting of new juriſdictions for their trial, as that of 33 *H.* 8. *cap.* 12. for felonies in the king's court; for theſe acts were

not conſtitutive of new felonies, but only directions of the courſe of proceedings in caſes of old felonies.

Thoſe ſtatutes that made new felonies both in the time of *H.* 8. and *E.* 6. are therefore of theſe kinds, *viz.*

1. Such as were enacted *de novo* in the times of *H.* 8. and *E.* 6. and were never after revived or re-enacted by any ſubſequent act of parliament; ſuch were thoſe of 31 *H.* 8. *cap.* 2. of breaking the heads of ponds, and taking fiſh, 31 *H.* 8. *cap.* 12. and 32 *H.* 8. *cap.* 11. ſtealing of hawks eggs, and hunting in the king's foreſts, *&c.* 33 *H.* 8. *cap.* 8. of witchcraft. 33 *H.* 8. *cap.* 14. of prophecies. 37 *H.* 8. *cap.* 6. The burning of a frame of timber. 37 *H.* 8. *cap.* 10. Libellous papers charging men to have ſpoken treaſon. 23 *H.* 8. *cap.* 11. Breaking priſon.

2. Such as were repeald but enacted again in the ſame kind, but with ſome alterations, as 22 *H.* 8. *cap.* 10. concerning *Egyptians*, altered by 1 *&* 2 *P. & M. cap.* 4. and by 5 *Eliz. cap.* 20.

3. Such as were *de novo* enacted to be felonies in the times of *H.* 8. and *E.* 6. and repeald, but re-enacted again, as 22 *H.* 8. *cap.* 11. touching cutting of *Powdike*, renewed by 2 *&* 3 *P. & M. cap.* 19. 3 *H.* 8. *cap.* 5. concerning ſoldiers, re-enacted in a great meaſure by 2 *E.* 6. *cap.* 2. and 4 *&* 5 *P. & M. cap.* 3. 21 *H.* 8. *cap.* 7. ſervants embezzling their maſters goods, by 5 *Eliz. cap.* 10. 25 *H.* 8. *cap.* 6. concerning buggery, by 5 *Eliz. cap.* 17. 23 *H.* 8. *cap.* 16. concerning *Scotchmen*, re-enacted by 1 *Eliz. cap.* 7. but finally repeald by 4 *Jac.* 1. *cap.* 1.

4. Some offenſes were made felony by former acts of parliament before *H.* 8. but had additions to them, extending the felonies farther than the old acts, ſome ſuch thing may be found in the ſtatute of 3 *H.* 8. *cap.* 5. concerning ſoldiers in relation to the ſtatute of 7 *H.* 7. *cap.* 1. and then the old felonies ſtand, but the additional felonies are repeald.

[666] Concerning the firſt of theſe ranks of acts, I ſhall ſay nothing, becauſe they are now utterly void; but concerning the other three ranks of ſtatutes, I ſhall proceed according to their order of time.

Firſt, For the ſtatute of 3 *H.* 8. *cap.* 5. as alſo that of 2 *E.* 6. *cap.* 2. concerning ſoldiers, I ſhall refer them to the ſtatute of 4 *&* 5 *P. & M. cap.* 18.

By

By the ſtatute of 21 *H.* 8. *cap.* 7. It is enacted, "That all and "ſingular ſervants, to whom any caſkets, jewels, money, goods or "chattels, by his or their maſters or miſtreſſes, ſhall from henceforth "be delivered to keep, that if any ſuch ſervant or ſervants withdraw "themſelves from their maſters or miſtreſſes, and go away with the "ſaid caſkets, jewels, money, goods or chattels, or any part thereof, "to the intent to ſteal the ſame, and defraud his or their maſters or "miſtreſſes thereof, contrary to the truſt and confidence to him or "them put by his or their maſters or miſtreſſes, or elſe being in the "ſervice of his or their maſter or miſtreſſes without any aſſent or "commandment of his maſter or miſtreſs, embezzle the ſame caſkets, "jewels, money, goods or chattels, or any part thereof, or other-"wiſe convert the ſame to his own uſe with like purpoſe to ſteal it, "that if the ſaid caſket, jewels, money, goods or chattels, that any "ſuch ſervant ſhall go away with, or which he ſhall embezzle with "purpoſe to ſteal as aforeſaid, be of the value of forty ſhillings, or "above, that then the ſame falſe, fraudulent, or untrue act and "demeanor ſhall from henceforth be deemed and adjudged felony, "*&c.* Provided it extends not to apprentices, nor to any perſon under "the age of eighteen years; but every ſuch apprentice or perſon "within that age doing that act ſhall be and ſtand in the like caſe "as they were before the making of this act. This act to endure "till the next parliament.

By the act of 27 *H.* 8. *cap.* 17. Clergy was taken away in this caſe, if the indictment were laid ſpecially upon the act of 21 *H.* 8. and purſuant to the ſame; and by the act of 28 *H.* 8. *cap.* 2. this act of 21 *H.* 8. was made perpetual; but by the act of 1 *E.* 6. *cap.* 12 theſe acts were both repealed.

But again, by the act of 5 *Eliz. cap.* 10. this act of 21 *H.* 8. was re-enacted and revived, yet it did not revive the act of 27 *H.* 8. *cap.* 17. for taking away clergy. 1. Becauſe the words of the reviving act of 5 *Eliz.* revive only the act of 21 *H.* 8. ſpecially and particularly by name, and not any other incident act concerning clergy. And again, 2. Becauſe the acts taking away clergy were ſpecially repealed by the ſtatute of 1 *E.* 6. *cap.* 12. except in thoſe caſes there particularly enumerated, ſo that at this day a party indicted and convict upon this ſtatute hath his clergy. *(f)* [667]

*(f)* But by 12 *Ann cap.* 7. Clergy is in ſuch caſe taken away from facts committed in any houſe or out-houſe, except as to apprentices under the age of fifteen years, robbing their maſters.

And *note*, that in this caſe, and all other caſes of this nature where a ſtatute is repealed and re-enacted, an indictment or information may conclude either *contra formam ſtatutorum*, or *contra formam ſtatuti*, for it ſhall be intended the laſt ſtatute. And ſo it is, if a ſtatute be but temporary and then expires, and then is re-enacted; but if a ſtatute be continued till the end of the next ſeſſion of parliament, and before that next ſeſſion be ended it is continued over, the indictment may run *contra formam* of the firſt ſtatute, for it never was interrupted, or it may conclude *contra formam ſtatutorum*. *P.* 42 *Eliz. B. R. Dingly* and *Moore*, (*g*) *M.* 31 & 32 *Eliz. B. R. Mill's* caſe.

This ſtatute was introductive of a new law, when the goods were actually delivered to the ſervant that goes away with them; for where there is ſuch a delivery it could not at common law be a felony.

But yet a ſervant might be guilty of felony at common law, if he takes the goods of his maſter feloniouſly, nay, tho they be goods under their charge, as a ſhepherd, butler, &c. *vide ſupra*, *cap.* 43. *p.* 505. and for this he may be indicted at this day as a felony at common law, and of this felony at common law, an apprentice or ſervant under the age of eighteen years may be guilty, and indicted thereof at common law.

And therefore tho the ſtatute of 21 *H.* 8. exempt an apprentice or [668] ſervant under the age of eighteen years from the pain of felony enacted *de novo* by this ſtatute, namely, where goods are actually delivered to him, yet it leaves him in the ſame condition as to any felony at common law, as if he were not excepted; and therefore if my butler or ſhepherd, under the age of eighteen years, or if my apprentice takes away my goods feloniouſly without my actual delivery. tho they are under the value of forty ſhillings, he is indictable of felony at common law.

If I deliver my ſervant a bond to receive money, or deliver him goods to ſell, and he receives the money upon the bond or goods, and goes away with it, this is not felony at common law becauſe the money is delivered to him, nor felony by this ſtatute, becauſe tho the bond or goods were delivered him by the maſter, yet the money was not ſo delivered by the maſter. *Dy.* 5. *a. Co. P. C. cap.* 44. And yet by the very payment of the money to the ſervant to the maſter's uſe, the maſter is by law ſaid to be actually poſſeſſed of this money; and if taken away from the ſervant by a treſpaſſer or robber, the maſter

(*g*) *Cro. Eliz.* 750.

may

may have a general action of treſpaſs, or action upon the ſtatute of hue and cry.

But it is held, that if the maſter delivers to the ſervant twenty pounds in ſilver to change it into gold at the goldſmith's or leather to make ſhoes, and he run away with the gold or ſhoes, it is felony. *Crompt. Juſtic.* 35. *b.*

If *A.* hath two ſervants, *B.* and *C. B.* by the command of *A.* the maſter, and in his preſence delivers the maſter's goods to *C.* by the maſter's command, and *C.* runs away with it, this is felony within the ſtatute, for it is the maſter's delivery; but ſuppoſe it be delivered by the maſter's command, but in the maſter's abſence, *quære*, whether this be within the ſtatute, and what difference there is between this caſe and the receiving money from a creditor by the maſter's directions? yet *vide Dy.* 5. it ſeems felony.

If the maſter's wife delivers goods of the maſter to the ſervant to keep, and he goes away with it, it ſeems this is within the ſtatute, for he hath them by delivery of his miſtreſs, and the maſter's wife is as well his miſtreſs, as if ſhe were ſole, *vide* ſtatute 25 *E.* 3. for petit treaſon.

By the ſtatute of 22 *H.* 8. *cap.* 11. Every perverſe and malicious cutting down of the new *Powdike* of *Marſhland*, [669] or of the old *Powdike* of the iſle of *Ely*, or of any part thereof, or of any other bank, being part of the rind and uttermoſt part of the country of *Marſhland*, made for the defenſe thereof, other than working upon the ſame for repairing or amending the fortifying thereof, is enacted to be felony.

This act was repealed by 1 *E.* 6. *cap.* 12. and 1 *Mar. cap.* 1. but is revived by 2 & 3 *P.* & *M. cap.* 19. and ſo continues.

But the offender hath the benefit of clergy.

By the ſtatute of 23 *H.* 8. *cap.* 16. The ſelling of a horſe to a *Scotchman*, or delivering a horſe in *Scotland* is made felony.

This was repealed by 1 *E.* 6. *cap.* 12. and tho made penal by the act of 1 *E.* 6. *cap.* 5. yet never revived, *(h)* and the acts of this kind are repealed by 4 *Jac.* 1. *cap.* 1. as to *Scotland.*

By the act of 25 *H.* 8. *cap.* 6. buggery with mankind or beaſt is enacted to be felony, and the felon excluded from clergy.

*(h)* This muſt be ſome miſtake in the MS. for this ſtatute was revived, as our author himſelf ſays a little above, *p.* 663. by 1 *Eliz. cap.* 7. tho afterwards repeal'd by 4 *Jac.* 1 *cap.*