A

TREATISE

OF THE

Pleas of the Crown.

By EDWARD HYDE EAST, Esq.
OF THE INNER TEMPLE.

Quid triſtes querimoniæ,
Si non ſupplicio culpa recidítur.
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CHAP. XV.

BURGLARY.

Definition.

A breaking and entering the Manſion-Houſe of another in the Night, with Intent to commit ſome Felony within the ſame. - - - § 1.

1. *What a breaking.* - - - § 2.

There muſt be a Breach procured by the Act of the Felons. *ib.* Not ſufficient if Door left open and Thieves enter. Aliter of Chimnies. But ſufficient if Door procured to be opened by Fraud. *ib.* Even through the Medium of legal Proceſs. *ib.* Or by any falſe Suggeſtion or Pretence. *ib.* Or by Conſpiracy with thoſe within. *ib.* Or Threat of Force to them. *ib.*

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What a ſufficient Breach of the Houſe in Fact. § 3.

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By

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Burglary.

§ 1. *Definition.* 3 Inst. 63. 1 Hale, 549, &c. Sum. 73. 1 Hawk. ch. 38. s. 1. 4 Blac Com 224. Staundf. 30. 1 Bac. Abr. 539. Crompt. Just. 31.

BURGLARY, which is derived from the German burg, a house, and laron or latro, a thief, is a felony at common law, and is generally defined to be,—A breaking and entering the mansion-house of another, in the night, with intent to commit some felony within the same, whether such intent be executed or not. The learning upon this subject will best be exhibited under the several parts of this definition.

1. *What is a breaking.*
2. *An entering.*
3. *A mansion-house.*
4. *Of whom.*
5. *In the night.*
6. *As to the intent.*

1. There

1. There must be a breach of the house made or procured by the act of the felons; and this either by construction of law, or by actual force. Ch. XV. § 2. *Breaking.*

§ 2.

1 Hale, 551, 2, &c. 3 Inst. 64. Kel. 67. 70. 1 Hawk. ch. 38. s. 4. Sum. 82, 1. 1 Bac. Abr. 539. 4 Blac. Com. 226. Dalt. ch. 151 s. 3. Crompt. Just. 32.

But though generally speaking every entry by a trespasser be a breaking in law, yet that is not sufficient in this case; for the words of the indictment are, feloniously and burglariously broke, &c. Therefore if the door or window be left open, and the thief enter and take away the goods in the night, that will not constitute a burglary. Though it is otherwise if a thief enter by a chimney, because it is as much inclosed as the nature of the thing will admit of. To amount to a breaking within this branch of the definition, the entrance must be obtained either by fraud, conspiracy, threat, or force; these will be illustrated by different examples.

By fraud. 1 Hawk. ch. 38. s. 5. 1 Hale, 552. 3 Inst. 64. Sum. 81. 4 Blac Com. 226. Kel. 44. 82. 2 MS Sum. 300, 1, 4. Lemott's case, Kel. 42. Bratton's case, O. B. May 1784. Seff. Pap. 738. Caffy and Cotter's case, Kel. 63. Farre's case, Kel. 43. Post. tit. Larceny.

Thieves having an intent to rob raised the hue and cry, and brought the constable, to whom the owner opened the door; and when they came in they bound the constable and robbed the owner; held burglary. So if admission be gained under pretence of business: or if one take lodgings with a like felonious intent, and afterwards rob the landlord: for the entrance was gained by fraud; and the law will not endure to have its justice defrauded by such evasions. By the same reasoning, getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavits without any colour of title, and then rifling the house, was ruled to be within the statute against breaking the house and stealing goods therein.

Ann Hawkins's case, MS. Tracy, 80. & MS. Sum.

At the Old Bailey sessions before Easter term 1704, Ann Hawkins was indicted of burglary: and upon evidence it appeared that she was acquainted with the house, and knew that the family were in the country. That meeting with the boy who kept the key, she desired him to go with her to the house, and to induce him promised him a pot of ale. The boy accordingly went with her, opened the door, and let her in. She then sent the boy for the pot of ale, robbed the house, and went off. This being in the night-time, Holt C. J., Tracy, and Bury adjudged it to be clearly burglary in the woman; for she prevailed with the boy by fraud to open the door with intent that she might rob the house: and Lord Holt relied upon Le Mott's case. Ante, Kel. 42. & 63.

Ch XV. § 2. *Breaking.*

How far it might be considered as a breaking, if a servant acting in confidence and with the assent of his master let robbers in by agreement with them to steal, but in truth with a view to their apprehension, was the subject of much debate and doubt in Eggington's case; which is elsewhere set forth.

Eggington's case, tit Larceny, & post. 494.

By conspiracy. 1 Hale, 553.

In the next place, if A. the servant of B. conspire with C. to let him in to rob B., and accordingly A. in the night-time opens the door or window and lets him in; this is burglary in C.; but according to Dalton, ch. 99. only larceny in A.: yet by Lord Hale, it seems to be burglary in both; for if it be burglary in C., it must needs be so in A., because he is present and aiding C. to commit the offence: and Hawkins, who is of the same opinion, compares it to the case where divers come to commit burglary, and some stand to watch in adjacent places, and others enter and rob: for in all such cases the act of one is in judgment of law the act of all.

Burnet's MS. Sum. 81, 2. acc.

1 Hawk ch. 38. f. 8, 9.

1 Hale, 549. 534, 5, 6. 3 Inst. 64.

Joshua Cornwall was indicted with another person for burglary; and it appeared that he was a servant in the house; and in the night-time opened the street door and let in the other prisoner, who robbed the house: after which Cornwall opened the door and let the other out, but did not go out with him. It was doubted at the trial whether this were burglary in the servant, he not going out with the other. But afterwards at a meeting of all the judges at Serjeants'-Inn, they were unanimously of opinion that it was burglary in both: and accordingly Cornwall was executed.

Josh Cornwall's case. 2 Stra 881. 10 St Tr. 4, 3. n. 4 Blac. Com. 227.

By threats. 2 MS. Sum. 298 1 Hale, 553 Crompt 32. 1 Hawk ch 38. f. 4. post. f. 7.

There may also be a breaking in law, where, in consequence of violence commenced or threatened in order to obtain entrance, the owner, either from apprehension of the force, or with a view more effectually to repel it, opens the door, through which the robbers enter.

Sum. 81. 2 MS. Sum 300. 1 Hawk. ch 38 f. 3. (Contra Dalt. ch. 151. f. 3.) Sav. 59. Crompt. 31.

But if the owner only throw his money out of the house to the thieves who assaulted it, this would not be burglary: though if the money were taken up in the owner's presence, it would be robbery. In all other cases where no fraud or conspiracy is made use of, or violence commenced or threatened, in order to obtain an entrance, there must be an actual breach of some part or other of the house; though it need not be accompanied with any violence as to the manner of executing it

Sum. 80.

As

Ch XV. § 3. *Breaking.*

§ 3. *Breach of what part of the house.*

As to what shall be considered as a sufficient breach of the house in point of fact.

2 MS. Sum. 80. 1 Hale, 552. 1 And. 114. 4 Blac Com 226. Hutt 20. Dalt. ch 151. f. 3. Crompt. Just. 31. b.

The breaking a window, taking a pane of glass out by drawing or bending the nails or other fastening, the drawing a latch where the door is not otherwise fastened, picking open a lock with a false key, putting back the lock of a door or fastening of a window with an instrument, turning the key where the door is locked on the inside, or unlooSing any other fastening which the owner has provided; are all instances of a breaking.

Wm. Brown's case, Winton Sp. Ass. 1799. cor. Buller J. MS.

On an indictment for burglary in the dwelling-house of George Aldridge, it appeared that the place which the prisoner entered was a mill under the same roof and within the same curtilage as the dwelling-house. Through the mill was an open entrance or gateway capable of admitting waggons, and intended for the purpose of loading them more easily with flour, through a large aperture or hatch over the gateway communicating with the floor above. This aperture was closed by folding doors with hinges which fell over it, and remained closed by their own weight, but without any interior fastening; so that those without under the gateway could push them open at their pleasure by a moderate exertion of strength. In this manner the prisoner was proved to have entered the mill in the night, with the evident intention of stealing the flour. And Buller J. held this a sufficient breaking to constitute the offence; and the prisoner was accordingly convicted.

Roberts s alias Chambers's case, O. B. before Hut. T. 1702 MS. Tracy, 80.

Where a glass window was broken, and the window opened with the hand, but the shutters in the inside were not broken; this was ruled burglary by Ward Ch. B., Powis, and Tracy Js. and the Recorder. But they thought this the extremity of the law: and on a subsequent conference, Holt C. J. and Powell J. doubting, and inclining to another opinion, no judgment was given.

1 Hale, 552. *& vide* Crompt. just. 31.

Lord Hale says, that by the 22 Ass. 95., which defines burglary to be a breaking of houses, churches, walls, courts, or gates, in time of peace; it seems that if a man have a wall about his house for its safeguard, and a thief in the night break the wall or the gates thereof, and finding the door of the house open enter the house; this is burglary; but otherwise if he had come over the wall of the court and

Ch. XV. § 3. *Breaking.*

found the door of the houſe open. He ſtates this doubtingly; and the book to which he refers ſeems more properly to apply to the walls or gates of a city than to a private houſe: and therefore this latter application of it never ſeems to have had any authority to ſupport it. But at any rate the diſtinction between breaking and coming over the wall or gate is very refined; for if it be part of the manſion, for the purpoſe of burglary, and be incloſed as much as the nature of the thing will admit of, it ſeems to be immaterial whether it be broken or over-leapt, and more properly to fall under the ſame conſideration as the caſe of a chimney. And if it be not part of the manſion-houſe for this purpoſe, then whether it be broken or not is equally immaterial; in neither caſe will it amount to burglary.

Vide poſt. f. 8.

Ante, 435.

§ 4. *In the inſide.* 1 Hale, 553. Sum. 81.

But though a thief enter a dwelling-houſe in the night-time through the outer door being left open, or by an open window; yet if when within the houſe he turn the key of or unlatch a chamber door with intent to commit felony, this is burglary: and ſo it was adjudged on a ſpecial verdict at Newgate 1672. The ſame was lately ruled in Johnſon's caſe by all the judges; where the priſoner entered at a back door of the houſe of William Hughes at Newington in Surry, which had been left open by the family; and afterwards broke open an inner door, and ſtole goods out of the room; and then unbolted the ſtreet door on the inſide and went out.

Rex v. Johnſon, Mich. T. 1786. MS. Buller J. & MS. Jud. *Vide* poſt. f. 6.

Sum. 82. 1 Hale, 554. Keb. 67. 4 Blac. Com. 227. Rex v. Bingloſe, O.B. 2 W. & M. MS. Denton. Serjt. Forſter's MS. Gray's caſe, 1 Stra. 481. Kel. 30 S. P. 1 Hale, 554.

A ſervant lay in one part of the houſe, and his maſter in another: between them was a door at the foot of the ſtairs which was latched. The ſervant in the night drew the latch and entered the maſter's chamber in order to murder him: and held burglary. So where a ſervant opened his lady's chamber door, which was ſhut with a ſpring lock, with deſign to commit a rape.

But Lord Hale doubts whether it would be burglary in a gueſt at an inn to open *his own* chamber door, with a felonious intent; becauſe he had a ſpecial intereſt therein. And yet if another opened the gueſt's door burglariouſly, it muſt be laid to be the manſion of the innkeeper; and a gueſt may commit larceny of what is delivered to his charge.

Vide poſt. f. 15. & tit. Larceny.

§ 5. *Fixtures, &c.* Foſt. 108. Poph. 84. Kel. 59. 69.

If the thief enter by the open door, and in the houſe break a trunk or box which was locked, this is no breaking to conſtitute

conſtitute burglary; becauſe ſuch things are no part of the houſe. Ch. XV. § 5. *Breaking.*

At a meeting of the judges upon a ſpecial verdict in January 1690, they were divided in opinion upon the queſtion, whether breaking open the door of a cupboard let into the wall of the houſe and fixed to the freehold were burglary or not. Lord Hale expreſsly ſays, that ſuch breaking is not burglary at common law; though he thinks it ſufficient to bring the caſe within the ſtat. 5 & 6 Ed. 6. c. 9. and 39 Eliz. c. 15.: founding the diſtinction upon Simpſon's caſe, where he ſtates that the breaking open of a cheſt in the houſe brought the offence within the ſtat. 39 Eliz.; which, if a moveable cheſt be meant, is denied by Mr. J. Foſter to be law; for Simpſon's caſe could not turn upon the circumſtance of breaking a cheſt or a cupboard, as in fact both the inward and outward doors were broken. With regard to cupboards, preſſes, lockers, and other fixtures of the like kind, the ſame learned Judge thinks that in favour of life there ought to be a diſtinction between caſes relative to mere property, as between the heir and executor, and ſuch wherein life is concerned. In the former the law will preſume the intention of the owner to have been to leave the houſe entire and undefaced. In the latter, ſuch fixtures which merely ſupply the place of cheſts and other ordinary houſhold utenſils ſhould be conſidered in no other light than as mere moveables partaking of the nature of thoſe utenſils, and adapted to the ſame uſes. And Lord Hale, in another paſſage, ſeems to have inclined to the ſame opinion.

MS. Denton.

1 Hale, 527.

Ib. 508. 524, 7. *Vide* 2 Hale, 358.

Foſt. 108. Kel. 31. 59. 69.

Foſt. 109.

1 Hale, 555.

§ 6. *Breaking out.* 12 Ann. c. 7. ſ. 3. Ante, f. 4.

By ſtat. 12 Ann. c. 7. ſtating the law to have been doubted, it is *declared* and enacted, "that if any perſon ſhall "enter into the manſion or dwelling-houſe of another by "day or by night, without breaking the ſame, with an "intent to commit felony; or being in ſuch houſe ſhall "commit any felony; and ſhall in the night-time break the "ſaid houſe to get out of the ſame; ſuch perſon is and ſhall "be adjudged to be guilty of burglary, and ſhall be ouſted "of the benefit of clergy in the ſame manner as if ſuch "perſon had broke and entered the ſaid houſe in the night-"time, with an intent to commit felony there."

This

Ch. XV. § 6. *Breaking.*

2 MS. Sum 300. Sum. 81. MS. Tracy, 81. 1 Hale, 554. Dalt. ch. 151. f. 3.

This was ſaid to be law before the paſſing of the ſtatute. But it had been doubted by Lord Holt and Trevor C. J. in the caſe of Elizabeth Clarke at the O. B. in 1707, upon a ſpecial verdict found by the direction of the former; in conſequence of which the act was paſſed.

2. *There muſt be an Entry.*

§ 7. *Entry.* 1 Hale, 555. Sum. 80. 1 Hawk. ch. 38. ſ. 3. 7. Foſt. 108. 3 Inſt. 64. 1 And. 114. Crompt. Juſt. 32.

Where the houſe was broken but not entered, and the owner for fear threw out his money; it was holden to be no burglary: though clearly robbery, if taken in the preſence of the owner. But if any part of the body be within the houſe, hand or foot; this at common law is ſufficient, and has always been ſo ruled. And this Mr. Juſtice Foſter ſays would be ſufficient to bring the caſe within the ſtatutes of Edward 6th and Eliz. with regard to houſe-breaking attended with larceny in the day-time.

Rex v. George Gibbons, O. B. 1752. cor. the Ld. Ch. B. and Foſter and Birch Js. Foſt. 107.

In Gibbons's caſe, evidence that the priſoner in the night-time cut a hole in the window-ſhutters of a ſhop, part of a dwelling-houſe, and putting his hand through the hole, took out watches, &c. was holden burglary though no other entry was proved.

2 MS. Sum. 298. 1 Hale, 553. 1 Hawk. ch. 38. ſ. 4. Crompt. 32. b. Sav. 59. Ante, f. 2. Sum 80. Burnet's MS. 80. 3 Inſt. 64.

Thieves came by night to rob a houſe; the owner went out and ſtruck one of them; another made a paſs with a ſword at perſons he ſaw in the entry, and in ſo doing his hand was over the threſhold; this was adjudged burglary by great advice. So putting a hook to ſteal, or a piſtol to kill, within the door or window, though the hand be not in, is an entry.

1 Hale, 555. *Vide* 1 And. 115. 1 Hawk. ch. 38. ſ. 7.

But if a man ſhoot without the window, and the bullet come in; this ſeems, ſays Lord Hale, to be no entry to make burglary; though he ſubjoins a quære. And Hawkins expreſsly conſiders the diſcharge of a loaded gun into a houſe as an entry. And indeed it ſeems difficult to make a diſtinction between this kind of implied entry, and that by means of an inſtrument introduced within the window or threſhold for the purpoſe of committing a felony; unleſs it be, that the one inſtrument by which the entry is effected is holden in the hand, and the other is diſcharged from it. No ſuch diſtinction however is any where laid down in terms: nothing further appearing than that the entry muſt be for the purpoſe of committing a felony. According to which, where thieves

had bored a hole *through* the door with a center-bit, and part of the chips were found in the inſide of the houſe, by which it was apparent that the end of the center-bit had penetrated into the houſe; yet as the inſtrument had not been introduced for the purpoſe of taking the property or committing any other felony, the entry was ruled incomplete.

Ch. XV. § 7. *Entry.*

O. B. 1785. Rex v. Hughes and others, cor. Willes J. and Hotham B. MS. S. C. 1 Leach, 452.

Alſo it appears from caſes before mentioned, that if a perſon living within the walls of a manſion enter into any other apartment of the ſame with a felonious intent, that is a ſufficient entry.

Ante, f. 4.

The entry need not be at the ſame time as the breaking, provided both be in the night; therefore if thieves break a hole in the houſe one night, with intent to enter another night and commit felony, which they execute accordingly, it is burglary.

1 Hale, 551.

3. *What a Manſion.*

§ 8. *Manſion-houſe.* 1 Hawk. ch. 38. ſ. 10. ch. 39. ſ. 17. 4 Blac. Com. 224. 3 Inſt. 64. 1 Hale, 549 556. Sum. 82.

Next is to be conſidered what is ſuch a manſion-houſe, the breaking and entering of which may amount to burglary. There ſeems to be three diſtinct objects of burglary mentioned in the books; 1. It may be committed, as it is ſaid, againſt the walls or gates of a walled town. 2. Againſt churches. 3. Againſt private dwelling-houſes. Of the firſt it is unneceſſary to ſay any thing; and not much of the ſecond in this place, further than to obſerve, that as it is evidently of a diſtinct nature from the laſt or common ſpecies of burglary, ſo many of the circumſtances fit to be obſerved of the one are inapplicable to the other. I proceed therefore 3dly, to conſider of burglary as it is now underſtood againſt a private manſion or dwelling-houſe. And this involves two queſtions:

1. *What buildings are included in the term manſion or dwelling-houſe.*
2. *What kind of inhabitancy is neceſſary to conſtitute it ſuch.*

§ 9. *To what the manſion extends.* 3 Inſt. 64, 5.

1. Every houſe for the dwelling and habitation of man is taken to be a manſion-houſe wherein burglary may be committed. Likewiſe a chamber or room, be it upper or lower, wherein any perſon inhabits or dwells, is a manſion-houſe in law.

Ch. XV. § 9. *Manſion.*

1 Hale, 556. 1 Hawk. ch. 38. ſ. 13. Cro. Car. 474.

law. But this latter muſt be underſtood with certain reſtrictions which will be explained as I proceed. In this ſenſe chambers in the inns of court are to be conſidered as the manſions of the ſeveral occupiers; though all under the ſame roof, and having the ſame common entrance.

Turner's caſe, O. B. Feb. 1784. Leach, 249. (laſt edit. 242.) and Saſſ. Pap. p. 350.

Thomas Turner was indicted for burglary and larceny in the dwelling-houſe of Edward Whitmead. The proſecutor was coachman to Lady Hervey, and rented two lodging-rooms, (one of which was broken open by the priſoner,) which were ſituated over the coach-houſe and ſtables, and were rated in the pariſh books as appurtenances to the coach-houſe and ſtables, and not as dwelling-houſes. The way to theſe was down a paſſage out of the public mews; and the entrance to the ſtair-caſe which lead to the rooms was through a door which was never faſtened out of the paſſage leading to the coach-houſe and ſtables. There were ſeparate doors at the top of the ſtair-caſe to each of the rooms, which were locked at night; and there were other rooms over the coach-houſe and ſtables ſituated in the ſame manner. It was contended that theſe rooms being intended as mere hay-lofts did not in contemplation of law form ſuch dwelling-houſes as to become the ſubject of burglary; but the judges upon reference to them were clearly of a different opinion: they thought the ſituation of the rooms could not alter the nature of the caſe; they were to all intents and purpoſes the habitation and domicile of the proſecutor and his family: and the priſoner had judgment for ſtealing to the value of 40 s. out of the dwelling-houſe, having been acquitted by the jury of the reſt of the charge.

Booths, &c. 1 Hawk. ch. 39. ſ. 17. 1 Hale, 557, 9. 4 Blac. Com 226. *Vide* tit. Larceny.

But no burglary can be committed by breaking into any incloſed ground, or into any booth or tent, though the owner lodge therein: but in caſe of any robbery committed in theſe latter, a remedy is provided by the ſtat. 5 & 6 Ed. 6. c. 9.

§ 10. *Outhouſes, &c.* 1 Hale, 558, 9. 1 Hawk. ch. 38. ſ. 12. Sum. 82. 3 Inſt. 64, 5. 4 Blac. Com. 225. Dalt. ch. 151. ſ. 4. MS. Burnet. 82.

The manſion not only includes the dwelling-houſe, but alſo the outhouſes, ſuch as barns, ſtables, cowhouſes, dairy-houſes and the like, *if they be parcel of the meſſuage*, though they be not under the ſame roof, or joining contiguous to it. Therefore two were condemned at Cambridge in 1616 for breaking open a back houſe of Robert Caſtle's 8 or 9 yards diſtant

diſtant from the dwelling-houſe, only a pale reaching between them. And ſo it was agreed by all the judges in the time of Lord Ch. J. Hyde in 1665. And it is clear that any outhouſe within the curtilage or ſame common fence as the manſion itſelf muſt be conſidered as parcel of the manſion. But no diſtant barn, warehouſe, or the like, is under the ſame privilege; nor indeed any out houſe however near, if it be not parcel of the meſſuage, and ſo found to be.

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R. v. Garland, Somerſet Lent Aſſ. 1776. MS. Gould J. *Vi. Green's caſe, O. B. Feb. Seſſ. 1789. cor. Thomſon B. and Groſe J.*

William Garland was indicted for burglary in the dwelling-houſe of George Shore. The jury found ſpecially that the priſoner broke and entered in the night-time, with intent to ſteal, an outhouſe in the poſſeſſion of G. S. and occupied by him with his dwelling-houſe mentioned in the indictment, and ſeparated therefrom by an open paſſage eight feet wide: and that the ſaid outhouſe was not connected with the ſaid dwelling-houſe by any fence incloſing both. In Eaſter term 16 Geo. 3. the judges were of opinion that there ſhould be judgment for the priſoner; for the jury ſhould have found it parcel of the dwelling-houſe, if it were ſo. In that caſe the outhouſe being ſo ſeparated from the dwelling-houſe, and not within the ſame curtilage or common fence, was not therefore protected by the bare fact of its being ſo occupied with it at the ſame time.

R. v. G. Brown, Newcaſtle Suſſ. Aſſ. 1787. cor. Wilſon J. MS. Gould & Bullet Js. *vide* poſt. ſ. 14. S. C. & *vide* Gibſon's caſe, poſt. 503.

But if the outhouſes be adjoining to the dwelling-houſe, and occupied as parcel thereof, though there be no common incloſure or curtilage, they may ſtill be conſidered as parts of the manſion. Upon an indictment for burglary in the dwelling-houſe of Martin Graydon, and ſtealing oats thereout; it appeared that the proſecutor, a farmer, had a dwelling-houſe in which he lived, a ſtable, a cottage, a cow-houſe, and barn, all in one range of building, in the order mentioned, and under one roof; but they were not incloſed by any wall or court yard, and had no communication from either to the other within. The priſoner ſtole the corn out of the barn at night; and after conviction, the judges upon a conference held it right; for the barn, which was under the ſame roof, was parcel of and enjoyed with the dwelling-houſe. Though there was ſome difficulty as to another point of the caſe hereafter noticed. Lord Hale puts this amongſt other inſtances of outbuildings which he conſiders would be no parcel of the meſſuage; namely, if a man take

Mich. T. 1787.

1 Hale, 559.

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a leaſe of a dwelling-houſe from A., and of a barn from B. From whence it might be inferred, that be the other circumſtances what they may, yet no outhouſe holden under a different title from the dwelling-houſe can be the ſubject of burglary. But with great deference to ſo high an authority, the circumſtance of an outbuilding being enjoyed by the occupier under a different title from his dwelling-houſe (a fact which cannot enter in any degree into the merits of the queſtion) ſeems a very unſatisfactory reaſon of itſelf for excluding it from the ſame protection, if it be within the curtilage or under the ſame roof, and actually enjoyed as parcel of the dwelling-houſe in point of fact, and under ſuch circumſtances as would apart from the difference of title conſtitute it parcel of the manſion in point of law. It may be very different where part of a dwelling is ſevered from the reſt by leaſe or otherwiſe, and in the diſtinct poſſeſſion of another, as will preſently be ſhewn.

Poſt. f. 20.

Rex v. Eggington and others, Stafford Sp. Aſſ. 1801. MS. Jud. *A manufactory carried on in the center building of a great pile, in the wings of which ſeveral perſons dwelt, but having no internal communication with the ſame, though the roofs of all were connected, and the entrances of all were out of the ſame common incloſure; held not a dwelling-houſe in which burglary could be committed.*

John Eggington and ſeveral others were indicted for burglary, and ſtealing goods in the dwelling-houſe of Mathew Robinſon Boulton. Another count laid the offence to be in the dwelling-houſe of John Buſh; and a third in that of William Nelſon. There were other counts not material to the preſent purpoſe. On the trial it appeared that Mathew Boulton (one of the perſons whoſe property was taken) was concerned in different manufactures with different perſons in whom the property taken was laid in the ſeveral counts: beſides which he carried on two other manufactories on his own ſole account. Some money and part of ſome ſilver taken were kept in a counting-houſe which was uſed for tranſacting the money concerns, and keeping the accounts of all the different buſineſſes in which M. Boulton was engaged: other part of the ſilver was in a room, being one of ſeveral, where the plate buſineſs was carried on; which rooms and counting-houſe formed a center, having two wings adjoining, conſiſting of dwelling-houſes inhabited by perſons engaged in M. Boulton's manufactories. One of them was inhabited by M. R. Boulton (mentioned in the firſt count); but that had no internal communication with the center building at the time of the offence committed; a room in his houſe, which communicated with the center building, having been allotted to the purpoſes of the plating buſineſs, with

with which he had no concern; and the door into it being ſhut up, and a working-bench placed againſt it, ſo as to ſtop the paſſage. One Buſh (mentioned in the ſecond count), a workman of M. Boulton's, occupied another of the dwelling-houſes in the ſame wing; and from his houſe there was no way into the center building: but there was in it a window which looked into a paſſage, that run the whole length of the center building. In the other wing was the dwelling-houſe of W. Nelſon, (the perſon thirdly named,) the partner of M. Boulton in the button buſineſs, which had no internal communication with the center: and in that wing other perſons lived. In the front of this building was a terrace or front yard, fenced round in different ways, and at the end of the pile of building, above deſcribed, by a wall with gates for horſes and carriages and a door for foot paſſengers. It appeared that the priſoners entered the premiſes in the night by the help of Phillips a ſervant of the proſecutor's employed in the manufactory, (who had privately given information of the whole to his employers,) who opened the door for them into the front yard, from whence they paſſed along the front of the building, and round into another yard behind it called the middle yard; and from thence they and Philips went through a door, which was left open, up a ſtair-caſe in the center building leading to the counting-houſe and rooms where the plating buſineſs was carried on: this door the priſoners bolted, and then broke open the counting-houſe, which was locked, and took from thence the ingots of ſilver and guineas. They then went to the ſtory above, into a room where the plated buſineſs was carried on, forced the door, and took from thence a quantity of ſilver, and returned by the way they came into the middle yard, where they were immediately apprehended. The priſoners were convicted; but the caſe was reſerved for conſideration on two points. After argument in the Exchequer-chamber before all the Judges, they all agreed on the firſt point, that the priſoners were not guilty of the burglary. That the center building, which they had entered, and plundered, could not be conſidered as part of any dwelling-houſe; but a place for carrying on a variety of trades; and no parcel of the houſes adjoining, with none of which it had any internal communication, nor was to be conſidered as under the ſame roof; though

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though the roof of it had a connection with the roofs of the houſes. But as to the ſecond point, a majority held the priſoners guilty of the larceny (*a*).

§ 11. *Inhabitantcy.*
1 Hawk. ch. 38. ſ. 11.
1 Hale, 556.
Sum. 82.
Kel. 52. 67.
3 Inſt. 64.
4 Blac. Com. 224, 5. Moor, 660. 4 Co. 40. Poph. 52. Foſt. 77.

2. The other point to be conſidered is relative to the *inhabitantcy*, of which there muſt be ſome token either by the preſent or at leaſt by the previous occupation of the owner or ſome part of his family, in order to make the manſion an object of this high protection of the law. However it is agreed by all, that a houſe wherein a man dwells but for part of the year, or a chamber in one of the inns of court, or of a college, wherein any perſon uſually lodges, may be called his dwelling-houſe, whether any perſon were actually therein or not at the very time of the offence. Yet in all caſes the owner muſt have quitted the houſe animo revertendi, in order to have it ſtill conſidered as his manſion, where neither he nor any part of his family were in it at the time of the breaking and entering.

Rex v. Murry & Harris, O. B. Eaſt. 10 W. 3. MS. and MS. Denton and Chapple Foſt. 77. and Serjt. Forſter's MS.

John Nicholls being poſſeſſed of a houſe in Weſtminſter wherein he dwelt, took a journey into Cornwal, with intent to return, and ſent his wife and family out of town, and left the key with a friend to look after the houſe: after he had been gone a month, no perſon being in the houſe, it was broke open in the night and robbed of divers goods. He returned a month after with his family and inhabited there. And adjudged burglary by Holt C. J., Treby J., and four other Judges.

Nutbrown's caſe, O. B. 1750. Foſt. 76.

John and Miles Nutbrown were indicted for burglary in the dwelling-houſe of one Mr. Fakney at Hackney, and ſtealing divers goods. The proſecutor made uſe of it as a country houſe in the ſummer, his chief reſidence being in London. About the latter end of the ſummer preceding the offence, he removed with his whole family to his houſe in the city, and brought away a conſiderable part of his goods. And in the November following the houſe at Hackney was broken open and in part rifled; upon which he removed the remainder of his houſehold furniture, except a clock and a few old bedſteads and ſome lumber of little value, leaving no bed or kitchen furniture or any thing elſe for the accommodation of a family. Mr. Fakney, being aſked whether at the time he ſo diſfurniſhed his houſe he

(*a*) *Vide* S. C. at large on this point, tit. Larceny.

had

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had any intention of returning to reſide there, declared that he had not come to any ſettled reſolution whether to return or not; but was rather inclined totally to quit the houſe, and to let it for the remainder of his term. The fact of the burglary happened in the January following. But the court were of opinion, that the proſecutor having left his houſe, and diſfurniſhed it in the manner before mentioned, without any ſettled reſolution of returning, but rather inclining to the contrary, it could not be deemed his dwelling-houſe at the time the fact was committed: and accordingly the priſoners were directed to be acquitted of the burglary; but they were found guilty of the ſtealing.

1 Hale, 557, 8.

If a man hire a ſhop in which he or his ſervant uſually or often lodge, burglary may be therein committed: but generally ſpeaking it ſeems that a mere caſual uſe of a tenement as a lodging, or only upon ſome particular occaſions, will not conſtitute it a dwelling-houſe for this purpoſe. In Brown's caſe all the Judges agreed that the fact of a ſervant having ſlept in a barn the night it was broken open and for ſeveral nights before, being put there for the purpoſe of watching againſt thieves, made no ſort of difference in the queſtion whether burglary or not. So a porter lying in a warehouſe *to watch goods*, which is only for a particular purpoſe, does not make it a dwelling-houſe: but if all communication with the dwelling-houſe of which it is a part be not excluded, it may ſtill be a part of the houſe in which burglary may be committed.

Brown's caſe, poſt, ſ. 14.

R. v. Smith, M. 3 G. 1 by 10 Judges, Lord King's MS. 96. Serjt. Forſter's MS.

§ 12. *Taking poſſeſſion.*
1 Hawk. ch. 38. ſ. 11.

Serjt. Hawkins ſtates generally, that burglary may be committed in a houſe which one has hired to live in and brought part of his goods into, but has not yet lodged in: but he cites no authority to that effect except a paſſage in Kelyng 46. to which there is a quære ſubjoined. And this point has often ſince been ruled otherwiſe.

Rex v. Lyons and Miller, O. B. Jan. 1778. Crown Caſ. Reſ. MS. & MS. Gould & Buller Js. *vide* Leach, 169. (new edit. 221.) where it is ſaid there were ſome goods in the houſe.

Lyon Lyons and Thomas Miller were indicted for burglary in the dwelling-houſe of Edward Smith, with intent to ſteal, &c. But it appearing that the houſe was left to the care of a carpenter, who was to put it into repair; and that the proſecutor had never inhabited it, nor had ſervants or furniture in it; and that the former occupier had removed out of it about a fortnight; and it was at the time of the of-

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fence committed uninhabited; it was objected for the priſoners that the houſe was not in judgment of law the dwelling-houſe of Edward Smith. And after conviction, upon reference to the Judges, they held that this was no manſion-houſe, having never been inhabited by Smith. They were alſo of opinion that it was not burglary upon this indictment; for there were no goods in the houſe: and the indictment (charging the intent to ſteal) muſt be to ſteal the goods *then and there being;* and where nothing was in the houſe nothing could be ſtolen. Alſo it ſeemed to be the ſenſe of the Judges; and Eyre B. declared it to be his opinion, that although ſome goods might have been put into the houſe, which is the caſe put in Kelyng 46., and there doubted; yet if neither the party nor any of his family had inhabited it, it would not be a manſion-houſe in which burglary could be committed.

Eaſt. term 1778.

MS. Gould J.

Hallard's caſe, Exeter Sp Aſſ. 1796. cor. Buller J. MS.

The former tenant of a houſe had quitted it, and the incoming tenant had put in all his furniture, and had been frequently there in the day-time; but had never ſlept in the houſe, nor any of his family. Buller J. held that burglary could not be committed therein. And the like caſe was ruled by Groſe J. at the ſame period on the home circuit.

Thompſon's caſe, Kingſton Sp. Aſſ. 1796. 2 Leach, 893. Fuller's caſe, O. B Dec. 1782. Leach, 169. n. (laſt edit. 222.)

William Fuller being indicted for a burglary in the dwelling-houſe of Mr. Holland; it appeared that the houſe was a new one, and finiſhed all but the painting and glazing; that a workman who was conſtantly employed by Mr. Holland ſlept in it for the purpoſe of protection; but no part of Mr. Holland's domeſtic family had yet taken poſſeſſion of it. This was ruled by the Recorder, on the authority of Lyons' caſe, not to be the manſion-houſe of the proſecutor.

Harris's caſe, O. B. Oct 1795. 2 Leach, 808.

On an indictment againſt John Harris for burglary in the dwelling-houſe of H. W. Dinſdale, it appeared that the proſecutor had lately taken the houſe near Cheapſide, and on the night of the offence and for ſix nights before had procured two hair-dreſſers, none of his own family, to ſleep there, for the purpoſe of taking care of his goods and merchandize therein depoſited; but he himſelf had never ſlept there, nor any of his family. The Recorder ruled that the priſoner could not be convicted of the burglary.

Conſonant to theſe authorities another caſe was lately ruled upon a ſimilar ſubject, which, though apparently it goes further than the reſt, yet in truth proceeds upon the ſame principle.

The

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The priſoner was tried upon an indictment for ſtealing goods to the value of 40s. the property of Thomas Pearce *in his dwelling-houſe.* The houſe was a public houſe in Palace Yard, of which Pearce was the owner. About a month or ſix weeks before the felony was committed, the tenant, who had carried on the buſineſs there, gave up the poſſeſſion to the proſecutor, who alſo purchaſed the furniture of him. The proſecutor reſided in Milbank, where he carried on his buſineſs of a brewer; and never intended perſonally to reſide in the public houſe, or to have the buſineſs of that houſe carried on upon his account; neither did any perſon inhabit his houſe in the day-time; but a ſervant of the proſecutor's had ſlept there conſtantly for about three weeks, ſolely for the purpoſe of protecting the furniture, till a tenant could be procured for the houſe. The priſoner was found guilty of the offence as charged in the indictment; but the queſtion was reſerved for the opinion of the Judges, whether by ſuch occupation of the houſe by Pearce in the manner above ſtated it became his *dwelling-houſe,* within the meaning of the ſtatute, ſo as to ſubject the priſoner to the capital part of the charge. In Trinity term 1800, the Judges held the conviction, as to the capital part of it, wrong; being of opinion, that as the maſter never intended to inhabit the houſe, it was not within the ſtatute; and that it would have been no burglary if the houſe had been broken in the night. The priſoner was therefore recommended to mercy on condition of tranſportation, which would have been his puniſhment if the verdict had been properly taken.

Rex v. John Davis, alias Silk, O. B. 1800. MS. Jud. *The owner of a houſe puts a perſon into it to ſleep there at nights till he can get a tenant, in order to protect ſome furniture there which he had purchaſed of the laſt tenant, which ſervant had ſo ſlept there for three weeks before; but the owner never intended to inhabit it himſelf: wherefore a conviction for ſtealing the goods* in the dwelling-houſe *of ſuch owner to the value of 40s. was holden wrong, as to the capital part of the charge, within the ſtat. 12 Ann. c. 7.*

A. died in his houſe; B. his executor put ſervants into it, who lodged in it and were at board wages; but B. never lodged there himſelf. Upon an indictment for burglary the queſtion was, whether this might be called the manſion-houſe of B.? The court inclined to think it might, *becauſe the ſervants lived there:* but upon the evidence there appeared no breach of the houſe.

Rex v. Jones and Longman, O. B. 1689. Chapple's MS. 2 MS. Sum. 305.

4. *As to the Owner.*

It is neceſſary to aſcertain to whom the manſion belongs, and to ſtate that with accuracy in the indictment. And here it is to be lamented that the ſame rule does not prevail

§ 13. *In whoſe manſion.* Poſt. t. 24.

Ch. XV. § 13. *In whose mansion.*

in this case as in arson, which is considered as an offence against the actual possessor by whatever title he may hold the possession. But in burglary the rule is much more complex; the ownership being neither referable altogether to the legal title, nor to the possession, but partaking sometimes of one sometimes of the other, as well as of both. If the rule by which to ascertain this ownership may be compressed with sufficient discrimination into a small compass, I should say generally, that where the legal title to the whole mansion remains in the same person; there, if he inhabit it either by himself, his family, or servants, or even by his guests, the indictment must lay the offence to be committed against *his* mansion. And so it is though he let out apartments to inmates, who have a separate interest therein, if they have the same outer door or entrance into the mansion in common with himself. But if distinct families be in the exclusive occupation of the house, and have their ordinary residence or domicile there, without any interference on the part of the proper owner; or if they be only in possession of parts of the house as inmates to the owner, and have a distinct and separate entrance; then the offence of breaking, &c. their separate apartments must be laid to be done against the mansion-house of such occupiers respectively. How far these general observations are well founded will best be seen by referring to the cases themselves from whence they have been drawn: and these may be considered in two points of view; as pointing out,

General rule.

1. *What shall be said to be an occupation or inhabiting sua jure, to make it the mansion of the party.*
2. *Where a severance of occupation in the same mansion shall constitute so many distinct mansions in law.*

§ 14. *What an occupation sua jure.* 1 Hawk. ch. 38. s. 13, 14. *By servants.* 1 Hale, 522 557. Kel. 27.

1. If a person inhabit a dwelling-house, as the wife, guest, servant, or part of the family of another, it is the occupation in law of such other person, and must be so laid to be in the indictment. This rule holds with respect to all persons standing in the relation of servants. Thus apartments in the king's palaces, or in the houses of noblemen for their stewards and chief servants, can only be laid to be the mansion-house of the king or nobleman; as was long ago adjudged in the instances of Somerset House, and Whitehall and more re-

cently in that of Chelsea Hospital; for in all these cases the occupation of the actual inhabitants is not in their own right, but as servants, or in the nature of such, representing their master: and therefore their occupation is that of the lord or proprietor of the whole mansion.

Ch. XV. § 14. *In whose mansion.*

Chelsea Hospital or Peyton's case, O.B. May 1784. 1 Leach, 364.

At the sessions at the Old Bailey before Easter term 1704, Ann Hawkins was indicted for burglary in the mansion-house of Samuel Story: and upon the evidence it appeared that it was the house of the African company, and that Story was an officer of the company, and had separate apartments, and lodged and inhabited there. Whereupon it was ruled by Holt C. J., Tracy J., and Baron Bury, that Story's apartments could not be said to be his mansion-house, because he and others in similar situations inhabited them only as officers of the company: and for this the jury were discharged of this indictment; and it was laid as the mansion-house of the company. For though an aggregate corporate body cannot be said to inhabit any where, yet they may have a mansion-house for the habitation of their servants.

Ann Hawkins's case, O. B. 1704. MS. Tracy Sz. Fost 38. *Burglary in the apartments of officers of a public company must be laid to be in the mansion-house of such company.*

John Picket was indicted for burglary, and stealing bullion in the dwelling-house of the East-India company, which is inhabited by their servants; and was convicted and executed.

Picket's case, O B. April 1765. Serjt. Forster's MS.

Maynard was indicted for burglary and felony in breaking and entering the mansion-house of the master, fellows, and scholars of Bennet College in Cambridge. The fact was, that he broke into the buttery of the college, and there stole some money: and it was agreed by all the Judges, upon reference to them, that it was burglary.

Charles Maynard's case, Cambridge Lent Ass. 1774. Serjt. Forster's MS.

George Brown was indicted for burglary in the dwelling-house of Martin Graydon, and stealing thereout oats. A 2d count stated it to be the dwelling-house of Thomas Trumball. Graydon who was a farmer had a dwelling-house in which he lived, a stable, cow-house, cottage, and barn, all in one range of buildings in the order mentioned, and under one roof: but they were not inclosed by any wall or court yard, and had no communication from either to the other within. Trumball's family resided in the cottage by agreement with Graydon when he went into his service; but Trumball paid no rent; only an abatement was made in his wages on account of his family being to reside in the cot-

Brown's case, Newcastle Sum. Ass 178-. cor. Wilson J. MS. Gould & Buller Js. & MS. Jud. ante, f. 10. § C. for another point.

Ch. XV. § 15. *In whose manſion.*

tage. Some corn having been miſſed out of the barn, Trumball and another perſon put a bed in the barn, and went and ſlept there, and on the fourth night after they had ſo done the priſoner unlocked the barn door and took away a quantity of oats. After conviction, judgment was reſpited upon a doubt whether it could be conſidered as the dwelling-houſe either of Graydon or Trumball. Upon a conference in Michaelmas term 1787, it was agreed by all the Judges that the ſleeping in the barn made no difference. But they held (Buller J. doubting) that this was no more than a licence to Trumball the ſervant to lodge in the cottage, and not a letting of it to him. And that the barn as well as the reſt of the buildings, being under the ſame roof, continued parts of the manſion-houſe of Graydon. And many of the Judges inclined that if there had been a demiſe to Trumball of the cottage, the barn would ſtill have continued part of Graydon's dwelling-houſe in point of law.

MS. Gould J.

§ 15. *Gueſts.* 1 Hale, 554 557. 2 MS. Sum. 305

By the ſame rule, if the chamber of a gueſt at an inn be broken open, it muſt be laid in the indictment to be the manſion-houſe of the innkeeper. It is indeed ſaid in Dalton, c. 151. ſ. 4. that if the hoſt of an inn break the chamber of his gueſt in the night to rob him, it is burglary. But this may juſtly be queſtioned: and there ſeems no diſtinction between that caſe and the caſe of an owner reſiding in the ſame houſe breaking the chamber of an inmate having the ſame outer door as himſelf; which Kelyng ſays cannot be burglary.

Kel. 84.

Abel Proſſer's caſe, Monmouth Sum. Aſſ 1768. 2 MS. Sum. 306. *One under pretence of being robbed forces the door of a gueſt's chamber in an inn in the night, and ſteals his goods; held, the burglary muſt be laid to be in the dwelling-houſe of the innkeeper, and not of the gueſt.*

Abel Proſſer was indicted for burglariouſly breaking, &c. the houſe of Nathan Levy, and ſtealing his property there. The proſecutor, a Jew pedlar, came to the houſe of one Lewis a publican to ſtay all night, and faſtened the door of his bed-chamber. The priſoner pretended to Lewis the landlord that the proſecutor had ſtolen his goods; and under this pretence he with the aſſiſtance of Lewis and others forced the chamber door open with intent to ſteal the goods mentioned in the indictment, and the priſoner accordingly ſtole them. Theſe facts were found ſpecially. Mr. Baron Adams, who tried the priſoner, doubted whether the bed-chamber could properly be called the dwelling-houſe of the proſecutor as deſcribed in the indictment, being truly a part of

of the dwelling-houſe of Lewis the innkeeper; he therefore reſerved the point for the opinion of the reſt of the Judges. And they all thought that though the proſecutor had for that night a ſpecial intereſt in the bed-chamber, yet it was merely for a particular purpoſe, namely, to ſleep there that night as a travelling gueſt, and not as a regular lodger. That he had no certain and permanent intereſt in the room itſelf; but both the property and the poſſeſſion of the room remained in the landlord, who would be anſwerable civiliter for any goods of his gueſt that were ſtolen in that room, even for the goods now in queſtion; which he could not be unleſs that room were deemed to be in his poſſeſſion. That the landlord might go into the room when he pleaſed, and would be no treſpaſſer to the gueſt. Upon the whole, that this indictment was inſufficient. Lord Hale puts this caſe: If A. be a lodger in an inn, and in the night he open the latch of his chamber door, and ſteal goods in the houſe and go away; it may be a queſtion whether this be burglary? and, ſays the learned author, it ſeems not, becauſe he had a kind of ſpecial intereſt in his chamber, and ſo the opening of his own door was no breaking of the innkeeper's houſe: but he admits, that if A. had opened the chamber of another lodger in the inn, to ſteal his goods, that had been burglary. Now if the reaſoning in the above caſe of Proſſer be juſt and well founded; namely, that a gueſt has not even the poſſeſſion of a room in an inn for himſelf, but it remains ſtill in the poſſeſſion of the hoſt; that reaſoning will bear very hard againſt the diſtinction which Lord Hale inclines to adopt in the above paſſage: and then the caſe of a gueſt in an inn breaking his own door to ſteal goods in the night will fall under the ſame conſideration as a ſervant under the like circumſtances: and this deſerves to be well weighed before any final reſolution upon the point.

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1 Hale, 554. 4 Blac. Com. 227.

(Kel. 69.)

Vide ante, f. 4.

Vide Gowen's caſe, Mich 1786. tit. Arſon.

§ 16. *By wife or family.* Farre's caſe, Kel. 43.

As the poſſeſſion of the ſervant or gueſt is the poſſeſſion of the owner, ſo is the poſſeſſion of any who in law are deemed to be part of the owner's family. Farre's caſe is very ſtrong to this effect; where it was holden, that if the houſe of a feme covert who lives apart from her huſband be broken, though the huſband had expreſsly refuſed to have any thing to do with the leaſe, and the landlord had thereupon agreed

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with the wife alone, yet it muſt be laid to be the houſe of the huſband. But it ſeems to follow as a matter of courſe, that in any caſe where the law would adjudge the ſeparate property of the manſion to be in the wife, and ſhe has alſo the excluſive poſſeſſion, the burglary ought to be laid againſt her manſion-houſe, and not againſt that of her huſband.

§ 17. *Several tenements in the ſame houſe.*

2. *What ſeverance of occupation in the ſame houſe will conſtitute ſo many ſeveral manſions in law?*

This is evidently the caſe where there is an actual ſeverance in fact by a partition or the like, all internal communication being cut off, and each part being inhabited by ſeveral occupants.

Jones's caſe, O. B. Sept. 1790, cor. Ld. C. B. Eyre & Gould J. Leach, 434. (new edit. 607.) *Several occupations of diſtinct parts of the ſame houſe, though by partners having a joint property therein, and paying the rent and taxes for the whole out of the joint ſtock, make ſeveral manſions.*

Martha Jones was indicted for burglary and larceny in the dwelling-houſe of Thomas Smith and John Knowles. The proſecutors were in partnerſhip, and lived next door to each other. The two houſes, which were formerly one, had been divided for the purpoſe of accommodating their reſpective families, and were then perfectly diſtinct and ſeparated from each other, without any communication but by the ſtreet. The houſekeeping was paid by each partner reſpectively for his own houſe; but the rent and taxes of both houſes were paid jointly out of the partnerſhip fund. The offence was committed in the houſe of Smith, to whom the priſoner was ſervant. It was objected, that although theſe two houſes were the joint property of both the partners, yet they were the ſeveral and reſpective manſions of each; and therefore the offence ought to have been laid as committed in the houſe of Smith only. And the court, conſidering the objection to be well founded, directed the jury to acquit the priſoner of the capital part of the charge; and ſhe was found guilty of the ſimple larceny only.

Tracy v. Talbot, Trin. 2 Ann. at Ni. Pri. Salk. 532.

In Tracy v. Talbot, Lord Holt was of opinion that if two ſeveral houſes are inhabited by two ſeveral families who make or have but one common avenue or entrance for both; yet in reſpect of their original both houſes continue rateable ſeparately; and if one family go, one houſe is vacant. But if one tenement be divided by a partition, and inhabited by different families, viz. the owner in one, and a ſtranger in another; theſe are ſeveral tenements, ſeverally rateable, while

while they are thus ſeverally inhabited; but if the ſtranger and his family go away, it becomes one tenement again. Ch. XV. § 17. *In whose manſion.*

With reſpect to the caſe of chambers in the inns of court, which have been before noticed in another view, they are to all purpoſes conſidered as diſtinct dwelling houſes: and therefore whether the owner happen to enter at the ſame common outer door or not will make no manner of difference. The ſets are often held under diſtinct titles, and are in their nature and manner of occupation as unconnected with each other as if they were under ſeparate roofs.

Ante, f. 9. Tracy's MS. 83. Evans v. Finch, Cro. Car 473. W. Jones, 394. 1 Hale, 522, 3. 556. 1 Hawk. ch. 38. f. 11.

§ 18. *Inmates.*

Much doubt has formerly been entertained whether in the caſe of burglary in the hired apartment of an inmate, it ſhall be laid to be committed in the manſion of the inmate or of the owner. Lord Hale was of the former opinion; which is alſo argued for very elaborately by Hawkins, at leaſt where the party has a fixed and certain intereſt in his apartment. As where one hires a diſtinct apartment in the houſe for his lodging for a certain time, though he enter at the ſame door with the other inhabitants, and therefore is but an inmate: becauſe as long as it is ſevered by the leaſe, it is in the eye of the law as diſtinct from the other parts of the houſe, as if the perſon who rented it had a freehold or inheritance in it. This opinion of Hawkins is delivered generally, without reference to the diſtinction of the owner's reſiding or not in the ſame manſion. But his reaſoning evidently tends to exclude any ſuch diſtinction. But however convenient ſuch a rule might have been, it certainly does not coincide with the current of authorities either ancient or modern. For the rule is now taken to be, according to the opinion of Kelyng, that if the owner, who lets out apartments in his houſe to other perſons, ſleep under the ſame roof, and have but one outer door common to him and his lodgers, ſuch lodgers are only inmates, and all their apartments are parcel of the one dwelling-houſe of the owner. But if the owner do not lodge in the ſame houſe, or if he and the lodgers enter by different outer doors, the apartments ſo let out are the manſion for the time being of each lodger reſpectively. And accordingly it was ſo ruled by Holt C. J. at the Old Bailey in 1701; although in that caſe the rooms were let for a year under a rent. And Tanner an ancient clerk of the court ſaid,

1 Hale, 556. 1 Hawk. ch. 38. ſ. 13, 14.

Kel. 84. 4 Blac. Com. 225. Lee v. Ganſell, Cowp. 1.

MS. Tracy, 83.

Ch. XV. § 18. *In whose manſion. Inmates.*

ſaid, that the conſtant opinion and practice of the court had been according to the opinion of Kelyng C. J., which opinion was cited by Lord Holt.

Carrell's caſe, O. B. Feb. 1782. MS. Gould and Buller Js. *Vi.* 1 Leach, 273. S. C. n. a. *Where an inmate had two rooms, one in which he ſlept, and the other up ſtairs; held burglary in the latter muſt be laid in his manſion; the owner retaining no part of the houſe.* (Eyre B. & Buller J.) Rogers's caſe, infra.

Richard Carrell was indicted for burglary in the dwelling-houſe of John Jordan. The houſe in which the offence was committed belonged to one Naſh, who did not live in any part of it himſelf, but let the whole of it out in ſeparate lodgings from week to week. Jordan had two apartments in the houſe, a ſleeping room up one pair of ſtairs and a work-ſhop in the garret, which he rented by the week as tenant at will to Naſh. The workſhop was the room broken open by the priſoner. In Eaſter term 1782 ten Judges againſt two held the offence well laid, and relied on the caſe of Rogers. The two Judges thought that it was not the manſion-houſe of Jordan, but that it might have been laid to have been the manſion-houſe of Naſh: to which ſome of the others inclined if it were not the manſion of Jordan.

Trapſhaw's caſe, O. B. Aug. 1786, and Hil. term 1787. MS. Jud. Leach, 333. S. C. (new edit. 478.)

In Trapſhaw's caſe the facts were exactly the ſame as in Carrell's caſe: the owner let the houſe out to different lodgers, who had but one common outer door. The proſecutor Linney rented and occupied a room on the firſt floor, where he ſlept, and a parlour below, which latter was broken open and rifled by the priſoner. All the Judges, upon the authority of Carrell's caſe and Rogers's caſe, held that the indictment (which was on the ſtat. 3 & 4 W. & M. c. 9.) well laid the robbery to be in the dwelling-houſe of Linney, and that the conviction was proper.

Kel. 84. MS. Tracy, 82.

Hence it follows, that if a man let out part of his houſe to inmates, and continue to inhabit the reſt himſelf; if he break open the apartments of ſuch inmates, and ſteal their goods, it is felony only, and not burglary; for it cannot be burglary to break open his own houſe.

§ 19. *Occupation of owner without inhabiting.*

But a mere occupation of ſome part of the manſion by the owner, without inhabiting the ſame, makes no difference in the queſtion of burglary with reſpect to tenants or inmates.

Rogers's caſe, M. 13 G. 3. MS. Gould and Buller Js. Leach, 84. S. C. (new edit. 104.)

William Rogers was indicted at the Old Bailey for burglary in the dwelling-houſe of Philip Chandler. It appeared that the owner let the whole of it in apartments to different perſons, and did not inhabit any part of it himſelf. Chandler rented the bottom part of the houſe, conſiſting of a ſhop and a parlour and a cellar underneath; but the owner had taken

taken back the cellar for the purpoſe of keeping wood and lumber in it, deducting ſo much for it out of the rent. There was but one common outer door from the ſtreet, which communicated with the reſt of the houſe as well as the ſhop and parlour in which the burglary was committed. Nine Judges preſent all agreed that the indictment properly laid the ſhop and parlour to be the manſion-houſe of the proſecutor; for that though the owner occupied the cellar, yet as he did not inhabit any part of the houſe, it could not be laid to be his dwelling-houſe; though if he had it would have been otherwiſe.

Ch. XV. § 19. *In whoſe manſion. Inmates.*

§ 20. *Severance by leaſe.*

But there may be ſuch a ſeverance by leaſe of part of a manſion as that it ſhall no longer be the ſubject of burglary.

Burnet's MS. 83. 1 Hale, 557, 8. Kel. 83, 4. 4 Blac. Com. 225, 6. 1 Hawk. ch. 38. § 26.

If A. have a ſhop which is parcel of his houſe, the indictment muſt be for breaking the manſion-houſe of A.; but if it be ſevered by leaſe, and have no communication with the dwelling-houſe, by having a different entrance; then unleſs the leſſee or his ſervant ſleep there uſually or often, no burglary can be committed in it. For it is not the manſion-houſe of A., being ſevered by the leaſe; nor can it be ſaid to be the manſion-houſe of the leſſee, if neither he nor his family ever dwell there, or if their ſleeping there be only caſual or temporary.

Kel. 83, 4.

Kelyng has put the caſe of a man having a dwelling-houſe, who lets a cellar and a chamber in the houſe to J. S., reſerving the reſt of his houſe for his own dwelling; and the only paſſage to the cellar is out of a ſtreet; and if the cellar be broken open in the night, whether it be burglary? And he thinks not, becauſe it was ſevered by the leaſe, and had no communication with the reſt of the houſe. But this may well be queſtioned; for the cellar which was before parcel of the houſe is no more ſevered by the leaſe therefrom than the chamber which was alſo let to J. S.; and Kelyng admits that if the chamber were broken open it would be burglary, and ſhould be laid to be the manſion of the owner; there being but one common entrance to him and the lodger. But if the cellar alone had been let, then clearly no burglary could have been committed in it. And this diſtinction ſeems fully to have been adopted in a late caſe of Gibſon

and

Ch. XV. § 20. *In whose manſion. Inmates.*

Rex v. Gibſon and others, Kingſton Lent Aſſ. 1785. MS. Gould and Buller Js. 2 Leach, 396. S. C.

and others; who were indicted and convicted of a burglary in the dwelling-houſe of Thomas Smith, and ſtealing the goods of John Hill. Smith was the owner of a houſe at Eſher, in which he reſided, and to which houſe there was a ſhop adjoining built cloſe to the houſe; but there was no internal communication between the houſe and the ſhop; and no perſon lay in the ſhop; and the only door to the ſhop was in the court-yard before the houſe and the ſhop, which yard was incloſed by a brick wall 3 feet high, including both the houſe and ſhop. Smith let the ſhop together with ſome apartments in the houſe to John Hill from year to year at a rent. There was only one common door to the houſe, which communicated as well to Smith's as to Hill's apartments. A gate or wicket faſtened by a latch in the wall of the court-yard next the road ſerved as a communication both to the houſe and ſhop. The burglary was committed in the ſhop. And upon objection that that could not be ſaid to be the dwelling-houſe of Smith, the point was referred to the Judges, who in Eaſter term 1785 were all of opinion that the indictment was well laid in deſcribing it to be the dwelling-houſe of Smith, who inhabited in one part; and there being but one outer door; eſpecially as it was within one curtilage or fence: and that the ſhop being let with a part of the houſe inhabited by Hill, ſtill continued to be part of the dwelling-houſe of Smith, although there were no internal communication between them. But it was admitted that if the ſhop had been let by itſelf, Hill not dwelling therein, burglary could not have been committed in it, for then it would have been ſevered from the houſe.

5. *In the night.*

§ 21. *Night.* 1 Hale, 551, 5. MS. Burner, 72. 4 Blac. Com. 224, 6.

The breaking and entering muſt be in the night; though they need not be both in the ſame night: for if thieves break a hole in the houſe one night, to the intent to enter another night, and commit felony, and they accordingly do ſo through the hole they ſo made the night before, this ſeems to be burglary; for the breaking and entering were both in the night; and, ſays Lord Hale, it ſhall be ſuppoſed, *that they broke and entered in the night when they entered;* for the breaking makes not the burglary till the entry. If this were the true legal ſuppoſition, which however by no means ſeems neceſſary to conſtitute that caſe burglary, it might have been applied

Ch. XV. § 21. *In the night.*

Crompton, 33. a.

applied not improperly to the caſe before put by the ſame author where the breaking was in the day-time, and the entering at night; which he ſays will not be burglary, upon the authority of Crompton from 8 Ed. 2.; though it is obſervable that the reſolution there only was, that if thieves enter in by night at an hole in the wall which was there before, it is not burglary: but it does not appear who made the hole, much leſs that it was made by the thieves themſelves with intent to enter more ſecurely at night. As to what ſhall be accounted night for this purpoſe; anciently the day was accounted to begin only from ſun-riſing, and to end immediately upon ſun-ſet: but it is now generally agreed, that if there be day-light enough begun or left either by the light of the ſun or twilight, whereby the countenance of a perſon may be reaſonably diſcerned, it is no burglary: but that this does not extend to moon-light; for then many midnight burglaries would go unpuniſhed. And beſides, the malignity of the offence does not ſo properly ariſe, as Mr. Juſtice Blackſtone obſerves, from its being done in the dark, as at the dead of night, when all the creation except beaſts of prey are at reſt, when ſleep has diſarmed the owner, and rendered his caſtle defenceleſs.

4 Blac. Com. 224. 1 Hale, 550. Sum. 79. 3 Inſt. 63. 1 Hawk. ch. 38. ſ. 2. 1 Bac. Abr. 541.

6. *As to the intent.*

§ 22. 1 Hale, 559, 561. 3 Inſt. 65. Kel. 67. 1 Bac. Abr. 543. Hutt. 20. 1 And. 115. 1 Hawk. ch. 38. ſ. 18. 4 Blac. Com. 228. Staundf. 30. Sum. 79.

The breaking and entry of the manſion in the night muſt be with intent to commit ſome felony therein, as murder, larceny, &c., whether the felonious intent be executed or not. For if the intention of the entry be either laid in the indictment or appear upon the evidence to be only to commit ſome treſpaſs, as to beat any perſon in the houſe, it will not be burglary; and this although killing or murder may be the conſequence of ſuch beating. For though in caſe of homicide, if one premeditately intend to beat another very ſeverely, and execute his purpoſe in ſuch a manner as muſt neceſſarily breed danger, and death enſue in conſequence, though beyond his original intent; he ſhall be ſaid in law to have intended all the conſequences, and therefore to have intended the felony; yet that intention is a deduction in law from the felonious act, and may be ſuppoſed to originate ſubſequent to the firſt purpoſe in the heat of blood conſequent upon the execution of it. But in burglary it muſt be found that the entry was for a felonious purpoſe; though

Vide Kel. 47.

Ch. XV. § 22. *Intent.*

though if a felony be actually committed, that is primâ facie pregnant evidence of ſuch an intent, unleſs the contrary appear.

Eaſter Seſſ. 1687. per Wright, Herbert, Atkins, Powell, & Holt. 2 Show. 53.

A ſervant who was entruſted by his maſter ſells goods and conceals the money in the houſe; and after he is diſcharged from the ſervice, breaks the houſe, and takes the money which he had concealed. This was holden to be no burglary, becauſe the firſt taking of the money was not felony.

Rex v. Knight and Roffey, MS. Gould & Buller Js. & MS. Jud. *Breaking and entering a houſe in the night-time to recover tea which had been ſeized; held no burglary, being intended for the benefit of the ſuppoſed owner. Qu. If the indictment had laid the intent to be to reſcue the goods ſeized, which is made felony by ſtatute.*

The priſoners were indicted for feloniouſly and burglariouſly breaking and entering the dwelling-houſe of Mary Snelling at Eaſt Grinſtead in the night of the 14th November 1781, with intent to ſteal the goods of Leonard Hawkins, then and there being in the ſaid dwelling-houſe. It appeared that L. Hawkins, being an exciſe officer, had ſeized 17 bags of tea on the ſame month at a Mrs. Tilt's, in a ſhop entered in the name of Smith, as being there without a legal permit, and had removed the ſame to Mrs. Snelling's at Eaſt Grinſtead, where Hawkins lodged. The tea the witneſſes ſaid they ſuppoſed to belong to Smith: and that on the night of the 14th November the priſoners and divers other perſons broke open the houſe of Mary Snelling with intent to take this tea. It was not proved that Smith was in company with them; but the witneſſes ſwore that they ſuppoſed the fact was committed either in company with or by the procurement of Smith. The jury were directed to find the priſoners guilty, on the point being reſerved: and being alſo directed to find as a fact with what intent the priſoners broke and entered the houſe; they found that they intended to take the goods on the behalf of Smith. In Eaſter term following all the Judges held that the indictment was not ſupported; there being no intention to ſteal, however outrageous the behaviour of the priſoners was in thus endeavouring to get back the goods for Smith. But if the indictment had been for breaking the houſe with intent feloniouſly to reſcue goods ſeized, &c., that being made felony by the ſtat. 19 G. 2. c. 34. the Chief Baron and ſome of the other Judges held that it would have been burglary. But even in that caſe it was agreed that ſome evidence muſt be given on the part of the proſecutor to ſhew that the goods were uncuſtomed, in order to throw the proof upon the priſoners that the duty was paid: but being found in oil-caſes or in great

Eaſt. term, 22 G. 3. 1782.

great quantities in an unentered place would have been ſufficient for that purpoſe. Ch. XV. § 22. *Intent.*

What felony.

The above opinion is in oppoſition to what was formerly ſuppoſed by ſome, that the felony intended muſt be of ſuch a fact as was felony at common law, and not ſuch as was ſince made ſo by ſtatute; and Lord Hale inclines to that opinion. And therefore, ſays he, it has been doubted whether the breaking of a houſe in the night with intent to commit a rape be burglary or not. Crompton thinking it is not, becauſe made felony by ſtat. Weſtm. 2. c. 34.; and Dalton thinking it would be burglary, becauſe rape was felony by the common law; which Lord Hale thinks the more warrantable opinion. And indeed the matter is ſince put out of all doubt in regard to the particular caſe of rape, by the caſe of the King v. Locoſt and Villers, and the King v. Gray; wherein it was clearly holden that the breaking, &c. the houſe with ſuch an intent was burglary. But ſtill the general point remained in the ſame doubt as before: for rape was eſtabliſhed to be felony at common law. Hawkins however, and after him Mr. Juſtice Blackſtone, carry the rule further; and though the former ſeems to found himſelf chiefly upon the miſtaken notion that rape was only made felony by ſtatute, yet the reaſon aſſigned by both is general: and according to them it makes no difference whether the offence intended were felony at common law, or only created ſo by ſtatute; *becauſe wherever a ſtatute makes any offence felony, it incidentally gives it all the properties of a felony at common law.* And it has been ſhewn before in the caſe of Knight, that the ſame reaſoning was adopted by ſeveral of the Judges, though the point was not immediately before them in judgment.

1 Hale, 562. Crompton, 32. Dalt. ch. 151. ſ. 5. Staundf. 81. R. v. Locoſt and Villers, O. B. 1664. Kel. 30. Rex v. Gray, 1 Stra. 481. ante, 488. 1 Hawk. ch. 38. ſ. 19. 4 Black. Com. 228. Ante, 510. *Vide* R. v. Welle, Eaſt. term 1786. Ante, 424. poſt. Indictment.

Trial.

§ 23. *Trial.*

I do not find any thing worthy of ſpecial notice in regard to the trial of burglaries in general; it is governed by the ordinary rules which prevail in caſes of felony. But I ſhall hereafter have occaſion to refer to the ſtats. 25 Hen. 8. c. 3. and 5 & 6 Ed. 6. c. 10. with reſpect to the trial and puniſhment of thoſe who are taken with goods in one county, which were obtained by burglary in another: and alſo to the ſtat. 10 Geo. 3. c. 48. concerning the receivers of certain goods obtained in the ſame manner.

Vi. tit. Larceny.

Ch. XV. § 24.

Indictment, Appeal, Evidence, and Verdict.

§ 24. *Indictment, &c.* 1 Hale, 549. 1 Hawk. ch 38. per tot.

The indictment for burglary may run thus: that J. S. on such a day, in the night of the ſame day, with force and arms, the dwelling-houſe of A. B. feloniouſly and burglariouſly broke and entered, and then and there ſuch and ſuch things of the goods and chattels of the ſame A. B., in the ſame houſe then being, feloniouſly and burglariouſly did ſteal, take, and carry away; or, if no theft were actually committed, then, with intent the goods and chattels of the ſaid A. B., in the ſame houſe then being, feloniouſly and burglariouſly to ſteal, take, and carry away; or, with intent the ſaid A. B. there feloniouſly to kill, &c.; or both the felonious intent and the actual felony may be charged.

1 Hale, 550. 4 Co 39. b. 5 Co. 121, b.

The offence muſt not only be laid to be done feloniouſly, but alſo *burglariouſly*; which is a term of art, and cannot be expreſſed by any other word or circumlocution.

Breaking and entering. Ante, f. 2. 7. 1 Hale, 550.

It muſt be ſtated that the offender *broke* and *entered* the houſe; a breaking without an entry, or vice verſâ, is inſufficient.

Manſion. 1 Hale, 550. c 56. 1 Hawk. ch. 38. ſ. 10. 4 Blac. Com. 224, 5.

It muſt be laid to be done in a manſion or dwelling-houſe; and therefore if it be only ſaid to be in the *houſe* of ſuch an one, it is not ſufficient. But this rule extends only to the caſe of burglary in a private houſe; for if, as has been hinted before, the offence may be committed by breaking open a church, or the gates or walls of a town, it ſeems agreed to be more proper to lay the indictment according to the truth of the fact; and therefore ſtating that the priſoner feloniouſly and burglariouſly broke and entered, &c. the pariſh church of D., &c. is ſufficient. Where the burglary is in any out-houſe, which by law is conſidered part of the dwelling-houſe, it muſt ſtill be laid to be done in the dwelling-houſe; or at leaſt, as in Dobbs's caſe after mentioned, in the ſtable, &c. alleging it to be part of the dwelling-houſe: and in either caſe, the jury ſhould find the fact, that it is parcel of the dwelling-houſe; according to the determination in Garland's caſe before mentioned.

Ante, 487. 491.

Garland's caſe, ante, 493.

But the indictment need not allege that any perſon was in the houſe; for this clauſe was inſerted in after the ſtat. 23 H. 8. which takes away clergy where any perſon in the houſe was put in fear: and now the ſtat. 18 Eliz. takes away clergy in all caſes of burglary.

MS. Tracy, 79. 84. Moor, 662.

Poſt. f. 30.

It

Ch. XV. § 24. *Indictment, Evidence, &c.*

Whoſe manſion. White's caſe, O.B. Feb. 1785. Leach, 216. (new edit. 286.)

It is neceſſary to aſcertain to whom the manſion belongs, and to ſtate that with accuracy in the indictment; and therefore, where the priſoner was indicted for burglary in the dwelling-houſe of John Snoxall, and ſtealing therein goods the property of Ann Lock; and it appeared that it was not the dwelling-houſe of J. S. Buller and Groſe Juſtices held that the priſoner could not be found guilty either of the burglary, or ſtealing to the amount of 40 *s.* in the dwelling-houſe; for it is eſſential in both caſes to ſtate in the indictment the name of the perſon in whoſe houſe the offence was committed. In Cole's caſe it was ſtated to be the ſhop of one Richard —— (leaving a blank for the ſurname); on which account it was doubted by B. R. whether it could be ſupported; though the Reporter ſays it was holden good.

W. Woodward's caſe, O.B. 1785. S. P. Cole's caſe, Moor, 466. *Vide* 1 Hale, 558.

In the night. 1 Hale, 549. 2 Hale, 179.

The indictment muſt not only ſtate the fact to have been done in the night of ſuch a day; but it ought alſo to expreſs at about what hour of the night it happened: though it does not ſeem neceſſary that the evidence ſhould ſtrictly correſpond with the latter allegation. In Waddington's caſe the indictment for burglary alledged the fact to have been committed in the night, but did not expreſs at or about what hour it was done. Gould J. held the indictment inſufficient as for a burglary, and directed the priſoner to be found guilty of ſimple larceny only. He ſaid that as the rule now eſtabliſhed was, that a burglary could not be committed during the twilight, it was therefore neceſſary to ſpecify the hour in order that the fact might appear upon the face of the indictment to have been done between the twilight of the evening and that of the morning.

Waddington's caſe, Lancaſter Lent Aſſ. 1771. Burn's Juſt. tit. *Burglary.*

§ 25. *Intent.* 1 Hale, 550, 9.

Further it muſt be alleged and proved, either that a felony was committed in the dwelling-houſe, or that the party broke and entered with intent to commit ſome felony within the ſame.

Dobbs's caſe, Buckingham Aſſ. 30 July 1770. Serjt. Forſter's MS. *Vide* 1 Hale, 561.

Joſeph Dobbs was indicted for burglary in breaking and entering the ſtable of James Bayley, part of his dwelling-houſe, in the night, with a felonious intent to kill and deſtroy a gelding of one A. B. there being. It appeared that the gelding was to have run for 40 guineas, and that the priſoner cut the ſinews of his fore-leg to prevent his running, in conſequence of which he died. Parker Ch. B. ordered him to be acquitted; for his intention was not to commit the

Ch. XV. § 25. *Indictment, Evidence, &c.*

felony by killing and deſtroying the horſe, but a treſpaſs only to prevent his running; and therefore no burglary. But the priſoner was again indicted for killing the horſe, and capitally convicted.

But whatever be the felony really intended, the ſame muſt be laid in the indictment and proved agreeably to the fact.

O. B. Oct. 1700. Serjt Forſter's MS. & *vide* poſt. 519. R. v. Vandercomb and Abbot.

One was indicted for burglary and ſtealing goods. It appeared that there were no goods ſtolen, but a burglary with intent to ſteal; and not being ſo laid, as it ought to have been, Lord C. J. Holt directed the priſoner to be acquitted.

MS. Burnet, 83. 1 Hale, 561. poſt. § 26.

And ſo if it be alleged that the entry was with intent to commit one ſort of felony, and the fact appear to be that it was with intent to commit another; that is not ſufficient.

Rex v. Locoſt and Villers, Kel. 30. 1 Hale, 560.

Though if the intended felony were actually committed, it is enough to lay the breaking and entering to be with intent to do ſo.

Jenks's caſe, C. B. June 1796, and before all the Judges in Mich. T. following, MS. Buller J. and MS. Jud. (2 Leach, 896. S. C.)

So where the indictment was for breaking, &c. the houſe of J. Davis, with intent to ſteal the goods of J. Wakelin, in the ſaid houſe being, and there was no ſuch perſon who had goods in the houſe: but J. W. was put by miſtake for J. D.; the priſoner was entitled to an acquittal: and it was ruled that the words "*of J. W.*" could not be rejected as ſurpluſage; for the words were ſenſible and material; it being material to lay truly the property in the goods; and without ſuch words the deſcription of the offence would be incomplete. This it ſeems is not like the caſe of laying a robbery in the dwelling-houſe of A., which turns out to be the dwelling-houſe of B.; becauſe that circumſtance is perfectly immaterial in robbery, which is ouſted of clergy generally; as was determined in Pye's caſe. Nor is this like Morris's caſe, where the name was ſo introduced as to make the ſentence inſenſible.

Vide tit. Larceny, f. 162. and Indictment—Surpluſage.

But it ſeems in all caſes ſufficient, where a felony has been actually committed, to allege the commiſſion of ſuch felony; for, as Lord Hale obſerves, that is ſufficient evidence of the intention. The ſtat. 12 Ann. c. 7. ſeems to have been drawn with that view. It is, beſides, a general rule, that a man who commits one ſort of felony, in attempting to commit another, cannot excuſe himſelf upon the ground that

1 Hale, 560. Ante, f. 6.

that he did not intend the commiſſion of that particular offence. Yet this it ſeems muſt be confined to caſes where the offence intended is in itſelf a felony, according to the reſolution in Dobbs's caſe before mentioned.

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Ante, 513.

§ 26. *Different intents.*

But the ſame fact may be laid with ſeveral intents. In Thompſon's caſe, which was an indictment for burglary, the firſt count laid the fact to be with intent to ſteal the goods of T. D.; the ſecond count laid it with intent to kill and murder him. Upon a general verdict of guilty, it was objected that there were two ſeveral capital charges in the ſame indictment, which, it was ſaid, tended to deprive the priſoner of ſo many challenges as he would be entitled to if the indictments were diſtinct; namely, 20 upon each. Another objection was, that it would tend to perplex the priſoner in his defence. But ſeven Judges (being all who were preſent at the conference,) held the indictment good. They ſaid it was the ſame fact and evidence, only laid in different ways. Whereas in O'Connor's caſe, in Lord C. J. Ryder's time, there were two diſtinct felonies charged in ſeveral counts; one for hiring A. with intent to cauſe him to be enliſted in the French king's ſervice; the other a ſimilar charge with reſpect to B.: and in that caſe no judgment was given; the priſoner being diſcharged from the indictment by the conſent of the attorney-general: and the rather upon the doubt whether the fact found amounted to the felony.

Rex v. Thompſon, Norfolk Sum Aſſ. 1781. MS. Gould J.

Mich. T. 1781.

See more under tit. Indictment, Joinder, and infra.

§ 27. *Different offences joined in ſame indictment, and severance by verdict.*

Further, the indictment may be ſo laid as to compriſe other offences than burglary, though connected therewith; ſo that the priſoner may be acquitted of part and found guilty of the reſt. As if the priſoner be charged that he feloniouſly and burglariouſly broke and entered the dwelling-houſe of J. S., and then and there certain goods of J. S. feloniouſly and burglariouſly did ſteal, &c.: the indictment compriſes two offences, namely, burglary and larceny; and therefore he may be acquitted of the burglary if the caſe be ſo upon the evidence, and found guilty only of the larceny. But in ſuch caſe, if the priſoner be acquitted of the larceny, it ſeems he cannot be found guilty of the burglary; becauſe as it is thus charged, the larceny conſtitutes part of the burglary. For though the act of theft being charged is a ſufficient allegation by intendment of law of the priſoner's

1 Hale, 559. 2 MS. Sum. poſt. 517. R. v. Withal & Overend, and R. v. Hungerford, poſt. 518.

Ante, 514.

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felonious intention; yet when he is acquitted of that, there being no expreſs charge of an intention to ſteal, it ſtands ſingly as if the indictment had been of a breaking and entering, &c. without any allegation of a felonious intent. And of this opinion was Lord Holt, at the Old Bailey, October, 1700. Therefore, ſays Lord Hale, the better way is to charge the priſoner with breaking, &c. with intent feloniouſly and burglariouſly to ſteal the goods, &c. therein, and to add alſo the particular felony: and then, though he be acquitted of the felony, the indictment ſtands good againſt him as for a ſimple burglary. The ſame author alſo thinks that three offences may be laid in the ſame indictment, namely, burglary, larceny, and felony upon the ſtatute 5 & 6 Ed. 6. c. 9. and the form of the indictment may run thus, That A. on, &c. in the night of the ſame day, with force and arms, at, &c. the dwelling-houſe of B., &c. feloniouſly and burglariouſly did break and enter, with intent the goods and chattels of the ſaid B., in the ſaid dwelling-houſe then and there being, feloniouſly and burglariouſly to ſteal, &c. and then and there, with force and arms, one ſilver cup, &c. of the ſaid B. then and there being, feloniouſly and burglariouſly did ſteal, &c. the ſaid B., his wife, and children, and family, in the ſaid dwelling-houſe then and there being, againſt the peace, &c. And ſuch indictment need not conclude againſt the form of the ſtatute. Hereby the priſoner may be either convicted of the burglary and not of the larceny, or convicted of the felony within the ſt. 5 & 6 Ed. 6.; in either of which caſes he is ouſted of clergy; or he may be convicted of the ſimple larceny, and ſo have the benefit of clergy.

Ante, 514.

1 Hale, 560. 2 MS. Sum. MS. Burnet, 84.

§ 28. *Verdict and judgment.*

There is a note of a caſe of Rex v. Comer, which is in general circulation, wherein it was ſuppoſed that much depended upon the manner of entering the verdict: for in that caſe, upon an indictment for burglary(*a*) and ſtealing goods in the houſe of the value of 150l., where the verdict was, "guilty of felony only in ſtealing goods to the value of 150l. from the dwelling-houſe, and not guilty of the burglary;" it was holden, that by a general acquittal of the burglary, which as the indictment was laid included (as was ſaid) the breaking and entry and taking of the goods, the priſoner was by neceſſary

Comer's caſe, 30th Nov. 1744. 2 MS. Sum. Serjt. Foſter's MS. S. C. Leach, 34. (new edit. 43.)

(*a*) By this muſt be underſtood breaking and entering the dwelling-houſe of ſuch an one in the night-time, without laying it to be done with a felonious intent.

conſequence

conſequence acquitted of the felony alſo. But they agreed that if the entry of the verdict had been "not guilty of the "breaking and entering the houſe in the night-time, but "guilty of the reſt of the indictment," the priſoner would then have been convicted of ſtealing goods to the value of 40s. in the dwelling-houſe, and been ouſted of clergy by ſtat. 12 Ann. c. 7. But I have ſeen a note of this caſe of Mr. Juſtice Abney's, (wherein it is called Hugh Connor's caſe), which throws great doubt upon the accuracy of the above ſtatement. From the latter it appears that Lord C. J. Lee, Parker C. B. and the Judges, Reynolds, Abney, Burnet, Deniſon, and Clarke, thought that the priſoner was ouſted of clergy on the finding of the jury. Willes C. J. inclined that the indictment was ill. Wright J. contrà. The other three were abſent. But upon the doubt conceived by the minority, and the priſoner having lain many months in priſon, they all agreed to recommend him for a pardon on the terms of tranſportation. At any rate this was an over-ſtrained nicety, which has been ſince corrected upon better conſideration.

Ch. XV. § 28. *Verdict and judgment.*

Vide 1 Hale, 559, 560. Summers's caſe, 1706. Com. Rep. 481.

Hungerford's caſe, poſt. 518.

Withal and Overend were indicted for feloniouſly and burglariouſly breaking and entering the dwelling-houſe of E. P., and ſtealing therein 60l. The jury found them not guilty of the breaking and entering the dwelling-houſe in the night, but guilty of ſtealing the money in the dwelling-houſe. It was objected for the priſoners that they were not excluded clergy, becauſe the jury had acquitted them of the burglary, and there was no ſeparate count in the indictment on the ſtat. 12 Ann. c. 7. for ſtealing in the dwelling-houſe to the value of 40s. This matter being reported to the Judges in Mich. term 1773, a great majority were of opinion that where a priſoner is indicted for a complicated offence comprehending in itſelf divers circumſtances of aggravation, each of which is ouſted of clergy; though he be acquitted of ſome of thoſe circumſtances, yet if he be found guilty of others from which the benefit of clergy is excluded, he ſhall receive ſentence of death. As if one be indicted of burglary and ſtealing a ſheep, and he be acquitted of the breaking, &c. but found guilty of the ſheep-ſtealing, no other than a capital judgment can be pronounced againſt him. But a few of the Judges ſtill doubting, the further conſideration of the

Rex v. Withal and Overend, Guildford Aſſ. 1773. MS. Crown Caſ. Ref. & MS. Jud. Serjt. Foſter's MS. (S. C. 1 Leach, 101.)

On indictment for burglary and ſtealing, &c. defendant being acquitted of the breaking, &c. but found guilty of ſtealing above 40s. in the dwelling-houſe, is ouſted of clergy.

Ch. XV. § 28. *Verdict and judgment.*

case was adjourned to Hilary term 1774, and in the mean time Lord C. B. Parker furnished the note of Comer's case first before mentioned. Finally, all the Judges were of opinion that the prisoners were ousted of their clergy by this finding; for the indictment contained every charge necessary upon the stat. 12 Ann. c. 7. namely, a stealing in a dwelling-house to the amount of 40s., and the jury had found them guilty of that charge.

Hungerford's case, Bristol, 1790. MS. Buller J.

Manner of taking the verdict in case of burglary and felony joined.

William Hungerford was indicted before the Recorder of Bristol for feloniously and burglariously breaking and entering the dwelling-house of J. H., and feloniously and burglariously stealing therein the goods, &c. of the value of 6l. The verdict was, "not guilty of the burglary, but guilty of stealing above the value of 40s. in the dwelling-house;" and the entry by the officer was in the same words. Judgment of death was given, but execution was respited till the opinion of the Judges could be taken. In Easter term 1790 the Judges, after some debate, adjourned this case to the next term; and on the 21st of June following they held the finding sufficient to warrant a capital judgment. They agreed, that if the officer were to draw up the verdict in form, he must do it according to the plain sense and meaning of the jury, which admitted of no doubt. That the minute was only for the future direction of the officer, and to shew that the jury found the prisoner guilty of the larceny only. But many of the Judges said, that when it occurred to them they should direct the verdict to be entered "not guilty of the breaking and entering in the night, but guilty of the stealing," &c.; as that was more distinct and correct. It appeared upon inquiry to be the constant course on every circuit in England upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict, "not guilty of murder, but guilty of manslaughter;" or "not guilty of murder, but guilty of feloniously killing and slaying:" and yet murder includes the killing. They added that the whole verdict must be taken together; and the jury must not be made to say that the prisoner is not guilty generally, when they find him expressly guilty of part of the charge; or to appear to speak contradictorily by means of the officer's using a technical term, when the verdict is sensible and intelligible in itself.

But

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Rex v. Turner and others, 1 Sid. 172.

But where several were indicted together for burglary (*a*), and for feloniously stealing goods, &c. in the house; it seemed to the two Chief Justices and others that the jury could not find one guilty of the burglary, and another guilty of the larceny only, upon the same indictment and the same evidence. In truth, such a finding shewed that the offences of the several prisoners were of a distinct nature, and therefore ought not to have been included in the same indictment.

§ 29. *Acquittal of burglary with one felonious act, and indictment for the same burglary with another such act.*

Rex v. James Vandercom and James Abbott, O. B. Jan. 1796 MS. Buller J. *An acquittal upon an indictment for burglary in breaking, &c.* AND STEALING *the goods of A. and of B. and of C. cannot be pleaded in bar to an indictment for burglary in the same dwelling-house on the same night* WITH INTENT *to steal the goods of A. and B. Auterfoits acquit cannot be pleaded, unless the facts charged in the second indictment would, if true, have justified the first indictment.*

It was formerly considered that a person indicted and acquitted for breaking and entering a dwelling-house in the night, and there stealing the goods of one person, could not be afterwards indicted for the same breaking and entering, and stealing the goods of another person; though he might be indicted of the simple larceny: but the cases in which that doctrine was established have been since denied to be law in the case of Vandercom and Abbott. The prisoners were indicted for burglariously breaking and entering the dwelling-house of Merial Nevill and Ann Nevill, &c. *with intent* to steal their goods therein being: to which they pleaded auterfoits acquit upon a former indictment, charging the same facts, with this difference, that instead of the breaking, &c. being laid *with intent to steal, &c.* the indictment charged an actual stealing of certain goods of Merial Nevill, and certain other goods of Ann Nevill, and certain other goods of one Susanna Gibbs (*b*), and concluding with an averment of the identity of the persons, and that the two indictments were for the same burglary. The case was argued upon demurrer before all the Judges, and they unanimously held the plea bad: the grounds of which judgment were afterwards stated by Buller J. at the Old Bailey in June 1796. He began by observing that on the part of the prisoners it was contended, that as the dwelling-house mentioned in the two indictments, and the times mentioned in each when the offence was committed, were the same, therefore the offence was the same, and the acquittal on the

(*a*) *Vide* ante, p. 516. n. (*a*).

(*b*) Mr. Justice Buller in delivering the opinion of the Judges on this case observed, that the property in the goods was differently described in the two indictments, which might afford another objection to the plea; but that he had not entered into the consideration of that circumstance, as the case did not require it. MS. Buller J.

Ch. XV. § 29. *Auterfoits acquit.*

former indictment a bar to the preſent. And further, that burglary was defined to be a felonious breaking and entering of a manſion-houſe in the night-time, to be completed by felony or an intention to commit it. And that two caſes in Kelyng were relied on in ſupport of the plea of auterfoits acquit. (After ſtating the two indictments he proceeded,) The queſtion is, Whether the ſeveral offences deſcribed in the two indictments can be ſaid to be the ſame? That there was only one act of breaking the houſe, and a felony committed only at one time, muſt on this record be taken to be clear: but that does not decide the queſtion. The crime of burglary is of two ſorts (*a*); 1. breaking and entering a dwelling-houſe in the night-time, and ſtealing goods there: 2. breaking and entering a dwelling-houſe in the night-time with intent to commit a felony, though that felony be not committed. The circumſtance of breaking and entering the dwelling-houſe is common and eſſential to both, but it does not of itſelf conſtitute the crime in either; for there muſt be a felony committed or intended, without one of which the crime of burglary does not exiſt: and theſe offences are ſo diſtinct in their nature, that evidence of one will not ſupport an indictment for the other. For example, if a man be indicted for breaking and entering a houſe in the night and ſtealing goods there, evidence that he broke, &c. and intended to ſteal goods, or to commit any other felony, would not ſupport the indictment. In the caſe of the preſent priſoners, the evidence applicable to the indictment now depending, which is for breaking, &c. with intent to ſteal, was not evidence to prove the firſt indictment for breaking, &c. and ſtealing goods. Then if the crimes are ſo diſtinct that evidence of one will not ſupport the other, it is inconſiſtent with reaſon to ſay that they are ſo far the ſame that an acquittal of one ſhall be a bar to a proſecution for the other. Neither do legal authorities ſupport ſuch a propoſition. The two caſes quoted on behalf of the priſoners were Turner's caſe, Kel. 30. and Jones and Beaver's caſe,

(*a*) Quære, whether the definition of the crime be not ſolely reſolvable into the breaking, &c. with intent to commit felony; of which the actual commiſſion is ſuch a ſtrong preſumptive evidence, that the law has adopted it, and admits it to be equivalent to a charge of the intent in an indictment. And therefore an indictment charging the breaking, &c. to be *with intent* to ſteal is ſaid to be ſupported by proof of actual ſtealing (ante, 514.) though certainly not vice verſâ.

Kel.

Kel. 52. William and James Turner were indicted for burglary in breaking and entering the dwelling-houſe of Mr. Tryon in the night, and ſtealing therein a large ſum of money; on which James was found guilty, but William was acquitted. Afterwards, there being ſtrong evidence that William was concerned in the ſame burglary, and there being 47 l. of the money of one Hill, a ſervant of Mr. Tryon, ſtolen at the ſame time, which was not laid in the former indictment, it was intended to indict him a ſecond time for the burglary in breaking, &c. the houſe of Mr. Tryon, and ſtealing the 47 l. of the money of Hill. But it was agreed, ſays the reporter, that William Turner could not be indicted again for the ſame burglary, though he might be indicted for felony for ſtealing the money of Hill. That caſe was no ſolemn judgment; for the priſoner was not indicted a ſecond time for the burglary. It was merely a direction from the Judges to the officer of the court how to draw the ſecond indictment; and it proceeded upon a miſtake as I ſhall preſently ſhew. If the Judges in that caſe exerciſed a little lenity before the indictment, which might more properly have been done after a conviction, much cenſure could not fall on them. But they proceeded on the ground that the priſoner having been indicted for burglary in breaking the houſe of Mr. Tryon and ſtealing his goods, and acquitted thereof, he could not be indicted again for the ſame burglary, *for breaking the houſe*; though he might be indicted for felony for ſtealing the money of Hill; for they were ſeveral felonies, and he was not indicted of that felony before. And he was indicted accordingly. In that caſe the Judges went on the idea that the breaking the houſe and the ſtealing the goods were diſtinct offences, and that breaking the houſe only conſtituted the crime of burglary; which was a manifeſt miſtake. The burglary conſiſted of breaking the houſe and ſtealing the goods; and if the ſtealing the goods of Hill were a diſtinct felony from that of ſtealing the goods of Tryon, (which they admitted it to be,) the burglaries from neceſſity could not be the ſame. In that caſe the fact was, that the priſoner broke the houſe of Tryon, and ſtole the money both of Tryon and of Hill at the ſame time. He had been tried for breaking the houſe and ſtealing the money of Tryon, and might have been convicted if the proſecutor had uſed due diligence about his evidence; ſo

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(Turner's caſe, Kel. 30.)

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ſo that the priſoner's life had been in jeopardy: but ſtill the Judges held that he might be tried for the other part of the ſame act, viz. ſtealing the money of Hill. If no money of Tryon's had been in the houſe or been ſtolen, probably the queſtion never would have ariſen in Turner's caſe; for then the firſt indictment would have been wholly inapplicable to the facts of the caſe, and the priſoner in no danger at all upon it: but that circumſtance could not vary the law of the caſe; and the opinion certainly proceeded from the want of adverting to what was neceſſary to conſtitute the crime of burglary. The caſe of Jones and Beaver proceeded wholly on that of Turner: and if the foundation fail, that caſe muſt alſo fall. There the priſoners were indicted for burglary and ſtealing the goods of Lord Cornbury; and being acquitted, were afterwards indicted for the ſame burglary in breaking, &c. and ſtealing the goods of Mr. Nunneſy: and it was agreed, that being acquitted once, they could not be indicted again for the ſame burglary; but that they might be indicted for ſtealing the goods of N., (according to Turner's caſe.) But authorities are not wanting to ſhew the principle and foundation on which a plea of auterfoits acquit is to be ſuſtained. (He then referred to 2 Hawk. ch. 35. ſ. 3. Foſt. 361, 2. and Rex v. Pedley, B. R. Tr. 1782.) Theſe eſtabliſh the principle, that unleſs the firſt indictment were ſuch as the priſoner might have been convicted upon by proof of the facts contained in the ſecond indictment; an acquittal on the firſt indictment can be no bar to the ſecond. To apply that principle to the preſent caſe: the firſt indictment was for breaking and entering the houſe and ſtealing the goods: if it were proved on that indictment that the priſoners broke and entered the houſe with intent to ſteal the goods, but had not ſtolen them, (which are the facts contained in the preſent indictment,) they could not have been convicted on that indictment by ſuch evidence. They have not then been tried, nor were their lives ever in jeopardy for this offence, which is for breaking the houſe with intent to ſteal the goods. For theſe reaſons the Judges are unanimouſly of opinion that the plea is bad; that there muſt be judgment for the crown on the demurrer; and that the priſoners muſt take their trial upon the indictment now depending.

(Jones and Beaver's caſe, Kel. 52.)

As

Ch. XV. § 30.

§ 30. *Clergy, puniſhment.*

As to the puniſhment for this offence; by ſtat. 18 Eliz. c. 7. "Every perſon and perſons who ſhall commit burglary, "and be found guilty by verdict, or be outlawed, or who "upon arraignment ſhall confeſs the ſame, ſhall ſuffer death "and forfeit as in caſes of felony, without benefit of clergy." And by ſtat. 3 W. & M. c. 9. ſ. 2. clergy is alſo taken away if the offender "ſtand mute, or do not directly anſwer, or "challenge peremptorily above 20." And this latter ſtat. (ſ. 1.) alſo ouſts of clergy "every perſon who ſhall counſel, "hire, or command, any perſon to commit any burglary, be-"ing thereof convicted or attainted, or being indicted "thereof and ſtanding mute, not directly anſwering, or "challenging above 20." Alſo by the ſtat. 1 Ed. 6. c. 12. ſ. 10. "Perſons attainted or convicted of breaking any houſe "by day or by night, any perſon being therein and thereby "put in fear or dread, or being indicted or appealed there-"of, and thereupon found guilty by verdict, or who ſhall "upon arraignment confeſs the ſame, or will not directly "anſwer, or ſtand wilfully or of malice mute, ſhall not be "admitted to the benefit of clergy."

18 Eliz. c. 7. 3 W. & M. c. 9. ſ. 2. 1 Hale, 562. 2 Hale, 361. 2 Hawk. ch. 33. ſ. 104, 105, 6.

1 Ed. 6. c. 12. ſ. 10. *vide* tit. Larceny.

By ſtat. 5 Ann. c. 31. ſ. 5. (which is principally levelled at the receivers of ſtolen goods,) "any perſon who ſhall re-"ceive, harbour, or conceal any burglars, &c. knowing "them to be ſo, ſhall be taken as acceſſary to the ſaid fe-"lony, &c. and being thereof legally convicted by the "teſtimony of one or more credible witneſſes, ſhall ſuffer "death as a felon convict."

5 Ann. c. 31. ſ. 5. *Acceſſaries after.*

Alſo, perſons indicted in one county for ſtealing goods obtained by burglary in another county are ouſted of clergy, as is elſewhere ſhewn.

Vide tit. Larceny, ſ. 157.

A reward of 40 l. and certificate of exemption from pariſh offices are given upon the conviction of burglars by ſeveral ſtatutes; and alſo a pardon to an offender out of priſon diſcovering two or more accomplices.

See general tit. Rewards, &c.

As a means of preventing this offence, perſons apprehended, having upon them any implements of houſebreaking, ſhall by ſtat. 23 Geo. 3. c. 88. be deemed rogues and vagabonds within the vagrant act 17 Geo. 2. c. 5.

23 G. 3. c. 88.

CHAP. XVI.

LARCENY AND ROBBERY.

Larceny.

Introduction. - - - § 1.

Definition.—The fraudulent or wrongful taking and carrying away by any Perſon of the mere perſonal Goods of another, from any Place, with a felonious Intent to convert them to his (the Taker's) own Uſe, and make them his own Property, without the Conſent of the Owner. - - § 2.

I. *What a mere taking.* - - § 3.

There muſt be a taking in fact of the Thing, ſufficient to conſtitute a Treſpaſs, either from the actual or conſtructive Poſſeſſion of the Owner. *ib.*

If Delivery to the Party be voluntary, no ſubſequent Converſion will make it Treſpaſs. Aliter, if Delivery obtained by Force, Threat, or Fraud. *ib.*

Inſtances of felonious taking on a Privity of Bailment determined; on a bare Charge; on Poſſeſſion obtained by Fraud; or upon a colourable Gift extorted by Fear. *ib.*

Taking by the Hand of the Law, or of an innocent Perſon. *ib.*

II. *What a carrying away.* - - § 4.

The leaſt Removal of the Thing from the Place where it was, though not carried off. *ib.* Carrying Sheets from a Bed into the Hall. *ib.* Taking Horſe in a Cloſe, though detected before he got it out. *ib.* Removing Parcel from one End of Waggon to another. *ib.* But not ſetting Package upright in the ſame Place when it was lying lengthways, it not being entirely liſted off from the ſpot. *ib.*

Nor

Nor taking Purſe out of Owner's Pocket, or Shop, to which it ſtill continued faſtened by a String. § 4.

Nor if in ſtruggling the Purſe fall to the Ground, the Robber not having hold of it, &c. *ib.*

But ſnatching an Ear-ring out of the Ear by Force, though it were loſt again inſtantly and fell into the Party's Hair, is ſufficient. *ib.*

If the Thief once take, though he immediately return the Thing again, it is Larceny. - § 5.

Where there is one continuing Tranſaction, all may be guilty as Principals, though ſeveral diſtinct Aſportations; if all concur before final Aſportation from virtual Cuſtody of Owner. - - § 6.

III. *By whom in particular Larceny may be committed.* - - - § 7.

1. Not by Joint Tenants. *ib.*

But by one of his own Goods from the Cuſtody of another, having ſpecial Property in them, and with fraudulent Intent to charge him or the Hundred for the Value. *ib.*

2. But not by *Wife* from her Huſband. - § 8.

Nor by any other from him by her Delivery. *ib.*

Nor by Wife from any other in Huſband's Preſence. *ib.*

Aliter, if by his Command in his Abſence. *ib.*

On Indictment againſt both, Huſband may be acquitted and Wife convicted, as well as vice verſâ. *ib.*

Where it lies on Wife to prove her Marriage. *ib.*

3. *By Servants*, of the Things entruſted to their Charge or Cuſtody. - - - § 9.

i. Upon Stat. 33 H. 6. c. 1. making Spoil of Maſters Goods on their Death. *ib.*

ii. Upon Stat. 21 H. 8. c. 7. - § 10.

Servants withdrawing themſelves with Things delivered to them by Maſters to keep, or embezzling them to the Value of 40 s. made Felony; but Clergy not ouſted, unleſs Goods taken out of Dwelling-houſe, &c. by Stat. 12 Ann. c. 7. *ib.*

Nor as it is ſaid Offenders tranſportable; ſed Quære. *ib.*

To

To what Servants and in what Inſtances the Statute extends. - - - § 11.

Not to Apprentices: but they are liable at common Law. *ib.*

To what Goods. Such as are delivered by Maſter to the Servant to be returned in Specie. § 12.

Form of Indictment thereon. - - § 13.

iii. By common Law Servants having only a bare Charge or Cuſtody of their Maſter's Goods may be guilty of Larceny in taking them, on the Principle that Poſſeſſion of Servant for the Maſter is Poſſeſſion of Maſter. - - - § 14.

As where a daily Clerk embezzled a Bill of Exchange delivered to him by his Maſter to ſend by the Poſt. § 15.

Or where a Tradeſman's Servant broke open and purloined a Package of Goods delivered him to carry to a Cuſtomer. *ib.*

Or where a Servant went off with Money delivered to him to carry to another. *ib.*

Or where one entruſted with his Maſter's Caſh Concerns got a Bill diſcounted in order to abſcond with the Money, which he did. *ib.*

Aliter, where Maſter had no otherwiſe the Poſſeſſion than by Receipt of the Servant by Delivery of another for his Maſter's Uſe, in which Caſe Embezzlement of the Servant no Larceny at common Law. § 16 & 17.

Unleſs where Servant has firſt done ſome act to determine his original excluſive Poſſeſſion, as by depoſiting the Goods in his Maſter's Houſe, Barge, &c. *ib.*

Or where he ſeparates Part from the Reſt, and conveys it away from the Veſſel on board which his Maſter had purchaſed it. *ib.*

And now by Stat. 39 Geo. 3. c. 85. Servants or Clerks receiving Money, Goods, Bonds, &c. or other valuable Securities or Effects on Account of their Maſters, &c. and fraudulently embezzling the ſame, ſhall be deemed to have feloniouſly ſtolen the ſame; and are ſubjected to Tranſportation not exceeding 14 Years. - - - § 18.

4. *By Officers and Servants of the Bank.* - § 19.

Felony without Clergy by Stat. 15 Geo. 2. c. 13. ſ. 12. 35 Geo. 3. c. 66. and 37 Geo. 3. c. 46. in ſuch Perſons embezzling any Note, Dividend-Warrant, Security for Money or Effects, &c. belonging to or depoſited with the Bank.

5. *By Officers and Servants of South-Sea Company.* § 20.

The ſame Proviſions as above.

6. *By Perſons employed in or by the Poſt-Office.* § 21.

Secreting, embezzling or deſtroying any Letter, &c. entruſted to their Care or coming to their Poſſeſſion, containing any Bank Note, Bill of Exchange, &c. Dividend-Warrant, &c. Felony without Clergy by Stat. 7 Geo. 3. c. 50. - - § 21.

Though Defendant have not taken the Oath required by Stat. 9 Ann. c. 10. ſ. 41. of Perſons employed by the Poſt-Office. *ib.*

Qu. Whether one indicted as *Charger and Sorter* of Letters for ſuch embezzling may not be convicted thereof as Sorter only. But if acquitted on ſpecial Count, he cannot be convicted on general Count as a Perſon employed in the Poſt-Office, being no otherwiſe employed than as Sorter. *ib.*

A Bill of Exchange may be laid as a Warrant for the Payment of Money within the Act. - § 22.

Stealing Letter containing Money not within the Act. *ib.*

Indictment for *ſecreting two Letters* containing therein a Bank Note, and Proof that the Bank Note was ſent in Halves on different Days, held within the Act. *ib.*

Aliter perhaps of a *Taking* which means the original Taking. *ib.*

Qu. As to ſecreting Letter containing a Bank Note, not knowing the Contents, with Intent to embezzle Poſtage paid. - - - § 23.

Semble within ſ. 19. of 5 Geo. 3. c. 25. which makes it Felony to embezzle Poſtage received with Letter. *ib.* & § 24.

Alſo Felony by ſame Act, to deſtroy Letter or advance Rate of Poſtage and embezzle it. - § 24.

How far varied by Stat. 7 Geo. 3. c. 50. ſ. 3. *ib.*

Letter-Carriers, &c. or others employed in Poſt-Office taking or receiving any Letter, &c. and Poſtage thereof, and deſtroying Letter, &c. or advancing Rate of Poſtage on Letters, &c. and not duly accounting for the Money, guilty of Felony by Stat. 7 G. 3. c. 50. ſ. 3. *ib.*

Stealing Letters, &c. by Perſons in general, vide Poſt.

7. *By Perſons employed in Manufactures.* - § 25.

Embezzling, &c. by thoſe employed in Hat, Woollen, Linen, Fuſtian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair, or Silk Manufactures, puniſhed by Fine, Whipping, and Impriſonment, on ſummary Conviction, by Stat. 17 Geo. 3. c. 56. *ib.*

8. *By Lodgers.* - - - § 26.

Stealing Furniture, &c. in Lodgings declared Felony by Stat. 3 & 4 W. & M. c. 9. ſ. 5. *ib.* But not where whole Houſe let, or where Contract with Lodger to make good what is miſſing. *ib.*

How Indictment to be framed to bring the Caſe within the Statute. *ib.*

IV. *Of what Things Larceny may be committed.* § 27.

1. Of *Goods perſonal*, not of the *Realty*, nor affixed thereto. *ib.*

Unleſs ſevered by diſtinct Act at different Time before Removal. *ib.*

Exceptions by Statute.

Stealing, &c. in the Night-time, *Roots*, *Shrubs*, or *Plants*, value 5 s. growing in incloſed Grounds, Felony and Tranſportation for 7 Years by Stat. 6 Geo. 3. c. 36. - - - § 28.

The ſame Offence in Day-time to any Value puniſhable by Fine on 1ſt and 2d Offence before Magiſtrate: 3d Offence Felony and Tranſportation for 7 Years by Stat. 6 Geo. 3. c. 48, which being paſſed in

the ſame Seſſion as the former, they muſt be conſtrued together. - - - § 28.

But ſtealing, &c. Turnips, Potatoes, &c. ſubject in all Inſtances only to Fine and Impriſonment upon ſummary Conviction, by Stat. 13 Geo. 3. c. 32. *ib.*

ii. The ſame Statutes of the 6 Geo. 3. with the like Conſtruction apply to the ſtealing, &c. certain *Timber-Trees*, or other Trees ſtanding for Timber, or likely to become ſo. - - - § 29.

What Trees are within theſe Acts, and that of 13 Geo. 3. c. 33. *ib.*

iii. Stealing or breaking, &c. with Intent to ſteal any *Lead*, *Iron Bar*, Grate, Paliſadoe, or Iron Rail fixed to Dwelling-houſe or other Building, or fixed in any Garden, Fence, Outlet, &c. Felony and Tranſportation for 7 Years by Stat. 4 Geo. 2. c. 32. § 30.

The ſame Proviſion extended to any *Copper*, *Braſs*, *Bell-metal* Utenſil or Fixture, by Stat. 21 Geo. 3. c. 68. *ib.* And alſo to any Iron Rail or Fencing fixed in any Square, Court, or other Place. *ib.*

And to all Aiders; and to Buyers and Receivers of the ſame. *ib.*

A Church is a Building within the Stat. 4 Geo. 2. and Lead fixed thereto may be laid to be the Property of the Vicar; but better laid to be "fixed to a certain Building being the Pariſh Church," &c. § 31.

But Iron Rails fixed to Tomb in Church-yard not within the Act. Nor a Window Caſement of Iron, Lead, and Glaſs, as ſuch.

But ſtealing Lead from Houſe in Poſſeſſion of Priſoner under fraudulent Pretence of Leaſe, within Stat. *ib.*

Stealing to the Value of 10d. held within the Acts, and Judgment of whipping. *ib.*

iv. *Black Lead*; entering with Force the Mines with Intent to ſteal, or ſtealing the ſame there, or aſſiſting or commanding, &c. thereto; Felony, puniſhed by Impriſonment, hard Labour, and public whipping, or Tranſportation; returning therefrom before Term, Death. § 32.

Buyers and Receivers guilty of Felony, and puniſhable as in other Caſes. *ib.*

2. *Coals ſevered*, and Tools for cutting; ſtealing puniſhable as Miſdemeanor on Conviction, by Stat. 39 & 40 Geo. 3. c. 77. - - - § 33.
3. Larceny cannot be committed of *Charters or other Aſſurances* concerning the Realty. - § 34.
4. Stealing, &c. *Records*, Felony by Stat. 8 H. 6. c. 12. § 35.
Trial before a peculiar Juriſdiction. *ib.*
To what Courts and Perſons the Act extends. *ib.*
Indictment how to be framed. *ib.*
5. Stealing Bonds, Bills, Notes, Exchequer Orders, Dividend-Warrants, &c. Navy Bills or Debentures, &c. Felony, with or without Clergy, as if Offender had ſtolen or taken by Robbery Goods of like Value with the Money thereby ſecured by Stat. 2 Geo. 2. c. 25. ſ. 3. revived by Stat. 9 Geo. 2. c. 18. § 36.
Stealing one Bank Note is within the Act, though in the plural Number. - - § 37.
So ſtealing Note payable to Order, but not indorſed. *ib.*
Compelling one by Dureſs to make a Promiſſory Note on ſtamped Paper before prepared by Priſoner, and immediately afterwards withdrawn, not within the Stat. *ib.*
Where an expired Statute is revived by another, Indictment laying Offence againſt *the Statute*, good. *ib.*
Bank Notes cannot be laid as *Chattels*; but this is Surpluſage. Nor as Notes *commonly called Bank Notes*, that not being the Deſcription in the Statute. *ib.*
Indictment for Larceny of Bill of Exchange in L. ſuſtained by Evidence that when found on Priſoner there it had Indorſement (made after the Felony) not laid in Indictment. A general Deſcription of the Bill, &c. in the Indictment is ſufficient. *ib.*
The ſtealing of ſuch Securities in the Bank of England by their Officers, &c. ante, § 19.
6. *Letters, &c. ſent by the Poſt.* - - § 38.
Stealing or robbing any Mail or Bag of Letters, or any Letter or Packet from any Poſt-houſe, &c. Felony without Clergy, by Stat. 5 Geo. 3. c. 25. and 7 Geo. 3. c. 50. ſ. 3.
Embezzlement by Perſons employed in Poſt-office; alſo of what Securities, &c. and in what Manner ſuch ſtealing may be; ante, § 21, &c.

Obtaining

Obtaining the Mail Bag by Delivery out of the Window of Poſt-office by pretending to be the Guard, a ſtealing within the Act. - - § 39.
Taking Letter out of the Office, with Intent to deliver it to the Owner, and only to embezzle Poſtage, not a ſtealing of Letter within St. 7 Geo. 3. c. 50. ſ. 2. *ib.*
Indictment for ſtealing Letter from Perſons uſing Firm of *Meſſrs.* A. B. and C. ſuſtained by Proof that they anſwered to ſuch Addreſs by others, though they only ſtiled themſelves A. B. and C. *ib.*
Indictment for robbing Mail Bag of Letters muſt be laid in County where Fact happened, and not merely where Priſoner was in poſſeſſion of Letters. *ib.*
7. *Things where none have determinate Property.* § 40.
Larceny cannot be committed of ſuch; as of Waifs, as ſuch, before Seizure. Qu. How of Wreck. *ib.*
8. *Animals feræ Naturæ.* - - § 41.
i. No Larceny of ſuch, unleſs dead, reclaimed, or confined; and ſo ſtated in the Indictment. *ib.* Nor of the Eggs of ſuch as are unreclaimed. *ib.*
ii. *Deer.* - - - § 42.
Stealing ſuch (being armed and diſguiſed) Felony without Clergy in Principals and Procurers, by Stat. 9 Geo. 1. c. 22. *ib.*
So not ſurrendering on Proclamation. *ib.*
But ſtealing in general Red or Fallow Deer in incloſed Places, &c. is Miſdemeanor only, puniſhable with Fine for 1ſt and 2d Offence; Felony and Tranſportation for 3d Offence, by Stat. 16 Geo. 3. c. 30. *ib.*
iii. *Fiſh.* - - - § 43.
Stealing ſuch out of River or Pond by Perſons armed and diſguiſed, a capital Felony by Stat. 9 Geo. 1. c. 22. *ib.*
What a ſufficient reclaiming to make them the Subject of Larceny at common Law. *ib.*
Stat. 22 & 23 Car. 2. c. 25. ſ. 7. gives treble Damages and 10 s. to the Poor againſt Offender for ſtealing Fiſh out of Ponds, &c. and other ſeveral Waters and Rivers without Conſent of Owner. *ib.*
But by Stat. 5 Geo. 3. c. 14. ſ. 1. ſtealing Fiſh in any Stream or Water in Park, &c. incloſed, or Garden,

&c. adjoining Dwelling-houſe, without Owner's Conſent; or aiding therein, or receiving or buying them knowingly; Tranſportation. § 43.

Such ſtealing, &c. (not being in ſuch Park, Garden, &c.) but in any other incloſed Ground, creates Forfeiture of 5 l. *ib.*

In Indictment on Stat. Geo. 3. for ſtealing Fiſh out of Pond, ſtating them to be "Goods and Chattels;" thoſe Words held Surpluſage. *ib.*

Qu. If Indictment at common Law muſt deſcribe what Kind of Pond, &c. *ib.*

iv. *Conies and Hares.* - - § 44.

Stealing, &c. Conies in Grounds incloſed for that Purpoſe before the Act, Miſdemeanor, Impriſonment and Penalty, and finding Sureties, by Stat. 3 Jac. 1. c. 13. Extends not to Hunting, &c. in Day-time. *ib.*

Stat. 22 & 23 Car. 2. c. 25. extends to Ground lawfully uſed for Conies whether incloſed or not, but confines Puniſhment to Conviction before Juſtice of Peace. *ib.*

By Stat. 5 Geo. 3. c. 14. ſuch Offenders in the Night-time ſubjected to Tranſportation or other leſs Puniſhment by Whipping, Fine, or Impriſonment. *ib.*

By Stat. 9 Geo. 1. c. 22. robbing Warrens or Places where Hares or Conies are uſually kept, by Perſons armed and diſguiſed, or reſcuing ſuch Offenders, or procuring others to join therein, Felony without Clergy. *ib.*

Reſult of ſeveral Statutes. *ib.*

9. *Animals of baſe Nature.* - - § 45.

As Foxes, Cats, &c. not Subjects of Larceny. *ib.*

But ſtealing Dogs puniſhable upon ſummary Conviction by Stat. 10 Geo. 3. c. 18. *ib.*

10. *Domeſtic Animals.* - - - § 46.

i. Fit for Food, are Subjects of Larceny. So of their Eggs and Young. *ib.*

ii. *Horſe ſtealing.* - - - § 47.

Felony without Clergy, by Stat. 1 Ed. 6. c. 12. and 2 & 3 Ed. 6. c. 23. and 31 Eliz. c. 12. which latter alſo ouſts Acceſſaries before and after:

But not the Receivers of ſtolen Horſes, though made Acceſſaries after, by Stat. 3 & 4 W. & M. c. 9. *ib.*

Stealing

iii. Stealing *Sheep and other Cattle.* - - § 48.

(i. e. by Stat. 15 Geo. 2. c. 34. Bulls, Cows, Oxen, Sheep, Steers, Bullocks, Heifers, Calves, and Lambs,) Felony without Clergy by Stat. 14 Geo. 2. c. 6.

Indictment for ſtealing Cow not proved by ſhewing it a Heifer. *ib.*

Indictment for ſtealing Lambs proved by ſhewing the Skins taken away, though Carcaſes left. *ib.*

Indictment charging Principal for ſtealing live Sheep, and Acceſſary for receiving Mutton, Part of Goods, &c. ſo as aforeſaid feloniouſly ſtolen, &c. good. *ib.*

iv. The *Products* of ſuch Animals Subjects of Larceny, as Milk, Wool, &c. - - - § 49.

11. *Manufactories.* - - - § 50.

i. A breaking into *Plate Glaſs* Manufactory, and ſtealing Goods, Felony and Tranſportation, or leſs Puniſhment as Court think fit. *ib.*

ii. *Woollen Cloth.* - - - § 51.

Stealing from the Rack or Tenters in the Night, Felony without Clergy; but Court may mitigate to Tranſportation by Stat. 22 Car. 2. c. 5. *ib.*

Extends not to Acceſſaries. *ib.*

Refuſing to be tranſported, or returning before Period, Execution on former Judgment. *ib.*

But by Stat. 15 Geo. 2. c. 27. Magiſtrate may iſſue Search Warrant to ſearch ſuſpected Places, and if on finding ſuch Goods Party give not ſatisfactory Account, he ſhall be deemed to have ſtolen them, and forfeit treble Value; for 3d Offence Felony and Tranſportation: but this not to alter former Law. *ib.*

iii. *Linen, Cotton, &c.* - - - § 52.

Stealing ſuch by Day or Night, expoſed to be printed, bleached, dried, &c. in Grounds, Houſes, &c. uſed by the ſeveral Manufacturers; or aſſiſting, &c. or procuring, &c.; or buying or receiving ſuch ſtolen Goods knowingly, &c. Felony without Clergy; but Court may ſentence to Tranſportation. Stat. 18 Geo. 2. c. 27. *ib.*

Breaking Gaol, or returning from Tranſportation, Death. *ib.*

Breaking into Houſes, &c. with Intent to ſteal ſuch, Felony without Clergy by Stat. 4 Geo. 3. c. 37. § 52.

12. *Naval and Ordnance Stores, &c.* - § 53.

Embezzling the ſame by Perſons having Charge or Cuſtody of them to Value of 20s. Felony; by Stat. 31 Eliz. c. 4. *ib.*

Ouſted of Clergy by Stat. 22 Car. 2. c. 5. with Power in the Court to reprieve and tranſport. *ib.*

Extends not to Acceſſaries or Appeals. *ib.*

Semble Felony at common Law in Perſons having Charge of ſuch Stores to ſteal them, though under 20s. Value. *ib.*

Vid. Poſt, Receivers.

Things ſtolen by Servants, Lodgers, and others under particular Prohibitions, conſidered ante. (§ 26.)

Things under peculiar Sanction on account of the particular Places from whence taken. Poſt.

V. *As to the Place from whence taken.* § 54.

Larceny from the Houſe, &c. - § 55.

In what Caſes Clergy ouſted. - § 56.

1. Where Larceny is above the Value of 12d.
2. Where to the Value of 5s.
3. Where to the Value of 40s. *ib.*

The ſeveral Statutes in order of Time. § 57.

By Stat. 23 H. 8. c. 1. ſ. 3. and 25 H. 8. c. 3. robbing Churches, &c. or robbing Perſons in Dwelling-houſes, the Owner, his Wife, Children, or Servants being therein, and put in Fear, Felony without Clergy. Qu. if repealed as to Clergy. *ib.*

By Stat. 1 Ed. 6. c. 12. ſ. 10. - - § 58.

Breaking Houſe by Day or Night, any Perſon being therein and put in Dread; or robbing any Perſon in or near Highway; or ſtealing in any Church or Chapel; Felony without Clergy. *ib.*

Houſebreaking within the Act muſt be attended with Felony. *ib.*

By Stat. 5 & 6 Ed. 6. c. 10. § 59.

Perſons

Perſons convicted of Larceny in one County where Goods taken by Robbery or Burglary in another, ouſted of Clergy. - - § 59.

By Stat. 5 & 6 Ed. 6. c. 9. - - § 60.

Robbing Perſons in Dwelling-houſes, the Owner, his Wife, Children, or Servants being therein, or in any other Place within the Precincts of the ſame, whether waking or ſleeping, ouſted of Clergy. *ib.*

The like as to robbing any Perſon in a Booth or Tent in a Fair or Market. *ib.*

By Stat. 4 & 5 Ph. & M. c. 4. - - § 61.

Acceſſaries before to Robbery in any Place ouſted of Clergy, i. e. Robberies of ſuch Kind as were before excluded of Clergy in caſe of Principals. *ib.*

By Stat. 39 Eliz. c. 15. - - § 62.

Felonious taking away in the Day-time of Money, Goods or Chattels from any Houſe to the Value of 5s., though no Perſon be within, ouſted of Clergy. *ib.*

By Stat. 3 W. & M. c. 9. ſ. 2. - § 63.

Perſons ouſted of Clergy by prior Stat. on Conviction, alſo ouſted on ſtanding Mute, &c. *ib.*

By the ſame Stat. ſ. 1. - - § 64.

Feloniouſly taking Goods in Dwelling-houſe, any Perſon therein and put in fear; or robbing Dwelling-houſe, in Day-time, any Perſon therein: or abetting or counſelling, &c. thereto; or to break Dwelling-houſe, Shop, or Warehouſe belonging to or therewith uſed, in Day-time, and ſtealing Money, Goods, &c. of 5s. Value, though no Perſon within, are ouſted of Clergy. *ib.*

By Stat. 10 & 11 W. 3. c. 23. - § 65.

Privately ſtealing Goods, Wares, or Merchandizes of 5s. Value in Shop, Warehouſe, Coach-houſe, or Stable, though not broken, nor any Perſon therein; and Aſſiſters, Commanders, &c. ouſted of Clergy. *ib.*

By Stat. 12 Ann. ſt. 1. c. 7. - - § 66.

Stealing Money, Goods, Wares, &c. of 40s. Value in Dwelling-houſe or Outhouſe, though not broken, and whether any Perſon therein or not, and Aiders, &c. ouſted of Clergy. *ib.*

Not to extend to Apprentices under 15, ſo robbing Maſters. - - - § 66.

Diſtinct Offences within the Statutes.

1. *Larceny or Robbery in a Church or Chapel.* § 67.
Ouſted of Clergy by Stat. 1 Ed. 6. c. 12. ſ. 10. and 3 W. & M. c. 9. as to Principals, but not as to Acceſſaries, unleſs amounting to Burglary. *ib.*

2. *Breaking Houſe by Day or Night, any Perſon therein and put in Fear.* - - - § 68.
Principals ouſted of Clergy by Stat. 1 Ed. 6. c. 12. ſ. 10. and 3 W. & M. c. 9.
Extends to Aiders at the Fact, though they do not enter. *ib.*
Acceſſaries ouſted by Stat. 4 & 5 Ph. & M. c. 4. *ib.*
There muſt be an actual breaking and putting in Fear. *ib.*

3. *The felonious taking, &c. of Goods out of Dwelling-houſe, any Perſon therein and put in Fear, though no breaking.* § 69.
Principals ouſted of Clergy by Stat. 3 W. & M. c. 9. ſ. 1. *ib.*
The ſame Rule as to Dwelling-houſes as in Caſes of Burglary. *ib.*
Semb. Value of Goods taken muſt be above 1 s. unleſs ſuch taking as amounts to Robbery. - § 70.
So it ſeems there muſt be actual Fear, unleſs Goods taken by Robbery in Preſence of Owner, &c. § 71.
Indictment muſt charge a putting in Fear by the Priſoner. *ib.*

4. *Robbing (i. e. breaking and taking Goods in) Dwelling-houſe in Day-time, any Perſon therein, though not put in Fear.* § 72.
Principals, Aiders, and Acceſſaries before, ouſted of Clergy by Stat. 3 W. & M. c. 9. ſ. 1. *ib.*
How Indictment may lay the Robbing, &c. and how proved. *ib.*
Difference between that and Stat. 5 & 6 Ed. 6. c. 9. *ib.* and - - - - § 73.
As to Value. *ib.*

5. *Robbing (i. e. breaking and taking Goods in) Booth or Tent in Fair or Market, the Owner or his Family therein.* § 74.
Principals

Principals ouſted of Clergy by Stat. 5 & 6 Ed. 6. c. 9. and 3 and 4 W. & M. c. 9. ſ. 2. - § 74.

6. *Breaking Dwelling-houſe, or Outhouſe, Shop, or Warehouſe, and ſtealing Goods to 5 s. Value in Day-time, though no Perſon within.* - - § 75.
Principals ouſted of Clergy by Stat. 39 Eliz. c. 15. and 3 W. & M. c. 9. ſ. 2. and Aiders and Acceſſaries before by ſ. 1. of latter Stat. *ib.*
There muſt be a breaking within Stat. of Eliz. though not mentioned in the enacting Part. *ib.*
Aiders without not entering the Houſe, not within Stat.; but included in Stat. of W. & M. *ib.*
Qu. Whether indictable generally as Principals. *ib.*
Any Removal of the Goods ſufficient, though not out of Houſe. *ib.*
Qu. Whether acceſſorial Stat. of William which drops the Term *Outhouſe*, and adopts thoſe of *Shop* and *Warehouſe*, be co-extenſive with Stat. of Eliz. in ouſting Acceſſaries before of Clergy. - § 76.
Form of Indictment. - - § 77.

7. *Privately ſtealing Goods, Wares, &c. to 5 s. Value, in Shop, Warehouſe, Coach-houſe, or Stable, though not broken, nor any Perſon within.* - - § 78.
Stat. 10 & 11 W. 3. c. 23. excludes from Clergy Principals, Aſſiſters, Hirers, and Commanders. *ib.*
If Force be uſed, the Offence is not within the Statute, but the Priſoner may be convicted of ſimple Larceny. § 79.
It extends only to the Owner's Goods, kept in their appropriate Places, and not to the Goods of a Stranger. - - - § 80.
What is *a Shop* or Warehouſe within the Act. *ib.*
Where Goods are kept for Sale, and Cuſtomers go to view them; not mere Repoſitories for ſafe Cuſtody. *ib.*
So as to Coach-houſes and Stables, the Goods muſt be ſuch as are uſually lodged in ſuch Places. *ib.*

8. *Larceny in Dwelling-houſe or Outhouſe of Money, Goods, Wares, &c. to 40 s. Value, though Houſe not broken, and whether any Perſon within or not.* § 81.
Clergy

Clergy oüſted by Stat. 12 Ann. ſt. 1. c. 7. § 81.
Exception as to Apprentices under 16. *ib.*
Extends not to Outlawry, nor to Acceſſaries before. *ib.*
Nor to ſuch Offence by Owner in his own Houſe. *ib.*
The Goods muſt be under the Protection of the Houſe for ſafe Cuſtody, not merely of a Perſon within it. § 82.
Bank Notes are within the Stat. - § 83.
Reſult of the Statutes againſt Houſe Larcenies and Robberies, as to Clergy. - - § 84.

In Ships. - - - § 85.

In Veſſels, Boats, &c. in navigable Rivers, &c. Larceny to 40s. Value, Felony without Clergy by Stat. 24 Geo. 2. c. 45. *ib.*
It provides alſo for Veſſels, &c. in Creeks, &c. *ib.*
Plundering Goods or Effects from Ships in Diſtreſs, wrecked, or ſtranded, excluded from Clergy by Stat. 26 Geo. 2. c. 19. - - - § 86.
So ſtealing Pump, by Stat. 12 Ann. ſt. 2. c. 18. ſ. 5. *ib.*
If the Things ſtolen be of ſmall Value, without Cruelty or Violence, Offender may be indicted for Petit Larceny by Stat. of Geo. 2. *ib.*
Expoſing ſuch Goods or Effects to Sale, without accounting for them to Satisfaction of one Juſtice, puniſhable by Impriſonment and treble the Vaule. *ib.*
Where Proſecution may be by Clerk of Peace, or in another County. *ib.*

In the Northern Counties. - § 87.

Taking Money, Corn, Cattle, or other Conſideration called Blackmail, Felony without Clergy by Stat. 43 Eliz. c. 13. *ib.*
And Clergy is alſo taken away by Stat. 18 Car. 2. c. 3. from great and notorious Thieves, and Spoil takers in Cumberland and Northumberland. *ib.*

VI. *To*

VI. *To whom the Property ſtolen ſhall be charged to belong.* - - - § 88.

Goods of Perſons unknown. *ib.*
Goods of a Church. Corpſe, &c. - - § 89.
Of Inteſtate before Adminiſtration. Of Executor before Probate. *ib.*
Special Property or Poſſeſſion. - - § 90.
In Bailee, Carrier, Innkeeper, Waſher, Agiſter, Stage Coachman; Indictment may lay Property either in ſuch or the Owners. *ib.*
And even againſt Owner ſtealing from ſuch Bailee, &c. *ib.*
Where Property may be laid in Servant. *ib.*
Property not changed by Larceny. *ib.*
Childrens' Cloaths, &c. laid either as their Property or that of Parents. - - § 91.
Property in truſt for Children. *ib.*

VII. *What is ſuch Evidence of the taking and carrying away being fraudulent or wrongful, and with Intent to convert the Goods to the Taker's own Uſe, and make them his own without Conſent of the Owner, as amounts to Felony.* § 92.

Felonious Intent muſt exiſt at the Time of the taking. *ib.*

Different Defences.

1. *Evidence on Denial of Fact.* - - § 93.
Length of Time. Nature of Property. Vicinity to the Spot. Behaviour. Identity of Property. Concealment. *ib.*
Confeſſion. - - - § 94.
Where excluded from Evidence, on Promiſe or Threat. *ib.*
2. *On Claim of Right.* - - - § 95.
On a Taking by the Party's own Act; as of Corn mixed, Cloth or Boards, &c. converted into other Forms, no Felony. *ib.*

So

So taking on any reaſonable Pretence of Title, however ill founded, if not urged as a Pretext for ſtealing. § 95.
On taking by Act of Law. - - § 96.
No Excuſe if procured by Fraud, and with Intent to ſteal. *ib.* As by fraudulent Replevin, or Ejectment without Pretence of Title. *ib.*
3. *On taking by Miſtake or Accident.* - § 97.
Rebutted by ſhewing Knowledge and Intent to deceive or conceal. *ib.*
4. *On taking as a Treſpaſſer.* - - § 98.
i. e. without Fraud, or openly before others, other than by apparent Robbery. *ib.*
As taking Plough and returning it. Taking Goods and paying more than the Value. Q. *ib.* Aliter where Money offered as a Colour for Fraud. *ib.*
Evidence of taking one Thing as a Treſpaſſer upon Aſſault with Intent to ſteal another. *ib.*
Evidence of taking a Horſe as a Treſpaſſer with Intent to uſe it on a Journey as far as it would go, and there leave it without returning it to the Owner. *ib.*
5. *On Finding.* - - - § 99.
No Felony to take Goods loſt; but this not to be urged as Pretence, where there is Knowledge of the Owner, or the Goods in a proper Place. *ib.*
Stealing Box left in a Hackney Coach. *ib.*
6. *On Delivery by a third Perſon.* - - § 100.
Probable Grounds for ſuch Defence. *ib.*
7. *Taking on Delivery by or on Behalf of the Owner, or by his Conſent or Approbation.* - - - § 101
i. No Larceny if the taking be not *invito domino*. *ib.*
Going out on Purpoſe to be robbed in Conſpiracy with ſome of the Robbers; held no Offence in the others, though ignorant of it. *ib.*
Aliter where Party went *bonâ fide* with a View to apprehend them. *ib.*
Or acted in confidence with one who had apparently conſented, but had revealed the Deſign, with Intent to detect the others. *ib.*
ii. Diſtinction between *Property*, or *Poſſeſſion* only paſſing by Delivery. - - - § 102.

iii. *No Felony if Property transferred, though Transfer induced by Fraud.* - - - - § 103.
As obtaining Delivery of Horſe ſold, on Promiſe to return immediately and pay for it; but not returning. *ib.*
So obtaining Money by Fraud, under the Appearance of fair Betting. *ib.*
Or obtaining Goods under Pretence of paying for them, and giving Vendor's Servant Bills of no Value. *ib.*
So obtaining Credit in the Name of another for Silver, on Pretence of ſending Gold in exchange preſently, no Felony. - - § 104.
Nor getting a Loan by writing a Letter in another's Name. *ib.*
Aliter obtaining Goods from another's Servant by uſing a falſe Name, he having no diſpoſing Power. *ib.*
iv. *Taking before Sale complete.* - - § 105.
Felony, though the Goods ſet apart while Owner looked for others, but not agreed for or delivered. *ib.*
v. *On Delivery for the Purpoſe of diſcounting.* - § 106.
If the Diſcount agreed to be paid at the Time, and the Owner did not intend to truſt the Party with the Bill without receiving the Diſcount; held Felony in the latter to run away with the Bill without paying, with Intent to convert it to his own Uſe. *ib.* The ſame as where a Tradeſman delivers Goods to a Cuſtomer who pretends that he wants to buy them for ready Money, and afterward runs off with the Goods without Payment. *ib.*
vi. *On Delivery by way of Pledge, or Security.* § 107.
The Property ſtill remains in the Owner, and Larceny may be committed if Delivery obtained fraudulently and with Intent to ſteal. *ib.* As by pretending to find a Ring of Value, and inducing another to pledge Things of Value on depoſiting it with him till his Share could be paid of the pretended Jewel. *ib.*
So where the Pledge was of Money to be returned again. *ib.*
vii. *Different Kinds of Poſſeſſion the Subjects of Larceny.* § 108.

General Rules, as to Delivery by way of *Charge, general Bailment*, or *for a ſpecial Purpoſe.* - § 108.
viii. *Poſſeſſion by way of Charge.* - - § 109.
As in caſe of Servants or Workmen, or by way of *ſpecial Uſe*, as in caſe of Gueſts, the Subject of Larceny. *ib.*
So if a Banker's Clerk purloin Money out of a Drawer to which he has Acceſs. *ib.*
So of Poſſeſſion in the Owner's Preſence for a ſpecial Purpoſe. - - - § 110.
ix. *Poſſeſſion upon general or ſpecial Bailment.* § 111.
What a Bailment. *ib.*
Larceny may be committed by Bailee, if Bailment obtained fraudulently with Intent to ſteal. § 112.
Such Intent to be found by the Jury. *ib.*
Hiring Horſe on Pretence of a Journey, with Intent to ſteal, and evidencing ſuch Intent by immediately ſelling it, held Larceny. *ib.*
Though Poſſeſſion obtained in another's Name. *ib.*
Diſtinction between theſe Caſes and Caſes within the Statutes 33 H. 8. c. 1. and 30 Geo. 2. c. 24. *ib.*
So though Poſſeſſion of a Chaiſe were obtained on Pretence of hiring for three Weeks or a Month, for a Journey, and the Party ſet off, and was not heard of till a Year after when he was apprehended, and no Account given of the Chaiſe: held Evidence of a wrongful Converſion and an original Taking with Intent to ſteal. *ib.* Aliter if felonious Intent originated after the firſt Taking on Hire. *ib.*
Review of the Caſes. - - § 113.
x. Larceny may be committed, notwithſtanding a lawful Bailment, *after Privity of Contract determined.* § 114.
As by Lapſe of Time. *ib.* By Completion of the Service. *ib.*
But where one who aſſiſted in reſcuing another's Goods from a Fire, in his Preſence but without his Deſire, and who afterwards concealed and denied having them, was found to have taken them honeſtly at firſt, and that the evil Intention aroſe afterwards, held no Larceny. *ib.*

xi. *Larceny may be committed by a tortious Converſion pending a Bailment.* - - - § 115.
By Carrier breaking a Package delivered to him to carry, and taking out Goods. Aliter upon mere Evidence of Non-delivery. *ib.*
So Miller taking Part of the Corn ſent him to grind. *ib.*
xii. *Concluſion* as to Evidence of felonious Intent upon a Delivery by Owner. - - § 116.
8. *On a Taking through Neceſſity.* - § 117.
No legal Defence, though it exiſt in Fact. *ib.*
But conſiderable in Apportionment of Puniſhment. *ib.*

Larceny from the Perſon. - § 118.
Introduction. *ib.*

Clam et Secrete, by Stat. 8 Eliz. c. 4. § 119.
Feloniouſly taking Money, Goods or Chattels from the Perſon of another *privily without his Knowledge* in any Place, ouſted of Clergy. *ib.*
The Stat. confined to the Actor, and extends not to Aiders and Abettors. - - § 120.
There muſt be a Taking from the Perſon, and not in his Preſence only. *ib.*
Value muſt be above 12d. to ouſt Clergy. *ib.*
What a Taking "*privily without his Knowledge.*" § 121.
1. *As to the Manner:* it muſt be ſecret or ſudden, without Terror or open Violence. *ib.*
But Clergy not ouſted if done openly before the Party without Force or Terror. *ib.*
2. *As to the Situation of the Perſon robbed.* - § 122.
The Stat. extends not to ſuch as expoſe themſelves to ſuch Loſs by their own Negligence or Miſconduct; as being drunk and aſleep in the Streets. *ib.* Unleſs it happen by the Contrivance of the Thief. *ib.*
But the Maſter of a Veſſel aſleep in his Cabin is within the Protection of the Stat. *ib.*
So a Waggoner aſleep in the Stables of the Inn Yard. *ib.*
Aliter where Party being drunk was picked up in the Street by a Woman of the Town, and carried to her

her Lodgings, where he fell aſleep; and in that State ſhe picked his Pocket. - - § 122.

Indictment and Verdict. - - § 123.

Indictment muſt purſue Words of the Statute, but need not conclude contra formam, &c. *ib.* Priſoner may be convicted of ſimple Larceny only. *ib.*

Robbery (properly ſo called). § 124.

Definition.

A felonious taking of Money or Goods to any Value, from the Perſon, by Violence or putting in Fear. *ib.*

Value immaterial. - - § 125.

What a Taking *from the Perſon.* - § 126.

Taking in his Preſence ſufficient. *ib.*

Violence or Fear neceſſary. - - § 127.

But either ſufficient. *ib.*

1. *By Violence*, of what Kind. *ib.*

Not any ſudden ſnatching, unleſs with Injury to the Perſon, or with Reſiſtance and Struggling. *ib.*

Seizing Proviſions in a Cart driven by the Owner, under Pretence of want of Permit; Robbery. *ib.*

So an Officer taking Money from a Priſoner handcuffed in his Cuſtody without her Conſent, under Pretence of letting her go Home, and of paying for Coach-hire and Liquor which he himſelf had ordered; though both before and after he took the Money ſhe had offered to give it him if he would let her go Home; the Jury finding that the Whole was done with a felonious Intent to get her Money. *ib.*

2. *By Fear.* - - - - § 128.

Sufficient if reaſonable Grounds for it from Circumſtances of Terror, Threat, or Aſſault. *ib.*

Colourable Gifts extorted by Fear; Robbery. *ib.*

Though offered to make the Priſoner deſiſt from Rape. *ib.*

So compelling Owner to ſell Goods at leſs than their Value. *ib.*

Of what Nature the Fear may be. - § 129.

It muſt be ſuch as in Reaſon and common Experience will induce Owner to part with Property againſt his Will. *ib.*

Robbers

Robbers ſwear one to bring them Money, which he does under a continuing Fear; held ſufficient. § 129.

So extorting Money by Threat to charge with an unnatural Crime. - - - § 130.

Though the Threat were to charge the Party before a Magiſtrate. *ib.*

(General Conſideration of the Queſtion. *ib.*)

And though the Party deliver his Money from Fear alone of his Character, and from no other Fear. *ib.*

So obtaining Money on Threat to come with a Mob and burn Dwelling-houſe. - § 131.

Or to tear down Mows of Corn and level Houſe. *ib.*

But paying Money under the Fear of being ſent to Priſon, which was threatened for not paying for a Lot charged to have been bid for at a pretended Auction, held not ſufficient Ground of Terror to conſtitute Robbery, being only ſimple Dureſs. *ib.*

So if Party deliver Money on a threatened Charge of Sodomy, without Fear for his Perſon or Character, but only with a View to the Conviction of the Offender; no Robbery. - - § 132.

The Fear muſt exiſt at the Time of the Property taken. Taking firſt by Stealth, and then uſing Menace on Diſcovery, no Robbery. - - § 133.

Of Grand and Petit Larceny, and Robbery, and their Puniſhments.

1. *Grand and Petit Larceny.* - § 134.

Value of Property ſtolen muſt be above 12d. to make Grand Larceny. *ib.*

Judgment of Death at common Law in Grand Larceny, but Offender entitled to Benefit of Clergy, unleſs ouſted by Statute. *ib.* Alſo Forfeiture of Goods. *ib.*

Judgment of Whipping and Impriſonment at common Law in Petit Larceny, and Forfeiture of Goods on Conviction. Alterations in both Caſes by Stat. *ib.*

Stat. 3 W. & M. c. 9. ſ. 2. extends former Statutes ouſting Clergy to Caſes of ſtanding mute, &c. § 135.

In clergyable Larcenies by Stat. 18 Eliz. c. 7. ſ. 3. Impriſonment not exceeding a Year. § 135.

And by Stat. 5 Ann. c. 6. the Offenders beſides being burned in the Hand may be ſent to hard Labour in Houſe of Correction, &c. for not leſs than 6 Months, nor exceeding 2 Years. *ib.*

When taking at ſeveral Times, or by ſeveral Perſons, and of different Owners, ſhall be ſaid to be Grand or Petit Larceny. - - § 136.

The Jury ought always to find the Value of the Goods ſtolen. - - - § 137.

2. *Robbery.* - - - - § 138.

Clergy ouſted in all Caſes of Robbery from the Perſon by Stat. 3 W. & M. c. 9. ſ. 1. and other Statutes, as well from Acceſſaries before as Aiders and Principals. *ib.*

But not Acceſſaries after. *ib.*

Statutes 25 H. 8. c. 3. 5 & 6 Ed. 6. c. 10. and 3 W. & M. c. 9. ouſts Clergy on Indictment for Larceny in one County of Goods obtained by Robbery or Burglary in another. - - § 139.

Principals, Acceſſaries, and Receivers.

1. *Principals and Acceſſaries* governed by general Rules. § 140.

Except as to ouſting of Clergy in particular Caſes of aggravated Larcenies, which extends not to Aiders and Abettors. *ib.*

In Petit Larceny no Acceſſaries, but all are Principals. *ib.*

2. *Receivers* of ſtolen Goods made Acceſſaries after the Fact by Stat. 3 W. & M. c. 9. ſ. 4. and 5 Ann. c. 31. ſ. 5. - - § 141.

And may be tranſported by Stat. 4 Geo. 1. c. 11. ſ. 1. *ib.*

Petit Larcenies not included therein. *ib.* But this aided by Stat. 22 Geo. 3. c. 58. *ib.*

At common Law, receiving ſtolen Goods only a Miſdemeanor: but afterwards merged in Felony. § 142.

Wherefore

Wherefore by the rule of the common Law Receiver could not be tried before Conviction of Principal. § 142.

But now he may, by Stat. 1 Ann. ſt. 2. c. 9. ſ. 2. though the Principal be not convicted; and by Stat. 5 Ann. c. 31. ſ. 6. though he be not taken. *ib.*

But where Principal amenable to Juſtice at the Time, Receiver ought on the ſaid Statutes of Ann. to be proſecuted for Felony. *ib.*

Aliter if not *then* amenable; though he had been before taken and afterwards eſcaped by the Neglect of the Proſecutor. *ib.*

Puniſhment on Miſdemeanor diſcretionary, as in other Caſes. *ib.*

But by Stat. 22 G. 3. c. 58. Receivers (except of certain Goods provided for by Stat. 29 Geo. 2. c. 30.) may be proſecuted for Miſdemeanor in all Caſes, whether of Grand or Petit Larceny, whether Principal amenable to Juſtice or not, except where Principal has been before convicted of Grand Larceny or ſome greater Offence. *ib.*

Perſons concealing ſtolen goods in their Dwelling-houſes, &c. or having ſuch found in their Cuſtody, and being privy thereto, guilty of Miſdemeanor. *ib.*

What Goods and Chattels within the Statutes. § 143.

Not Money. *ib.* Qu. Bank Notes. *ib.*

3. Proviſion againſt *Receivers of particular Goods ſtolen.* § 144.

i. *Receivers of ſtolen Lead, Iron, Braſs, Copper, Bell-metal, and Solder*, tranſportable for 14 Years by Stat. 29 Geo. 2. c. 30. ſ. 1. *ib.*

ii. Extended to *Pewter* by Stat. 21 Geo. 3. c. 69. with Tranſportation for 7 Years, or Impriſonment and Whipping. *ib.*

Conſtruction thereon. *ib.*

iii. Receiving Goods ſtolen from *Ships in the Thames*, Tranſportation by Stat. 2 Geo. 3. c. 28. ſ. 12. § 145.

iv. Receiving ſtolen *Jewels, Gold, Silver, Plate, Watches, &c.* Felony and Tranſportation by Stat. 10 Geo. 3. c. 48. - - - § 146.

What a Jewel within the Act. *ib.*

v. Receiving *Woollen, Linen, and Cotton Goods.* § 147.
vi. *Garden Plants*, &c. *ib.*
vii. *Wad, Black Lead*, &c. *ib.*
viii. Receiving *Naval and Military Stores* of the Crown. § 148.

By Stat. 9 & 10 W. 3. c. 41. no ſuch Stores except for the King's Uſe ſhall have the King's Mark. *ib.*

Perſons in whoſe Cuſtody ſuch Stores are found, or who ſhall conceal them, forfeit the ſame and 200l., and ſhall be impriſoned till Payment. *ib.*

Stat. 1 Geo. 1. ſt. 2. c. 25. gives ſummary Juriſdiction to puniſh ſuch Embezzlements. *ib.*

Stat. 9 Geo. 1. c. 8. gives Juriſdiction to mitigate Penalty and commit to Gaol, &c. *ib.*

Court ſhall ſettle Diſpute as to Shares of Penalties, &c. *ib.*

By Stat. 17 Geo. 2. c. 40. Judges at the Aſſizes, &c. may impoſe Fine not exceeding 200l. for any Offence within Stat. 9 & 10 W. 3. c. 41. and 9 Geo. 1. c. 8. and may mitigate, &c. or inflict corporal Puniſhment in lieu of Fine. *ib.*

Stat. 39 & 40 Geo. 3. c. 89. for preventing Embezzlement of King's Naval, Ordnance, and Victualling Stores. - - - - § 149.

Whoever (except Contractors) ſhall knowingly ſell, or deliver, or receive, or have in Poſſeſſion any ſuch Stores in raw State or new, or only one-third worn, or ſhall conceal the ſame, ſhall be deemed a Receiver of ſtolen Goods, and be tranſported for 14 Years. *ib.*

Unleſs he produce Certificate from Commiſſioners, &c. *ib.*

Perſons in whoſe Cuſtody ſhall be found Canvas or Buntin marked, &c. or who ſhall be convicted of Offences contrary to Stat. 9 & 10 W. 3. relating to warlike Stores, &c. ſhall ſuffer corporal Puniſhment, beſides the Fine of 200l., which may be mitigated. *ib.*

Contractors only exempted for Poſſeſſion of Stores made for the Crown. *ib.*

Defacing Marks on King's Stores Felony and Tranſportation for 14 Years. - - § 150.

Perſons not tranſported for firſt Offence againſt Stat. 39 & 40 Geo. 3. and guilty of ſecond Offence againſt that or the Stat. 9 & 10 W. 3. ſhall be tranſported for 14 Years. - - - § 151.

Returning from Tranſportation before Term expired, Death. *ib.*

Court may commute Tranſportation for corporal Puniſhment and Fine. *ib.*

Reward on Diſcovery of Offenders. - § 152.

Search Warrant. *ib.* Summary Juriſdiction over certain Miſdemeanors. *ib.* Not to prevent Proſecutions againſt Receivers, &c. ſo as Party be not twice puniſhed, &c. *ib.*

What ſhall be ſaid to be a *receiving* or *having in Poſſeſſion* under theſe Acts. - § 153.

A bare receiving malo animo, though without Intereſt in the Goods. *ib.*

Buying at under Value Evidence of Knowledge of the Felony. But not where one becomes poſſeſſed by Act of Law without Fraud. *ib.*

Whether one who *had* Stores in his Poſſeſſion at the paſſing of the Stat. 39 & 40 Geo. 3. c. 89. but *received* them before it be within the Act. *ib.*

4. *Diſtinction between Accomplice and Receiver.* § 154.
5. *Taking Reward for helping to ſtolen Goods*, Felony, and puniſhable the ſame as original Offence by Stat. 4 Geo. 1. c. 11. ſ. 4. - - § 155.

Whether the Offender may be *tried* before the Principal. *ib.*

Trial. - § 156.

Trial of Larceny may be in any County where the Thief is in Poſſeſſion of the Goods; but Indictment for Robbery can only be where the Force or Fear was. *ib.*

But where original Taking was out of Juriſdiction of common Law, there can be no Larceny. *ib.*

As at Sea; or in Scotland till Stat. 13 Geo. 3. c. 31. ſ. 4. gave Juriſdiction. *ib.*

The latter Stat. extends to Receivers. *ib.*

Plundering Wrecks in Wales triable in next adjoining Engliſh County where the King's Writ runs. § 156.
This does not include Cheſhire. *ib.*
So where Fact happens in an Engliſh County. *ib.*
In *aggravated Larcenies* all the Circumſtances of Aggravation muſt be proved in County where Indictment laid, otherwiſe clergyable. - - § 157.
Except by Stat. 25 H. 8. c. 3. where, on Indictment for Larceny in one County, the Goods appear *by Evidence or Examination* to have been obtained by Burglary or Robbery in another County; in which Caſe Clergy ouſted. *ib.* Extended to Outlawry, &c. by Stat. 3 W. & M. c. 9. ſ. 3. *ib.*
And to Goods obtained by any other Manner in any other Shire in which Clergy would be there ouſted. *ib.*
But not to Larcenies ouſted of Clergy by ſubſequent Statutes. *ib.*
Nor to Acceſſaries or Appeals. *ib.*
Nor to Trials for Larcenies in any Juriſdiction inferior to Counties. Semble. *ib.*
The Offender muſt have had the Goods in the County in which he is indicted for the Larceny. *ib.*
And if not more than 12d. Value, Clergy not ouſted thereon, though obtained by Robbery, &c. in another County. *ib.*
What is meant by appearing *on Evidence or Examination, &c.* - - - § 158.
Not neceſſary, though uſual, to enter on the Record that it appeared on ſuch Evidence not to be a clergyable Felony. *ib.*
But ſemble ſufficient if Averment of the Goods obtained by Robbery in another County and Plea of guilty. *ib.*
Inſtances of capital Convictions on theſe Statutes. *ib.*
What Evidence ſufficient to ouſt Clergy. *ib.*
Qu. Whether neceſſary to ouſt Clergy by Counter-plea. *ib.*

Indict-

Indictment, Evidence, and Verdict.

1. *In Larceny.* Form of *Indictment.* - § 159.
   i. *In Simple Larceny,* muſt ſtate the general Deſcription of the Goods ſtolen. *ib.* Quantity (where neceſſary). *ib.* Value. *ib.* To whom belonging. *ib.* A Taking and carrying away. *ib.* And Fact done *feloniouſly. ib.*
   Indictment for Grand Larceny may have Judgment of Petit Larceny, but not of Treſpaſs. *ib.*
   ii. In *aggravated Larcenies.* - - § 160.
   Muſt ſtate the ſubſtantial and diſtinguiſhing Facts in order to ouſt Clergy. *ib.*: But if Proof fail as to thoſe, Conviction may be of ſimple Larceny, though laid contra formam Statuti. *ib.*
   So Indictment may include ſeveral capital Charges; and Proof of any one will ouſt Clergy. *ib.*
   Indictment for Larceny or Robbery in Houſes, &c. how laid and proved. - - § 161.
   iii. For Larcenies of *particular Goods,* or by *particular Perſons* before enumerated. - § 162.
   iv. Againſt *Receivers* of ſtolen Goods. - § 163.
   Need not allege Time and Place to the Larceny, but only to the Receipt. *ib.*
   May charge the Principal to be unknown. *ib.*
   Sufficient if the Receipt appear to be of the ſame Goods ſtolen, though differently denominated. *ib.*
   Muſt ſtate the Receipt to be made knowing of the Felony. *ib.*
   But Poſſeſſion alone of naval Stores, &c. of the King with the King's Marks ſufficient by Statute. *ib.*
   Indictment ſufficient for a *Miſdemeanor,* though principal Offence only Petit Larceny. - § 164.
   And not neceſſary to aver that Principal not convicted. *ib.*
   Though if ſo proved, it acquits of the Miſdemeanor. *ib.*
   So it need not aver that Principal could not be taken. *ib.*
   Sufficient to allege *Conviction* (without Attainder) of Principal for principal Offence, and ſubſequent Receipt of Goods with Knowledge. - § 165.

The Principal may be a *Witneſs* againſt the Receiver. § 166.
2. *In Robbery.* Indictment, general Form. § 167.
Charges Aſſault on Perſon, and taking by Violence, *or* by putting in Fear. *ib.* Aſſault to be laid *feloniouſly*. *ib.*
Conviction may be of ſimple Larceny. *ib.*
Allegation of Place not material, ſince Clergy ouſted from Robbery in general. - - § 168.
3. Form of *Appeal* of Larceny and Robbery. § 169.
By whom maintainable. *ib.*
In what County. *ib.* And in what Time. *ib.*

Reſtitution of ſtolen Goods. - - § 170.

1. By Appeal of Larceny or Robbery. *ib.*
2. By Stat. 21 H. 8. c. 11. on Indictment. § 171.
Writ of Reſtitution diſuſed. *ib.*
3. By common Law. - - § 172.
4. By Stat. in particular Inſtances. - § 173.

For other Matters, *vide* general Heads, Reward, Pardon, &c.

Larceny and Robbery.

§ 1. Introduction.

THE offence of feloniouſly taking the perſonal property of another is denominated either Larceny where the fact is accompliſhed ſecretly, or by ſurpriſe or fraud; or Robbery where accompanied by circumſtances of violence, threats, or terror to the perſon deſpoiled. Theſe two offences, which in their nature are intimately connected, the one being included in the other, are alſo in part blended together by the ſtatute law: this will lead to the joint conſideration of them in ſeveral particulars, which will be pointed out in their proper order. It is propoſed to treat

Diviſion of the ſubject.

I. *Of Simple Larceny, its Definition, and an Illuſtration of the component Parts of ſuch Definition: In the Courſe of which will be noticed the Variations which have from Time to Time been introduced by Statute.*

II. *Of*

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II. *Of Larceny clam et ſecrete from the Perſon.*
III. *Of Robbery properly ſo called.*
IV. *Of Grand and Petit Larceny and Robbery with their ſeveral Puniſhments.*
V. *Of Principals, Acceſſaries, and Receivers.*
VI. *Of the Trial, Indictment, Appeal, Evidence, and Verdict.*
VII. *Of Reſtitution of ſtolen Goods.*

I. As to the firſt head of inquiry,

§ 2. *Definition of Larceny.*

Lord Coke, and after him moſt others, have defined ſimple larceny to be the felonious and fraudulent taking and carrying away, by any perſon, of the mere perſonal goods of another, neither from the perſon, nor by night in the houſe of the owner. Perhaps it may with as much propriety be defined at large to be, *the wrongful or fraudulent taking and carrying away by any perſon of the mere perſonal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own uſe, and make them his own property, without the conſent of the owner.* Thus Bracton defines it to be contrectatio rei alienæ, fraudulenter, cum animo furandi, invito illo domino cujus res illa fuerit. And Mr. Juſtice Blackſtone ſays, that the taking muſt be felonious, that is, done animo furandi, or as the civil law (*a*) expreſſes it, lucri cauſâ. On the debate in Pear's caſe, Eyre B. defined larceny to be "the wrongful taking of goods with intent to ſpoil the owner of them cauſâ lucri."

3 Inſt. ch. 47. Tracy's MS. 66. Britt. ch. 15. fo. 22. 1 Hawk. ch. 33. ſ. 1. Sum. 60. 1 Hale, 504. 4 Blac. Com. 229. Poſt. 123, 4. Staundf. 24.

Bract. lib. 3. c. 32. 4 Blac. Com. 232.

Poſt. ſ. 112.

Conſtituent parts of larceny.

In the examination of this ſubject it will be neceſſary to conſider

1. *What is a mere taking;*
2. *What a carrying away;*
3. *By what perſon;*
4. *Of what things;*
5. *From what place;*
6. *To whom belonging:*
7. *What is ſuch evidence of the taking and carrying away being wrongful or fraudulent and with intent to convert the goods*

(*a*) By the civil law (which ſeems to go further than the common law) furtum eſt contrectatio fraudulosa lucri faciendi cauſâ, vel ipſius rei, vel etiam uſus ejus poſſeſſionisve. Juſt. Inſt. lib. 4. tit. 1.

to

Ch. XVI. § 2.

to the taker's own uſe, and make them his own property, without the conſent of the owner, as will amount to felony.

1. *What is a mere taking of Goods.*

§ 3. *What is a taking.*

It is not here intended to conſider the taking as connected with the felonious intent, becauſe that will be more conveniently examined under the 7th head of inquiry: but what ſort of taking poſſeſſion is in fact requiſite to ſupport a charge for larceny. As to which, there muſt be an actual taking or ſeverance of the thing from the poſſeſſion of the owner; for as every larceny includes a treſpaſs, if the party be not guilty of a treſpaſs in taking the goods, he cannot be guilty of felony in carrying them away. Hence it is that if the party obtain poſſeſſion of the goods lawfully, as upon a truſt, for or on account of the owner, by which he acquires a kind of ſpecial property in them, he cannot afterwards be guilty of felony in converting them to his own uſe, unleſs by ſome new and diſtinct act of taking, as by ſevering part of the goods from the reſt, with intent to convert them to his own uſe, he thereby determines the privity of the bailment and the ſpecial property thereby conferred upon him; in which caſe he is as much guilty of a treſpaſs againſt the virtual poſſeſſion of the owner by ſuch ſecond taking, as if the act had been done by a mere ſtranger.

Actual ſeverance neceſſary. 1 Hawk ch. 33. ſ. 2. 2 MS. Sum. 231.

1 Hale, 504. & poſt. ſ. 108, &c.

Privity of bailment determined. 1 Hale, 505. 1 Hawk. ch. 33. ſ. 5. 7. Poſt. ſ. 114.

A bare charge of goods, ſuch as that which is committed to a ſervant over the goods of his maſter, or a mere liberty to make uſe of a thing for a particular purpoſe, ſuch as a gueſt at an inn has of the furniture, &c.; inaſmuch as it does not in law convey even the poſſeſſion of the goods, much leſs any ſpecial property in them to ſuch ſervant or gueſt, furniſhes no objection to a charge of felony if either take or convert them to his own uſe. But this is only mentioned for the preſent in order to obviate any difficulty which may ſeem to ariſe from imputing a charge of *taking* that which at firſt ſight appears to have been in his lawful poſſeſſion before.

On a bare charge of goods. 1 Hale, 506. 1 Hawk. ch. 33. ſ. 6. Sum. 61. 2 MS. Sum. 230. Poſt. ſ. 109.

In like manner, though the poſſeſſion be delivered by the owner for a particular purpoſe, yet if it be obtained by any fraud it amounts to a tortious taking, in the ſame degree as if the party had taken it without any delivery at all from the owner.

Poſſeſſion by fraud. MS. Chapple. 2 MS. Sum. Poſt. ſ. 112.

Though otherwiſe if the delivery be obtained on a truſt without fraud. The books abound with examples of this ſort of larceny, which will be noticed in their place.

Ch. XVI. § 3. *After bailment.* 1 Hale, 504.

So a colourable gift, which in truth was extorted by fear, amounts to a taking and treſpaſs in law; and has often been holden to conſtitute robbery, as will hereafter be ſhewn: and this though the thing obtained were not originally in the contemplation of the robber, but received as the price of deſiſting from a felonious attempt of another kind. But the taking in all caſes muſt be againſt or without the conſent of the owner to conſtitute robbery or larceny.

Colourable gift. 1 Hale, 533. Poſt. ſ. 128. Blackham's caſe, poſt. ſ. 128. Poſt. ſ. 102.

But although there muſt be a taking in fact from the actual or conſtructive poſſeſſion of the owner, yet it need not be by the very hand of the party accuſed. For if he fraudulently procure another who is himſelf innocent of any felonious intent to take the goods for him, it will be the ſame as if he had taken them himſelf; and the taking muſt be charged to be by him. As if one procure an infant within the age of diſcretion to ſteal goods for him; or if by fraud or perjury he get poſſeſſion of goods by legal proceſs without colour of title. This has been already and will be further illuſtrated hereafter. The caſe of accomplices or acceſſaries falls under a different conſideration.

Taking by another hand. 1 Hawk. ch. 33. ſ. 8. 1 Hale, 507. 3 Inſt. 108. Poſt. ſ. 96.

Vide tit. Burglary, ante, p. 485.

Other inſtances will be adduced in the following ſection where the taking and carrying away are blended as it were in the ſame act.

2. *What ſhall be deemed a carrying away.*

§ 4. *Carrying away.*

The leaſt removal of the thing taken from the place where it was before is a ſufficient aſportation though it be not quite carried off.

1 Hawk. ch. 33. ſ. 18. 4 Blac. Com. 231. 3 Inſt. 108, 109. 2 MS. Sum. 238, 239, 240. Kel. 31.

Upon this ground the gueſt, who having taken off the ſheets from his bed with an intent to ſteal them carried them into the hall, and was apprehended before he could get out of the houſe, was adjudged guilty of larceny. So alſo was he, who having taken a horſe in a cloſe with intent to ſteal it, was apprehended before he could get it out of the cloſe. And ſuch was the caſe of him who, intending to

1 Hale, 508. 27. Aſſ. 39. *Removal from the place.*

Ch. XVI. § 4. *Removal.*

ſteal plate, took it out of the trunk wherein it was, and laid it on the floor, but was ſurprized before he could remove it any further.

Henry Cozlett's caſe, O B. Feb. 1782, and Eaſter term 1782. MS. Crown Caſ. Ref. and MS. Buller J. (S. C. Leach, 204. laſt edit. 271.)

So where the priſoner took up a parcel in a waggon and carried it from one end of the waggon to the other, with intent to ſteal it; although it was never taken out of the carriage, but he was ſeized in the fact; yet, by all the Judges, this was a ſufficient aſportation to conſtitute felony.

Cherry's caſe, Oxford, Lent Aſſ. 1781. and Eaſt. term 1781.

But where William Cherry was indicted for ſtealing a wrapper and ſome pieces of linen cloth; and it appeared that the linen was packed up in the wrapper in the common form of a long ſquare, which was laid length-way in a waggon: That the priſoner ſet up the wrapper on one end in the waggon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpoſe; but was apprehended before he had taken any thing: All the Judges agreed that this was no larceny; although his intention to ſteal was manifeſt. For a carrying away in order to conſtitute felony muſt be a removal of the goods from the place where they were; and the felon muſt for the inſtant at leaſt have the entire and abſolute poſſeſſion of them.

MS. Gould and Buller Js. 2 MS. Sum. 238. 240. and MS. Crown Caſ. Ref.

Wilkinſon's caſe, 1 Hale, 508. MS. Burnet. Sum. 64.

One had his keys tied to the ſtrings of his purſe in his pocket, which Elizabeth Wilkinſon attempted to take from him, and was detected with the purſe in her hand; but the ſtrings of the purſe ſtill hung to the owner's pocket by means of the keys. This was ruled to be no aſportation: the purſe could not be ſaid to be carried away, for it ſtill remained faſtened to the place where it was before.

1 Hale, 533.

So where A. had his purſe tied to his girdle, and B. attempting to rob him, in the ſtruggle the girdle broke, and the purſe fell to the ground; B. not having previouſly taken hold of it, nor picking it up afterwards; it was ruled to be no taking.

Supra.

In the conference upon Cherry's caſe above referred to, Eyre B. mentioned a caſe before him, where goods in a ſhop were tied to a ſtring, which was faſtened by one end to the bottom of the counter. A thief took up the goods and carried them towards the door as far as the ſtring would permit, and was then ſtopped: this he held not to be a ſeverance, and conſequently no felony.

James

Ch. XVI. § 4. *Removal.*

James Lapier was convicted of robbing Mrs. Hobart on the highway, and taking from her perſon a diamond ear-ring. The fact was, that as Mrs. H. was coming out of the opera-houſe ſhe felt the priſoner ſnatch at her ear-ring and tear it from her ear, which bled, and ſhe was much hurt: but the ear-ring fell into her hair; where it was found after ſhe returned home. Judgment being reſpited for the opinion of the Judges, whether this were ſuch a taking from the perſon as to conſtitute robbery; they were all of opinion that it was. It being in the poſſeſſion of the priſoner for a moment, ſeparate from the lady's perſon, was ſufficient, although he could not retain it, but probably loſt it again the ſame inſtant: and it was taken by violence.

R. v. Lapier, O. B. May, 1784, MS. Gould J. Poſt. f. 127. (S. C. 1 Leach, 360.) Tr. T. 1784. *A momentary poſſeſſion, though loſt again in the ſame inſtant, the thing being found about the owner's perſon, is ſufficient.*

Farrel's caſe, O. B. July 1787, Leach. 266. n. Poſt. f. 126.

But in the caſe of Edward Farrell, who upon an indictment for robbery was found to have ſtopped the proſecutor as he was carrying a feather bed on his ſhoulders, and told him to lay it down or he would ſhoot him; on which the proſecutor laid the bed on the ground; but before the priſoner could take it up ſo as to remove it from the ſpot where it lay, he was apprehended: the Judges were of opinion that the offence was not completed, and the priſoner was diſcharged.

§ 5. *Returning goods.* 1 Hale, 533. 3 Inſt. 69.

If the thief once take poſſeſſion of the thing, the offence is complete, though he afterwards return it. As if a robber finding little in a purſe which he had taken from the owner, reſtore it to him again, or let it fall in ſtruggling, and never take it up again, having once had poſſeſſion of it.

Peat's caſe, O. B. 1781, cor. Hotham B. and Willes J. Leach, 200. (laſt edit. 266.)

Or as in Peat's caſe, who having robbed Mr. Downe of his purſe returned it again, ſaying, if you value your purſe take it back again, and give me the contents; but before Mr. D. could do this his ſervant ſecured the robber: the offence was ruled to be complete by the firſt taking.

§ 6. *Where diſtinct aſportations by ſeveral.* R. v. Dyer and Diſting, poſt. f. 254.

Where it is one continuing tranſaction, though there be ſeveral diſtinct aſportations in law by ſeveral perſons, yet all may be indicted as principals who concur in the felony before the final carrying away of the goods from the virtual cuſtody

Ch. XVI. § 5.

cuſtody of the owner; as will be ſhewn more fully in another place.

§ 7. *By whom.*

3. *By whom in particular Larceny or Robbery may be committed.*

The ſame excuſes of infanity, ideocy, coverture, and infancy, which prevail in other caſes of felony, will of courſe have place here: but theſe as far as they apply to other felonies are conſidered elſewhere.

Joint-tenants. 1 Hale, 513. & infra.

As to this offence in particular, it is to be noted that joint tenants or tenants in common of a chattel cannot be guilty of ſtealing the ſame from each other, becauſe the property and poſſeſſion is in both. But under ſome circumſtances a man may be guilty of larceny in ſtealing his own goods, or of robbery in taking his own property from the perſon of another. So he may be an acceſſary after the fact to ſuch larceny or robbery, by harbouring the thief or aſſiſting his eſcape. A. delivers goods to B. to keep for him, and then ſteals them, *with intent to charge B. with the value of them:* this is felony in A. So A. having delivered money to his ſervant to carry to ſome diſtant place, diſguiſes himſelf, and robs the ſervant on the road, *with intent to charge the hundred:* this is undoubtedly robbery in A. For in theſe caſes the money and the goods are taken from thoſe who have a temporary ſpecial property in them, with a wicked fraudulent intent, which is the ancient known definition of larceny: fraudulenta contrectatio rei alienæ invito domino. By the ſame rule the wife may ſteal the goods of her huſband bailed to another perſon.

Larceny of a man's own goods. Foſt. 123, 4. 1 Hale, 513, 514. 3 Inſt. 310. 1 Hawk. ch. 33. ſ. 30. 2 MS. Sum. 249. Staundf. 26. 4 Blac. Com. 231. Bro. Coron. 160. Poſt. f. 90.

1 Hale, 513.

§ 8. *By feme covert.* 1 Hawk. ch. 33. ſ. 19. Staundf. 27. 1 Hale, 514. 2 MS. Sum. 242.

But a feme covert cannot commit larceny of her huſband's goods from his own poſſeſſion, becauſe in law they are conſidered but as one perſon, and ſhe has a kind of intereſt in his goods. On which account not even a ſtranger can commit larceny of ſuch by the delivery of the wife, although he knew they were the huſband's goods; as he may by taking the wife by force and againſt her will, together with the goods of the huſband, by force of the ſtatute.

St. Weſtm. 2. c. 34. 1 Hale, 514. 2 MS. Sum. 238.

Nathaniel

Ch. XVI. § 8. *By feme covert.*

Nathaniel Harriſon was indicted for ſtealing ſome plate: and it appearing that the proſecutor's wife had the conſtant keeping of the key of the cloſet where the plate was uſually locked up, and that the priſoner could not have taken it without her privity and conſent, (which appeared probable from other circumſtances; although no direct evidence of the fact could be produced;) the court thinking that it might be preſumed that he had received it from her, directed him to be acquitted; which was accordingly done.

Harriſon's caſe, O. B. Feb. 1756, cor. Adams B. Denniſon, and Bathurſt Js. MS. (S. C. 1 Leach, 56.)

Neither can the wife commit larceny in the company of her huſband; for it is deemed his coercion and not her own voluntary act. Yet if ſhe do it in his abſence and by his mere command, ſhe is then puniſhable as if ſhe were ſole. And the huſband, it is ſaid, may be acceſſary to the wife in receiving her; though not the wife for the receipt of the huſband; a technical diſtinction for which there ſeems no juſt reaſon. Hawkins thinks ſhe is alſo liable if ſhe commit a robbery in company with her huſband. And even with reſpect to larceny, Lord Hale in one place ſays, it is only a preſumption in law till the contrary appears: for he was always of opinion that if upon the evidence it clearly appeared that the wife was not drawn to the offence by the huſband, but that ſhe was the principal actor and inciter to it, ſhe was guilty as well as the huſband. But in another part he ſays, that the contrary practice, which he thinks fitteſt to be followed, had prevailed. And I am not aware that the former opinion, however reaſonable it appears, has been acted upon in any modern inſtances, though the occaſion muſt have too often occurred.

2 MS. Sum. 241, 2. 1 Hale, 45. Staundf. 26. *Vide* general tit. *Perſons capable of Crimes.*

1 Hawk. ch. 1. ſ. 11. 1 Hale, 516.

1 Hale, 45.

However, if a wife be guilty of larceny in company with her huſband, both of them may be indicted: and if the huſband be convicted, the wife ſhall be acquitted. But if the huſband be acquitted, and it appear that the felony were by her own voluntary act, (by which muſt be underſtood that the huſband, if preſent, had no knowledge of or participation in the fact,) ſhe may upon the ſame indictment be convicted: for the charge is joint and ſeveral. And if a woman inſiſt that ſhe is the wife of the man in whoſe company the felony was done, ſhe may be indicted by her huſband's name and her own, with an alias, and the addition of ſpinſter;

1 Hale, 46. Kel. 37. 2 MS. Sum. 242.

Semb. E.

Ch. XVI. § 8. *By feme covert.*

ſpinſter; and it will lie upon her to prove her coverture, or elſe ſhe may be found guilty.

§ 9. *By perſons having a uſe or charge. Vide* poſt. f. 14—18. 109.

With reſpect to larcenies at common law committed by ſervants and others entruſted with the uſe or charge of goods, I ſhall have an opportunity of conſidering them more fully hereafter. For the preſent I have to obſerve, that the legiſlature has thought it neceſſary to make ſpecial proviſion for them in ſeveral inſtances. And firſt, as to ſervants.

33 H. 6. c. 1. *Servants making ſpoil of their maſters' goods at their death.* 1 Hale, 515.

The ſtat. 33 H. 6. c. 1. reciting "that divers houſehold "ſervants of Lords or other perſons of good degree, ſhortly "after their maſters' deaths, violently and riotouſly have "taken and ſpoiled the goods which were of their ſaid "maſters at the time of their death, and the ſame diſtributed "amongſt them," &c. enacts, "that after full information "made to the Chancellor by the executors (or any two of "them) of ſuch Lord or perſon, of ſuch riot, taking, and "ſpoil made, &c. the ſaid Chancellor, by the advice of "the Chief Juſtices of B. R. and C. B., and the C. B. of the "Exchequer, or two of them, may make out writs to ſuch "ſheriffs as ſeem neceſſary, to make open proclamation (ſuch "as is thereby directed) for the ſaid offenders to appear be-"fore B. R. on the day limited by the writ, &c.; whereupon "if they make default, &c. they ſhall be attainted of felony: "but if they appear, they ſhall be committed or bailed until "they anſwer the ſaid executors in ſuch actions as ſhall be "brought againſt them for the ſaid riot, taking, and ſpoil-"ing," &c. In effect therefore, though if the party do not appear he ſhall anſwer for the offence as felony; yet if he appear, he may be ſued as for a treſpaſs. The ſtatute extends to one executor, if but one.

1 Hale, 515. 654.

§ 10. *By ſervants embezzling goods committed to their charge.* 21 H. 8. c. 7. made perpetual by 5 Eliz. c. 10. *Vide* 1 Hale, 505. n.

The ſtat. 21 H. 8. c. 7. reciting that divers perſons had upon confidence and truſt delivered unto their ſervants their caſkets and other jewels, money, goods, and chattels, ſafely to keep to the uſe of the ſaid maſters, &c. and that they had afterwards withdrawn themſelves, and had gone away with the ſame or part thereof, or continuing with their maſter, &c. had converted the ſame or part thereof to their own uſe; and that it was doubtful whether this were felony or not at common

common law; enacts, "that all and ſingular ſuch ſervants "(being of the age of 18 and not apprentices) to whom any "ſuch caſkets, jewels, money, goods or chattels, by his or "their ſaid maſters or miſtreſſes ſhall from thenceforth ſo "be delivered to keep, that if any ſuch ſervant or ſervants "withdraw him or them from their ſaid maſters or miſ-"treſſes, and go away with the ſaid caſkets, &c. or any part "thereof, with intent to ſteal the ſame, and defraud his or "their ſaid maſters or miſtreſſes thereof, contrary to the "truſt and confidence to him or them put by his or their "ſaid maſters or miſtreſſes; or elſe being in the ſervice of "his ſaid maſter or miſtreſs, without their aſſent or com-"mand, he embezzle the ſame caſkets, &c. or any part "thereof, or otherwiſe convert the ſame to his own uſe, "with like purpoſe to ſteal it; that if the ſaid caſkets, &c. "that any ſuch ſervant ſhall ſo go away with, or which he "ſhall embezzle with purpoſe to ſteal it as is aforeſaid, be "of the value of 40s. or above; that then the ſame falſe, "fraudulent, and untrue act or demeanor from thence-"forth ſhall be deemed and adjudged felony," &c. and the offenders be puniſhed as other felons are puniſhed for felonies committed by the courſe of the common law.

Ch. XVI. § 10. *By ſervants within ſtat.* 21 H. 8. c. 7.

By the ſtat. 27 H. 8. c. 17. clergy was taken away in this caſe: and it was made perpetual by ſtat. 28 H. 8. c. 2. and confirmed by ſtat. 1 Ed. 6. c. 12. ſ. 18. But both theſe acts were repealed by ſtat. 1 Mar. ſt. 1. c. 1. ſ. 5. (*a*) The ſtat. 21 H. 8. however was afterwards re-enacted and revived by 5 Eliz. c. 10.; but not the ſtat. 27 H. 8.; ſo that the party ſtill had his clergy. But now by the ſtat. 12 Ann. c. 7. after-mentioned clergy is taken away if the offence be committed in a dwelling-houſe or outhouſe thereunto belonging. It is ſaid however that the offender is not tranſportable under the ſtat. 4 Geo. 1. c. 11. or 6 Geo. 1. c. 23. for that thoſe ſtatutes extend only to larcenies, and this is a breach of truſt made felony by the ſtat. But I cannot ſubſcribe to this opinion, at leaſt to the full extent of it; for the ſtat. of H. 8. in effect only eſtabliſhes what the common law had before provided for, which by the recital it appears had been before doubted; and ſays that the offences deſcribed ſhall be deemed felony,

(*a*) *Vide* 1 Hale, 666, which ſuppoſes the repeal to have been by the ſtat. 1 Ed. 6. c. 12. inſtead of the ſtat. of Mary.

2 MS. Sum. 237. poſt. f. 66. 81.

Poſt. f. 135.

Vide 4 Blackſt. Com. 230.

Ch. XVI. § 10. *By ſervants within ſtat.* 21 H. 8. c. 7.

and the offenders puniſhed as other felons by the courſe of the common law. But even if this were doubtful, the words of the ſtat. 4 Geo. 1. c. 11. are large enough to reach this caſe; for it extends to perſons "convicted of grand or petit "larceny, *or any felonious ſtealing or taking* of money or "goods, &c. from the perſon or houſe of any other, or in "any other manner," &c.

§ 11. *What ſervants within ſtatute.* 1 Hawk. ch. 33. ſ. 12. Sum. 63. 2 MS. Sum. 234, 5. Crompt. Juſt. 50. Dy. 5. a. Dalt. ch. 58.

This ſtatute extends only to ſuch as were ſervants to the owners of the goods both at the time of the delivery and when they were ſtolen, and not at all to apprentices bound by indenture as ſuch, or to ſervants under 18 years of age. Therefore if A. deliver goods to B. to keep, and afterwards take him into his ſervice, and then B. run away with the goods, it is no felony under this ſtatute; becauſe not originally delivered under the ſpecial truſt of a ſervant.

Apprentices.

1 Hale, 668.

But notwithſtanding the exception as to apprentices, yet if any ſuch take his maſter's goods delivered to him by way of charge, or not delivered to him at all, he is guilty of felony at common law.

§ 12. *What goods within ſtatute.* 1 Hawk. ch. 33. ſ. 13. 2 MS. Sum. 234, 5. Dy. 5. 3 Inſt. 105. 1 Hale, 505.

The ſtatute is confined to ſuch goods as are delivered to keep for the uſe of the maſter, to be returned to him again. And therefore a receiver who runs away with his maſter's rents received by him for his maſter, or a ſervant who being entruſted to ſell goods or receive money due on a bond ſells the goods, &c. and departs with the money, is not within the ſtatute, becauſe he did not receive the money by delivery from his maſter. Yet this is doubted by Lord Hale for reaſons which will be mentioned preſently.

1 Hale, 668.

Watſon's caſe, Worceſter Sp. Aſſ. 1788, cor. Heath J. MS. Buller J. *No larceny in ſervant who embezzles money delivered to him to purchaſe goods with, either on the ſtatute or at common law; ſed qu. the latter.*

William Watſon was tried on an indictment, containing three counts; the 1ſt ſtating, that the priſoner as a ſervant received 3l. 18s. the money of E. Cowper his late maſter, which was delivered to him ſafely to keep to the uſe of his ſaid maſter; and that afterwards the ſaid priſoner withdrew himſelf from his maſter with the money, with an intent to ſteal the ſame, and to defraud his ſaid maſter thereof. The 2d count ſtated, that the priſoner having received the ſaid money in the manner above ſtated, and being with his maſter, had

had converted the ſame to his own uſe: and both concluded againſt the form of the ſtatute. The third count was for larceny generally. It appeared that Cowper, who was a ſurrogate, had ſent the priſoner, who was his ſervant, to buy ſome blank licences, and had delivered him the 3l. 18s. for that purpoſe; but the priſoner ran away with the money: and being convicted, a queſtion was reſerved for the opinion of the Judges, Whether the evidence ſupported any of the counts? and in Eaſt. term 1788 all the Judges but the Chief Baron held that this caſe was not within the ſtat., for to *keep* means to keep for the uſe of the maſter, and to return to him. As to the count for larceny, all the Judges held this could not be felony at common law; for to make it felony there muſt be ſome act done by the priſoner, a fraudulent obtaining of the poſſeſſion with intent to ſteal. This laſt point however has been ſince denied to be law in Lavender's caſe.

Ch. XVI. § 12. *By ſervants within ſtat.* 21 H. 8. c. 7.

MS. Buller J. Poſt. ſ. 15.

The ſtatute extends not to goods the actual property of which were not in the maſter at the time: and therefore it is ſaid that if the property be changed, as by melting money down, or malting corn, and then it be taken away, it is not within the ſtatute. But qu. Whether this be not ſtated too generally, where the deſign of embezzlement originated before the alteration of the thing? for if the whole act of the ſervant be taken together as it ought to be, the ſubſequent appropriation of the metal or the malt to his own uſe may be evidence of the felonious intent with which he took the money or the corn. But it is agreed, that if a ſervant make a ſuit of cloaths of cloth, or ſhoes of leather, or change one ſpecies of corn into another, which in their original ſtate were delivered to him by his maſter to keep, he is within the ſtatute, becauſe the property is not altered.

1 Hawk. ch. 33. ſ. 15. 2 MS. Sum. 235. MS. Burnet, 63.

1 Hawk. ch. 33. ſ. 15. 2 MS Sum. 235. 1 Hale, 668.

But no waſting or conſuming of goods is within the ſtatute, however wilful.

2 Hawk ch. 33. ſ. 14. Sum. 63.

Goods delivered by another ſervant.

The delivery of ſuch goods by another ſervant of the maſter is the ſame as a delivery by the maſter himſelf; and that even in his abſence, if by his command. And therefore Lord Hale doubts the diſtinction between this caſe and receiving money from a creditor by the maſter's order. Yet it ſeems that the act of the creditor cannot on the particular wording

2 MS. Sum. 235. 1 Hawk. ch. 33. ſ. 13. Dy. 5. Burnet's MS. 62. 1 Hale, 668.

Ch. XVI. § 12. *By ſervants within ſtat.* 21 H. 8. c. 7.

of the ſtatute be conſidered as the act of the maſter, as the act of another ſervant on behalf of his maſter may.

Value. Burnet's MS. 62. 3 Inſt. 105.

The value of the goods is to be computed as they would ſell.

§ 13. *Form of indictment.* 2 MS. Sum. 235. Dy. 5. Ante, p. 562.

5. All indictments upon the ſtatute againſt ſervants embezzling of goods delivered to them muſt charge that they feloniouſly *carried away*, and not that they feloniouſly *took* them; for the carrying away is the offence. It does not appear however that the words "*carried away*" are technically neceſſary; and in Watſon's caſe the two firſt counts proceeded upon other words of the ſtatute.

MS. Burnet, 62. *Sed vide* MS. Tracy, 206. *contrà*, which cites Cro. Car. 378.

It is ſaid that the indictment muſt not be vi et armis, which according to the caſe in Cro. Car. 378. it ought to be; but it ſeems well enough to lay it either way.

§ 14. *By ſervants at common law.* 1 Hale, 506. 668. 2 MS. Sum. 230, 1. MS. Burnet, 63. Bro. Coron. 160. Sum. 61. Crompt. 25. a. MS. Tracy, 60. 1 Hawk. ch. 33. ſ. 6. Staund. 25. Poph. 84. Owen, 52. Moor. 248. and ſubſequent caſes. 1 Hale, 506, 667.

The above ſtatute however is but little reſorted to at this day; for notwithſtanding the inference which might at firſt ſight be drawn from it, it is a clear maxim of the common law, that where one has only the bare charge or cuſtody of the goods of another, the legal poſſeſſion remains in the owner, and the party may be guilty of treſpaſs and larceny in fraudulently converting the ſame to his own uſe. Thus a butler may commit larceny of plate in his cuſtody, or a ſhepherd of ſheep. The ſame of a ſervant entruſted to ſell goods in a ſhop. This rule appears to hold univerſally in the caſe of ſervants, whoſe poſſeſſion of their maſter's goods by their delivery or permiſſion is the poſſeſſion of the maſter himſelf. Lord Hale indeed does not appear to ſpeak with his uſual clearneſs on this point: for he ſeems to make a diſtinction in this reſpect where goods are actually delivered or not by the maſter to the ſervant; that the latter is felony at common law, but not the former without the aid of the ſtat. of H. 8. Yet are not ſheep delivered to a ſhepherd, and plate to a butler? Or ſuppoſing a maſter delivered a new piece of plate with his own hand to his butler, would it make any difference in the law, ſo that the purloining of that particular piece would not be felony at common law as much as the reſt, of which there was only an implied charge given him? That Lord Hale himſelf wavered in the opinion 1 Hale, 688. juſt alluded to is very plain; for after ſtating the caſe of a maſter's

maſter's delivering a bond to a ſervant to receive the money, or goods to ſell, and the ſervant's going away with the money; which he ſays is not felony at common law, becauſe the money is delivered to him, nor by the ſtatute, becauſe it was not delivered by the maſter; he adds, *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 may have a general action of treſpaſs or action upon the ſtatute of hue-and-cry.* It ſeems more reaſonable and conſiſtent to conſider that ſtat. in the nature of a declaratory law: and ſo it was holden to be by Gould J. in delivering the opinion of the Judges in Wilkins' caſe. Ch. XVI. § 14. *By ſervants.* *Vide* Aſhcome v. The Hundred of Spelholme, 1 Show. 94. 241. Poſt. f. 104. Suppoſing this maxim to be well founded, it leads to an important difference between the caſe of ſervants and others: for if there be a delivery of goods by a maſter to his ſervant for a particular purpoſe, and inſtead of applying them accordingly he embezzle the whole or a part, it amounts to felony, although there be no evidence of a prior felonious intent at the time he received ſuch goods; becauſe even after ſuch delivery to him the goods continued in the legal poſſeſſion of the maſter and not of the ſervant; and therefore the act of converting them fraudulently is in law a tortious taking from the poſſeſſion of the maſter. But it is otherwiſe in the caſe of a legal delivery to any other than a ſervant; for then unleſs ſuch delivery were procured by fraud, and the jury find a previous felonious intent to convert the goods exiſting at the time of the delivery, a ſubſequent converſion is not felony; unleſs in thoſe caſes which will be pointed out hereafter, where the privity of contract is determined. Poſt. f. 114.

§ 15. *Modern caſes.* I cannot do better than refer to the ſeveral modern caſes wherein the maxim of the common law touching larceny by ſervants has been fully recognized.

Robinſon's caſe, O. B. Feb. 1755. per Adams B. Wilmot J. Serjt. Forſter's MS. A carter going away with his maſter's cart was holden felony.

R. v. Paradice, Sarum Lent Aſſ. 1766, cor. Gould J. Serjt. Forſter's MS. Francis Paradice was indicted for ſtealing a bill of exchange of 100 l. value, the property of William Periam. The proſecutor to whom the bill was indorſed was a draper at Devizes, and the priſoner, who was his book-keeper on a ſalary, kept his accounts, and received and paid money for *One employed as a clerk in the day*

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him, but did not live in his house; but came every day there to transact his business. The prosecutor delivered the bill in question, with several others, to the prisoner, and ordered him to send them by that day's post, as he had often done before, from the Devizes to the prosecutor's banker in London, as cash to be accounted for to the prosecutor. The prisoner next day asked the prosecutor's leave to go to a town in the neighbourhood, which was consented to on condition that he returned the next day by 12 o'clock. The prisoner went to Salisbury, got cash for the bill, which was indorsed by the prosecutor, and next by the prisoner; who was afterwards apprehended at Exeter with part of the bills and the money. Gould J., before whom he was tried and convicted, respited judgment to take the opinion of the Judges whether this were felony or a breach of trust. In Easter term 1766 all the Judges (except Lord Camden, who was absent,) held it larceny, upon the principle that the possession still continued in the master.

time, but not residing in the house, embezzles a bill of exchange, which he received from his master in the usual course of business with directions to transmit it by the post to a correspondent; held larceny.

Bass's case, O. B. 1782, cor. Adair Serjt. Recorder, MS. Buller J. 2 MS. Sum. 231. & MS. Jud. (S. C. 1 Leach, 283.)

Goods delivered to a tradesman's servant to carry to a customer are still in the possession of the owner, and the servant is guilty of larceny in breaking the package and converting them.

William Bass was indicted for stealing gauze of above 80*l.* value of John Gatsea. The prisoner was porter to the prosecutor, (in his general employ), who delivered to him a parcel containing the goods mentioned in the indictment to carry to a customer. In his way he was met by two men who prevailed upon him to go into a public house to drink with them; where they persuaded him to dispose of the goods, to which he consented. One of the men then brought a person who bought the goods, and the prisoner received eight guineas of the money. The question referred to the Judges was, Whether this amounted to a felonious taking? It was further mentioned as an additional circumstance, that the goods were taken out of the package in which they had been delivered to the prisoner, and put into a bag at the public house. In Mich. term 1782 all the Judges held this to be felony, *because the possession still remained in the master.* That was the ground of the determination, not only as it appears from the MS. cited in the margin, but also as the case was afterwards cited by Mr. Justice Gould in giving judgment at the O. B. in Wilkins' case.

2 Leach, 586. 3 C. post. 104.

Lavender's case, Huntingdon Lent Ass. 1793,

John Lavender was indicted for larceny at common law of a certain sum of money belonging to John Edmonds. The prisoner

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prisoner was a servant to Edmonds, who had delivered him the money in question to carry to the house of one Thomas Flawn, and there to leave the same with him, he having agreed to give Edmonds bills for the money in a few days. The prisoner did not carry the money to Flawn as directed, but went away with it, purchased a watch and other things with part, and part remained in his possession when he was apprehended. Being found guilty, sentence was respited for the opinion of the Judges, whether this were a felony or a breach of trust: and in Easter term 1793 all the Judges held this was a felony, and that the last point in Watson's case above referred to was not law. In Trinity term following this case was again under the consideration of the Judges; when they adhered to their former opinion: and some said that the distinction between this case and Watson's, if there were any, was, that in Watson's case the money was not delivered to the prisoner to be paid specifically to any other person; but if the prisoner had laid out his own money to the same amount in buying licences, it would have been a compliance with the order. He was commissioned to merchandize with the money. But they admitted that the distinction, if any, was extremely nice; and Buller J. thought there was none: and recognized the case of R. v. Paradice before Gould J. as good law.

cor. Perryn B. MS. Buller J. & MS. Jud.

A servant going off with money which his master had given him to carry to another, and applying it to his own use, is guilty of larceny.

Ante, 562.

Vide that case mentioned in R. v. Wilkins, 2 Leach, 591.

Upon an indictment for larceny of a bill of exchange for 122*l.* the property of R. Burkit and T. Fothergill, it appeared that the prisoner was clerk to the prosecutors, and had the sole management of their cash concerns. He received the bills and money remitted and due to his masters, carried bills to their bankers to discount whenever he wanted cash, made payments for freight and other similar matters, and settled the balance with his masters every week. On the 14th Sept. 1795 the bill in question, due the 17th, was remitted to the prosecutors by the post: and Mr. Burkit gave it to another clerk to get it accepted, which he did, and then laid it among other bills on his master's desk. On the 16th September the prisoner carried this and another bill to the bankers, and it being observed there that neither of them were indorsed by the prosecutors, it was asked, Whether they were to be entered short, or discounted? The prisoner said

R. v. Chipchase, O. B. Oct. 1795, cor. Heath J. 2 Leach, 805.

A clerk who had the general management of his master's cash concerns, and the authority to get his bills discounted as occasion required, discounted a bill which had been before received into his master's possession, for the purpose, as appeared, of absconding with the money, which he accordingly did: held larceny.

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he wanted ſmall notes and money for them, and that the money muſt be full weight and good, as it was for Mr. Burkit's particular uſe. On the ſame day he abſconded with the money he had thus received, and was taken under a feigned name from on board a ſhip at Falmouth. It was contended that this was only a breach of truſt, the bill having come legally into his poſſeſſion; not delivered for any ſpecific purpoſe, but generally like all the other bills of his maſters over which he had a diſpoſing power: that he had a right to receive the money for the bill, though not to convert it when received to his own uſe; and therefore could not be guilty of ſtealing the bill itſelf: and it was likened to Waite's caſe after mentioned. But Heath J. was clearly of opinion that this was felony; and the priſoner was convicted and ſentenced to tranſportation.

Poſt. p. 570.

§ 16. *What poſſeſſion in the maſter neceſſary to conſtitute larceny in the ſervant taking his goods.*

All that has been ſaid above relating to ſervants is upon a ſuppoſition that the goods purloined were received into the maſter's poſſeſſion before the actual taking by the ſervant: for if the maſter had no otherwiſe the poſſeſſion of them than by the bare receipt of his ſervant upon the delivery of another for the maſter's uſe, and the ſervant have done no act to determine his original, lawful, and excluſive poſſeſſion, as by depoſiting the goods in his maſter's houſe or the like; although to many purpoſes and as againſt third perſons this is in law a receipt of the goods by the maſter, yet it has been ruled otherwiſe in reſpect of the ſervant himſelf upon a charge of larceny at common law in converting ſuch goods to his own uſe: becauſe as to him there was no tortious taking in the firſt inſtance, and conſequently no treſpaſs, as there is where a ſervant converts to his own uſe property in the virtual poſſeſſion of his maſter, whereof he has but the bare charge for ſpecial purpoſes committed to him by ſuch maſter. I ſhall ſubjoin ſome determinations to this purpoſe previous to the act of the 39 G. 3. c. 85. in ſome of which it has been conſidered what was evidence of a previous receipt of the goods into the maſter's poſſeſſion before the converſion of them by the ſervant.

Poſt. p. 574.

Spears' caſe, Kingſton Sp. Aſſ., 1798, cor.

John Spears was convicted on an indictment for ſtealing 40 buſhels of oats of James Browne and Co. in a barge on the Thames. Browne and Co. ſent the priſoner with their barge to Wilſon a corn meter for as much oats as the barge would carry, and which were to be brought in looſe bulk. The priſoner received from Wilſon 220 quarters in looſe bulk, and 5 quarters in ſacks; the priſoner ordering that quantity to be put into ſacks. The quantity in ſacks was afterwards embezzled by the priſoner. And the queſtion reſerved for the opinion of the Judges was, Whether this were felony? the oats never having been in the poſſeſſion of the proſecutors; or, Whether it be not like the caſe of a ſervant receiving charge of, or buying a thing for his maſter, but never delivering it? But they held that this was larceny in the ſervant; for it was a taking from the actual poſſeſſion of the owner as much as if the oats had been in his granary.

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Buller J. MS. Jud. (S. C. 2 Leach, 962). *A ſervant goes by command of his maſter with his barge to receive oats in bulk; and afterwards orders part to be put in ſacks, which he embezzles out of the barge: held larceny, the ſame as if taken out of the maſter's granary.*

Another caſe of a ſimilar kind was reſerved from the ſame aſſizes, which being ſtated generally by Buller J. to be of the ſame deſcription as the former, received the ſame determination. That was an indictment framed on the ſtat. 24 G. 2. c. 45. for ſtealing five quarters of oats from a veſſel on the navigable river Thames, the property of J. B. &c. The proſecutors were cornfactors, and the priſoner was their ſervant, and had been employed by them many years, in ſuperintending the unloading of corn veſſels. The proſecutors having purchaſed 240 quarters of oats, on board a Dutch veſſel lying on the Surry ſide of the Thames, of which the five quarters in queſtion were part; while the corn meters were in the act of unloading the oats from the Dutch veſſel into the proſecutor's barge, the priſoner with another perſon came alongſide in a boat, and handed ten empty ſacks on board the Dutch veſſel, deſiring that the ſacks might be filled with oats and tied, ſaying, they were going to be put into an up-country lug-boat. He alſo deſired that the account of the oats put into the ſacks might be carried to the ſcore, and not a ſeparate account made of them. The reſt of the oats were loaded in looſe bulk into the proſecutor's barge. After the ſacks were filled, the priſoner ſent them away to another place, where he ſold them. The priſoner had never been employed by the proſecutors to ſell corn for them, nor was he authorized ſo to do. The priſoner at the enſuing Summer aſſizes received judgment of death; the Judges being of opinion that the conviction was right.

Abrahat's caſe, Surry Sp. Aſſ. 1798, 2 Leach, 960. *A. having purchaſed corn on board a veſſel in the Thames, ſent his barge to receive it in bulk. His ſervant, employed by him to ſuperintend the delivery, ſeparates part from the reſt while on board the veſſel, and embezzles that part by conveying it away immediately by another boat; held larceny on the ſtat. 24 G. 2. c. 45. for ſtealing from a veſſel on the Thames.*

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In that caſe there appears to have been a tort committed by the ſervant in the very act of taking; and the property of his maſters in the corn was complete before the delivery to him; and after the purchaſe of it in the veſſel they had a lawful and excluſive poſſeſſion of it as againſt all the world but the owner of ſuch veſſel.

§ 17. *Where no other poſſeſſion than by ſervant.*

It is different where the maſter has no otherwiſe any property or poſſeſſion in the thing ſtolen than by the delivery to the ſervant for the maſter's uſe.

Waite's caſe, Hil. 16 G. 2. B. R. MS. Shapleigh, 2 Leach, 33. S.C. *Before the ſtat.* 15 G. 2. c. 13. ſ. 12. *made it a capital felony for any officer of the Bank to embezzle any bond, &c. depoſited with the Company, or with him as their officer, it was not felony in ſuch officer to whom any bond was delivered for that purpoſe to convert it to his own uſe before he had ſo depoſited it in the proper place; for till ſuch depoſit made the Bank have no poſſeſſion of the inſtrument diſtinct from that of their officer.*

John Waite was indicted for feloniouſly ſtealing ſix Eaſt-India bonds, laid in one count to be the property of the Bank of England, and in another to be the property of a perſon unknown, and laid to be againſt the form of the ſtatute. It appeared that the bonds in queſtion among ſeveral others were paid into the Bank by the order of the court of Chancery in ſeveral cauſes, according to the directions of the ſtat. 12 Geo. 1. c. 32. which makes the Bank accountable for what is ſo paid in; and that Waite was one of the caſhiers, and was employed in tranſacting this buſineſs, and had given ſecurity to the Bank for his integrity; and that he had given receipts for theſe bonds for the governor and company of the Bank of England. That it was the practice of the Bank, when any ſecurities from the court of Chancery were depoſited there, for the directors to lock them up in a cheſt in the cellar; but that the bonds in queſtion were never locked up in the cheſt: but Waite, when he received them from the court of Chancery, put them into his own deſk, and afterwards ſold them, and put the money into his own pocket.

Vide 12 Ann. ſt. 1. c. 7. & 2 Geo. 2. c. 25. ſ. 3. on which the indictment was framed.

For the priſoner, it was argued, that this was only a breach of truſt, and was not felony. For the ſtat. 21 H. 8. c. 7. which makes it felony in ſervants to take or embezzle their maſters' money, does not extend to it. That the ſtat. 15 Geo. 2. c. 13. had now made this felony; but that act having been made ſince the tranſaction in queſtion happened, ſhewed that it was not felony before. The Judges Carter and Denniſon (*a*) were clearly of opinion that this caſe was not felony; for

(*a*) Mr. Leach's report of this caſe ſays it was tried before Reynolds B.

the

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the bonds were received by Waite, and were never put into the cellar as is uſual: ſo that the poſſeſſion was always in him, and the Bank had no poſſeſſion but what was the poſſeſſion of Waite, till they were brought down and placed in the cheſt in the cellar as uſual. Denniſon J. ſaid, that though this might be ſuch a poſſeſſion in the Bank whereon they might maintain a civil action, yet there was a great difference between ſuch a poſſeſſion and a poſſeſſion whereon to found a criminal proſecution. The priſoner was acquitted.

Joſeph Bazeley was tried at the O. B. in February 1799, on an indictment for ſtealing a bank note of the value of 100l. the property of Peter Eſdaile and others bankers in London. It appeared in evidence, that Mr. Gilbert, who kept caſh with theſe gentlemen, ſent by his ſervant 122l. in bank notes and 15l. in money, and amongſt the bank notes was the note in queſtion. That the ſervant delivered the whole into the hands of the priſoner, who was a clerk to the bankers, *and as ſuch authorized to receive and give a diſcharge for the ſame;* and that it was his duty to put the money received into a till, and to place in another drawer the ſeveral bank notes which he might receive during the day, for the purpoſe of another clerk taking down and entering in a book the particular deſcription of each note. The priſoner gave an acknowledgment to the ſervant of having received the full ſum of 137l., and put the money into the till; but inſtead of placing the remaining ſum of 122l. which he received in bank notes into the drawer, according to his duty, he kept back the one of 100l., for which he was indicted; and only delivered over thoſe to the amount of 22l. The jury found the priſoner guilty, ſubject to the opinion of the Judges, Whether ſuch taking were to be conſidered as felonious, or only a breach of truſt? The caſe was argued in the Exchequer-chamber in Eaſter term 39 Geo. 3. before all the Judges, except Aſhhurſt, Buller, and Heath, Js. who were abſent. The arguments are in print, and therefore I ſhall not detail them at length in this place. It is ſufficient to obſerve, that on the part of the priſoner it was contended to be a breach of truſt, and not felony. And theſe diſtinctions were taken; that larceny is the taking of property from the poſſeſſion of another without his conſent and againſt his will: breach of truſt the miſapplication of property which another by his own voluntary conſent has

put

Bazeley's caſe, O. B. Feb. 1799. MS. Jud. (S. C. 2 Leach, 973.) *Where a clerk in a banker's ſhop received money and notes paid in by a cuſtomer on his account, and the clerk placed the money in the till, but embezzled the notes immediately; held no larceny, but only breach of truſt at common law; for though the poſſeſſion of the ſervant is for many purpoſes and as againſt third perſons the poſſeſſion of the maſter, yet here the maſter never had a poſſeſſion diſtinct from the ſervant as againſt him; and his receipt being lawful, there was no tortious taking by him, without which there can be no larceny. Aliter if he had taken the notes after he had depoſited them in the till.*

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put into the poſſeſſion of the party: and that fraud was (in this reſpect) the obtaining the poſſeſſion of the property of another with his conſent by ſome contrivance againſt which common prudence cannot guard. That in order to conſtitute larceny the owner of the property muſt be in poſſeſſion of it either actually or conſtructively. That here there was no actual poſſeſſion, nor any conſtructive poſſeſſion as againſt the priſoner. In the courſe of the argument it was ſtated and admitted that the priſoner had given his employers ſecurity to account for what he received, and againſt embezzlements. And on the part of the priſoner this was likened to a caſe of one Bull (*a*) who was indicted for receiving his maſter's money. The proſecutor was a paſtry-cook, and having occaſion to ſuſpect he was robbed by the priſoner, who was his ſervant attending his ſhop, he employed a cuſtomer to come to his ſhop, on pretence of buying ſomething; and for this purpoſe he gave him ſome marked ſhillings of his own, with which the cuſtomer came to the ſhop in the abſence of the owner, and bought goods of the defendant. Soon after the maſter coming in examined the till where the defendant ought to have depoſited the money when received, and not finding all the marked money there, he procured the defendant to be immediately apprehended and ſearched, and the reſt of the marked money was found upon him. After conviction the point was ſaved by Mr. Juſtice Heath; and the Judges on being conſulted were of opinion that the priſoner was not guilty of larceny, but only of a breach of truſt; the money never having been put in the till, and therefore not having been in poſſeſſion of the maſter as againſt the defendant. And Waite's caſe before mentioned was very mainly relied on, in order to ſhew that this was a mere breach of truſt; confirmed as the doctrine there laid down had been by the acts of the legiſlature in providing in future againſt embezzlements of that ſort in the particular caſe of the Bank, by the act of the 15 Geo. 2. c. 13. and by ſimilar ſtatutes

(*a*) Thomas Bull's caſe, O. B. Jan. Seſſ. 1797, cor. Heath J. and afterwards before the Judges in Hilary term following. No regular caſe in writing was laid before the Judges; but the circumſtances were as ſtated here; and the priſoner, who appears by the O. B. Seſſions' Papers to have received ſentence of tranſportation, was afterwards recommended for a pardon. *Vide* 2 Leach, 980. S. C.

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in regard to the Poſt-office and other caſes. And the particular contract between the priſoner and his employers was alſo inſiſted upon, as diſtinguiſhing this from the general caſe of maſter and ſervant.

During the argument Eyre C. J. obſerved, that Charlewood's caſe and other caſes of the ſort turned upon the poſſeſſion having been unlawfully obtained by the priſoner; but that here there was no evidence to find ſuch an original intention to ſteal, becauſe the poſſeſſion came to the ſervant in the ordinary courſe of his buſineſs, without any act of his own for that purpoſe.

For the crown, it was inſiſted upon as a general rule, that in the caſe of perſonal chattels the poſſeſſion in law follows the right of property. That if by law the poſſeſſion of the ſervant were that of the maſter, which could not be denied, then no compact between them to indemnify the maſter could do away the operation of the law. That the cuſtomer did not mean to depoſit the notes as a matter of truſt in the clerk's hands; for they were paid in the banker's own houſe, of which the defendant was only one of the organs; and therefore it was like paying money into the hands of the bankers themſelves; and the act of receipt by the clerk eo inſtanter veſted the poſſeſſion in them. That in Bull's caſe the ſervant had authority to ſell the goods, and was only accountable for their value; but the priſoner had no authority to diſpoſe of the notes which he received in the ſhop. But there could be no doubt in that caſe, if the ſervant had embezzled the maſter's goods out of his ſhop it would have been felony. That conſidering this as a bailment, yet part of the property being depoſited in its proper place, the ſeparating the other part made it a felony, for the bailment was entire. That in Waite's caſe there was a perſonal confidence repoſed in him by the perſon making the depoſit in the known authenticated character of *caſhier of the Bank*. The act of parliament directing the depoſit to be with the *caſhier of the Bank*; and therefore a delivery to him at any place would have been ſufficient.

Lord Kenyon C. J. thereupon obſerved, that the proviſions of that act would hardly warrant an inference that the depoſit was directed to be made perſonally with the caſhier; but merely with him as an officer of the corporation, who muſt

act

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act by their agents. And Lord C. J. Eyre remarked, that the money and bonds were to be paid *to the Bank*, though *the caſhier's receipt* was to be a diſcharge ſo as to bind the Bank.

It was then ſaid that the act was made pro majori cautelâ.

Vide ante. *Vide* Chipchaſe's caſe, ante, 567. where the note having been once in the maſter's poſſeſſion, and afterwards taken by the clerk, was ruled to be felony by Heath J. O. B. Oct. 1795.

Afterwards on conſultation among the Judges, ſome doubt was at firſt entertained; but at laſt all aſſembled agreed that it was not felony, inaſmuch as the note was never in the poſſeſſion of the bankers diſtinct from the poſſeſſion of the defendant; though it would have been otherwiſe if the priſoner had depoſited it in the drawer, and had afterwards taken it. And they thought that this was not to be differed from the caſes of Waite and Bull, which turned on this conſideration, that the thing was not taken by the priſoner out of the poſſeſſion of the owner: and here it was delivered into the poſſeſſion of the priſoner. That though to many purpoſes the note was in the actual poſſeſſion of the maſters, yet it was alſo in the actual poſſeſſion of the ſervant, and that poſſeſſion not to be impeached, for it was a lawful one. Eyre C. J. alſo obſerved, that the caſes ran into one another very much, and were hardly to be diſtinguiſhed. That in the caſe of the King v. Spears the corn was in the poſſeſſion of the maſter under the care of the ſervant. And Lord Kenyon ſaid he relied much on the act of parliament reſpecting the Bank not going further than to protect the Bank. The priſoner was accordingly recommended for a pardon.

§ 18. Stat. 39 Geo. 3. c. 85. againſt embezzlements by ſervants, &c.

This deciſion, however juſt in leaning to the merciful ſide on a doubtful queſtion of law, having opened a door to the moſt alarming and extenſive frauds by ſervants in general, and particularly in thoſe inſtances where from the very nature of their employment they were unavoidably entruſted with the receipt of large ſums of money in commercial tranſactions, the legiſlature thought it neceſſary to interfere immediately, and accordingly the declaratory act of the 39 Geo. 3. c. 85. was paſſed, intitled "An act to protect maſters "againſt embezzlements by their clerks or ſervants;" which

Preamble.

reciting that "whereas bankers, merchants, and others, "are, in the courſe of their dealings and tranſactions, fre- "quently obliged to entruſt their ſervants, clerks, and per- "ſons employed by them in the like capacity, with receiv- "ing, paying, negociating, exchanging, or transferring,

"money, goods, bonds, bills, notes, bankers drafts, and other "valuable effects, and ſecurities: and whereas doubts have "been entertained whether the embezzling of the ſame by "ſuch ſervants, clerks, and others, ſo employed by their "maſters, amounts to felony by the law of England; "and it is expedient that ſuch offences ſhould be puniſhed in the ſame manner in both parts of the United "Kingdom;" enacts and *declares*, that if any ſervant "or clerk, or any perſon employed for the purpoſe in "the capacity of a ſervant or clerk, to any perſon or perſons whomſoever, or to any body corporate or politick, "ſhall, by virtue of ſuch employment, receive or take into "his poſſeſſion any money, goods, bond, bill, note, banker's "draft, or other valuable ſecurity, or effects, for or in the "name or on the account of his maſter or maſters, or employer or employers, and ſhall fraudulently embezzle, ſecrete, or make away with the ſame, or any part thereof; "every ſuch offender ſhall be deemed to have feloniouſly "ſtolen the ſame from his maſter or maſters, employer or "employers, for whoſe uſe or in whoſe name or names, or on "whoſe account the ſame was or were delivered to or taken "into the poſſeſſion of ſuch ſervant, clerk, or other perſon "ſo employed; although ſuch money, goods, bond, bill, "note, banker's draft, or other valuable ſecurity, was or "were no otherwiſe received into the poſſeſſion (*a*) of his or "their ſervant, clerk, or other perſon ſo employed. And "every ſuch offender, his adviſer, procurer, aider, or abettor, being thereof lawfully convicted or attainted, ſhall be "liable to be tranſported to ſuch parts beyond the ſeas as "his majeſty, by and with the advice of his privy council, "ſhall appoint, for any term not exceeding fourteen years, "in the diſcretion of the court before whom ſuch offender "ſhall be convicted or adjudged."

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Servants or clerks taking into their poſſeſſion any money or other effects on their maſter's account, and fraudulently embezzling or ſecreting any part thereof, ſhall be deemed to have feloniouſly ſtolen the ſame; and ſuch offenders and their abettors ſhall, on conviction, be liable to be tranſported for 14 years.

(*a*) By ſome blunder, in the fair copy taken from the original draft of the act, a line has been here omitted which was in the original draft prepared by myſelf. The words omitted are thoſe which follow in Italics; "although ſuch money, &c. was or were no otherwiſe received into the poſſeſſion *of ſuch "maſter or maſters, employer or employers, than by the actual poſſeſſion* of his or their "ſervant," &c. the inſertion of which words will make the language of the legiſlature, as to the particular occaſion of paſſing the act, more intelligible than it is at preſent.

On

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Jones's caſe, Winton Sp. Aſſ. 1800, MS. *Indictment on the ſtatute muſt purſue the words of it.*

On a general indictment for larceny at common law, the facts were, that the priſoner a ſervant had ſtolen ſeveral articles of wearing apparel from his maſter; and it was contended on the part of the proſecution, that under the above act there muſt be judgment of tranſportation; but Palmer Serjt. who tried the priſoner, on the next day ſaid he had communicated with Mr. Juſtice Lawrence (the other Judge on the circuit) on the ſubject; and they were both of opinion that in order to found a judgment upon the ſtatute the indictment muſt be ſpecially drawn, ſo as to bring the caſe within it.

M'Gregor's caſe, O. B. Sept. 1801. cor. the Common Serjeant. MS. Jud. *Indictment on the ſtatute muſt contain the requiſites of an indictment for larceny at common law.*

An indictment on the ſame ſtat. of the 39 Geo. 3. c. 85. charged that John M'Gregor after the 12th July 1799, to wit, on, &c. at, &c. (he the ſaid J. M'G. then and there being a clerk to G., S. &c. and employed by them in the capacity of ſuch clerk,) did by virtue of ſuch his employment receive and take into his poſſeſſion 300 l. for and on account of the ſaid G., S. &c. the ſaid maſters and employers of the ſaid J. M'G.: and that he the ſaid J. M'G. afterwards, to wit, on, &c. at, &c. with force and arms, fraudulently and feloniouſly did embezzle and ſecrete the ſaid 300l., againſt the form of the ſtatute, &c. And ſo the ſaid J. M'G. then and there, to wit, on, &c. at, &c. with force and arms feloniouſly did ſteal, take, and carry away the ſaid 300l. from the ſaid maſters and employers of him the ſaid J. M'G., on whoſe account the ſaid 300l. was ſo taken into the poſſeſſion of him the ſaid J. M'G., being ſuch clerk ſo employed, and by virtue of ſuch his employment as aforeſaid, againſt the form of the ſtatute, &c. After conviction it was moved in arreſt of judgment that the indictment was defective, inaſmuch as the money alleged to have been feloniouſly ſtolen, taken, and carried away by the priſoner was not expreſsly averred to be the money of any perſon. And the caſe was argued before all the Judges (except Lord Kenyon and Heath J. abſent) in Hilary term 1802 in the Exchequer-chamber.

On the part of the priſoner it was contended, that the ſtatute did not mean to make *embezzling*, eo nomine, a ſubſtantive felony; but to declare that under certain circumſtances it ſhould be adjudged larceny: the words being that "he ſhall be deemed to have *feloniouſly ſtolen* the ſame;" which refers to a well-known common law offence; to which

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which alſo the doubts ſtated in the preamble could alone refer. That conſequently the indictment muſt have all the requiſites of an indictment for larceny at common law. So in the ſtat. 1 Ed. 6. c. 12. the words "felonious ſtealing "of horſes," are uſed as deſcriptive of larceny of horſes: but it was never conceived that an indictment which merely followed the words of that ſtatute would be a ſufficient deſcription of the offence. So indictments on the ſtatutes 8 Eliz. c. 4. 22 Car. 2. c. 5. 3 & 4 W. & M. c. 9. ſ. 1. 10 & 11 W. & M. c. 23. ſ. 1. 12 Ann. c. 7. and 24 Geo. 2. c. 45. againſt ſtealing particular goods, or under certain circumſtances, all purſue the ſame form as to the requiſite parts of larceny at common law. On the other hand it was contended that the ſtatute in queſtion made the embezzling by ſervants in the manner ſtated a ſubſtantive felony, which before was only a miſdemeanor, or breach of truſt for which the maſter had a civil remedy. That it was therefore ſufficient to follow the words of the act as in other inſtances where new offences were created; which differed from indictments on ſtatutes merely ouſting the offender from clergy in caſes which were before larcenies at common law. That the Legiſlature in this inſtance meant to take in caſes where the property being as it were in tranſitu it was difficult to aſcertain in whom it was at the time of the offence committed: it therefore meant to relieve the proſecutor from the neceſſity of laying it to be in any particular perſon. That at any rate no technical form of words was neceſſary in charging a thing to be the property of another; and that here enough was ſtated to ſhew that it was not the priſoner's own property, being charged to have been received by him *on account of his maſters*; which was tantamount to an allegation of their having a ſpecial property in it. In reply it was urged, that if it were neceſſary to allege the property in any perſon, it muſt be ſo alleged expreſsly, and could not be collected by intendment. That the uſual form of indictment in theſe caſes was to charge that the priſoner took and carried away the monies, &c. *being the proper monies of the proſecutor.*

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The Judges at firſt entertained great doubt upon the caſe, which ſtood over for further conſideration; and a difference of opinion for ſome time prevailed: but on the 25th of Feb. 1802 all the Judges (except Lord Kenyon and Rooke J.) met at Mr. Juſtice Heath's, when they were of opinion that the indictment was bad in not alleging the money to be the money of the proſecutors. That the ſtatute made the offence a larceny; and made the poſſeſſion of the ſervant under ſuch circumſtances the poſſeſſion of his maſters.

It may be obſerved, that the ſtatute in queſtion does not upon this conſtruction of it neceſſarily exclude any other puniſhment than that of tranſportation; but inaſmuch as it makes the offence larceny, and only provides that the offender ſhall be liable to be tranſported for not more than 14 years, it appears to let in any other judgment, at leaſt of an inferior degree, to which larceny of the ſame deſcription is ſubjected by any other law.

§ 19. *By ſervants in public truſts.*

Servants employed in public truſts of high importance have in ſeveral inſtances been ſubjected even to capital puniſhment for embezzlement of the things committed to their charge.

By officers and ſervants of the Bank of England. 15 Geo. 2. c. 13. ſ. 12

By the ſtat. 15 Geo. 2. c. 13. ſ. 12. (which was before adverted to as furniſhing an argument in the caſes of Waite (*a*) and Bazeley) it is enacted, that "if any officer "or ſervant of the Bank, being entruſted with any note, "bill, dividend-warrant, bond, deed, or any ſecurity, money, "or other effects belonging to the ſaid company, or having "any bill, dividend-warrant, bond, deed, or any ſecurity or "effects of any other perſon or perſons lodged or depoſited "with the ſaid company, or with him as an officer or ſervant "of the ſaid company, ſhall ſecrete, embezzle, or run away "with any ſuch note, bill, dividend-warrant, bond, deed, "ſecurity, money, or effects, or any part of them; being

(*a*) The act was paſſed before the determination in Waite's caſe, though the fact happened before the act was paſſed. The proviſion in queſtion is one of many other regulations touching the Bank and its officers, upon occaſion of a loan granted by the Company to Government.

"thereof

"thereof convicted, he ſhall be deemed guilty of felony, and "ſhall ſuffer death as a felon without benefit of clergy."

Ch. XVI. § 19. *By officers, &c. of the Bank.*

35 Geo. 3. c. 66. & 37 Geo. 3. c. 46. ſ. 6.

The ſtat. 35 Geo. 3. c. 66. ſ. 6. and 37 Geo. 3. c. 46. for making certain annuities created by the parliament of Ireland tranſferable, and the dividends payable at the Bank of England, contain exactly the ſame proviſions with reſpect to officers or ſervants of the Bank "entruſted with any "note, bill, dividend-warrant, or warrant for payment of "any annuity or intereſt or money, or any ſecurity, money, "or other effects of or belonging to the ſaid governor, &c., "or having any note, &c. or other effects of any other perſon "or perſons, body politic or corporate, lodged or depoſited "with the ſaid governor, &c. or with him as an officer or "ſervant, &c. in purſuance of thoſe acts."

It may perhaps be thought that the general words of the ſtat. 39 Geo. 3. c. 85. before ſet forth extend to cover theſe and other acts of the ſame kind, ſo as to do away the capital part of the puniſhment therein preſcribed: but it is obſervable that the Legiſlature could not have had ſuch a repeal in contemplation, becauſe they recite that doubts had been entertained whether the offences deſcribed in the act of the 39 Geo. 3. amounted to felony by the law of England; which doubts could never have attached on the caſes particularly provided for and expreſsly made felony by the acts now in queſtion; and they then proceed to enact and declare, that thoſe offences ſhall be deemed felony; a proviſion altogether nugatory in reſpect to the officers and ſervants of the Bank of England and other public companies, whoſe embezzlements were before ſpecially inhibited and made felony without benefit of clergy.

§ 20. *By officers and ſervants of the South Sea Company.* 24 Geo. 2. c. 11. ſ. 3.

The ſtat. 24 Geo. 2. c. 11. ſ. 3. enacts the ſame proviſion with regard to the officers and ſervants of the South-Sea company, in the ſame terms as are contained in the ſtat. 15 Geo. 2. c. 13. ſ. 12.

§ 21. *By perſons in the Poſt-office.* 5 G. 3. c. 25. ſ. 17. 7 Geo. 3. c. 50. ſ. 1.

By the ſtat. 7 Geo. 3. c. 50. ſ. 1. re-enacting more largely the proviſions of the 5 Geo. 3. c. 25. ſ. 17. it is enacted, that "if any deputy, clerk, agent, letter-carrier, poſt-boy, "or rider, or any other officer or perſon whatſoever em-

Ch. XVI. § 22. *By persons in the Post-office.*

Vi. post. § 24. 38. *further provisions respecting larceny in general of letters.*

" ployed in receiving, ſtamping, forting, charging, carrying, " conveying, or delivering, letters, or packets, or in any " other buſineſs relating to the poſt-office, ſhall ſecrete, em- " bezzle, or deſtroy, any letter, packet, bag, or mail of letters " which they ſhall be entruſted with, or which ſhall have " come to their poſſeſſion, containing any bank note, bank " poſt bill, bill of exchange, exchequer bill, South-Sea or " Eaſt-India bond; dividend-warrant of the Bank, South- " Sea, Eaſt-India, or any other company, ſociety, or corpo- " ration; navy, or victualling, or tranſport bill, ordnance " debenture, ſeamen's ticket, ſtate lottery ticket, or certifi- " cate, Bank receipt for payment on any loan, note of aſ- " ſignment of ſtock in the funds, letter of attorney for re- " ceiving annuities or dividends, or for ſelling ſtock in the " funds, or belonging to any company, ſociety, or corpora- " tion; American provincial bill of credit, goldſmiths' or " bankers' letter of credit, or note, for or relating to the " payment of money, or other bond, or warrant, draught, " bill, or promiſſory note whatſoever for the payment of " money; or ſhall ſteal and take any of the ſame out of any " letter or packet that ſhall come to his poſſeſſion; every " ſuch offender ſhall on conviction be deemed guilty of " felony, and ſuffer death without benefit of clergy."

Clay's caſe, York Lent Aſſ 1784. cor. Willes J. MS. Cr. Caſ. Ref. & MS. Buller J.

Upon a conference of all the Judges in the caſe of Charles Clay, in Eaſter term 1784, they held it not to be neceſſary in order to ground a conviction on the abovementioned ſtatute that the perſon employed by the poſt-office ſhould have taken the oath mentioned in the ſtat. 9 Ann. c. 10. ſ. 41. (*a*).

Shaw's caſe, O.B. May 1771, 2 Blac. Rep. 789. Qu. *Whether one indicted as a charger and forter of letters may not be convicted as a forter only? but if acquitted on the ſpecial count he cannot be convicted on a general count as a perſon employed in the Poſt-office, on evidence that he was no otherwiſe employed than as a forter.*

Shaw being indicted on theſe ſtatutes was charged in the 1ſt and 3d counts as a clerk employed *in charging and forting* letters in the poſt-office; and in the 2d and 4th, *as a perſon employed in the buſineſs relating to the General Poſt-office.* It turned out that he was only a *forter*, and not a charger of letters; and was therefore acquitted by order of the court

(*a*) It is thereby enacted, that no perſon ſhall be capable of exercising any employment relating to the poſt-office, &c. unleſs he ſhall have firſt taken a certain oath: but no penalty is annexed to the omiſſion thereof. The priſoner was acquitted on the firſt indictment on the ſuppoſed validity of the objection that he had not taken ſuch oath; but as other indictments were pending againſt him for the like offences, it was thought neceſſary to take the opinion of the Judges on the point.

on

Ch. XVI. § 22. *By perſons in the Poſt-office.*

on the 1ſt and 3d counts, and found guilty on the other two. Whereupon it was objected, that having been acquitted on the counts charging him as a forter and charger, and as he did not appear to have been employed by the poſt-office in any other buſineſs than that of forting, which is one of the employments particularly ſpecified in the ſt. 7 G. 3. he ought not to have been convicted on the other two counts. And of this opinion were all the Judges preſent, upon argument before them at Serjeants'-Inn: but they inclined to think that the jury might have convicted the priſoner on the 1ſt and 3d counts, by a ſpecial finding that he was a forter only.

§ 22. *As to the contents of the letter.* Willoughby's caſe, Warwick Lent Aſſ. 1783. MS. Gould J. *A bill of exchange may be laid as a warrant for the payment of money within the ſtat.*

Benjamin Willoughby was indicted on the ſtat. 7 G. 3. c. 50. for that he, being a clerk employed in the poſt-office at Birmingham in ſtamping and charging letters, &c. ſtole and took out of a letter which was put into the office there *a certain warrant for the payment of money* of the following tenor:

Poſt Bill.

N° 6127. Birmingham, 13th Febr 1783.

Sir Wm Lemon Bt and Co Bankers, London.

Pay 5 Gs to Mr Richd Moore or bearer on Demd value recd Robt Coales.

Five Gs

entd R. Moore.

The fact of ſtealing being proved, it was objected, that according to the true conſtruction of the ſtatute this was *not a warrant for the payment of money*, but a *poſt* bill (*a*), note, *or bill of exchange.* And the priſoner being found guilty, judgment was reſpited to take the opinion of the Judges. At a conference of the Judges in Eaſter term 1783, Aſhhurſt J., Perryn B., and Buller J. doubted at firſt whether this were a warrant within the meaning of the act. For the act having enumerated ſpecific things, and bills of exchange being expreſsly mentioned, the words "other warrant" muſt mean ſomething beſides a bill of exchange, viz. warrants from ſome of the public boards for payment of money, which are ſpecific things differing from bills of exchange; and therefore as this was a bill of exchange, the deſcription in the indictment was improper. But finally they admitted, that the caſe

(*a*) It was obſerved, that the words of the act are, "*Bank* poſt bill." MS. Gould J. MS. Buller J.

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Vide tit. Forgery.

could not be diſtinguiſhed from R. v. Shepherd, Mich. 1781, where, in forgery, the indictment was laid in the ſame manner, and holden good. And the other nine Judges were all clear (and the three finally appeared to be ſatisfied) that the indictment was well laid; for though it was a bill of exchange, it was alſo a warrant for payment of money; it was a voucher to the bankers or drawees, if genuine, for the payment: and it might alſo have been laid to be a draught. Gould J. compared this to Mitchell's caſe, Foſt. 119. where a warrant or order for payment of money or delivery of goods was holden to mean where a man has money or goods in the hands of another, not where he directs them to be ſupplied on credit: and conſidering this, whether as a bill of exchange or warrant, it purported that Coales had money in the drawer's hands. Eyre B. ſaid it would be the ſame if a dividend-warrant of the Bank were made in the form of a bill of exchange. And they were of opinion that the indictment might be laid either way.

MS. Crown Caſ. Reſ.

Skutt's caſe, O. B. 1774, cor. Willes J. & Glyon Recorder, 1 Leach, 124. *Stealing letters containing money not within the ſtatute.*

Timothy Skutt, who was a ſorter of letters in the poſt-office, ſtole two letters, each containing 5s. 3d. in gold coin; and being indicted on theſe ſtatutes, and the fact proved; it was objected, that as the letters contained money, and not any ſecurity relating to the payment of money mentioned in the acts, the caſe did not fall within them: and the court being of the ſame opinion, he was acquitted on that indictment; but was again indicted and convicted of grand larceny for ſtealing the money, and was tranſported.

Iſaac Moore's caſe, O. B. Sep. 1792, cor. Hotham B. MS. Buller J. (S. C. 2 Leach, 655.) *Indictment for ſecreting two letters containing therein a Bank note, and proof that it was ſent in halves on different days, held within the act. Aliter perhaps of a taking.*

In Moore's caſe it was holden upon a conference by all the Judges (except Buller J. who was abſent, and doubted) that a letter-carrier ſecreting half a bank note in one letter on one day, and the other half in another on another day, is a ſecreting within the ſtat. 7 Geo. 3. c. 50. The doubt was, whether *ſecreting* in the ſtatute did not mean the original ſecreting, as taking does. But they diſtinguiſhed between taking and ſecreting; for after the priſoner had got poſſeſſion of the ſecond letter, he ſecreted both. In that caſe, one count of the indictment charged the priſoner with ſecreting *two certain letters* before ſent by the poſt, then containing therein a certain bank note; to which alone the evidence applied.

The

Ch. XVI. § 22. *By perſons in the Poſt-office.*

Poſt. f. 37.

The note or other ſecurity ſtolen in the letter may be deſcribed generally in the indictment, as appears by the caſe of Milnes aftermentioned.

§ 23. *As to the intent.*

Joſeph Sloper's caſe, O. B. Jan. 1772, cor. Blackſtone J. 1 Leach, 94. *Secreting a letter containing a Bank note, not knowing the contents, but with intent only to embezzle the poſtage paid.*

In Sloper's caſe, who was indicted on the ſame ſtatutes of G. 3. the jury found ſpecially that the priſoner was a perſon employed by the poſt-office in ſtamping and facing letters: and that on the 26th October 1771 he ſecreted a letter which came into his hands by virtue of his office, containing a 10l. bank note; but that he did not open the ſame, nor know that the bank note was contained therein; but that he ſecreted it with intent to defraud the king of the poſtage thereof, which had been paid. The priſoner remained, it is ſaid, in Newgate ſeveral years for judgment, but it does not appear what judgment was given.

Vide Howatt's caſe, poſt. f. 39.

This caſe ſeems to fall within one of the offences provided for by the 19th clauſe of the ſtat. 5 Geo. 3. c. 25. after mentioned: but ſome difficulty might have ariſen in bringing it within the correſponding clauſe of the 7 Geo. 3. c. 50. f. 3. becauſe it appeared that the letter had not been deſtroyed, but was found in the priſoner's cuſtody.

§ 24.

5 Geo. 3. c. 25. f. 19. *Embezzling the poſtage received, or deſtroying letters, or advancing rate of poſtage, and not accounting for the ſame, felony.*

Vide Howatt's caſe, poſt. f. 39.

It is further enacted by the ſtat. 5 Geo. 3. c. 25. f. 19. that "if any deputy, clerk, agent, letter-carrier, or other "ſervant appointed, authorized, and entruſted to take in "letters or packets, and receive the poſtage thereof, ſhall "embezzle or apply to their own uſe any money or monies "by him or them received with ſuch letters or packets for "the poſtage thereof; or ſhall burn or otherwiſe deſtroy "any letter or letters, packet or packets by him, &c. ſo taken "in or received; or who by virtue of their reſpective offices "ſhall advance the rates upon letters or packets ſent by the "poſt, and ſhall not duly account for the money by him, &c. "received for ſuch advanced poſtage; every ſuch offender, "being thereof convicted, ſhall be deemed guilty of "felony."

The wording however of the correſponding clauſe (f. 3.) in the ſtat. 7 Geo. 3. c. 50, varies very materially from the foregoing, though it does not profeſs in terms to repeal it. It is however intitled "An act to amend certain laws re-

Ch. XVI. § 24. *By perſons in the Poſt-office.*

" lating to the revenue of the poſt-office," &c. and enacts, that " if any deputy, clerk, agent, letter-carrier, officer, or " other perſon whatſoever, employed in any buſineſs relating " to the poſt-office, ſhall take and receive into his, her, or " their hands or poſſeſſion any letter or letters, packet or " packets, to be forwarded by the poſt, and receive any ſum " or ſums of money therewith for the poſtage thereof, ſhall " after the firſt November 1767 burn or otherwiſe deſtroy " any letter or letters, packet or packets, by him, her, or them " ſo taken in, or received; or if any ſuch deputy, clerk, " agent, letter-carrier, officer, or other perſon whatſoever, " ſo employed, ſhall advance the rate or rates of poſtage " upon any letter or letters, packet or packets, ſent by the " poſt, and ſhall ſecrete and not duly account for the money " by him, her, or them received for ſuch advanced poſtage; " every ſuch offender or offenders, being thereof convicted " as aforeſaid, ſhall be deemed guilty of felony."

With reſpect to other felonies touching the poſt-office which relate more to the things ſtolen than to the perſons by whom ſuch offences are committed, they will be more properly treated of under the next head of inquiry, of what things larceny may be committed.

Poſt. f. 38.

§ 25. *By manufacturers.* 17 Geo. 3. c. 56.

By the ſtat. 17 Geo. 3. c. 56. ſ. 1. perſons employed in the felt or hat, woollen, linen, fuſtian, cotton, iron, leather, fur, hemp, flax, mohair, or ſilk manufactures, or in manufactures of the ſaid materials mixed one with another, who ſhall purloin, embezzle, ſecrete, ſell, pawn, exchange, or otherwiſe unlawfully diſpoſe of any of the materials with which they are entruſted, whether wrought up or not, are puniſhable in a ſummary manner before two juſtices; who are directed, for the firſt offence to commit the offender to the houſe of correction or other public priſon, there to be kept to hard labour not leſs than 14 days nor more than three months, and for any ſubſequent offence not leſs than three nor more than ſix months; and in either caſe may alſo in diſcretion order the party to be once publicly whipped. And by ſ. 3. if any perſon ſhall buy, receive, accept, or take by way of gift, pawn, pledge, ſale, or exchange, or in any other manner whatſoever from any ſuch perſon before deſcribed, ſuch materials, &c. they ſhall on like ſummary conviction for the firſt offence forfeit not leſs than 20l. nor more than 40l. to be applied as therein directed, or on failure of payment ſhall be committed in like manner for not more than ſix nor leſs than three months, or committed for three entire days and once publicly whipped; for a ſecond offence to be committed to the quarter ſeſſions, and on conviction ſhall forfeit not more than 100l. nor leſs than 50l., or on failure of payment ſhall be committed to houſe of correction, &c. there to be kept to hard labour not more than ſix nor leſs than three months, or for three entire days and to be once publickly whipped. By ſ. 5. ſelling, pawning, pledging, exchanging, or otherwiſe unlawfully diſpoſing of any of the ſaid materials, knowing them to have been embezzled, &c. ſubjects the offender to the ſame puniſhment as the principal.

Ch. XVI. § 25. *By manufacturers.*

I have referred to the above ſtatute as the moſt general in its operation for withdrawing petty offenders of this deſcription from the cognizance of the ordinary tribunals, and ſubjecting them to a ſummary juriſdiction: but there are various other ſtatutes of the ſame kind which are to be met with in Mr. Burn's Juſtice of the Peace, touching larcenies by particular deſcriptions of the ſame perſons.

§ 26. *By lodgers.*

It was doubted in Mary Raven's caſe whether a lodger fraudulently purloining any of the furniture in his lodging were guilty of larceny, he having, as was thought, a kind of ſpecial property in the goods. And in Rex v. Meeres and others, T. 1 W. & M. a majority of the Judges determined in the negative. And yet if it clearly appear that he took the lodgings with intent to gain a better opportunity of rifling them, and to elude the law, there ſeems no reaſon why it ſhould not be felony at common law. And in the laſt-mentioned caſe, Rokeſby and Ventris Js. concurred with the majority, becauſe no ſuch intent appeared; and all thought the principal point deſerving of very good conſideration. But the ſtat. 3 & 4 W. & M. c. 9. appears to have gone ſtill further, by enacting and *declaring*, " that if any perſon or " perſons ſhall take away, with intent to ſteal, embezzle, or " purloin, any chattel, bedding, or furniture, which by con- " tract or agreement he or they are to uſe, or ſhall be let to " him

2 MS. Sum. 236. 1 Hawk. ch. 33. ſ. 10. Mary Raven's caſe, O. B. 14 Car. 2. Kel. 24. 81, 2. Meere's caſe, 1 Show. 50.

3 & 4 W. & M. c. 9. ſ. 5.

Ch. XVI. § 26. *By lodgers.*

" him or them to uſe in or with ſuch lodging'; ſuch taking, " embezzling, or purloining ſhall be to all intents and pur- " poſes taken, reputed, and adjudged to be larceny and fe- " lony; and the offender ſhall ſuffer as in caſe of felony."

But notwithſtanding this is a declaratory as well as enacting law in the terms of it, yet the declaratory part of it muſt be conſtrued with reference to the preamble, and by which alone it ſeems to be warranted (*a*); and that recites that it was a frequent practice " to hire lodgings *with an intent to have* " *an opportunity to take away, embezzle, or purloin the goods and* " *furniture being in ſuch lodgings.*"

Palmer's caſe, Suſſex Lent Aſſ. 1795, MS. Jud. & MS. Buller J. (S. C. 2 Leach, 782.) *Where the whole houſe ready furniſhed was let to the priſoner, he cannot be indicted on the ſtat.* 3 & 4 W. & M. c. 9. *for ſtealing the goods in the lodging-houſe: particularly where by the agreement he was to make good everything which was miſſing or injured.*

As to what ſhall be conſidered as a lodging within the act; Charles Palmer was indicted for ſtealing ſome ſilver ſpoons of J. G. " in a *lodging-houſe* of the ſaid J. G. let by him to the priſoner, and to be uſed by the priſoner with the ſaid *lodging-houſe.*" Another count deſcribed the place as *lodgings*, inſtead of a *lodging-houſe*, to which the evidence did not apply; the fact appearing to be, that the priſoner had hired the whole houſe ready furniſhed by the week: and it was particularly agreed that he ſhould make good every thing which was miſſing or injured (*b*). The ſpoons ſtolen by him were let with the houſe. After conviction, ſentence was reſpited upon a doubt whether the caſe were within the ſtatute, which uſes the word *lodging* and not *lodging-houſe*; and the caſe, by deſire of the priſoner, was argued before all the Judges (except Aſhhurſt J.) in the Exchequer-chamber on the 16th of June 1795. On the 25th of the ſame month all the Judges (in the abſence of Groſe J.) agreed that this was not a caſe within the act of parliament. Eyre C. J. ſaid, it was meant to apply to caſes where the owner had a poſſeſſion, and the lodger the uſe, and was made to obviate a doubt as to the owner's poſſeſſion: and Buller J. referred to the ſtat. 30 Geo. 2. c. 3. as explanatory of the word Lodger, which gives a penalty againſt *houſeholders* for not giving an account of their *lodgers* to the aſſeſſors of the land-tax. It was alſo thought by ſome that the agreement to make good what ſhould be miſſing took this caſe out of the ſtatute.

(*a*) Except perhaps where the owner continuing in the houſe may be ſaid to retain the *poſſeſſion* of the furniture, and the lodger to have only the *uſe*.

(*b*) There was alſo another count for a common larceny.

An

Ch. XVI. § 26. *By lodgers.*

An indictment on this ſtatute charged the priſoner with ſtealing of T. N. certain articles of furniture ſpecified, " the ſame goods and chattels being in a certain lodging-room in the dwelling-houſe of the ſaid T. N. there ſituate, let by contract by the ſaid T. N. to the ſaid defendant, and to be uſed by the ſaid defendant with the lodging aforeſaid," &c. After conviction, it was objected in arreſt of judgment, that the indictment was defective in not having ſtated that the goods were let *at the time* they were ſtolen. But in Michaelmas term 1793 all the Judges held the indictment ſufficient. Mr. Juſtice Aſhhurſt, in delivering the opinion of the Judges at the O. B. in the December following ſaid, that if the words " in the dwelling-houſe of the ſaid T. N." were put in a parentheſis, it would make the ſenſe clear, and the averment would be ſufficient; for then it would run thus, " the ſame goods and chattels being in a certain lodging-room (in the dwelling, &c.) let by contract, &c. and to be uſed by the ſaid defendant with the lodging aforeſaid." And he obſerved that indictments on this ſtatute had always been drawn in the preſent form.

Bernell's caſe, O.B. June 1793, MS. Buller J. (S. C. 2 Leach, 668.) *Form of indictment in deſcribing the goods let with the lodging at the time.*

Seſſ. Pap. p. 168.

The indictment on the ſtatute muſt alſo ſet forth as well the name of the perſon by whom, as of the perſon to whom the lodgings were let.

Ann Pope's caſe, O.B. July 1784, cor. Adair Serjt. Rec. 1 Leach, 377. Seſſ. Pap. No. 747.

4. *Of what Things Larceny may be committed.*

§ 27. *Of goods perſonal, not of realty.* 1 Hawk. ch. 33. ſ. 21. 2 MS. Sum. 247. 1 Hale, 509, 510. 4 Blac. Com. 233. Sum. 65. Staundf. 25. b.

It muſt be of goods perſonal, and not of chattels real, or ſuch as are annexed to the freehold, unleſs in certain caſes provided for by ſtatute. For at common law it is merely a treſpaſs, and not a felony to take ſuch things: the reaſon of which ſeems to be, that things annexed to the freehold, being uſually more difficult to remove, are leſs liable to be ſtolen, and therefore need not be ſecured by ſuch ſevere laws as mere perſonal goods require. Wherefore no larceny can be committed of trees, graſs, hedges, ſtones, or lead of a houſe, or the like. But when once they are ſevered from the freehold, either by the owner, or even by the thief himſelf, if there be an interval between his ſevering and taking them away, ſo that it cannot be conſidered as one continued act, it would then be felony to take them away. Thus of wood

cut,

Ch. XVI. § 27. *Of goods perſonal, not of realty.*

cut, graſs in cocks, ſtones dug out of a quarry, larceny may be committed. But ſeveral exceptions to the general rule have been made by ſtatute.

§ 28. *Garden roots, ſhrubs, &c.* 6 Geo. 3. c. 36.

By ſtat. 6 Geo. 3. c. 36. ſ. 1. "Every perſon who ſhall, "*in the night-time*, pluck up, dig up, break, ſpoil, or deſtroy, "or carry away any root, ſhrub, or plant, or roots, ſhrubs, "or plants, of the value of 5 s., and which ſhall be growing, "ſtanding, or being in the garden-ground, nurſery-ground, "or other incloſed ground of any perſon or perſons whom-"ſoever, ſhall be deemed guilty of felony, and ſubject to "the pains and penalties thereof: and the court before "whom the trial is had ſhall have authority to tranſport the "offender for 7 years in like manner as other felons, &c. "And perſons wilfully aiding, abetting, or aſſiſting therein, "or who ſhall buy or receive ſuch root, ſhrub, or plant, "roots, ſhrubs, or plants, of the value aforeſaid, knowing "the ſame to be ſtolen, ſhall be ſubject to the ſame puniſh-"ment as if they had ſtolen the ſame."

6 G. 3. c. 48. ſ. 3.

Then by another ſtat. of the ſame ſeſſion, (c. 48. ſ. 3.) "Every perſon who ſhall pluck up, or cut, ſpoil, or deſtroy, "or take or carry away, any root, ſhrub, or plant, roots, "ſhrubs, or plants, out of the fields, nurſeries, gardens, or "garden grounds, or other cultivated lands, of any perſon "or perſons, without the conſent of the owner or owners; "and ſhall be convicted thereof before one juſtice of the "peace, &c. ſhall forfeit for the firſt offence not exceeding "40 s.; for the ſecond offence not exceeding 5 l.; and if "any perſon ſo before convicted ſhall a third time commit "the like offence, and ſhall be thereof convicted, ſuch per-"ſon ſo convicted ſhall for ſuch third offence be deemed "guilty of felony; and the court before whom ſuch perſon "ſhall be tried ſhall have authority to tranſport ſuch perſon "for ſeven years to any of his majeſty's plantations in Ame-"rica, in like manner as other felons are directed, &c. by "the laws of this realm."

R. v. Hitchcock and Howe, Hil. 1788, MS. Buller J. & 2 MS. Sum. 225. (S. C. 2 Leach, 541.)

In the caſe of Hitchcock and Howe, eleven Judges preſent, in Hilary term 1788, all held that the firſt of theſe acts is not repealed by the ſecond; but they ſhall be conſidered as one act, being paſſed in the ſame ſeſſion. They ſaid it was mere

mere accident in what order the chapters in the ſtatute book were arranged; it depended on the will of the clerks of the parliament; and if the chapters were tranſpoſed in this caſe, there could be no doubt that the reſult of the two acts conſtrued together would be, that if the property taken or deſtroyed were of the value of 5 s., and the fact were done in the night-time, it was felony under the former ſtatute; but that in all other caſes the offence muſt be proſecuted under the laſt act. But that the court were not obliged to tranſport the offender under the firſt act, but might paſs any other ſentence that could be paſſed for a ſingle felony. But by Buller J. If the two ſtatutes had been made in different ſeſſions, undoubtedly the laſt would have been a virtual repeal of the former.

Ch. XVI. § 28. *Garden roots, ſhrubs, &c.*

under the two acts conſtrued together, if the offence be committed in the night to the value of 5 s. it is felony.

With reſpect however to the "ſtealing and taking away, or "maliciouſly pulling up or deſtroying any turnips, potatoes, "cabbages, parſnips, peaſe, or carrots growing or being in "any garden, lands, or grounds, open or incloſed," the offenders are by the ſtat. 13 Geo. 3. c. 32. ſubjected on a ſummary conviction before a juſtice of peace to a ſmall fine, or in default thereof to impriſonment in the houſe of correction. And the ſtat. of the 23 Geo. 2. as to the ſtealing of turnips is repealed.

Stat. 13 Geo. 3. c. 32. *Stealing turnips, potatoes, &c. ſubjected to a ſummary juriſdiction.*

§ 29. *Timber trees, &c.* 6 Geo. 3. c. 36. *Vide* laſt ſection.

The like conſtruction applies to another ſubject of larceny contained in the foregoing ſtatutes. By the ſtat. 6 Geo. 3. c. 36. "Every perſon who ſhall *in the night-time* lop, top, "cut down, break, throw down, bark, burn, or otherwiſe "ſpoil or deſtroy, or carry away, any oak, beach, aſh, elm, "fir, cheſnut, or aſp timber-tree, or other tree ſtanding for "timber, or likely to become timber, without the conſent "of the owner or owners thereof firſt had and obtained, "ſhall be deemed guilty of felony and ſubject to the pains "and penalties thereof. And the court before whom ſuch "offenders are tried ſhall have authority to tranſport them "for ſeven years in like manner as other felons, &c. And "every perſon who ſhall be wilfully aiding, abetting, or aſ-"ſiſting in ſuch cutting down, breaking, throwing down, "barking, burning, or otherwiſe ſpoiling or deſtroying, or

Aiders and abettors, &c.

Ch. XVI. § 29. *Timber trees, &c.*

" carrying away any ſuch oak, beach, &c. ſhall be ſubject " to the ſame puniſhment as if they had ſtolen the ſame."

6 Geo. 3. c. 48.

Then by the ſtat. 6 Geo. 3. c. 48. " Every perſon who " ſhall wilfully cut or break down, bark, burn, pluck up, lop, " top, crop, or otherwiſe deface, damage, ſpoil, or deſtroy, " or carry away any timber-tree or trees, or trees likely to " become timber, or any part thereof, or the lops or tops " thereof, without the conſent of the owner or owners firſt " had, or in any of the king's foreſts or chaces, without the " conſent of the ſurveyor, his deputy, or perſon entruſted " with the care thereof, ſhall on conviction before one juſ- " tice of peace for the firſt offence forfeit a ſum not exceed- " ing 20l. &c.; for a ſecond offence not exceeding 30l. &c. " And if any perſon, ſo convicted, ſhall be guilty of the like " offence a third time, and ſhall be thereof convicted in like " manner (*a*), ſuch perſon ſhall be deemed guilty of felony, " and the court before whom he ſhall be tried ſhall have " authority to tranſport him for 7 years in like manner as " other felons," &c.

Sect. 2. enacts, that " all oak, beach, cheſnut, walnut, " aſh, elm, cedar, fir, aſp, lime, ſycamore, and birch trees, " ſhall be deemed timber-trees within *this* act." To which the ſtat. 13 Geo. 3. c. 33. adds poplar, alder, larch, maple, and hornbeam; in the ſame manner as if inſerted in the laſt-mentioned act.

§ 30. *Lead, iron, &c. affixed to buildings.*

4 Geo. 2. c. 32.

By ſtat. 4 Geo. 2. c. 32. it is enacted, that " every per- " ſon who ſhall ſteal, rip, cut, or break, with intent to ſteal, " any lead, iron bar, iron gate, iron paliſadoe, or iron rail " whatſoever, being fixed (*b*) to any dwelling-houſe, out-

(*a*) Mr. Burn, 4th vol. tit. Wood, ſ. 7. properly obſerves, that the words " *in* " *like manner*" here are inſerted by miſtake; for it could not be intended that a juſtice of peace ſhould have a power of tranſporting a man. But he obſerves that the word *court* which afterwards follows, and which, as it ſeems by other parts of the act, means the aſſizes or ſeſſions, implies a legal trial by jury. Perhaps thoſe words were intended only to mean *by the like evidence.*

(*b*) In Hedge's caſe, O. B. May 1779, (reported in 1 Leach, 240.) the queſtion turned on Whether the window ſaſhes ſtolen were *fixed* to the freehold? and under the circumſtances there ſtated it was ruled in the negative. In truth it was only a *temporary* faſtening. *Vide* Seſſ. Pap. 276.

" houſe,

" houſe, coach-houſe, ſtable, or other building uſed or occu- " pied with ſuch dwelling-houſe or thereunto belonging, or " to any other building whatſoever; or fixed in any garden, " orchard, court-yard, fence, or out-let, belonging to any " dwelling-houſe *or other building*, ſhall be deemed guilty of " felony; and every ſuch felon and felons ſhall be ſubject to " the like pains and penalties as in caſes of felony: and the " court by and before whom ſuch perſon or perſons ſhall be " tried ſhall have power to tranſport ſuch felons for ſeven " years, in like manner as other felons, &c. All and every " perſon who ſhall be aiding, abetting, or aſſiſting in ſtealing " or in ſuch ripping, &c. or who ſhall buy or receive any " ſuch lead, iron bar, &c. knowing the ſame to be ſtolen, " ſhall be liable to the ſame puniſhment as if he, ſhe, or they " had ſtolen the ſame; any law to the contrary notwith- " ſtanding."

Ch. XVI. § 30. *Lead, Iron, &c. affixed to buildings.*

Vide 29 Geo. 2. c. 30. as to receivers, poſt. ſ. 144.

By the ſtat. 21 Geo. 3. c. 68. intitled " an act to explain " and amend" the former act; after reciting the ſame, and that " the ſtealing of copper, braſs, and bell-metal affixed to " dwelling-houſes and the appurtenances thereto is not there- " by expreſsly prohibited and made puniſhable," enacts " that " all and every perſon and perſons who ſhall ſteal, rip, cut, " break, or remove with intent to ſteal any copper, braſs, " bell-metal, utenſil, or fixture, being fixed to any dwelling- " houſe, out-houſe, coach-houſe, ſtable, or other building " uſed or occupied with ſuch dwelling-houſe or thereunto " belonging, or to any other building whatſoever, or fixed in " any garden, orchard, court yard, fence, or outlet belonging " to any dwelling-houſe or other building, or any iron rails " or fencing ſet up or fixed in any ſquare, court, or other " place (ſuch perſon having no title or claim of title there- " to), ſhall be deemed and conſtrued to be guilty of felony; " and the court by and before whom ſuch perſon or perſons " ſhall be tried and convicted, ſhall, and hereby have power " and authority to tranſport ſuch felons for the term of ſeven " years, in like manner as other felons are directed to be " tranſported by the laws and ſtatutes of this realm; or to " order and direct that ſuch offender be kept and detained " in priſon, and therein kept to hard labour for any time not " exceeding three years, nor leſs than one year; and within

21 Geo. 3. c. 68. *extending the ſame proviſions to copper, braſs, and bell metal.*

" that

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" that time, if ſuch court ſhall think fit, ſuch offender ſhall " be once or oftener, but not more than three times, pub- " licly whipped: and all and every perſon and perſons who " ſhall be aiding, abetting, or aſſiſting in ſtealing, or in ſuch " ripping, cutting, breaking, or removing any copper, braſs, " bell-metal, utenſil, or fixture fixed to any dwelling-houſe, " out-houſe, coach-houſe, ſtable, or other building, or fixed " in any garden, orchard, court yard, fence, or outlet, be- " longing to any dwelling-houſe, or other building, or any " iron rails, or fencing, ſet up or fixed in any ſquare, court, " or other place; or who ſhall buy or receive any ſuch cop- " per, braſs, bell-metal, utenſil or fixture, iron rails, or " fencing, knowing the ſame to be ſtolen, ſhall be ſubject " and liable to all and every the ſame puniſhments, pains, " and penalties, as if he, ſhe, or they had ſtolen the ſame; " although the principal felon or felons has not or have not " been convicted of ſtealing the ſame; any law to the con- " trary in any wiſe notwithſtanding."

§ 31. *Conſtruction of the ſtatutes.*

Rex v. Parker and Eaſy, Suffolk Sum. Aſſ. June 1782, MS. Gould and Buller Js. and MS. Jud.

In the caſe of Parker and Eaſy, who were indicted on the ſtat. 4 Geo. 2. a majority of the Judges determined in Mich. term 1782 that a church was within the meaning of the words, " *or other building.*" It was there doubted whether thoſe words muſt not be conſtrued with reference to the ſame ſort of buildings as were before expreſſed; particularly as the ſubſequent act of the 21 Geo. 3. c. 68. intitled an act to explain and amend the former, recites that the ſtealing of copper, &c. affixed to dwelling-houſes *and the appurtenances thereto* was not expreſsly prohibited by that act, &c.; which latter ſtatute being paſſed in pari materiâ might be conſidered as explanatory of the other. But Lord Mansfield ſaid, there was a great difference between bringing a caſe within the equity of an act where it was not within the words, and taking a caſe out of the meaning of an act by an equitable conſtruction, where it was within the words. That the firſt ought never to be done in a criminal caſe; neither ought the ſecond, if the caſe were in equal miſchief with others clearly within the meaning of the act. That here the words of the act compriſed the caſe in queſtion, and churches were equally within the miſchief with dwelling-houſes. But all the

MS. Buller J.

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the Judges agreed that the property of lead fixed to a church cannot be laid to be either in the churchwardens or in the inhabitants and pariſhioners; and it being ſo laid here, the conviction was holden wrong.

R. v. Hickman & Dyer, O. B. May 1784, 2 MS. Sum. 139. (*Vide* 1 Leach, 358.) poſt. t. 29.

In the caſe of Hickman and Dyer, the indictment was for ſtealing ſo much lead " belonging to the Rev. C. G., clerk, and then and there fixed to a certain building called Hendon church;" the ſecond and third counts were the ſame, only ſtating the lead to belong the one to " J. B. &c. the church-wardens of the pariſh; the other, to the inhabitants and pariſhioners." In Eaſter term 1785 the Judges, who had before been much divided in opinion, all held the indictment good on the firſt count (which laid the property in the vicar). But many of them thought that the better way of laying the caſe would be to allege the lead to have been " fixed to a certain building, being the pariſh church," &c. without ſtating the property to be in any one. Buller J. thought that charging it to be property was abſurd and repugnant; property (in this reſpect) being only applicable to perſonal things; and that it ſhould only be charged to be lead affixed to the church, or to a houſe belonging to ſuch a perſon: and that the allegation as to property in this indictment ſhould be rejected as ſurpluſage.

Vide Watſon's Clerg. Law. 391. the ſoil and freehold of the body of the church is in the vicar.

John Davis's caſe, O. B. Jan. 1792, MS. Jud.

But where an indictment on the ſame ſtatute charged the priſoner with ſtealing iron rails fixed to a tomb in a church-yard belonging to a certain building called Iſlington church; and laid reſpectively to be the property of the vicar, church-wardens, pariſhioners, and of a perſon unknown; and it appeared that the tomb was not connected by any building with the church; all the Judges, on reference to them, held that the offence laid was not within the ſtatute.

R. v. Senior, O. B. Sept 1788, cor Gould and Grole Js and Hotham B. and Adair Serjt. Recorder. 1 Leach, 559.

John Senior was indicted on the ſtatutes 4 Geo. 2. c. 32. and 21 Geo. 3. c. 68. for ſtealing *a window caſement made of iron, lead, and glaſs*, the property of the Benchers of the Middle Temple, fixed to a certain building, &c. The court held that the caſe was not within the acts; for they do not mention *a caſement*. The priſoner was afterwards indicted for a ſimilar offence in the December ſeſſions following before Wilſon J. and acquitted on the authority of the above caſe.

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Robert Munday was indicted on the ſtat. 4 Geo. 2. c. 32. for ſtealing 200 cwt. of lead fixed to a houſe, &c. The property was laid in different perſons. The houſe was to be let, and the priſoner under a falſe deſcription of his ſituation and place of reſidence obtained poſſeſſion of it under a treaty for a leaſe of it for 21 years, which was agreed to be executed: but immediately after he ſtripped it of all the leaden pipes, lead on the roof, &c.; and the jury found that he had entered into the contract for the purpoſe of getting a fraudulent poſſeſſion of the houſe, and found him guilty of the charge. On the caſe being reſerved for the opinion of the Judges, the printed report ſtates that no opinion was publicly delivered, but the priſoner in May following had judgment of impriſonment for two years in the houſe of correction.

Munday's caſe, O. B. Feb. 1799, 2 Leach, 991. *Stealing lead, &c. from houſe of which party had obtained fraudulent poſſeſſion under pretence of leaſe is within the act.*

2 MS. Sum. 235. *Judgment for petit larceny within the act.*

At the Old Bailey in January 1775 one was indicted on the ſtat. 4 G. 2. for ſtealing lead, and found guilty to the value of 10d., and had judgment to be whipped; by the opinion of Aſhhurſt and Nares Js. and the Recorder; and afterwards Lord C. J. De Grey, Burland B., and Gould J. were of the ſame opinion.

§ 32. *Black lead, &c. from mines.* 25 Geo. 2. c. 10.

By the ſtat. 25 Geo. 2. c. 10. "it is enacted, that all and "every perſon or perſons who ſhall unlawfully break, or by "force enter into, any mine or mines, wad-hole or wad-"holes of wad or black cawke, commonly called black lead, "or into any pit, ſhaft, adit, or vein of wad, black cawke "or black lead, with intent to take and carry away from "thence any wad, or black cawke, or black lead, or ſhall "unlawfully from thence take and carry away any wad, "black cawke, or black lead; although ſuch mine or mines, "wad-hole or wad-holes, pit, ſhaft, adit, or vein, be not ac-"tually broken, or by force entered into by ſuch offender or "offenders; or ſhall aid, abet, aſſiſt, hire, or command any "perſon or perſons to commit ſuch offence or offences as "aforeſaid; that then, all and every ſuch perſon or perſons "ſhall be deemed guilty of felony: and it ſhall and may be "lawful for the court or Judge, before whom any ſuch per-"ſon or perſons ſo offending as aforeſaid ſhall be lawfully "convicted, to order ſuch offender or offenders to be committed

"mitted to the priſon or gaol of the ſaid county, appointed "for criminals, or to ſome houſe of correction within the "ſame county, for a time not exceeding one year; there to "be kept to hard labour during all the ſaid time, and to be "publicly whipped by the common hangman, or by the "maſter of ſuch houſe of correction, at ſuch times, and at "ſuch places, and in ſuch manner, as ſuch court or Judge "ſhall think proper. Or it ſhall and may be lawful to and "for ſuch court or Judge, or for any other ſubſequent court "held at the ſame place with the like authority as the for-"mer, to order ſuch offender or offenders to be tranſported "to ſome of his majeſty's plantations beyond the ſeas for a "term not exceeding ſeven years, as ſuch court or Judge "ſhall think moſt proper; and thereupon judgment ſhall be "given that the perſon or perſons ſo convicted ſhall be "committed and whipped, or tranſported accordingly. And "if tranſportation ſhall be directed, the ſame ſhall be exe-"cuted in ſuch manner as is or ſhall be provided by law for "the tranſportation of felons. And if any ſuch perſon or "perſons ſo committed or tranſported ſhall voluntarily "eſcape, or break priſon, or return from tranſportation be-"fore the expiration of the time for which he, ſhe, or they "ſhall be ordered to be tranſported, as aforeſaid; ſuch per-"ſon or perſons being thereof lawfully convicted ſhall ſuffer "death as a felon, without benefit of clergy; and ſhall be "tried for ſuch felony in the county where he, ſhe, or they "ſo eſcaped, or where he, ſhe, or they ſhall be appre-"hended."

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§ 33. *Coals, &c. ſevered.* 39 & 40 Geo. 3. c. 77. "An act for the "ſecurity of "collieries and "mines," &c. *Tools, &c. for cutting.*

By ſtat. 39 & 40 Geo. 3. c. 77. ſ. 5. "if any perſon "ſhall ſteal or take away any coal, culm, or coak, wood, "iron, ropes, or leather, not exceeding the value of 5s. from "any bank, yard, wharf, or other place, belonging to any "manufacturer or coal-dealer, or off or out of any boat, "barge, waggon, cart, or other carriage; or ſhall ſteal or "embezzle any tools or implements uſed for cutting or get-"ting coal, culm, or other minerals, not exceeding the value "above mentioned; and ſhall on complaint of the owner "or his agent be convicted before one or more juſtices of "peace," &c. he is ſubjected to certain penalties, or im-

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Vide tit. Cheats.

priſonment in lieu thereof or until payment: and no perſon convicted of any offence under this act ſhall be liable to be proſecuted for the ſame offence under any other law. By the ſame act, ſ. 4. " Whereas miners often defraud each " other by conveying away iron ſtone from one heap unto " another; if any perſon ſhall take and remove any iron ſtone " or iron ore, with intent to defraud the perſon or perſons " who ſhall have raiſed the ſame, he ſhall, on a ſummary " conviction before a juſtice of peace, be impriſoned not " exceeding three months."

§ 34. *Charters and writings touching the realty.*

3 Inſt. 109. Staundf. 25. b. 1 Hawk. ch. 33. ſ. 22. 1 Hale, 510. 2 Roll. Abr. 53. Weſtbeer's caſe, O. B. 1739, cor. Lord Ch. B. Comyns and Chapple J. MS. Tracy, 66. (S. C. 1 Leach, 14.)

As larceny cannot be committed of things real at common law, neither can it be committed of charters or other written aſſurances concerning the realty, becauſe they favour of the ſame nature; or as ſome writers ſay, becauſe they are not in themſelves of any value; though Lord Coke and Staundford give the ſame rule as to the box or cheſt in which they are kept, to which the latter reaſon would not apply. Upon an indictment for larceny, a ſpecial verdict was found, ſtating that the priſoner was guilty of privately taking away a parchment writing value 1 d. from the records of the Six Clerks' office, purporting to be a commiſſion under the Broad Seal; (it was a commiſſion for aſcertaining the boundaries of two manors purſuant to an order made in a cauſe in Chancery; and this was laid to be the goods of the king:) and another parchment writing annexed thereto value 1 d., purporting to be the return to the ſaid commiſſion, (which was laid to be the goods of perſons unknown,) with intent to ſteal the ſame. But the court were unanimouſly of opinion, that as theſe parchment writings concerned the realty, no larceny could be committed of them.

§ 35. *Records.*

8 Hen. 6. c. 12. ſ. 3. 1 Hale, 645.

By the ſtat. 8 H. 6. c. 12. ſ. 3. " If any record or parcel " of the ſame, writ, return, panel, proceſs, or warrant of " attorney, in the king's courts of Chancery, Exchequer, " the one Bench or the other, or in his Treaſury, be wil- " lingly, ſtolen, taken away, withdrawn, or avoided by any " clerk, or by other perſon; becauſe whereof any judgment " ſhall be reverſed; ſuch ſtealer, taker away, withdrawer, " or avoider, their procurers, counſellors, and abettors, " thereof

" thereof indicted and by proceſs thereupon made thereof, " duly convicted by their own confeſſion, or by inqueſt (viz. " half of which ſhall be of the men of any of the ſame courts, " (i. e. officers,) and the other of other men, (i. e. of com- " mon jurors) ſhall be guilty of felony." And the inquiry ſhall be before the Judges of the one or the other Bench. Though acceſſaries before only are named in the ſtatute, yet there may be acceſſaries after by general conſtruction of law. This ſtatute only extends to the courts expreſsly named, and to the court of Chancery ſo far only as it proceeds according to the courſe of the common law. And it does not extend to the Judges; becauſe clerks are firſt named who are inferior to them. But Judges in all caſes, as well as others in caſes not made felony by the above-mentioned act, are by the ſtat. 8 Rich. 2. c. 4. to pay a fine to the king, and make ſatisfaction to the party, for falſely entering pleas, or raſing rolls, or changing verdicts, to the diſheriſon of any one.

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4 Blac. Com. 128. 1 Hawk. ch. 45. ſ. 3, 4, 7. 3 Inſt. 72. 1 Hale, 649.

8 Ric. 2. c. 4.

In an indictment on this ſtatute the offence muſt be laid to be done *willingly* as well as feloniouſly.

3 Inſt. 72. 1 Hale, 650.

The juſtices of either Bench have a concurrent authority: they who firſt inquire ſhall proceed, and need no ſpecial commiſſion if the offence be committed in the county where they ſit. But if the offence be partly committed in one county and partly in another, ſo as not to amount to a complete offence in either, the party cannot be indicted in either for a felony, but only for a miſdemeanor. But though the trial is to be by a jury of the deſcription before deſcribed, yet the indictment may be found by a grand jury of either or any deſcription.

1 Hawk. ch. 45. ſ. 6. 8. 1 Hale, 651.

§ 36. *Bonds, bills, orders, warrants, tallies, &c.*

2 MS. Sum. 247. 4 Blac. Com 234. 1 Hawk. ch. 33. ſ. 22.

In order to make the ſtealing of goods felony, they ought to have ſome worth in themſelves, and not merely from their relation to ſome other thing: and therefore bonds, bills, notes, and other ſecurities, which concern mere choſes in action, were not the ſubjects of larceny at common law; being of no intrinſic value, and not importing any property in poſſeſſion of the perſon from whom they are taken. But now by ſtat. 2 Geo. 2. c. 25. ſ. 3. it is enacted, " that if " any perſon or perſons ſhall ſteal or take by robbery any " exchequer orders, or tallies, or other orders, entitling

2 G. 2. c. 25. ſ. 3. made perpetual by 9 G. 2. c. 18.

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"any other perſon or perſons to any annuity, or ſhare in any "parliamentary fund, or any Exchequer bills, Bank notes, "South-Sea bonds, Eaſt-India bonds, dividend-warrants of "the Bank, South-Sea company, E. I. company, or any "other company, ſociety, or corporation, bills of exchange, "navy bills, or debentures, Goldſmiths' notes for the pay-"ment of money, or other bonds, or warrants, bills, or "promiſſory notes, for the payment of any money, being "the property of any other perſon or perſons, or of any cor-"poration; notwithſtanding any of the ſaid particulars are "termed in law a choſe in action; ſhall be deemed guilty "of felony of the ſame nature, and in the ſame degree, and "with or without the benefit of clergy, in the ſame manner "as it would have been if the offender had ſtolen or taken "by robbery any other goods of like value with the money "due on ſuch orders, tallies, bills, bonds, warrants, deben-"tures, or notes, or ſecured thereby, and remaining unſa-"tisfied; and ſuch offender ſhall ſuffer ſuch puniſhment as "he or ſhe ſhould or might have done if he or ſhe had ſtolen "other goods of the like value with the monies due on ſuch "orders, &c. reſpectively, or ſecured thereby and remain-"ing unſatisfied."

As to what is a warrant for payment of money, *vide* ante, f. 22. & tit. Forgery.

§ 37. *Conſtruction of the act.*

Though the ſtatute mentions bank notes, &c. in the plural number, yet the ſtealing of a ſingle bank note is within it, particularly on account of the words which follow, "notwithſtanding *any* of theſe particulars may be termed in "law *a choſe in action.*"

Haſſell's caſe, O.B. Oct. 1730, cor. Ld. C. J. Raymond, Denton J. and Comyns B. Leach, 1.

At a conference of the Judges in Eaſter term 1781, Nares J. mentioned that a perſon was convicted before him for privately ſtealing from the perſon of another a pocket book containing a note of the Briſtol bank, ſigned by ſome one on behalf of himſelf and partners, promiſing to pay to the proſecutor or order a ſum of money, but which the proſecutor had not indorſed. All the Judges were of opinion that this was a capital felony within the ſtat. 22 Geo. 2. c. 25. which makes the ſtealing promiſſory notes, &c. felony with the ſame conſequences as goods of the like purported value: that this was a promiſſory note; and its not being indorſed was immaterial.

Eaſt. T. 1781, MS. Gould J. *A bill payable to order but not indorſed.*

Maria

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Maria Thereſa Phipoe was indicted on the ſtat. 2 Geo. 2. c. 25. for robbing John Courtoy in a dwelling-houſe, and taking from him a promiſſory note value 2000l., ſigned by J. Courtoy againſt the ſtatute. In another count the note was laid to be the property of Courtoy. It appeared in evidence that the proſecutor had been inveigled to the priſoner's houſe, where he was detained by force for three hours, and compelled under a menace of death to draw the promiſſory note in queſtion, (on a ſtamped paper previouſly prepared by the priſoner) dated the 30th of March 1795, for 2000l., payable at two months to the priſoner or order; which the priſoner attempted to get diſcounted the next day without ſucceſs, and which was found in her poſſeſſion when ſhe was apprehended. After conviction, a caſe was reſerved for the opinion of the Judges, which was argued before them at Serjeant's-Inn hall on the 4th of Feb. 1796; and two objections were urged on the priſoner's behalf. 1ſt, That this was no robbery within the ſtat. 2 Geo. 2. c. 25. the note being of no value while in the hands of the proſecutor; and the ſtatute only extending to ſecure valid exiſting ſecurities in the poſſeſſion of the party robbed. That nothing could be ſaid to be due on this note as the ſtatute required. That the note never was the property, nor in the poſſeſſion of Courtoy; the paper and ſtamp being the property of the priſoner, and never out of her poſſeſſion. That property implied dominion, which Courtoy never had for a moment. That the priſoner had obtained the note by dureſs and not by ſtealing. 2dly, It was objected that the indictment was bad, becauſe it ſtated the offence to have been committed againſt the form of the ſtatute, and not of the ſtatutes, the ſtat. 2 Geo. 2. c. 25. having once expired, and been revived by the ſtat. 9 Geo. 2. c. 18.

Phipoe's caſe, O.B. May 1795, cor. Groſe J. MS. Jud. S. C. 2 Leach, 774. *Where one was compelled by dureſs to make a promiſſory note on ſtamped paper before prepared by the priſoner who was preſent during the time, and withdrew the note as ſoon as it was made; held not a ſtealing or robbery of the note within the ſtatute; for according to ſome that is confined to available ſecurities in the hands of the party robbed, which this was not, being of no value while in the hands of the maker himſelf: But even if it were, yet by others, this was never in his poſſeſſion; his ſignature having been procured by dureſs to a paper which during the whole continuing tranſaction was in the poſſeſſion of the priſoner.*

To the firſt objection it was anſwered, that the ſtatute intended to put the ſecurities mentioned therein upon the ſame foot as the money they repreſented. That property conſiſting in the right of diſpoſing; and Courtoy, having by the means employed been deprived of the right of diſpoſing of the 2000l. thereby transferred to the priſoner, had therefore been deprived of ſo much property within the meaning of the act. That if the money had been actually received

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upon the note, there could have been no doubt, and the ſtatute made the taking the ſecurity as penal as taking the money ſecured. That for an inſtant the proſecutor had both the poſſeſſion and the property of the note in him, and the priſoner was guilty of a treſpaſs in taking it away from him. As to the ſecond objection, it was anſwered, that a ſtatute continuing or reviving another was not the ſtatute creating the offence, but that the offence was referable to the original ſtatute alone: and three ſeveral precedents were referred to on this ſubject; 1. The caſe of Robert Clark, who was convicted on an indictment at the O. B. Sept. 1791, for ſtealing money, goods, and a bank note. 2. The caſe of J. Randal, convicted at the O. B. May 1792, for ſtealing a note in a houſe, and afterwards executed. 3. The caſe of Lawrence Jones, convicted of the ſame offence at the October Seſſions 1793; in all which the indictments concluded againſt the form of the ſtatute.

Upon the firſt and principal point there was a difference of opinion amongſt the Judges; nine of them expreſsly held that the offence was not within the ſtatute. Some of thoſe, amongſt whom was Lord Kenyon, thought that the ſtatute was only intended to protect exiſting available notes in the hands of the perſon from whom they were taken, and that this note did not come within that deſcription, being of no value in the hands of the proſecutor. Others inclined to think that the note was of value from the moment it was drawn; but that it never was in the poſſeſſion of the proſecutor, but continued all the time in the poſſeſſion of the priſoner herſelf, by whoſe dureſs the proſecutor was compelled to make it. And in particular Eyre C. J. obſerved, that the property never exiſted till the force, but aroſe out of it; and therefore it was different from the caſe of money. And admitting that if the proſecutor had brought the note in his pocket, it would have been a caſe within the act, though the note would not be available while in his poſſeſſion (upon which point he ſhould have heſitated;) yet this was not that caſe. But all the nine Judges conſidered that the whole tranſaction was one continued act, and that the note was procured by dureſs, and not by ſtealing. One of the Judges (Aſhhurſt J.) who differed, thought that it was not a ſingle act;

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act; but that there was a diſtinguiſhable interval between the writing of the note and the actual taking of it by the priſoner, during which the proſecutor had the poſſeſſion of it; and that therefore it was taking from him an inſtrument of value within the meaning of the ſtatute, as it would have been available againſt him in the hands of an innocent holder. On this ground alſo Macdonald C. B. doubted: and the other Judge (Buller J.) was abſent.

Form of indictment laying offence againſt the form of the ſtatute, good.

Upon the ſecond point it became unneceſſary to give any opinion. But thoſe Judges who adverted to it thought the form of the indictment good; and that the *re-enacting* (*a*) ſtatute was the only ſtatute in force againſt the offence. And ſo it was afterwards expreſsly holden in the caſe of William Morgan, who was convicted before Lawrence J. at Reading Lent aſſizes 1796, upon an indictment for ſtealing Bank notes againſt the form of the ſtatute. With which Thomſon B. whom he conſulted on the occaſion declared his concurrence; conſidering the reviving ſtatute as in effect re-enacting the proviſions of the expired law.

Morgan's caſe, MS. Jud.

R. v. Sadi and Morris, O. B. 1787, MS. Buller J. S. C. poſt. 143. and *vide* Seſſ. Pap. of Feb. 1788, p. 221. for the reaſons of the judgment.

In the caſe of Sadi and Morris, which is elſewhere ſtated more at large, it was determined by all the Judges to be improper to lay Bank notes to be *chattels;* but it was alſo their opinion that that word might be rejected as ſurpluſage, if the indictment were in other reſpects ſufficient. They were there laid to be "the property and chattels" of S. S. in the count againſt the receiver.

How Bank notes to be deſcribed in indictment.

Craven's caſe, Lancaſter Sum. Aſſ. 1801, cor. Lord Alvanley, MS. Jud.

An indictment againſt Richard Craven upon the ſtat. 2 Geo. 2. c. 25. charged him with ſtealing *a certain note commonly called a Bank note,* of the value of 1l. of lawful money, &c. marked, &c. dated, &c. and ſigned by A. Hooper for the Governor and Company of the Bank of England; by which ſaid note the ſaid A. Hooper for the ſaid Governor, &c. did promiſe to pay to Mr. Abraham Newland, or bearer, on demand, the ſum of 1l., the ſaid note being the property of one T. Y.; and the ſaid ſum in the ſaid note mentioned and ſecured, &c. then, &c. being due and unſatisfied to the ſaid T. Y. the proprietor thereof; againſt the form of the

(*a*) 2 Hale 173. and Cro. Eliz. 750. which were cited, agree; but refer the offence to the *firſt* ſtatute.

ſtatute,

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ſtatute, &c. After conviction, on objection taken to the generality of the deſcription of the Bank note in the indictment, all the Judges on reference to them in Mich. term 1801, held the indictment ill laid; as in deſcribing the property ſtolen to be "*a note commonly called a Bank note*," it did not follow any of the deſcriptions of property in the ſtatute, and in other reſpects ſeemed inaccurate.

R. v. Auſtin and King, Leiceſter Lent Aſſ. 1783, MS. Gould and Buller Js. *Indictment for ſtealing a bill in L. ſuſtained by proof that when found in poſſeſſion of priſoner there it had an indorſement (made afterwards) and not laid in indictment.*

Mr. Baron Perryn reported to the Judges, that W. Auſtin and J. King were indicted for ſtealing a bill of exchange; and it appeared that when the bill was ſtolen from the proſecutor at Mancheſter, the names of John Halton and Luke Wigan only were indorſed thereon; but when it was negotiated by the priſoner Auſtin at Leiceſter, the name *Thomas Watts* was added to the two other indorſers. It was objected for the priſoner, that this being an indictment in Leiceſter, for *then and there* ſtealing a bill of exchange, whereon the names of John Halton and Luke Wigan were indorſed, it was not ſupported by evidence of a bill with the additional name of *Watts* indorſed thereon, at the time of the negotiation thereof by the priſoner in Leiceſter. But it was reſolved in Eaſter term 1783 by all the Judges, that the addition of the third name made no difference: it was the ſame bill that was originally ſtolen: and that therefore the priſoner was properly convicted.

Milnes's caſe, Worceſter Sum. Aſſ. 1800, MS. Jud. *Indictment for larceny of a promiſſory note may deſcribe it generally, as "one "promiſſory note "for the payment "of one guinea;" without ſetting the note forth; and if the value of the thing ſtolen in the dwelling houſe (including the note) be 40s. clergy is ouſted.*

(Lawrence J. abſent.)

Peter Milnes was indicted before Heath J. for ſtealing in a dwelling-houſe goods and chattels to the value of 33s., and alſo a promiſſory note for the payment of one guinea, and alſo one other promiſſory note for the payment of five guineas, all which ſaid notes were the property of J. M., and were due and unſatisfied. The priſoner was convicted; and a queſtion was reſerved for the opinion of the Judges, Whether the priſoner were entitled to his clergy? which depended on this, whether the notes were ſufficiently deſcribed in the indictment? At a conference in Mich. term 1800 many precedents were adduced of indictments drawn in the ſame general manner with reſpect to Bank notes and Bank poſt bills, ſome of them alſo including private promiſſory notes. And all the Judges held the indictment well laid, and the conviction proper.

The

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The ſtealing of ſecurities, money, or other effects of the Bank of England by their officers or ſervants, was conſidered before.

§ 38. *Letters.*

7 Geo. 3. c. 50. ſ. 2. *Vide* 5 Geo. 3. c. 25. ſ. 18. Ante, ſ. 22.

In addition to the proviſions before adverted to againſt embezzlements by officers and ſervants in the poſt office, it is alſo further enacted by ſtat. 7 Geo. 3. c. 50. ſ. 2. "that "if any perſon or perſons ſhall rob any mail or mails, in "which letters are ſent or conveyed by the poſt, of any let-"ter or letters, packet or packets, bag, or mail of letters; "or ſhall ſteal and take from or out of any ſuch mail or "mails, or from or out of any bag or bags of letters ſent or "conveyed by the poſt, or from or out of any poſt-office or "houſe or place for the receipt or delivery of letters or "packets ſent or to be ſent by the poſt, any letter or letters, "packet or packets; although ſuch robbery, ſtealing or "taking ſhall not appear or be proved to be a taking from "the perſon, or upon the king's highway, or to be a robbery "committed in any dwelling-houſe, or any coach-houſe, "ſtable, barn, or any out-houſe belonging to a dwelling-"houſe; and although it ſhould not appear that any perſon "or perſons were put in fear by ſuch robbery, ſtealing, or "taking; yet ſuch offender or offenders being thereof con-"victed as aforeſaid, ſhall be deemed guilty of felony, with-"out benefit of clergy."

Embezzlements by perſons employed in the poſt-office have been before conſidered. Ante, ſ. 22.

§ 39. *Conſtruction of of the acts.*

Noah Pearce's caſe, Buckingham Sum. Aſſ. 1794, cor. Ld. G. J. Eyre, MS. Buller J. and MS. Jud. *Fraudulently obtaining the mail by delivery from one in the poſt-office to the priſoner without is a ſtealing out of the poſt-office. Vide* poſt. ſ. 104.

Noah Pearce, intending to ſteal the mail bags, went one night about the uſual time to the poſt-office at High-Wycombe, and pretending to be the mail guard, obtained from the perſon who was there the bags of letters, which were let down to him from out of the window of the poſt-office by a ſtring, from whence he took them, and immediately made off. Being indicted on the ſtat. 7 Geo. 3. and found guilty; all the Judges were of opinion in Hilary term 1793 that the conviction was proper on a count in the indictment for ſtealing the letters out of the poſt-office. For his artifice in obtaining the delivery of them in the bag out of the houſe was the ſame as if he had actually taken them out himſelf.

James

Ch. XVI. § 39. *Letters, mails, &c.*

Howatt's caſe, Lancaſter Sum. Aſſ. 1795, cor. Rooke J. MS. Jud. *A letter carrier taking letters out of the office, intending to deliver them to the owners but to embezzle the poſtage, cannot be indicted for ſtealing ſuch letters under* ſtat. 7 Geo. 3. c. 50. ſ. 2.

James Howatt was indicted on the 2d ſection of the ſtat. 7 Geo. 3. c. 50. 1ſt, for ſtealing out of the London bag ſent by the General Poſt-office from London to Mancheſter divers letters ſpecified; 2dly, 3dly, and 4thly, for ſtealing the like letters reſpectively out of the poſt-office in M., and out of a certain houſe for the receipt and delivery of letters ſent by the poſt, and out of a certain place for the ſame. It appeared to be the duty of the clerks in the office to count the letters and deliver them out to the letter carriers, of whom the priſoner was one. That he contrived to obtain poſſeſſion of ſome of the letters before they were ſo counted out to him, and was detected with them in his pocket in the letter-carrier's room, which is under the ſame roof as the office, ſeparated therefrom only by ſome ſteps. For ſome time previous there had been a great deficiency in the receipt of the poſtage, though there was no complaint of the miſcarriage of any letters: and from circumſtances it appeared, and ſo the jury found when they convicted the priſoner, that he intended to have delivered the letters, and only to have embezzled the poſtage. But in Mich. term 1795 the Judges upon a conference (abſent Hotham B.) all agreed that this was not a ſtealing within the act. It was indeed at firſt ſuggeſted by two of the Judges in the courſe of diſcuſſing the point, that inaſmuch as the act of the priſoner deprived the crown of its lien, though there were no intention to defraud the true owner, it was as much larceny as ſtealing from a pawn-broker; and that the clauſe in queſtion was poſitive, without adverting to the view with which the act was done. On the other hand it was obſerved, that the two firſt clauſes reſpected the ſafe carriage of letters, and ſeemed to be confined, as appeared further by the preamble, to a taking to the prejudice of the owner. That the third clauſe was for the protection of the revenue, which though it did not reach this caſe went to ſhew, that the legiſlature did not mean to protect the revenue by the antecedent clauſes. That if the letters had been ſo taken by thoſe to whom they were directed, it would not have been within the clauſe in queſtion of the act. Though if it were a queſtion of larceny at common law, it would be equally larceny in the owner. But at any rate, this was an indictment on the ſtatute, and not for taking the

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goods of ſuch an one, as was charged in an indictment for ſtealing the goods of a bailee; and therefore all agreed that the conviction was wrong on the finding of the jury on this indictment.

John Dawſon's caſe, Lancaſter Sp. Aſſ. 1801, cor. Chambre J. and before all the Judges Trin. Term 1801, MS. Jud. *Deſcription of the letter.*

In a proſecution on the ſtat. 7 Geo. 3. c. 50. ſ. 1. againſt one employed in the buſineſs of the poſt-office as a poſt-boy and rider in carrying letters, &c. for ſecreting and ſtealing certain bills of exchange contained in a letter ſent by the poſt, which came to his poſſeſſion in his ſaid employment; it is no variance to deſcribe in the indictment ſuch letter as one "to be delivered to perſons uſing in trade the name and firm of *Meſſrs.* B., N., and H.; which word *Meſſrs.* was frequently added to their addreſs in the direction of letters and other papers received in buſineſs; though they themſelves in drawing or indorſing bills, making out invoices, and the like, wrote themſelves B., N., and H., without ever adding *Meſſrs.* as part of their firm. For if they accepted bills directed to them in that manner, it would be a uſing of that firm. So it is ſufficient to allege in part deſcription of the bills ſo ſecreted and ſtolen, that they were *ſubſcribed* by A. and B., without ſaying that they were drawn or made by them.

Thomas's caſe, O.B. Dec. 1794, MS. Buller J. and MS. Jud. (S. C. 2 Leach, 723.) *The indictment for robbing mail bag of letters muſt be laid in the county where the mail was actually taken in order to bring the caſe within the ſtatute; and cannot be laid in the county where only the priſoner was in poſſeſſion of it; the jury finding that the letters were taken from the bag in ſome other county through which the mail had paſſed.*

Thomas Thomas was indicted on the ſtat. 5 Geo. 3. c. 25. ſ. 18. and 7 Geo. 3. c. 50. ſ. 2. Firſt for robbing the mail in which letters were ſent by the General Poſt from Briſtol to London of one letter directed, &c. againſt the form of the ſtat.; and 2dly, for ſtealing and taking out from out of a certain bag of letters, called the Briſtol bag for London, then and there ſent by the poſt from Briſtol to London, one letter directed, &c. Both theſe offences were charged to have been committed in the county of Middleſex; and the trial was had at the Old Bailey. It was proved that the Briſtol bag was put with the reſt in the mail box at Briſtol; that the priſoner on the ſame night went on the outſide of the mail coach from Briſtol to London; and that ſome part of the way, in the counties of Wilts and Berks, he ſat on the guard's ſeat, from whence he was enabled to open the mail box in which the bags were, and take out ſome of its contents. That he rode upon the coach box the reſt of the journey, and left the coach at Hyde Park Corner. There was no doubt of the fact of the priſoner's having taken the letters out of the

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mail bag, the ſeal of which had been broken, and the contents of ſome of the letters were traced to him; but it was objected that there was no evidence to prove the offence to have been committed in Middleſex, but on the contrary either in Wilts or Berks. To this it was anſwered, that the offence was not complete till the priſoner had quitted the coach, which was in Middleſex; or at any rate, having poſſeſſion of the letters there, it was a new taking and offence in that county. The jury found the priſoner guilty, and that the letters were not taken out of the bag in Middleſex, but in one of the other counties. But upon reference to the Judges in Hilary term 1795, they held the conviction bad; the offence not having been proved where it was laid.

It may be remarked upon the above ſtatutes, that they do not make the ſtealing of letters generally a capital offence, but the ſtealing them from the places particularly ſpecified; which is a definite act, local in its nature, and cannot be extended by conſtruction to a new taking in every county in which the thing ſtolen is conveyed, as in the caſe of ſimple larceny.

§ 40. *Waifs, wreck, &c.*
1 Hawk. ch. 33. ſ. 24.
1 Hale, 510.
Pult. de pace, 131.
2 MS. Sum 250.
26 Geo. 2 c. 19.
Vide poſt. Larceny from Ships.

It is generally ſaid that larceny cannot be committed of that wherein none have any determinate property, as of treaſure-trove, waifs, &c. till ſeized. The ſame was ſaid of wreck; but now the legiſlature have by a moſt juſt and humane ſtatute (26 Geo. 2. c. 19.), protected the owners of property in this ſtate againſt the odious plunderers of it. And indeed there ſeems to be ſome incorrectneſs in the generality of the poſition with reſpect to the other things mentioned. As waifs, treaſure-trove, &c. the lord has no determinate property in them till ſeizure; but the true owner, though unknown, who has loſt or been robbed of the things themſelves, has ſtill a property in them. Pulton therefore aſſigns the uncertainty of the true owner, as the reaſon why they are not the ſubject of larceny; a reaſon which, though not true to the full extent of it, does at leaſt imply that if the owner be known, larceny may be committed of them. Where indeed the circumſtances of the caſe furniſh a preſumption of an intended dereliction of ſuch property

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property on the part of the owner, there no larceny can be committed before ſeizure by the lord, becauſe the taking is not invito domino.

§ 41. *Animals feræ naturæ.*
Staundf. 25. b.
3 Inſt. 109, 110.
4 Blac. Com. 235, 6.
1 Hale, 510, 511.
1 Hawk. ch. 33. ſ. 25. to 28.
Sum. 67, 8.
3 Lev. 227.
Davies v. Powell, Willes' Rep. 49.

It is however certain, that larceny cannot be committed of ſuch animals in which there is no property, as of beaſts that are feræ naturæ and unreclaimed; ſuch as deers, hares, and conies in a foreſt, chaſe, or warren; fiſh in an open river or pond; old pidgeons out of the houſe; or wild fowls at their natural liberty: although any perſon may have an excluſive right ratione loci aut privilegii to take them if he can in thoſe places. But if they are dead, reclaimed, and known to be ſo, or confined and may ſerve for food, it is otherwiſe even at common law. For of deer ſo incloſed in a park, which may be taken at pleaſure; fiſh in a trunk or net, or as it ſhould ſeem in any other incloſed place which is private property, and where they may be taken at the pleaſure of the owner at any time; pheaſants or partridges in a mew; young pidgeons, or old ones when ſhut up; young hawks in a neſt, and even old ones, or falcons reclaimed and known by the party to be ſo; larceny may be committed. The ſame as to peacocks: ſo of ſwans marked and pinioned, or ſwans unmarked, if tame, kept in a mote, pond, or private river: but if they range out of the royalty, it is no felony to take them though marked, becauſe it cannot be known that they belong to any perſon. Nor can larceny be committed of the eggs of theſe, or of hawks; becauſe the ſtat. 11 H. 7. c. 17. has appointed a leſs puniſhment, namely, fine and impriſonment. But the ſtealing a ſtock of bees ſeems to be admitted to be felony.

Owen, 20.
Cro. Car. 555.
Vide poſt. more of fiſh.

Vide ſtat. 37 Ed. 3 c. 19.
3 Inſt 97, 8, 9.
1 Hale, 642.
18 H. S. 2 pl. 11.

Tibbs v Smith, Ray. 33.

John Rough being convicted on an indictment for ſtealing a pheaſant, value 40 s., of the goods and chattels of H. S.; all the Judges on a ſecond conference in Eaſter term 1779, after much debate and difference of opinion, agreed that the conviction was bad; for in caſes of larceny of animals feræ naturæ, the indictment muſt ſhew that they were either dead, tame, or confined; otherwiſe they muſt be preſumed to be in their original ſtate; and that it is not ſufficient to add "of the goods and chattels" of ſuch an one.

John Rough's caſe, Surrey Lent Aſſ. 1779, MS. Buller J. 2 MS Sum. 251. 3 MS. Sum. 43. and MS. Crown Caſ. Reſ.

By

Ch. XVI. § 42. *Deer.*

§ 42. *Deer.* 1 H. 7. c. 7.

By ſtat. 1 H. 7. c. 7. the unlawful hunting in any foreſt, park, or warren, being private property, in warlike array, by night, or with painted faces, &c. was made felony. But the uſe of that ſtatute, which ſeems principally to have been levelled at public diſturbers of the peace, is ſuperſeded by the more general law of the 9 Geo. 1. c. 22. "whereby "If any perſon or perſons, being armed with ſwords, fire-"arms, or other offenſive weapons, and having his or their "faces blacked, or being otherwiſe diſguiſed, ſhall appear "in any foreſt, chaſe, park, paddock, or grounds incloſed "with any wall, pale, or other fence, wherein any deer "have been or ſhall be uſually kept, or in any warren or "place where hares or conies have been or ſhall be uſually "kept; or in any high road, open heath, common, or "down; or ſhall unlawfully and wilfully, hunt, wound, "kill, deſtroy, or ſteal any red or fallow deer; or unlaw-"fully rob any warren or place where conies or hares are "uſually kept; or ſhall unlawfully ſteal or take away any "fiſh out of any pond or river; or if any perſon or perſons "(i. e. whether armed and diſguiſed or not,) ſhall unlawfully "and wilfully hunt, wound, kill, deſtroy, or ſteal any red "or fallow deer, fed or kept in any places in any of the "king's foreſts or chaſes, which are or ſhall be incloſed "with pales, rails, or other fences, or in any park, pad-"dock, or grounds incloſed, where deer have been or ſhall "be uſually kept," &c.

By deer ſtealers, armed and diſguiſed. 9 Geo. 1. c. 22. ſ. 1. *made perpetual by* 31 G. 2. c. 42. ſ. 2. *Deer.*

Whether armed and diſguiſed or not.

Reſcuing ſuch offenders.

"Or ſhall forcibly reſcue any perſon being lawfully in "cuſtody of any officer or other perſon for any of the of-"fences before mentioned," &c.

Procurers.

"Or ſhall by gift or promiſe of money or other reward, "procure any of his majeſty's ſubjects to join him or them "in any ſuch unlawful act; every perſon ſo offending, be-"ing thereof lawfully convicted, ſhall be guilty of felony "without benefit of clergy."

Surrender clauſes. Vide tit. Proceſs to bring in the party.

By ſ. 2. and ſubſequent ſections, proviſions are made for attainting ſuch offenders not ſurrendering themſelves on proclamation, as therein directed; which will be ſet forth elſewhere.

By ſ. 14. "Every offence committed contrary to this act, "ſhall and may be inquired of, examined, tried, and deter-"mined

"mined in any county within England, in ſuch manner "and form as if the fact had been therein committed." Corruption of blood, &c. is ſaved. Ch. XVI. §. 42. *Deer.*

But that part of the clauſe which relates to the unlawfully and wilfully hunting, wounding, killing, deſtroying, or ſtealing any red or fallow deer in any foreſt, chace, or incloſed places, where deer have been or ſhall be uſually kept, (not being armed and diſguiſed,) was holden by all the judges in Davies' caſe to be repealed by ſtat. 16 G. 3. c. 30. which puniſhes the firſt offence with a pecuniary forfeiture (*a*); and then enacts (ſ. 1.) "That if any perſon or per-"ſons, after having been convicted of any of the aforeſaid "offences, ſhall offend a ſecond time againſt this act, by "committing any of the aforeſaid offences; ſuch ſecond "offence, whether it be the ſame as the firſt offence, or be "any other of the aforeſaid offences, ſhall be deemed and "adjudged to be felony," and the offender, on conviction by indictment ſhall be tranſported for ſeven years. Conſonant to the above conſtruction, no indictment lies for deer-ſtealing in the firſt inſtance, although it be laid that the deer was reclaimed. And though the ſtatute only mention red or fallow deer, yet the croſs breeds, ſuch as what is called a baſtard me-

16 G. 3. c. 30. R. v. Davies, Mich. 1783, MS. Gould and Buller Js. (S. C. 1 Leach, 306.)

Thomas Heath's caſe, Sarum, March 1801, and afterwards before all the Judges. MS. Jud.

(*a*) That act, (the 16 G. 3. c. 30.) reciting that the ſtatutes then in force for the diſcovery and puniſhment of deer ſtealers are numerous, and many of them ineffectual; and that the purpoſes thereby intended might be better effected if ſuch as are found defective were repealed, and the good proviſions therein contained, together with ſuch further proviſions as may be expedient, were reduced into one act; then enacts, "that if any perſon ſhall courſe or hunt, or ſhall take in any "ſlip, nooſe, toil, or ſnare, or ſhall kill, wound, or deſtroy, or ſhall ſhoot at "or otherwiſe attempt to kill, wound, or deſtroy, or ſhall carry away any red or "fallow deer, in any foreſt, chace, purlieu, or ancient walk, whether incloſed or "not, or in any incloſed park, paddock, wood, or other incloſed ground where "deer are, have been, or ſhall be uſually kept, without the conſent of the owner, "or without being duly authoriſed; or ſhall be aiding, abetting, or aſſiſting there-"in or thereunto; every perſon ſo offending by courſing, hunting, ſhooting at or "otherwiſe attempting to kill, wound, or deſtroy, or by aiding therein or there-"unto, ſhall forfeit for every ſuch offence 20 *l.* and every perſon ſo offending by "killing, wounding, or deſtroying, or by taking in any ſlip, nooſe, toil, or "ſnare, or by carrying away, or by aiding therein reſpectively, ſhall for every "deer ſo wounded, killed, deſtroyed, taken, or carried away, forfeit 30 *l.*" [doubling the penalty in caſe of a keeper or perſon entruſted.]

The laſt ſection but one of the act repeals many ſtatutes or parts of them concerning deer from 13 Ric. 2. to 10 Geo. 2. both inclusively, which are particularly enumerated; but the above ſtat. of 9 Geo. 1. is not mentioned.

Ch. XVI. § 42. *Deer.*

nald, bred from a menald buck and a fallow doe, are within the act.

§ 43. *Fish.*
Ante, f. 41, 42.
9 G. 1. c. 22. f. 1.
1 Hale, 511.
Foſt. 366.

It has been juſt noted that the ſtealing of fiſh out of any river or pond by perſons armed and diſguiſed, or forcibly reſcuing ſuch offenders, or procuring ſuch offence, is made a capital felony by the ſtat. 9 Geo. 1. c. 22. But ſomething more is required to be ſaid as to the taking of fiſh, in addition to the proviſion already referred to in the black act reſpecting offenders of this deſcription, armed and diſguiſed as therein ſtated. It has been doubted whether at common law larceny can be committed of fiſh in a pond. It is admitted that it may be if they be confined in a trunk or net; becauſe they are then reſtrained of their natural liberty. And it ſeems difficult not to extend the application of the ſame reaſon to the caſe of fiſh in a pond; the pond being private incloſed property, and the fiſh liable to be taken at any time according to the pleaſure of the owner. Lambert ſays, "fiſhes in ſtreams and rivers are nullius bona, et occupanti conceduntur: but he and others agree that it may be felony to take them in a trunk, ſtew, or pond: for a man hath ſuch a poſſeſſion of them, that by their reſtraint they cannot without help uſe their nature and forſake him." So by Lord Coke; Larceny may be committed of fiſh in a trunk or pond, becauſe they are not at their natural liberty, but as it were in a pound. The caſe of Grey and Bartholomew was a queſtion between the heir and executor, which of them ſhould have fiſh out of a pond. There it was adjudged that the heir was entitled to them, upon the ſame principle that he ſhould have deer in a park. Hawkins conſiders it as clear that the taking fiſh out of a pond is felony.

Lamb. 274.
18 E. 4. 8. pl. 7.
9 H. 6. 14. pl. 10.
Staundf. 25. b.
MS. Sum.
3 Inſt. 109.

Rex v. Hanſon and Graham, O. B. 1757.
Grey v. Bartholomew, Owen, 20.
Goldſb. 129.
Vide 3 Mod. 97.
6 Mod. 183.
Cro. Car. 553.
1 Lev. 203.
1 Hawk. ch. 33. f. 25.

The ſtat. 22 & 23 Car. 2. c. 25. was not calculated to remove the doubt. That ſtatute, reciting that whereas divers idle perſons do betake themſelves to ſtealing, taking, and killing of fiſh out of ponds, pools, motes, ſtews, and other ſeveral waters and rivers, to the great damage of the owners; enacts, "that if any perſon ſhall uſe any caſting net, &c. "or other net whatſoever, &c. or ſhall take fiſh by any "means or device whatſoever, in any river, ſtew, pond, "mote, or other water as aforeſaid; or ſhall be aiding or "aſſiſting thereunto, without the licence or conſent of the "lord

22 & 23 Car. 2. c. 25. f. 7.

"lord or owner of the ſaid water; and be thereof convict, "&c. before any juſtice, &c.; ſuch offender in ſtealing, taking, or killing fiſh, ſhall for every ſuch offence give ſuch "recompence as the juſtice, &c. ſhall appoint, not exceeding "treble damages, and pay 10s. to the poor, &c."

Ch. XVI. § 43. *Fish.*

In Rex v. Mallinſon Lord Mansfield ſaid that the offence provided againſt by this ſtatute of Car. 2. is *ſtealing fiſh*: taking and killing, in the intention of the act, means ſtealing.

1 Burr. 682.

But now by ſtat. 5 G. 3. c. 14. "If any perſon ſhall "enter into any park or paddock fenced in or incloſed, or "into any garden, orchard, or yard, adjoining or belonging to any dwelling-houſe, in or through which park, &c. "or garden, &c. any river or ſtream of water ſhall run or "be; or wherein ſhall be any river, ſtream, pond, pool, "mote, ſtew, or other water; and by any means or device "whatſoever ſhall ſteal, take, kill, or deſtroy any fiſh bred "kept, or preſerved in any ſuch river, &c. without the conſent of the owner; or ſhall be aiding or aſſiſting therein "as aforeſaid; or ſhall receive or buy any ſuch fiſh, knowing the ſame to be ſo ſtolen or taken as aforeſaid; and being "thereof indicted within ſix calendar months next after "ſuch offence or offences ſhall have been committed, before "any judge or juſtices of gaol delivery for the county "wherein any ſuch park or paddock, garden, orchard, or "yard ſhall be; and ſhall on ſuch indictment be by verdict "or confeſſion convicted of ſuch offence, &c. the perſon "or perſons ſo convicted ſhall be tranſported for 7 years."

5 G. 3. c. 14 f. 1.

By ſ. 2. an offender diſcovering and convicting an accomplice is entitled to a pardon.

And by ſ. 3. "If any perſon ſhall take, kill, or deſtroy, "or attempt to take, kill, or deſtroy, any fiſh in any river or "ſtream, pond, pool, or other water, (not being in any park "or paddock, or in any garden, orchard, or yard adjoining, "&c.) but in any other incloſed ground, private property;" he ſhall, on ſummary conviction, forfeit 5 l. to the owner, &c.

An indictment againſt John Hundſon on the ſtat. 5 Geo. 3. c. 14. charged him with unlawfully entering a garden of A. T. adjoining and belonging to her dwelling-houſe, in which was a certain pond uſed for keeping fiſh, and without A. T.'s conſent, with a certain net ſtealing and taking out

Hundſdon's caſe, O. B. 1781, cor. Willes J. MS. Buller J. 2 MS. Sum. 281. & MS. Crown Caſ. Reſ.

Ch. XVI. § 43. *Fiſh.*

of the ſaid pond a certain quantity of live gold and ſilver fiſh, *of the goods and chattels of the ſaid A. T.*, againſt the form of the ſtatute. On evidence it appeared that the pond out of which the fiſh were taken adjoined to the houſe, and was about twenty yards in length and ten in breadth; that gold fiſh and other fiſh were kept in it, which were uſually fiſhed for with a hook and line. It was objected, that fiſh in an open pond were feræ naturæ, unreclaimed, and not the property of any particular perſon, as they were laid to be in the indictment. In anſwer to which a diſtinction was taken on the part of the crown, that this was not an indictment for a felony, but only for a miſdemeanor on the ſtatute (*a*), though the puniſhment directed was tranſportation. In Eaſter term 1781 all the Judges held the indictment good, the caſe being fully brought within the ſtat. 5 Geo. 3. without the allegation that the fiſh were the goods and chattels of any perſon; and therefore that part of the indictment was ſurpluſage. But if the indictment had been at common law for felony, it was the opinion of ſome that it ſhould have deſcribed what ſort of a pond it was, that it might appear on the face of the indictment that taking fiſh out of ſuch a pond was felony.

§ 44. *Conies and hares.* 3 Jac. 1. c. 13.

In reſpect to conies, the ſtat. 3 Jac. 1. c. 13. enacts, "that if any perſon ſhall in the night-time or by day wrongfully or unlawfully break or enter into any park impaled, or any other ſeveral grounds incloſed with wall, pale, or hedge, and uſed or kept for the keeping, breeding, &c. of any deer or conies; and wrongfully or unlawfully ſhall hunt, drive, or chaſe out, or take or kill any deer or conies within any ſuch impaled park, &c. againſt the will of the owner or occupier, &c. of the ſame, not having lawful authority, &c.; and thereof ſhall be convicted at the ſuit of the king or the party grieved, he ſhall be impriſoned three months, and pay to the party grieved treble damages and coſts, &c. and find ſureties for good behaviour for ſeven years, or continue in priſon till he does." But this extends not to any grounds to be incloſed and uſed for conies after the making of the act, without the king's licence. Nor by ſ. 8. to the hunting, chaſing, or killing any deer or conies in the *day-time*: which contradictory proviſion is noticed by

(*a*) It is obſervable, however, that the ſtatute uſes the word *ſeal*.

the

the ſtat. 7 Jac. 1. c. 13. and repealed as to deer, but preſerved as to conies. Ch. XVI. § 44. *Conies and hares.*

The ſtat. 22 & 23 Car. 2. c. 25. ſ. 4. enlarges the deſcription of the offence to warrens or grounds lawfully uſed or kept for the breeding or keeping of conies, although the ſame be not incloſed; and ſubjects the offender to puniſhment on ſummary conviction. 22 & 23 Car. 2. c. 25. ſ. 4.

The ſtat. 5 Geo. 3. c. 14. enacts, "that if any perſon ſhall wilfully and wrongfully in the night-time, enter into any warren or grounds lawfully uſed or kept for the breeding or keeping of conies, although the ſame be not incloſed, and ſhall then and there wilfully and wrongfully take or kill in the night-time any coney or conies againſt the will of the owner or occupier thereof, or ſhall be aiding or aſſiſting therein; and ſhall be convicted of the ſame before juſtices of oyer and terminer or gaol delivery; every ſuch offender ſo convicted, &c. ſhall and may be tranſported for ſeven years, or ſuffer ſuch other leſſer puniſhment by whipping, fine, or impriſonment, as the court before whom ſuch perſon ſhall be tried ſhall award." Provided (ſ. 8.) that conies may be killed or taken, &c. in the day-time on the ſea or river banks in the county of Lincoln, ſo far as the tide ſhall extend, or within one furlong of the ſaid banks, &c.; and (by ſ. 9.) the perſon taking them ſhall not be obliged to make ſatisfaction for damage done by ſuch entry, unleſs the ſame ſhall exceed one ſhilling. The object of this exception was to prevent the deſtruction of the banks by the increaſe of conies. 5 G. 3. c. 14. ſ. 6. 8, 9.

By 9 Geo. 1. c. 22. "if any perſon being armed and diſguiſed (as before ſtated) ſhall appear in any warren or place where hares or conies are uſually kept, or unlawfully rob any ſuch warren, &c. or (whether armed and diſguiſed or not) ſhall reſcue any perſon in cuſtody for ſuch offence, or procure any perſon to join him therein, he ſhall be guilty of felony without benefit of clergy." 9 G. 1. c. 22. *Vide* ante, 608.

Reſult.

The general reſult of theſe ſtatutes appears to be, that by ſtat. 3 Jac. 1. c. 13. if a wrong-doer ſhall hunt, drive out, take, or kill, any coney in the night-time in any incloſed ground kept for that purpoſe, which was ſuch at the time

Ch. XVI. § 44. *Conies and hares.*

of paſſing the act, or has become ſo ſince by the king's licence, he may be proſecuted for the miſdemeanor at the aſſizes or ſeſſions. By the ſtat. 22 & 23 Car. 2. c. 25. ſ. 4. if he chaſe, take, or kill any coney either by day or night in any ground uſed for keeping conies, whether incloſed or not, he is liable to be convicted before a magiſtrate. The ſtat. 5 Geo. 3. c. 14. gives juriſdiction to the juſtices of oyer and terminer and gaol delivery, where the offence of *taking* or *killing* any coney is committed in the night, in any ground uſually appropriated to the keeping of them, whether incloſed or not; and gives a diſcretionary power of tranſporting the offender. And if any ſuch place where hares or conies are kept be robbed at any time by any offender armed and diſguiſed, it is made felony without benefit of clergy by the ſtat. 9 Geo. 1. c. 22.

§ 45. *Animals of baſe nature.*
1 Hale, 512.
1 Hawk. ch. 33. ſ. 23.
3 Inſt. 109.
10 G. 3. c. 18.

But there are ſome animals which, though they may be reclaimed, yet are conſidered of ſo baſe a nature that no larceny can be committed of them; ſuch as bears, foxes, monkies, cats, ferrits, and the like. And the ſame rule applied to dogs; but now by ſtat. 10 Geo. 3. c. 18. the ſtealing of dogs is made puniſhable upon conviction before two juſtices.

§ 46. *Domeſtic animals.*
1 Hale, 511.
1 Hawk. ch. 33. ſ. 28.

Of domeſtic animals, ſuch as ſheep, oxen, horſes, and the like, or of domeſtic creatures which are fit for food, as hens, ducks, geeſe, turkeys, peacocks, &c.; and alſo of their eggs, larceny may be committed. Concerning ſome of theſe particular proviſion has been made by ſtatute.

§ 47. *Horſes.*
2 Ed. 6. c. 12.
2 MS. Sum. 283.
1 Hale, 531.
2 Hale, 365.
R. v. Pearles, Poſt. ſ. 137.

By ſtat. 1 Ed. 6. c. 12. ſ. 10. it is enacted, "that no "perſon or perſons who ſhall be convicted of feloniouſly "ſtealing any horſes, geldings, or mares; or being indicted "or appealed thereof, and thereupon found guilty by ver"dict, or ſhall confeſs the ſame on arraignment, or will not "anſwer directly, or ſhall ſtand mute, ſhall have the benefit "of clergy." Therefore if the jury were to find the value to be 12d. or under, it would not be capital, becauſe the party in that caſe would have no occaſion to pray clergy. This ſtatute

ſtatute however mentioning thoſe animals in the plural number only, a doubt aroſe whether it extended to the caſe of ſtealing a ſingle horſe, &c.; to remove which the ſtat. 2 & 3 Ed. 6. c. 33. declares and enacts, "that all perſons felo- "niouſly taking or ſtealing any horſe, gelding, or mare, ſhall "be put from their clergy in like manner and form as "though they had been indicted or appealed for felonious "ſtealing two horſes, two geldings, or two mares of any "other, and thereupon found guilty by verdict, or confeſs "the ſame on their arraignment, or ſtand wilfully mute." Ch. XVI. § 47. *Horſes.* 2 & 3 Ed. 6. c. 33.

Though this ſtatute mentions thoſe offenders only who ſhall be convicted by verdict or confeſſion, or by ſtanding mute, or not directly anſwering; yet it ſeems a reaſonable conſtruction, according to Hawkins, to extend it to thoſe who ſhall be outlawed or challenge above 20: becauſe, ſays he, it is general; that all ſuch perſons ſhall be put from their clergy, &c. in ſuch manner as if they had been found guilty, &c.; and if they had been found guilty, it is certain they would have been ouſted of their clergy by the expreſs words of the ſtat. 1 Ed. 6. c. 12. ſ. 10. However the ſtat. 3 & 4 W. & M. c. 9. ſeems to extend to ouſt all ſuch offenders. 2 MS Sum. 283. 2 Hale, 365. 2 Hawk. ch. 33. ſ. 62. MS. ſupra.

The ſtat. 37 H. 8. c. 8. ſ. 2. was more particularly worded than either of the acts of Ed. 6. and mentioned "any horſe, "gelding, mare, *foal*, or *filley*;" but this ſtatute is repealed by the general words of the ſtat. 1 Ed. 6. c. 12. except ſo far as it is therein re-enacted. And as the words "*foal* or "*filley*" are dropped in both the acts of Ed. 6. it has been queſtioned by ſome whether they extend to a foal or filley ſo as to ouſt clergy. But yet it ſeems that the words of thoſe acts are plain and general enough to include them; and it is refining rather too much to argue thoſe words into doubt from the over nicety of a prior ſtatute which is ſet aſide. 37 H. 8. c. 8. ſ. 2. 2 Hale, 364. 2 MS. Sum. 535.

The ſtatutes of Ed. 6. extend not to take away clergy from the acceſſaries before or after. But 1 Hale, 529.

By the ſtat. 31 Eliz. c. 12. ſ. 5. (which regulates the public ſale of horſes) it is enacted, "that not only all ac- "ceſſaries before ſuch felony, but alſo all acceſſaries after "(i. e. in horſe-ſtealing) ſhall be deprived of clergy, as the "principal, by ſtatute heretofore made, is or ought to be." 31 El. c. 12. ſ. 5. *Acceſſaries.*

Ch. XVI. § 47. *Horſes.*

But it muſt be obſerved that this ſtat. extends only to ſuch perſons as were acceſſaries in judgment of law at the time the act was made, namely, acceſſaries at common law: and therefore in Eaſter term, 2 Ann. it was agreed by all the Judges not to extend to one who knowingly received a ſtolen horſe, though made an acceſſary after by the ſtat. 3 & 4 W. & M. c. 9.

MS. Tracy, 229. Foſt. 373. 2 MS. Sum. 535. Poſt. c. 141.

§ 48. *Sheep and other cattle.* 14 Geo. 2. c. 6.

By ſtat. 14 G. 2. c. 6. reciting "that ill-diſpoſed perſons "had made it a practice ſecretly in the night to kill ſheep "and ſtrip off their ſkins, and then ſteal the carcaſes, leaving the ſkins behind to prevent diſcoveries; and alſo in "like manner to kill ſheep, and then cut them open and "take out and ſteal their inward fat, leaving their carcaſes "behind to prevent being diſcovered," &c. enacts "that "if any perſon or perſons ſhall at any time feloniouſly drive "away, or in any other manner feloniouſly ſteal one or "more ſheep or other cattle of any other perſon or perſons "whatſoever; or ſhall wilfully kill one or more ſheep or "other cattle of any other perſon or perſons, with a felonious intent to ſteal the whole carcaſe or carcaſes, or any "part or parts of the carcaſe or carcaſes of any one or "more ſheep or other cattle which ſhall be ſo killed; or "ſhall aſſiſt or aid any perſon or perſons to commit ſuch "offence or offences; then the perſon or perſons guilty of "any ſuch offence, being thereof convicted, ſhall be adjudged guilty of felony without benefit of clergy."

15 Geo. 2. c. 34. *Other cattle.*

This ſtatute, with reſpect to the words "*other cattle*," is explained by ſtat. 15 G. 2. c. 34. which enacts and declares "that the former ſtatute was intended and ſhall be "deemed to extend to any bull, cow, ox, ſteer, bullock, "heifer, calf, and lamb, as well as ſheep, and to no other "cattle whatſoever."

Cook's caſe, Warwick Lent Aſſ. 1774. 2 MS. Sum 284. (S. C. 1 Leach, 123.) Serjeants' Inn, April 20, 1774.

Richard Cook was indicted for ſtealing a cow. It appeared in evidence that the beaſt was only two years and a half old, and had never had a calf; and that ſuch female of the cow kind, however old, if ſhe have never had a calf, is always called a heifer. The Judges were all of opinion, upon reference to them, that as the ſtatute particularly mentions cows and heifers, and the beaſt ſtolen was not ſuch

ſuch as was deſcribed in the indictment, the priſoner was entitled to an acquittal.

Ch. XVI. § 48. *Sheep and other cattle.*

Rawlins' caſe, Sarum, Sum. Aſſ. 1800, cor. Lord Eldon. MS. Jud. *Indictment for ſtealing lambs ſuſtained by proof that the carcaſes were found in the owner's ground, and only the ſkins taken away. Vide* Sum. 64. S. P.

Rawlins was indicted for ſtealing ſix lambs: and the fact proved was, that the carcaſes of the lambs, without their ſkins, were found on the premiſes where they had been kept, and that the priſoner had ſold the ſkins, (which were identified,) the morning after the offence was committed. There was no count in the indictment for killing with intent to ſteal the carcaſe, or any part thereof; but as the lambs muſt have been removed from the fold, the jury were directed to find the priſoner guilty, which they accordingly did. But a doubt occurring whether as the ſtatute 14 Geo. 2. c. 6. ſpecifies feloniouſly driving away, and feloniouſly killing with intent to ſteal the whole or any part of the carcaſe, as well as feloniouſly ſtealing in general, although there muſt, in ſuch caſes, be ſome removal of the thing, it did not intend to make theſe different offences; the caſe was ſubmitted to the Judges in Mich. term 1800, who all held the conviction right; for any removal of the thing feloniouſly taken conſtitutes larceny. Crompton's Juſtice ſtates the law in the ſame manner.

(Abſent Lawrence J.)

Crompt. 36. pl. 17.

Indictment againſt principal and receiver. R. v. Cowell and Green, Suffolk Sum. Aſſ. 1756, cor. Lord C. J. Eyre, MS. Buller J. and MS. Jud. Mich. T. 1796.

Cowell and Green were convicted upon an indictment charging that Cowell feloniouſly ſtole one live ewe ſheep, the goods, &c. of J. L.; and that Green received "twenty pounds of *mutton*, part of the goods, &c. ſo as aforeſaid feloniouſly ſtolen, &c. knowing the ſame to have been ſtolen." On a queſtion referred to the Judges, whether the indictment were ſufficient againſt the acceſſary, they all held the conviction proper.

To prevent larcenies of cattle and horſes certain regulations are made for ſlaughter-houſes by the ſtat. 26 Geo. 3. c. 71.

§ 49. *Produce of ſuch animals.*

Serjt. Forſter's MS. 99. cites De Grey's MS.

It being felony to ſteal the animals themſelves, it is alſo felony to ſteal the product of any of them, though taken from the living animals. Thus milking cows at paſture, and ſtealing the milk, was holden felony by all the Judges, on a caſe reſerved by Serjt. Leigh, who ſat for Bathurſt J. on the Oxford circuit, about 1769.

So

Ch. XVI. § 49. *Sheep and other cattle.*

So pulling the wool from ſheep's backs is felony; it being underſtood in this, as in the other inſtance, that the fact is done fraudulently and feloniouſly, and not merely from wantonneſs or frolic; which muſt be collected from concurrent circumſtances, ſuch as the quantity taken, the uſe to which it is applied, the behaviour of the party, &c.

Martin's caſe, Northampton Lent Aſſ. and Eaſt. term, 1777, MS. Crown Caſ. Reſ. (S. C. 1 Leach, 205).

§ 50. *Plate glaſs manufactory.* 13 Geo. 3. c. 38. ſ. 29 continued by 38 Geo. 3. c. 27. ſ. 24.

By the ſtat. 13 Geo. 3. c. 38. for incorporating the Britiſh Plate Glaſs Manufactory, it is enacted (ſ. 29.) "That if "any perſon or perſons ſhall by day or night break into "any houſe, ſhop, cellar, vault, or other place or building, "or by force enter into any houſe, &c. belonging to the "ſaid manufactory, or wherein the ſame ſhall be then carrying on, with intent to ſteal, cut, break, or otherwiſe "deſtroy any glaſs, or plate glaſs, wrought or unwrought, "or any materials, tools, or implements, uſed in, for, or "about the making thereof, or any goods and wares belonging to the ſaid manufactory; or ſhall ſteal or wilfully "or maliciouſly cut, break, or otherwiſe deſtroy, any ſuch "glaſs, materials, tools, or implements; every ſuch offender, being thereof lawfully convicted, ſhall be adjudged guilty of felony, and ſhall be tranſported for a "term not exceeding ſeven years." But the ſtat. 38. Geo. 3. c. 17. (local and private acts) ſ. 24. enables the court before whom any ſuch offender is tried, to adjudge him "to ſuffer "ſuch leſs puniſhment as the court ſhall think fit to award."

§ 51. *Woollen cloth.* 22 Car. 2. c. 5.

By ſtat. 22 Car. 2. c. 5. ſ. 3. "No perſon who ſhall be "indicted for feloniouſly cutting and taking, ſtealing or "carrying away of any cloth or woollen manufactures from "the rack or tenters (*a*) in the night time, and be thereupon "found guilty by verdict, or ſhall confeſs the ſame on arraignment, or will not anſwer to the ſame directly, or "ſhall ſtand mute, or challenge peremptorily above twenty, or "ſhall be upon ſuch indictment outlawed, ſhall be admitted "to the benefit of clergy." But (by ſ. 4.) the court before whom ſuch offender ſhall be arraigned and condemned, may

(*a*) Where, as appears by the preamble, the ſaid cloth is put for the drying thereof.

grant

grant a reprieve for the ſtaying execution, and cauſe him to be tranſported for ſeven years, "to be accounted from the "time of ſuch tranſportation. And if ſuch offender refuſe "to be ſo tranſported, or after ſuch tranſportation ſhall return into England, Wales, or Berwick upon Tweed, he "ſhall be put to execution upon the judgment ſo given "againſt him." Ch. XVI. § 51. *Woollen.*

This ſtatute extends not to acceſſaries. 2 Hawk. ch. 33 ſ. 70.

By ſtat. 15 Geo. 2. c. 27. ſ. 1. "If any cloth or woollen "goods on the rack or tenters, or woollen yarn, or wool "left out to dry, ſhall be ſtolen in the night, any juſtice of "peace, upon complaint made within ten days by the owner, "may iſſue his warrant to any peace officer, in the day-"time to enter into and ſearch, the houſe, out-houſe, yards, "gardens, or other places, belonging to the houſes of every "perſon whom ſuch owner ſhall upon his oath declare to "ſuch juſtice he ſuſpects to have ſtolen, taken away, or "received the ſame. And if the officer ſhall find any ſuch "goods, which from the oath of ſuch perſon he ſhall have "reaſon to ſuſpect to have been ſo ſtolen, he ſhall apprehend every perſon in whoſe cuſtody or poſſeſſion the ſame "ſhall be found, and carry him before a juſtice: and if "ſuch perſon arreſted ſhall not give a ſatisfactory account "how he came by the ſame, or in a convenient time to be "ſet by the juſtice produce the party of whom he had the "ſame, or a credible witneſs to depoſe on oath his property "therein, or right of poſſeſſion; he ſhall be convicted of "ſtealing ſuch goods; and for the firſt offence forfeit treble "the value, &c. or be impriſoned, &c. For the ſecond "offence ſhall both incur forfeiture and ſuffer impriſonment. "And if ſuch perſon ſhall again commit the ſame offence, "and be thereof convicted, as aforeſaid, the juſtice or "juſtices of the peace before whom ſuch perſon ſhall be ſo "convicted as aforeſaid ſhall forthwith iſſue his or their "warrant to commit the ſaid offender to the common gaol, "there to remain till the next aſſizes or great ſeſſions, "where he ſhall be tried for the ſaid offence. And in caſe "he ſhall not, by producing the party of whom he acquired "the property or poſſeſſion of ſuch goods, or otherwiſe, "prove to the ſatisfaction of the jury, that he lawfully ob-

"tained

15 G. 2. c. 27.

Ch. XVI. § 52. *Woollens.*

" tained the property or poſſeſſion of the ſame, he ſhall be " adjudged guilty of felony, and be tranſported for ſeven " years: and ſhall be liable to the ſame puniſhment, and to " the like methods of proſecution, trial, and conviction, for " returning from ſuch tranſportation, as other felons are " liable to by virtue of the laws now in force." But (by ſ. 3.) " This ſhall not alter any former law in force for " ſtealing or receiving ſuch cloth, woollen yarn, or wool, " except where the proof is laid on the offender as afore- " ſaid."

§ 52. *Linen, cotton, &c.* 18 G. 2. c. 27. repealing ſtat. 4 G. 2. c. 16.

By ſtat. 18 Geo. 2. c. 27. ſ. 1. " Every perſon who ſhall " by day or night feloniouſly ſteal any linen, fuſtian, callico, " cotton cloth, or cloth worked, woven, or made of any " cotton or linen-yarn mixed, or any thread, linen, or cot- " ton-yarn, linen or cotton-tape, incle, filletting, laces, or " any other linen, fuſtian, or cotton goods or wares what- " ſoever, laid, placed, or expoſed, to be printed, whitened, " bowked, bleached, or dried, in any whitening or bleach- " ing croft, lands, fields, or grounds, bowking-houſe, dry- " ing-houſe, printing-houſe, or other building, ground, or " place, made uſe of by any callico printer, whiſter, crofter, " bowker, or bleacher, for printing, whitening, bowking, " bleaching, or drying of the ſame, to the value of 10 s.; " or who ſhall aid or aſſiſt, or ſhall wilfully or maliciouſly " hire or procure any other perſon or perſons to commit " any ſuch offence; or who ſhall buy or receive any ſuch " goods or wares ſo ſtolen, knowing the ſame to be ſtolen " as aforeſaid, ſhall on conviction be deemed guilty of fe- " lony without benefit of clergy." But by ſ. 2. the court may inſtead of giving judgment of death, order ſuch of- fender to be tranſported for fourteen years.

Breaking gaol or returning from tranſportation before the end of the term is (by ſ. 3.) felony without clergy.

4 G. 3. c. 37. ſ. 16. *vide* tit. Malicious Miſchief.

Alſo the ſtat. 4 Geo. 3. c. 37. ſ. 16. provides againſt the breaking into any houſe, ſhop, &c. or other place or building, with intent to ſteal, cut, or deſtroy any linen, yarn, or cloth, &c. by making it felony without benefit of clergy.

By

Ch. XVI. § 53. *Naval and military ſtores, &c.*

§ 53. *Naval Stores, &c.* 31 Eliz. c. 4.

By ſtat. 31 Eliz. c. 4. ſ. 1. " If any perſon having the " charge or cuſtody of any armour, ordnance, munition, " ſhot, powder, or habiliments of war of the queen, &c. " or of any victuals provided for any ſoldiers, gunners, " mariners, or pioneers, ſhall for any lucre or gain, or wit- " tingly, adviſedly, and of purpoſe to hinder or impeach her " majeſty's ſervice, embezzle, purloin, or convey away the " ſame, to the value of 20 s. at one or ſeveral times; ſuch " offence ſhall be adjudged felony," &c. By ſ. 2. the pro- ſecution muſt be commenced within a year after the of- fence done.

Habiliments extend to harneſs and all utenſils that belong to war. 3 Inſt. 79.

The ſtat. 22 Car. 2. c. 5. reciting the firſt clauſe of the above mentioned act, and that the offenders were embold- ened by being admitted to clergy, enacts, ſ. 3. " that no " perſon who ſhall be indicted for any offence againſt the " ſaid recited act of the 31 Eliz.; or" (which extends to any perſon who) " ſhall feloniouſly ſteal or embezzle any of his " majeſty's ſails, cordage, or other of his majeſty's naval " ſtores, to the value of 20 s., and be thereupon found " guilty by verdict, or confeſs the ſame upon arraignment, " or not anſwer directly, or ſtand mute, or challenge per- " emptorily above 20, or be outlawed upon ſuch indict- " ment, ſhall be admitted to the benefit of clergy," &c. But the court may (by ſ. 4.) grant a reprieve for the ſtaying of execution, and cauſe the offender to be tranſported for ſeven years, to be accounted from the time of ſuch tranſportation, and there kept to hard labour. " And if any " ſuch offender ſhall refuſe to be ſo tranſported, or after " ſuch tranſportation ſhall return into England, Wales, or " Berwick upon Tweed, within the time aforeſaid, he ſhall " be put to execution on the judgment ſo given againſt " him." 22 Car. 2. c. 5.

The act extends not to acceſſaries or appeals. It is re- cogniſed as an exiſting law in ſubſequent ſtatutes on the ſame ſubject, which create ſeveral new offences. 2 Hawk. ch. 33. ſ. 26.

This act of Car. 2. makes the embezzling of the king's naval ſtores to the amount of 20 s. felony, and takes away clergy Kent, Sum. Aſſ. 1749, per Burnet J. MS. Tracy, 220.

Ch. XVI. § 53. *Naval and military ſtores, &c.*

clergy from that, and alſo from the offence of ſtealing ſuch ſtores to the ſame amount, which was felony before.

Vide ante, f. 14. &c. Larceny by ſervants.

But further, though the ſtatute ſpeaks only of embezzling or ſtealing ſtores to the value of 20 s. ſtill it ſeems that any of the officers who have a bare charge of taking care of the ſtores in the king's warehouſes, or a mere authority to order them to be delivered out to the ſeveral workmen or others properly authorized to receive them, may be guilty of felony at common law in ſtealing them, to any amount, from ſuch places of depoſit. Accordingly, in Thorne's caſe, where it appeared that the priſoner was foreman of one of the ſtore-houſes in Plymouth dock, containing naval ſtores, and had given ſecurity in 200 l. for the faithful diſcharge of his duty, and was entruſted with the receiving and delivering out again of the ſtores in the abſence of the clerk, whoſe proper duty it was, when preſent: and that certain kerſey, for ſtealing of which he was indicted, was cut off by him from a bale in the ſtores, and delivered by him to an accomplice, to be taken out of the yard; though the value were under 20 s. he was convicted of larceny at common law by the direction of the court.

Thorne's caſe, Exeter Sp. Aſſ. 1800, cor. Palmer Serjt.

For other offences relative to the ſtealing, receiving, or having in poſſeſſion ſtores of this deſcription, I refer to the head of Receivers, after mentioned.

Poſt. f. 148. &c.

In regard to the particular goods, the ſtealing of which by ſervants is puniſhable under the ſtat. 21 H. 8. c. 7. or by lodgers, within the ſtat. 3 & 4 W. & M. c. 9. they have been already conſidered in treating of larcenies by thoſe reſpective deſcriptions of perſons; thoſe acts being levelled more at the perſons by whom ſuch offences are committed, than meant for the protection of the particular ſpecies of property in general.

Ante, f. 10. 26.

§ 54. **5. *As to the Place where the Offence is committed.***

From what place. Ante, 588. 618.

In treating under the laſt head of the ſeveral ſpecies of property which the legiſlature have thought it neceſſary to protect from depredation by a peculiar ſanction, ſeveral kinds are to be noted to which ſuch ſanction only extends when taken from particular places.

They

Ch. XVI. § 54. *In houſes, &c.*

They were however conſidered under the former view of the ſubject; becauſe it was not ſo much the reſpective places which were intended to be ſo ſecured, as the ſeveral enumerated chattels uſually kept there. But under the preſent head of inquiry I ſhall be led to conſider ſuch ſtatutes as have been paſſed, more for the purpoſe of ſecuring particular places from being plundered, than of ſecuring any ſpecific property preſerved therein: although attention muſt ſtill be paid in ſome inſtances, which will be pointed out, to the general nature of the property taken.

§ 55. *Larceny from the houſe, &c.* 2 MS. Sum. 272. 528. 4 Blac. Com. 239, 240, 1. *Vide* Noah Pearce's caſe, ante, f. 39.

Larceny from the houſe is not diſtinguiſhed at common law from ſimple larceny, unleſs where it is accompanied with the circumſtance of breaking the houſe at night, when it falls under another deſcription, that of burglary. This offence, it ſeems, may, as in other caſes, be effected, as well where a delivery of the thing out of the houſe is obtained by any artifice from any perſon therein at the time, as where the thief himſelf enters the houſe and takes it there. In robbery and burglary the value is immaterial, however ſmall it be; for thoſe were capital offences before the ſtatute allowing clergy; and under different ſtatutes clergy is ouſted generally in thoſe two caſes. But in all other caſes of larceny committed in a dwelling-houſe, where clergy is taken away, the value muſt exceed *a ſhilling*, or it is not a capital offence. And now by various acts of parliament the benefit of clergy is taken away from larcenies committed in a houſe in almoſt every inſtance. And though the multiplicity of thoſe proviſions is apt to create ſome confuſion, yet upon comparing them, we may collect that the benefit of clergy is denied upon the following domeſtic aggravations of larceny:

Vide ſt. 25 Ed 3. ſt. 3. c. 4.

Firſt—In Larcenies above the Value of 12 *d. committed.*

§ 56. *Clergy.* 23 H. 8. c. 1. ſ. 3. 1 Ed. 6. c. 12. ſ. 10. 5 & 6 Ed. 6. c. 9. ſ. 5. 1 Hale, 522. Poſt. f. 74.

1. In a church or chapel, with or without violence or breaking the ſame.
2. In a booth or tent in a fair or market, in the day or night, by violence or breaking the ſame, the owner or ſome of his family being therein; though they need not be put in fear.

Ch. XVI. § 56. *In houſes, &c.*

3 & 4 W. & M. c. 9. 2 MS. Sum. 272. 528. Poſt. f. 72. 3 & 4 W. & M. ch. 9. Poſt. f. 69.

3. By robbing a dwelling-houſe in the day-time; (which robbing implies a breaking;) any perſon being therein, though not put in fear.

4. In a dwelling-houſe, by day or night, without breaking the ſame, any perſon being therein and put in fear; which amounts in law to a robbery (*a*): and in both theſe laſt inſtances acceſſaries before the fact are excluded clergy.

Secondly—In Larcenies to the Value of 5 s. committed.

39 Eliz. c. 15. 3 & 4 W. & M. c. 9. Sect. vi. Poſt. f. 76.

1. By breaking any dwelling-houſe, or any out-houſe, ſhop, or warehouſe, thereto belonging, in the day time; though no perſon be therein: which extends to aiders, abettors, and acceſſaries before the fact.

10 & 11 W. 3. c. 23.

2. By privately ſtealing goods, wares, or merchandizes in any ſhop, warehouſe, coach-houſe, or ſtable, by day or night; though the ſame be not broken open; and though no perſon be therein: which extends likewiſe to ſuch as aſſiſt, hire, or command the offence to be committed.

Thirdly—In Larcenies to the Value of 40 s.

12 Ann. ſt. 1. c. 7.

In a dwelling-houſe or its out-houſes, though not broken open, and whether any perſon be therein or not; unleſs committed by apprentices under the age of 15, againſt their maſters: this alſo extends to aiders and aſſiſters.

§ 57. *The ſtatutes.*

Keeping this index to the ſtatutes in view, as far as reſpects the value of the goods ſtolen; the ſubject will be beſt illuſtrated by a recital of the ſtatutes themſelves in order of time, and a ſubſequent reference to them under the ſeveral heads of offences into which they branch; together with the caſes which have been adjudged upon the conſtruction of each. I begin with the ſtat. 23 H. 8. though it is much to be doubted whether it be not repealed as to the point of clergy, by ſtat. 1 Ed. 6. c. 12. which ſupplies its place in great meaſure; and if ſo, not revived by ſtat. 5 & 6 Ed. 6. c. 10.

23 H. 8. c. 1. f. 3. Poſt. f. 68.

By ſtat. 23 H. 8. c. 1. f. 3. "No perſon who ſhall be "found guilty after the laws of this land, for robbing any "churches, chapels, or other holy places; or for robbing

(*a*) If the property be taken by violence or terror in the preſence of the party, which alone amounts to robbery, properly ſo called, the value is immaterial. *Vide* poſt. f. 70.

"of

"of any perſon or perſons in their dwelling-houſes, or Ch. XVI. § 57. *In houſes, &c.*
"dwelling-places; the owner or dweller in the ſame houſe, *Statutes.*
"his wife, his children, or ſervants, then being within,
"and put in fear and dread by the ſame; or for robbing of
"any perſon or perſons in or near about the highways: nor
"any perſon or perſons being found guilty of any abetment,
"procurement, helping, maintaining, or counſelling of or
"to any ſuch felonies, ſhall be admitted to his clergy; ſuch
"as be within holy orders only excepted."

By ſtat. 25 H. 8. c. 3. f. 2. "Every perſon indicted of 25 H. 8. c. 3. f. 2.
"robbery, burglary, or other felony, according to the tenor
"and meaning of the ſtat. 23 H. 8. and thereupon arraigned,
"do ſtand mute, or challenge peremptorily above 20, or not
"anſwer directly to the ſame indictment and felony where-
"upon he is ſo arraigned, ſhall loſe the benefit of his clergy,
"in like manner and form as if he had directly pleaded to
"the ſaid robbery, burglary, or felony, whereupon he is ſo
"arraigned, and thereupon had been found guilty, after
"the laws of the land."

§ 58.

By ſtat. 1 Ed. 6. c. 12. f. 10. "No perſon who ſhall be 1 Ed. 6. c. 12. f. 10.
"in due form of law attainted or convicted of breaking of
"any houſe by day or by night; any perſon being then in
"the ſame houſe, where the ſame breaking ſhall be com-
"mitted, and thereby put in fear or dread; or of robbing
"any perſon in or near the highway; or of felonioufly
"taking of any goods out of any pariſh church or chapel;
"or being indicted or appealed of any of the ſame offences,
"and thereupon found guilty by verdict, or ſhall confeſs
"the ſame upon his arraignment, or will not anſwer directly,
"or ſhall ſtand mute, ſhall (not) be admitted to the benefit
"of his clergy. And in all other caſes of felony, other
"than ſuch as are before mentioned, &c. all perſons who
"ſhall be arraigned or found guilty upon their arraignment,
"or ſhall confeſs, or ſtand mute, in form aforeſaid, ſhall
"have their clergy in like manner as before the 1 H. 8."
This ſtatute muſt be intended of ſuch a houſe breaking as
amounts to or is attended with felony. Poſt. f. 68.

§ 59.

The ſtat. 5 & 6 Ed. 6. c. 10. f. 1. &c. reciting the above-mentioned clauſe of the ſtat. 23 H. 8. concerning clergy, 5 & 6 Ed. 6. c. 10.

Ch. XVI. § 59. *In houſes, &c.* — *Statutes.*

and taking notice that it was defective in omitting thoſe who rob, &c. in one county, and remove the thing taken into another, and were there tried, &c. and that this omiſſion was ſupplied by the ſtat. 25 H. 8. which latter ſtat. was made ineffectual in this reſpect, by the ſtat. 1 Ed. 6. c. 12. which reſtored clergy as it ſtood before the reign of Hen. 8th to all the felonies not therein mentioned; and that by reaſon of the ſaid ſtat. of Ed. 6. many perſons committing robbery or burglary in one county, and flying into another, and there taken with the mainour, and convicted of larceny, had been admitted to their clergy, to the great emboldening and comforting of ſuch offenders; for redreſs whereof enacts, "that "the ſtat. 25 H. 8. touching the putting of ſuch offenders "from their clergy, and every article, clauſe, and ſentence "contained in the ſame, touching clergy, ſhall touching ſuch "offence from henceforth to be committed and done, ſtand, "remain, and be in full force and virtue, in ſuch manner "and form as it did before the making of the ſaid act of "1 Ed. 6."

§ 60. 5 & 6 Ed. 6. c. 9.

The ſtat. 5 & 6 Ed. 6. c. 9. ſ. 1 & 2. reciting the ſtat. of the 23 H. 8. c. 1. which was made perpetual by the ſtat. 32 H. 8. c. 3. and that it had been doubted whether if ſuch robberies and felonies have been committed in dwelling-houſes, &c. the "owner or dweller in the ſame, his wife, "children, or ſervants, being then put in fear or dread by "the ſame, the offender ſhould loſe his clergy, unleſs the "ſame robbery or felony be committed in the very chamber, "houſe, or place, where the owner or dweller in the ſame "houſe, his wife, &c. ſhall happen to be or lie at the "time of ſuch robbery or felony committed, and put in "fear or dread; although the owner and dweller in ſuch "houſe, &c. his wife, &c. at the time of ſuch robbery "and felony committed, were or lay in other places within "the precinct of the ſame dwelling-houſes, nigh unto the "houſe or place where ſuch robbery and felony ſhall happen "to be done. Or if it happen, that the owner or dweller "within the ſame houſe, where ſuch robbery and felony "ſhall be done, his wife, &c. to be aſleep at the time of "ſuch robbery and felony, although the ſame robbery were "done

"done in the chamber or place where the owner or dweller "in the ſame houſe, his wife, &c. then lay; the offenders "being found guilty thereof ſhould loſe their clergy. And "reciting (ſ. 3.) further, that it had been doubted whether "if ſuch robberies and felonies be committed in any booth "or tent in any fair or market, the owner of the ſame, his "wife, &c. being within the ſame at the time of the committing of ſuch felonies, and put in fear and dread, the "offenders therein, being found guilty, ſhould not loſe their "clergy." (S. 4.) "For the true declaration and explanation of the ſame doubts before recited, enacts, ordains, "and eſtabliſhes, that if any perſon or perſons be found "guilty of robbing of any perſon or perſons in any part or "parcel of their dwelling-houſes or dwelling-places, the "owner or dweller in the ſame houſe, or his wife, his "children, or ſervants, being then within the ſame houſe "or place, where it ſhall happen the ſame robbery and "felony ſhall be committed and done, or in any other "place within the precinct of the ſame houſe or dwelling-"place; that ſuch offenders ſhall not be admitted to their "clergy; whether the owner or dweller in the ſame houſe, "his wife, or children, then and there being, ſhall be "waking or ſleeping." "And (ſ. 5.) that no perſon or "perſons which ſhall be found guilty of and for robbing "any perſon or perſons in any booth or tent in any fair or "market, the owner, his wife, his children, or ſervants, "or ſervant, then being within the ſame booth or tent, "ſhall (not) be admitted to the benefit of clergy, &c. whether the owner or dweller of ſuch booths or tents, his "wife, children, or ſervants being in the ſame at the time "of ſuch robberies and felonies committed, ſhall be ſleeping or waking."

Ch. XVI. § 60. *In houſes, &c.* — *Statutes.*

§ 61. 4 & 5 Ph. & M. c. 4.

The ſtat. 4 & 5 Ph. & M. c. 4. ſ. 1. enacts, "that every "perſon who ſhall maliciouſly hire, command, or counſel "any perſon or perſons to commit or do any robbery in any "dwelling-houſe or houſes, or in or near the highway in "the realm of England, or in any of the queen's dominions, "or to commit or do any robbery in any place within the "marches of England againſt Scotland; that then every ſuch

Ch. XVI. § 61. *In houſes, &c.* — *Statutes.*

" offender being outlawed thereof, or being thereof arraigned " and found guilty by the order of the law, or being other- " wiſe lawfully attainted or convicted of the ſame offence; " or being arraigned thereof do ſtand mute, or challenge pe- " remptorily above 20, or will not anſwer directly to ſuch " offence, ſhall not have the benefit of clergy."

2 Hawk. ch. 33. ſ. 46. 11 Co. 37.

Though this ſtatute be general as to all robberies in any dwelling-houſe, yet it is reſtrained in the conſtruction of it to ſuch robberies of this kind as are excluded from clergy by ſome former ſtatute.

§ 62. 39 Eliz. c. 15. poſt. ſ. 75.

The ſtat. 39 Eliz. c. 15. ſ. 1. reciting, " that then of " late divers felonious perſons underſtanding that the " robbing of houſes in the day-time, no perſon being therein " at the time, is not ſo penal as where ſome perſon is there- " in, had been emboldened to take their opportunity to " commit many heinous robberies in breaking and entering " divers houſes eſpecially of the poorer ſort, who are not " able to keep any ſervant, or otherwiſe to leave any perſon " to look to their houſe when they go to hear divine ſer- " vice, or from home to follow their labour," &c. enacts (ſ. 2.) " that if any perſon or perſons ſhall be found guilty " and convicted by verdict, confeſſion, or otherwiſe, ac- " cording to law, for the felonious taking away in the day- " time of any money, goods, or chattels, being of the value " of 5 s. or upwards, in any dwelling-houſe or houſes, or " any part thereof, or any outhouſe or outhouſes, belonging " to and uſed with any dwelling-houſe or houſes; although " no perſon ſhall be in the ſaid houſe or outhouſes at the " time of ſuch felony committed; then ſuch perſon ſhall " not be admitted to clergy."

§ 63. 3 & 4 W. & M. c. 9. ſ. 2.

The ſtat. 3 & 4 W. & M. c. 9. ſ. 2. enacts " that if any " perſon or perſons whatſoever be indicted of any offence, " for which by virtue of any former ſtatute he or they are " excluded clergy, if he or they had been thereof convicted " by verdict or confeſſion; if he or they ſtand mute, or will " not anſwer directly to the felony, or challenge peremptorily " above 20, &c. or ſhall be outlawed thereupon, ſhall not " be admitted to the benefit of clergy."

The

Ch. XVI. § 64. *In houſes, &c.* — *Statutes.* § 64. 3 & 4 W. & M. c. 9. ſ. 1.

The ſame ſtatute, ſ. 1. enacts " that all and every per- " ſon or perſons who ſhall rob any other perſon; or ſhall " feloniouſly take away any goods or chattels, being in any " dwelling-houſe, the owner or any other perſon being " therein and put in fear; or ſhall rob any dwelling-houſe " in the day-time, any perſon being therein; or ſhall com- " fort, aid, abet, aſſiſt, counſel, hire, or command, any " perſon or perſons to commit any of the ſaid offences; " or to break any dwelling-houſe, ſhop, or warehouſe, " thereunto belonging, or therewith uſed, in the day-time, " and feloniouſly take away any money, goods, or chattel, " of the value of 5 s. or upwards, therein being; although " no perſon ſhall be within ſuch dwelling-houſe, ſhop, or " warehouſe; being thereof convicted or attainted, or being " indicted thereof, ſhall ſtand mute, or will not directly " anſwer to the indictment, or ſhall peremptorily challenge " above 20, ſhall not have the benefit of clergy."

§ 65. 10 & 11 W. 3. c. 23.

By ſtat. 10 & 11 W. 3. c. 23. " All and every perſon " and perſons who, by night or day, ſhall in any ſhop, " warehouſe, coach-houſe, or ſtable, privately and felo- " niouſly ſteal any goods, wares, or merchandizes, being " of the value of 5 s. or more; though ſuch ſhop, &c. be " not actually broken open by ſuch offender or offenders; " and though the owners of ſuch goods, or any other per- " ſon, be not in ſuch ſhop, &c. to be put in fear; or ſhall " aſſiſt, hire, or command any perſon to commit ſuch of- " fence; being thereof convicted or attainted by verdict or " confeſſion, or being indicted thereof, ſhall ſtand mute, " or not directly anſwer, or challenge peremptorily above " 20, &c. ſhall be excluded clergy."

§ 66. 12 Ann. ſt. 1. c. 7. ſ. 1.

The ſtat. 12 Ann. ſt. 1. c. 7. reciting that " foraſmuch " as divers wicked and ill-diſpoſed ſervants and other per- " ſons are encouraged to commit robberies in houſes by the " privilege of clergy," &c. enacts " that every perſon who " ſhall feloniouſly ſteal any money, goods, or chattels, " wares or merchandizes, of the value of 40 s. or more, " being in a dwelling-houſe, or outhouſe thereunto belong- " ing;

Ch. XVI. § 66. *In houſes, &c.*

Statutes.

" ing; although ſuch houſe or outhouſe be not actually " broken by ſuch offender; and although the owner of ſuch " goods, or any other perſon or perſons, be or be not in " ſuch houſe or outhouſe; or ſhall aſſiſt or aid any perſon or " perſons to commit any ſuch offence; being thereof con- " victed or attainted by verdict or confeſſion, or being in- " dicted thereof ſhall ſtand mute, or will not directly anſwer " to the indictment, or ſhall peremptorily challenge above " 20, &c. ſhall be debarred of clergy." With a proviſo, (ſ. 2.) " that the act ſhall not extend to apprentices under " the age of 15 years, who ſhall rob their maſters as afore- " ſaid."

Out of the above-recited ſtatutes are to be collected eight different claſſes of offences, which I ſhall now proceed to conſider of ſeparately; noticing by the way, whatever peculiarities may occur in the ſeveral forms of indictment, and referring to the before-mentioned index reſpecting the value of the property taken.

Ante, 623, 4.

1. *Larceny or Robbery in a Church or Chapel.*

§ 67. *Robbery and larceny in a church or chapel.*
2 Hale, 333.
vi. 11 Co. 29.
1 Ed. 6. c. 12. ſ. 10.
2 Hawk. c. 33. ſ. 74.
3 & 4 W. & M. c. 9.
(2 Hale, 270.)
5 & 6 Ed. 6. c. 10.
Sum. 241.
Poſt. Trial, &c.

Clergy was it ſeems allowable at common law in caſe of ſacrilege, unleſs, as it is ſaid, the ordinary refuſed it. But now all perſons in general are ouſted of clergy for " the " felonioufly taking of any goods out of any pariſh church, " or other church or chapel," by ſtat. 1 Ed. 6. c. 12. ſ. 10. in all caſes, except that of challenging peremptorily more than 20, which is ſupplied by ſtat. 3 & 4 W. & M. c. 9. as to indictments (and is the leſs material, as ſuch challenges are now merely over-ruled); and this, as well in regard to indictments in another county, as in that in which the ſacrilege was committed, as will be ſhewn hereafter more at large.

2 Hawk. c. 33. ſ. 75.
2 Hale, 365.

But acceſſaries before are not ouſted by any ſtatute now in force, ſince the repeal of the ſtat. 23 H. 8. c. 1. in that reſpect; unleſs the offence amount to burglary.

Ante, ſ. 31.

The ſtat. 4 Geo. 2. c. 32., againſt ſtealing lead or other fixtures there enumerated from buildings, has been holden to extend to churches.

2. *The breaking of Houſes by Day or Night, any Perſon being therein and thereby put in Dread.*

Ch. XVI. § 68. *In houſes, &c.*

§ 68. *Breaking houſes any perſon therein and put in fear.*
1 Ed. 6. c. 12.
2 Hawk. ch. 33. ſ. 40
2 MS. Sum. 274.
1 Hale, 548. 562, 3.
2 Hale, 353.
11 Co. 31. b. 32. 36.
Poſt. ſ. 72.

By the word "*breaking*" in the ſtat. 1 Ed. 6. c. 12. ſ. 10. muſt be underſtood ſuch a breaking as amounts to or is attended with ſome felony: and therefore if the houſe be broken in the day-time, though with a felonious intent, yet if nothing be taken, it is not within the ſtatute. Lord Hale, who once thought otherwiſe, afterwards corrected his opinion. So that the general words of it ought to be ſupplied with an intendment, viz. where the party is convicted of breaking the houſe in the night *burglariouſly*, or in the day, and *ſtealing goods therein*. But it requires an actual breaking of the houſe, ſuch as, if done in the night, would conſtitute burglary; and alſo a putting of ſome perſon within it in fear. Subject to this explanation, offenders of this deſcription above referred to (including aiders and abettors at the fact, though they do not enter the houſe,) are ouſted of clergy by ſtat. 1 Ed. 6. c. 12. ſ. 10. being all robbers; for otherwiſe, as Lord Hale obſerves, this great abſurdity would follow, that thoſe who are preſent, aiding, and aſſiſting in the robbery, would have a greater privilege than if abſent and only acceſſaries before, who are ouſted by the ſtat. of Ph. & M. aftermentioned. Such offenders are ouſted on being attainted or convicted, or upon indictment or appeal found guilty by verdict, or confeſſing the ſame upon arraignment, or not anſwering directly, or being wilfully mute; and by ſtat. 3 & 4 W. & M. c. 9. ſ. 2. upon indictment challenging peremptorily more than 20. The ſtat. 4 & 5 Ph. & M. c. 4. alſo includes acceſſaries before under all circumſtances, and extends as well to appeals as to indictments. And if the reaſoning of Lord Hale and Mr. J. Foſter upon Powlter's caſe be right, that the ſtat. of 4 & 5 Ph. & M., taking away clergy in all caſes from the acceſſary before, does by neceſſary conſequence take away clergy in all caſes from the principal; then it will follow of courſe, that the ſtatute having taken away clergy from the acceſſary before, in the caſe of his challenging above 20, upon an appeal, as well as upon an indictment, does alſo take it away in the ſame inſtance from the principal.

1 Hale, 563.
2 Hale, 359.

3 & 4 W. & M. c. 9 ſ. 2.
4 & 5 Ph. & M. c. 4.
2 Hawk. ch. 33. ſ. 45.

2 Hale, 346, 7. Foſt. 330. Poſt. ſ. 73.

Ch. XVI. § 68. *In houſes, &c.*

2 Hale, 270. 345. 4 Blac. Com. 354.

Though this obſervation is more important from its general tendency, than from the particular inſtance to which it is applied; ſince by the practice of modern times, ſuch challenges above the allowed number in caſes of felony are merely over-ruled, and conſidered as a nullity, by force of the ſtat. 22 H. 8. c. 14. It is further to be remarked, that this ſtat. of the 1 Ed. 6. c. 12. has ſuperceded the neceſſity of the ſtat. 25 H. 8. c. 3. ſ. 2. and the 23 H. 8. c. 1. ſ. 3. therein recited, as far as they relate to this matter; even ſuppoſing the clauſes concerning the ouſting of clergy in this caſe, which were repealed by the ſaid ſtat. of 1 Ed. 6. were revived by the ſtat. 5 & 6 Ed. 6. c. 10. an opinion maintained by Serjt. Hawkins, grounded on the report of Lord Coke, but which is ably controverted by Mr. J. Foſter, who cites the opinion of Lord Hale to the ſame effect. For the deſcription of the offence is narrower in the ſtat. 23 H. 8. c. 1. ſ. 3. than in the ſtat. 1 Ed. 6. c. 12. ſ. 10. being confined to caſes where "*the owner or dweller in the ſame houſe, his wife, children, or ſervants,*" are within and put in dread: whereas the latter ſtatute extends the deſcription to "*any perſon*" being in the houſe, &c. And indeed this very ſtat. of 1 Ed. 6. is in its turn in effect rendered uſeleſs by ſtat. 3 & 4 W. & M. c. 9. ſ. 1. as will be preſently ſhewn.

2 Hawk. ch. 33. ſ. 43. 11 Co. 33. Foſt. 330. &c. 2 Hale, 347.

Poſt. ſ. 72.

§ 69. *Putting in fear without a breaking.*

3. *The felonious taking of any Goods out of a Dwelling-houſe, the Owner or any other Perſon being therein and put in Fear, (which amounts in Law to a Robbery); though there be no breaking of the Houſe.*

2 MS. Sum. 276. 1 Hawk. ch. 33. ſ. 88. (*Vide* 1 Hale, 518.) 3 & 4 W. & M. c. 9. ſ. 1. *Vide* ſt. 23 H. 8. c. 1. ſ. 3. ante. 12 Geo. 3. c. 20.

Clergy is ouſted in this caſe by ſtat. 3 & 4 W. & M. c. 9. ſ. 1. from principals, aiders, and abettors, and from acceſſaries before, upon conviction or attainder, or being indicted and ſtanding mute, or not directly anſwering, or peremptorily challenging above 20. And the ſtat. 12 Geo. 3. c. 20. which directs that any perſon being arraigned on any indictment or appeal for felony, and ſtanding mute, or not directly anſwering, ſhall be convicted of the felony, ſupplies the deficiency in that caſe upon appeals. And I have before ſhewn, that the challenging above 20 ſignifies nothing as to the point of clergy, as the challenge is merely over-ruled.

Supra.

No

Ch. XVI. § 69. *In houſes, &c.*

No breaking is neceſſary under this branch of the ſtat. of William (*a*).

A chamber of an inn of court has been holden to be a dwelling-houſe within this act, which muſt doubtleſs be governed by the ſame rules as prevail in the caſe of burglary (*b*).

(*a*) 2 MS. Sum. 276 *Vide* 1 Hale, 518. 548. on the correſponding ſt. of 23 H. 8. c. 1. (*b*) Evans and Finch, Cro. Car. 473. Poſt. ſ. 72.

§ 70. *Value.*

2 MS. Sum. 275.

There is one point of ſome difficulty. In the text of the manuſcript referred to it is ſaid (ſpeaking of this branch of the ſtat. of King William) that the value of the goods taken is immaterial: but a quære is put to this in the margin, "*unleſs the thing be taken in the preſence of the party.*" I preſume the quære is made on the ground, that unleſs the thing be taken in the preſence of the party, the offence does not amount to robbery; and therefore, unleſs the value were above 1 s. the offender need not pray the benefit of clergy. But the manuſcript in the place above referred to ſeems to conſider that the ſtatute was not meant to be confined to ſuch a putting in fear as amounts in law to a robbery from the perſon, namely, where the thing is taken in his preſence. And this appears further, from the reaſoning adopted upon another branch of the ſame ſtatute, immediately following the paſſage cited: where ſpeaking of robbing any dwelling-houſe, any perſon being within the ſame, (the offence mentioned in the next ſection) it ſays, "and "this ſeems a capital offence, whether that perſon be put "in fear or not. The legiſlature meant to guard againſt "danger as well as fear: and when thieves break into a "houſe, all perſons within it may be deemed to be in dan"ger of perſonal violence from ſuch daring ruffians: in this "caſe the value of the goods taken ſeems equally immate"rial." And again, the ſame manuſcript ſpeaking of a third offence under the ſtatute of William; namely, the breaking of any dwelling-houſe, ſhop, or warehouſe, and taking money or goods to the value of 5 s., though no perſon happen to be therein; ſays, "If no perſon be within "the houſe, and conſequently no perſonal terror or danger "to any life be mixed with the felony, there muſt not only "be a breaking of the houſe, but a taking of money or "goods to the value of 5 s." According to this reaſoning

 therefore

Ch. XVI. § 70. *In houſes, &c.*

therefore the aggravation of the offence in the firſt-mentioned clauſe, which I am now treating of, conſiſts in the actual fear created in ſome perſon in the houſe, from the knowledge of thieves being therein, although out of his preſence, and therefore the value of the thing taken as much out of the queſtion as in robbery properly ſo called. Lord Hale may be thought to have adopted the ſame opinion, (ſpeaking of the ſtat. 5 & 6 Ed. 6.) which applies to the firſt mentioned branch of the ſtat. of William, though not as to the offence of breaking the houſe without putting in fear. For he puts the caſe; if a man break a houſe in the day-time, and ſteal goods only of the value of 12 d., the owner, his wife, or children being in the houſe, *and not put in fear* (*a*); this will be but petit larceny; notwithſtanding the ſtat. of 5 & 6 Ed. 6. takes away clergy: for that ſtat. altered not the nature of the offence, but takes away clergy where clergy was allowed before, namely, where the offence was capital, as in caſe of grand larceny. Therefore he conſiders that the putting in fear would affect the queſtion of clergy even when the value of the thing taken was not more than 12 d. Yet it ſeems the uſual interpretation of the ſtatute has been, and is ſo expreſſed to be in another part of the ſame manuſcript before quoted, that as well upon the clauſe requiring a putting in fear, as upon that which implies a breaking, in order to ouſt any offender of clergy, the value taken muſt in either caſe exceed 1 s.; with the exception in the former inſtance pointed out in the quære, where the thing is taken in the preſence of ſome perſon in the houſe, ſo as to amount in law to a robbery.

1 Hale, 531.

Ante, f. 56.

Ante, 633.

§ 71. *Fear.*

But I do not find it any where ſettled, whether or not it be neceſſary to prove the actual ſenſation of fear felt by any perſon in the houſe; or whether if any perſon in the houſe be conſcious of the fact at the time of the robbery, the fact itſelf raiſes the implication of fear from the reaſonable grounds exiſting for it. Lord Coke (ſpeaking of a ſimilar proviſion in the ſtat. 1 Ed. 6. c. 12.) only ſays that if the party were in the houſe, and not put in fear, as, if he were aſleep, or in another part of the houſe, the offender ſhall have his clergy. Yet in

12 Co. 37. b.

(*a*) Perhaps Lord Hale meant no more by theſe words, than virtually to except the caſe of *robbery*, properly ſo called.

theſe

Ch. XVI. § 71. *In houſes, &c.*

theſe caſes, there being no aſſault upon the perſon, as in conſtruction of law there is in every caſe of a robbery from the perſon, there does not ſeem the ſame reaſon for raiſing ſuch an implication. And I believe the practice is to require proof of an actual fear excited by the fact when committed out of the preſence of the party, ſo as not to amount to robbery at common law. But certainly if the perſon in whoſe preſence the thing was taken were not conſcious of the fact at the time, the caſe would not fall within the act.

Indictment. Rex v. Etherington, and Brook, on the ſpecial commiſſion at Lewes, May 1795, and before all the Judges in June 1795. MS. Jud. and MS. Buller J. (S. C. 2 Leach, 771.)

The indictment muſt allege that the perſons in the houſe were put in fear *by the priſoner*; merely ſtating the ſtealing of the goods in the dwelling-houſe of J. G. "he the ſaid "J. G. &c. then being in the ſaid dwelling-houſe, and "being put in fear therein, againſt the form of the ſtatute," &c. was holden by all the Judges (*abſente Groſe* J.) not to be ſufficient in the caſe of R. v. Etherington and Brook. On the firſt conſideration of the matter, moſt of the Judges inclined to think the indictment good in purſuing the words of the ſtatute. They all agreed that it was neceſſary to prove that the priſoners put the perſons in the dwelling-houſe in fear; and that ſuch was the meaning of the ſtatute: and they thought, that whatever was the conſtruction of the words of the ſtature, the ſame muſt be the meaning and conſtruction of the ſame words in the indictment. But upon being referred to ſome precedents of indictments for burglary, in which to ouſt the offenders of their clergy in caſe of their ſtanding mute or challenging more than twenty, they were charged with putting perſons in fear who were in the houſes; (under which circumſtances they are ouſted of clergy by ſtat. 1 Ed. 6. c. 12.) and alſo to officium clerici pacis 149. 217. Weſt's Symbol. f. 234. 245. and 280. tit. Indictments and offences; and to a precedent of an indictment on the Weſtern circuit, found at the Summer aſſizes for Devon 1710, which charged that the priſoner Ann Anderſon domum manſionalem Joannæ Snell fregit et intravit, et præd. Joan. Snell in eadem domo exiſtent: in timore corporali vitæ ſuæ impoſuit, &c; they agreed that the priſoners were entitled to their clergy for the defect of the indictment in not ſtating that the perſons in the houſe were put in fear by the priſoners.

Vide 12 Co. 35. b.

Ch. XVI. § 72. *In houſes, &c.*

4. *The robbing of any Dwelling-houſe (which implies a breaking and an actual taking of the Goods) in the Day-time; any Perſon being therein, though not put in Fear.*

§ 72. *Breaking and ſtealing without putting in fear.*

The ſtat. 3 & 4 W. & M. c. 9. ſ. 1. ouſts clergy in this caſe from the principals, aiders, and abettors, and acceſſaries before, upon conviction or attainder, or being indicted and ſtanding mute, or challenging peremptorily above 20. But what I have before obſerved concerning challenges will alſo apply here: and ſtanding mute operates as a conviction by ſtat. 12 Geo. 3. c. 20.

2 Hale, 352, 3. 3 & 4 W. & M. c. 9. Ante, 632. 12 Geo. 3. c. 20.

This ſtat. of King William is more comprehenſive than either the ſtat. 1 Ed. 6. c. 12. or the ſtat. 5 & 6 Ed. 6. c. 9. ſ. 4. and ſeems to include them both as to this point. For as the word *robbing* here implies a *breaking*, and the ſtat. 1 Ed. 6. c. 12. ſ. 10. which ſpeaks only of a breaking, muſt be intended of ſuch an one as amounts to or is attended with felony; and they each require ſome perſon to be preſent in the houſe; they may in theſe reſpects be ſaid to amount to the ſame offence. But in the ſtatute of William, *the putting in fear* is omitted, which is neceſſary to bring the caſe within the ſtat. 1 Ed. 6. So with reſpect to the ſtat. 5 & 6 Ed. 6. c. 9. which ouſts clergy in caſe of robbing any perſon in their dwelling-houſes, or dwelling-places; it agrees with the ſtat. of William in this, that a breaking of the houſe is neceſſary; for *robbing* implies violence: and it is not neceſſary that the perſons within ſhould be in fear; for the ſtatute extends to them "*whether waking or ſleeping*:" but it requires that the *owner* or *dweller in the houſe, his wife, children, or ſervants*, ſhould be in the ſame at the time of the robbery or felony; which has been holden not to extend to a ſojourner or lodger. Whereas the ſtatute of William is general as to "any perſon." But it is not neceſſary they ſhould be in the ſame room where the robbery is committed; nor need it be alleged in the indictment by way of robbery properly ſo called, viz. with violence from the perſon: but it is ſufficient to ouſt the offender of clergy to allege the breaking of the houſe and taking the goods there, ſuch an one being therein, &c.

Ante, 632. 2 MS. Sum. 272, 528. Ante, ſ. 58. 60. 1 Hale, 548. Kel. 68, 9. 2 Hawk. ch. 33. ſ. 40. Ante, ſ. 68.

2 Hawk. ch. 33. ſ. 92. 2 MS. Sum. 528. 1 Hale, 520. 522. 548. 2 Hale, 354.

2 Hawk. ch. 33. ſ. 93. 2 MS. Sum. 527, 8. Dy. 183. b. (n.) Kel. 69. 1 Hale, 522. 2 Hale, 354.

The breaking the door of an inner room, and ſtealing goods from thence, is within theſe ſtatutes; but not the breaking of a cheſt or fixed counter. It muſt be ſuch a robbery as would

1 Hale, 523. 526, 7, 8. 2 Hale, 355. 7, 8. MS. Burnet, 76. Kel. 59. 69. Foſt. 108, 9. Ante, ſ. 69.

amount

amount to burglary if done in the night. And the ſame rule ſeems to prevail as to what ſhall be deemed a dwelling-houſe. Ch. XVI. § 72. *In houſes, &c.*

An indictment was laid upon the ſtat. 5 & 6 Ed. 6. for breaking the king's manſion at Whitehall, and ſtealing Sir H. Hungate's goods there, divers of the king's ſervants then being in the houſe. R. v. Williams and others, 14 Car. 2. 1 Hale, 522.

§ 73. 5 & 6 E. 6. c. 9. *Clergy.* 4 & 5 Ph. & M. c. 4. 3 & 4 W. & M. c. 9. ſ. 1, 2. 12 Geo. 3. c. 20. 1 Hale, 528. Ante, ſ. 68.

But the particular offence deſcribed in the ſtat. 5 & 6 Ed. 6. c. 9. is ouſted of clergy in all caſes, both as to principals and acceſſaries before, by force of that ſtat. and the expreſs words of the ſtats. 4 & 5 Ph. & M. c. 4. 3 & 4 W. & M. c. 9. ſ. 1, 2. and 12 G. 3. c. 20.; except as to the principal challenging above 20 on an appeal; to which according to Lord Hale and Mr. J. Foſter, the ſtat. 4 & 5 Ph. & M. muſt be extended by neceſſary conſequence, inaſmuch as it ouſts the acceſſary before in the ſame predicament: and upon the ſame ground, Lord Hale is clearly of opinion, that aiders and aſſiſters within the ſtat. 5 & 6 Ed. 6. c. 9. are alſo ouſted of clergy, though they do not actually enter the houſe. But he ſuggeſts whether it may not be neceſſary to charge them in the indictment, as "maliciouſly commanding, hiring, or "counſelling" to the fact, within the words of the ſtat. 4 & 5 Ph. & M.; though he himſelf thinks the words, "ma-"liciouſly preſent, aiding, and abetting," include the former and much more; and he alſo thinks, that all may be indicted generally for the breaking, &c. as in caſe of burglary or robbery. 1 Hale, 521, 2.

Value.

Whether or not the value of the thing taken be material in this offence of robbing an houſe, without putting any perſon therein in fear, has been diſcuſſed in a prior ſection: Lord Hale however is expreſs that it muſt be above 12 d. in order to ouſt clergy. Ante, ſ. 70. 1 Hale, 532.

§ 74. *Breaking booth or tent, without putting in fear.*

5. *The robbing any Perſon in a Booth or Tent, in any Fair or Market, (which includes a Breaking) the Owner, his Wife, Children, or Servants being within the ſame, whether ſleeping or waking.*

This offence is only ouſted of clergy in regard to principals, by ſtat. 5 & 6 Ed. 6. c. 9. ſ. 5. in caſe of being found guilty, (which means either by verdict or confeſſion) upon an 1 Hale, 522. 2 Hale, 354. 2 Hawk. ch. 33. ſ. 91, 92. 2 MS. Sum. 528. 5 & 6 Ed. 6. c. 9.

Ch. XVI. § 74. *In booths or tents, &c.*

an appeal or indictment; which is extended by ſtat. 3 & 4 W. & M. c. 9. ſ. 2. (as to indictments,) to outlawry, ſtanding mute, or challenging above 20; and the ſtat. 12 G. 3. c. 20. includes ſtanding mute upon appeals. But it does not appear that acceſſaries before to a robbery in a booth or tent are ouſted of clergy by any ſtatute, unleſs it be a robbery from the perſon; in which caſe the ſtat. 3 & 4 W. & M. c. 9. attaches upon them: for the ſtat. 4 & 5 Ph. & M. extends only to dwelling-houſes.

3 & 4 W. & M. c. 9. ſ. 2.
12 Geo. 3. c. 20.
Acceſſaries.
Vide 1 Hale, 564.
Ante, f. 61.

For the conſtruction put upon the ſtat. 5 & 6 Ed. 6. c. 9. I refer to the laſt ſection.

§ 75. *Breaking dwelling-houſes, out-houſes, ſhops, &c. though no perſon within, in the day-time, and ſtealing to the value of 5 s.*

6. The Breaking of any Dwelling-houſe or Out-houſe, Shop, or Warehouſe, and the felonioufly taking away Money, Goods, or Chattels of the Value of 5 s. or upwards in the Day-time; though no Perſon be within the ſame at the Time.

39 Eliz. c. 15.
Ante, 628.
3 W. & M. c. 9. ſ. 2.

The principals are ouſted of clergy by ſtat. 39 Eliz. c. 15. upon being found guilty, and convicted by verdict, confeſſion, or otherwiſe; and the ſtat. 3 & 4 W. & M. c. 9. ſ. 2. extends it, as to indictments, to outlawry, as well as the other caſes there mentioned, and ſtanding mute, not directly anſwering, and challenging above 20 peremptorily; and the firſt ſection of the ſame ſtatute alſo ouſts the aiders and abettors, and acceſſaries before of their clergy, upon conviction or attainder, or being indicted and challenging peremptorily above 20, or ſtanding mute; which latter is ſupplied upon appeals as well as indictments, by ſtat. 12 G. 3. c. 20. in the manner before mentioned.

Ante, f. 69.

But ſeveral matters are neceſſary to be noted in the conſideration of the ſtat. 39 Eliz. and its auxiliary the ſtat. 3 & 4 W. & M.

Breaking.
R. v. Evans & Finch, 1 Hale, 527. Cro. Car. 474. 2 MS. Sum. 272. 273. 531. 2 Hawk. ch. 33. ſ. 96. 1 Hale, 525. 548. 2 Hale, 356. 2 MS. Sum. 277. 1 Hale, 526, 7. Ante, f. 72. 74. (*a*) Smith's caſe, O. B. Oct. 1698.

Firſt, the neceſſity of a *breaking*, in order to bring the offence within the ſtat. 39 Eliz. is drawn principally from the preamble, which mentions *robbing* and *breaking and entering* houſes, &c.: for the words in the enacting clauſe are ſimply confined to *the felonious taking away of goods*, &c. and there muſt alſo be an actual breaking under this branch of the ſtat. of William. But ſuch a breaking as would conſtitute burglary if done in the night is ſufficient (*a*). Next, the words *breaking and entering* in the ſtat. of Eliz. are alſo in conſtruc-

conſtruction connected with the felonious taking away in the enacting part; and therefore mere aiders or acceſſaries, who do not actually *enter* the houſe, are not within this ſtatute ſo as to be ouſted of clergy; though Hawkins doubts this being law in the caſe of aiders and abettors, upon general principles governing caſes of felony. But the conſtruction which has prevailed is founded on the particular wording of this ſtatute. And it is clear, that the ſtat. 4 & 5 Ph. & M. does not extend to this caſe.

Ch. XVI. § 75. *In houſes, &c.*
Entering.
2 MS. Sum. 273. Cro. Car. 474. 1 Hale, 526, 7. 564. n. 2 Hale, 358. 2 Hawk. ch. 33. ſ. 98. Ante, f. 61.

Quære then, Whether a perſon preſent at the robbery and aſſiſting in it, but who does not enter the houſe, may be indicted as a principal, ſo as to be ouſted of clergy under either the ſtat. of Eliz. or that of W. & M.? or, whether he muſt be indicted as an aider and abettor under the latter act? Yet in the caſe of Mouncer and others, thoſe who watched without as well as he who entered were all indicted as principals, and, as it ſeems, ruled to be well enough; but the jury found the value under 5 s.

Aiders and abettors.
R. v. Mouncer and others, Eſſex, Lent Aſſ. 1792, cor. Hotham B. 2 Leach, 645.

What a ſtealing.
2 MS Sum. 521. 1 Hale, 526. Simſon's caſe, Cambridge, Lent Aſſ. 16 Car. 2. Kel. 31. 2 Hale, 358. Ante, f. 4.

The leaſt removal of the goods from the place where the thief found them, though they be not carried off out of the houſe, is within this act, as in other larcenies; for the ſtatute does not create a new felony, but only takes away clergy from the particular ſpecies of larceny deſcribed.

§ 76. *To what out-houſes extending. Vide* 2 Hawk. ch. 33. ſ. 100.

Laſtly, the places deſcribed in the ſtat. 39 Eliz. are "*dwelling-houſe or houſes, or any part thereof; or any out-houſe* "*or out-houſes, belonging and uſed to and with any dwelling-*" *houſe or houſes.*" But the auxiliary ſtat. of William, which extends to aiders, abettors, and acceſſaries before, varies the terms to "*dwelling-houſe, ſhop or warehouſe thereunto* "*belonging, or therewith uſed,*" dropping the term *outhouſe*, uſed in the former ſtatute, and introducing the terms *ſhop* and *warehouſe*, which had not before occurred; though agreeing with the ſtat. of Eliz. in every other particular, as alſo in the turn of expreſſion. Yet ſome authorities, treating of theſe two ſtatutes, conſider them as co-extenſive and co-operating. But though a ſhop or warehouſe, belonging to and uſed with a dwelling-houſe, may, under moſt circumſtances, be ſuppoſed to fall under the deſcription of an out-houſe, if it be not part of the dwelling-houſe itſelf, yet the

4 Blac. Com. 240. 2 MS. Sum. 272.

Ch. XVI. § 76. *In houſes, &c.*

converſe will not hold equally general. And therefore in the caſe of breaking any out-houſe, (not being part of the dwelling-houſe,) other than a ſhop or warehouſe, and ſtealing thereout under the circumſtances deſcribed in the ſtat. 39 Eliz. it does not appear that the acceſſary before is expreſsly ouſted by any ſtatute; and if not, neither is the aider or abettor, according to the conſtruction put upon that ſtatute, unleſs he actually enter the houſe. Though at any rate, if the value of the goods ſtolen amount to 40 s. then aiders and aſſiſters are ouſted of clergy by ſtat. 12 Ann. c. 7. But it will follow from the reaſoning upon Powlter's caſe before alluded to, that the ſtatute of William, having ouſted of his clergy the acceſſary before to ſuch a felony committed in a ſhop or warehouſe, muſt be taken to have ouſted the principal alſo under the like circumſtances. And the caſe of privately ſtealing in houſes is provided for by ſtat. 10 & 11 W. 3. c. 23. which I ſhall ſhortly deſcribe.

2 Hawk. ch. 33. ſ. 100, 101. Supra.

1 Hale, 565. n.

Ante, ſ. 68. 73.

§ 77. *Indictment.*

The indictment muſt preciſely purſue the words of the ſtatute 39 Eliz. By the words, "although no perſon ſhall be "in the ſaid houſe or out-houſes at the time of ſuch felony "committed," muſt be underſtood that no perſon was within at the time; and it muſt be ſo laid in the indictment and proved in evidence. And if it appear that the felony were committed in the night, ſo as to make it burglary; or when ſome of the family were in the houſe, in which caſe the offender might have been ouſted of clergy by the ſtat. 5 & 6 Ed. 6. c. 9. if the indictment had been framed on that ſtatute; the defendant can only be convicted of ſimple larceny, and ſhall not loſe the benefit of clergy.

1 Hale, 525. b.

§ 78. *Larceny of 5 s. in ſhop, &c. though not broken, and though no perſon within.* 10 & 11 W. 3. c. 23.

7. *Privately ſtealing Goods, Wares, and Merchandizes to the Value of 5 s. in a Shop, Warehouſe, Coach-houſe, or Stable, by Day or Night, though not broken, and though no Perſon be within at the Time.*

In theſe offences the ſtat. 10 & 11 W. 3. c. 23. excludes from clergy the principals, aſſiſters, hirers, and commanders; being thereof convicted or attainted by verdict or confeſſion, or being indicted and ſtanding mute, or challenging above twenty.

This

Ch. XVI. § 78. *In ſhops, warehouſes, coach-houſes, &c.*

This ſtatute is defective in not mentioning perſons outlawed; nor, as Hawkins ſays, acceſſaries: but the latter aſſertion is too general as to acceſſaries before; for the ſtatute extends to ſuch as *hire* or *command* the offence to be committed. And Lord Coke, and after him Mr. Juſtice Foſter, conſider the word *command* as comprehending all thoſe who incite, procure, ſet on, or ſtir up any other to do the fact.

2 Hawk. ch. 33. ſ. 65. 68. 1 Hale, 565. n. Foſt. 126. Ante, 629.

§ 79. *Conſtruction of* 10 & 11 W. 3. c. 23. *No force.*

The words of the ſtatute are, "privately and feloniouſly "ſteal, &c.;" and therefore if the ſhop, &c. be broken, or any force uſed, it is not within the act. It was ſo ruled by Trevor, Powis, and Blencow, in the caſe of Tims and Cecil, O. B. 5th December 1711, and in Rex v. Cartwright, O. B. 1726. But the ſtat. 3 & 4 W. & M. c. 9. ſ. 1. extends to breaking. In Thomas Jones' caſe, who was indicted on this ſtatute for privately ſtealing goods out of a ſhop; it appeared that the ſhop was detached at a conſiderable diſtance from the dwelling-houſe; that it was left ſafely locked on the Saturday night, about 12 o'clock, and on the Monday morning following it was diſcovered that the ſhop had been entered, (as ſuppoſed, by a falſe key or pick-lock,) and the goods ſtolen to the value of above 700 l. There were two locks on the outward door of the ſhop, next the ſtreet, both of which were found unlocked on the Monday morning; but the door was ſhut, one of the locks being a ſpring-lock. No violence appeared to have been uſed in gaining admittance, but a deſk in the counting-houſe was wrenched open and the lock broken. The priſoner was capitally convicted: but it was objected on his behalf, that force having been uſed by breaking the lock and wrenching the deſk open, the offence was not that of *privately* ſtealing; and that the priſoner could not be convicted on this indictment. The jury found him guilty. But in Eaſter term 1787 all the Judges held the conviction wrong as to the capital part of the charge, there having been force uſed (*a*). But as the priſoner ought to have been convicted of the ſimple

2 MS. Sum 277. 534. MS. Burnet, 79. Foſt. 79.

Jones's caſe, Lancaſter Lent Aſſ. 1787, MS. Jud. MS. Buller J. & 2 MS. Sum. 277, 8.

(*a*) According to the MS. of Buller J. the opening the door with a pick-lock was a force ſufficient to take the caſe out of the ſtatute.

Ch. XVI. § 79. *In ſhops, warehouſes, coach-houſes, &c.*

felony upon this record, he was recommended for a pardon on condition of tranſportation.

Foſt. 79.

This agrees with Mr. Juſtice Foſter's deſcription of the offence under this ſtatute; which, he ſays, ſeems to exclude all caſes where *any degree of force* is uſed *to come at the goods.* But where it did not appear whether any force had been uſed or not, the caſe was adjudged to be within the ſtatute by Parker C. J. and Tracy J. and the ſame reſolution was made in a ſubſequent caſe.

R. v. Matthews, O. B. 5th April 1715.
R. v. Corder, O. B. 6th Dec. 1721, Serjt. Foſter's MS.

§ 80.
Extends only to the owner's goods.
2 MS. Sum. 234. Howard's caſe, 1751, O. B. Foſt. 78, 9. infra.

The ſtat. 10 & 11 W. 3. alſo ſays "though the owner or "any other perſon be not in ſuch ſhop," &c. If, therefore, the goods of a ſtranger only be ſtolen, it is not within this act: for this law was intended as a ſecurity for ſhop-keepers and traders in the better protection of their goods. And upon the ſame principle, it has always been holden, that the goods ſtolen muſt be ſuch as are uſually ſold or expoſed to ſale in ſuch ſhop; and not any other valuable thing which may happen to be put there: for it was the object of the ſtatute to ſecure ſuch repoſitories for their proper purpoſes. And therefore a ſhirt left in a mercer's ſhop to be ſent to waſh was holden not to be within the act.

Kept in their appropriate places. Poſt. f. 85.

Vide S. C. 8 Mod 162. O. B. April, 9 Geo. 1.

Howard's caſe *, O. B. 1751, cor. Ld. C. B. Parker, Foſter & Birch Js. Foſt. 77. (*Vide* Godfrey's caſe, O. B Dec. 1783; Seſſ. Pap. No. 20. and 2 Leach, 322. et Qu.)

The words of the ſtatute are "ſhop, warehouſe," &c. John Howard was indicted on the ſtatute for privately ſtealing goods the property of Fludyer and Co. in the warehouſe of J. Day. Another count charged the priſoner with ſtealing the goods of J. D. in his warehouſe. It appeared that Day kept a common warehouſe by the water ſide, where merchants uſually lodged goods intended for exportation, until they could ſhip them. Fludyer and Co. ſent theſe goods to the warehouſe for that purpoſe, from whence they were ſtolen by the priſoner. The court held that the caſe was not within the ſtatute; for by the word *warehouſes* were meant, not mere repoſitories for goods, but ſuch places where merchants and traders kept their goods for ſale in the nature

* *Vide* Barrington on the ſtat. 487. obſerving, in contradiction to this caſe, that ſuch warehouſes, at a diſtance from the dwelling-houſe, were particularly meant to be protected by the ſtat. 6 & 11 W. 3. c. 23. and vide preface to 1st edition of Foſter's C. L. xvi.

Ch. XVI. § 80. *In ſhops, warehouſes, coach-houſes, &c.*

of ſhops, and whither cuſtomers went to view them. And though there the goods might properly enough be laid to be the property of Day, ſince he had the charge of them, and was accountable for them to his principals; yet the warehouſe was not a place for ſale, but merely for ſafe cuſtody. Accordingly the priſoner was found guilty of the ſimple larceny only, and acquitted of the ſtealing privately in the warehouſe.

Stone was indicted for privately ſtealing a watch, the property of Sir Robert Heſketh, in the ſhop of one Alcock. The proſecutor had ſent it to his watch-maker to be repaired, and it hung in the ſhow glaſs in the ſhop, from whence it was taken: yet not being there for ſale, the priſoner could not be convicted under the ſtatute.

R. v. Stone, O. B. 1784, 1 Leach, 375.

Foſt. 78.

Money.
Foſt. 79. 2 MS. Sum. 277. Herbert's caſe, O. B. 1720, by Powell, Dormer, and Richardſon, Js. and Ward's caſe, ad idem.

It has alſo been rightly holden that *money* is not within the act with regard to any of the places mentioned in it; the words being "*goods, wares, and merchandizes.*" For though the word "*goods*" may, and often does, in a large ſenſe include money; yet being connected with *wares and merchandizes*, the ſafer conſtruction, in ſo penal a ſtatute, will be to confine it to goods ejuſdem generis, namely, goods expoſed to ſale. But the ſtat. 12 Ann. ſt. 1. c. 7. extends expreſsly to money.

Ante, 629.

Coach-houſes and ſtables.
2 MS. Sum. 234. Foſt. 78. poſt f. 85.

The ſame conſtruction takes place with reſpect to coach-houſes and ſtables: the goods muſt be ſuch as are uſually lodged in ſuch places. For the legiſlature, in giving ſo high a protection to thoſe particular repoſitories, intended it only for the proper and uſual contents of them. In John Sea's caſe, the court doubted whether a livery great coat belonging to a coachman, which he had hung up in the ſtables whilſt he went into the houſe to receive his wages, could be conſidered as any part of the proper or uſual furniture of the ſtable out of which it was ſtolen: and therefore directed the priſoner to be acquitted of the capital part of the charge.

Sea's caſe, O. B. 1785. Leach, 5th edit. 341.)

Ch XVI. § 81. *In dwelling-houſes and out-houſes to 40s. value.*

8. *Larceny in a Dwelling-houſe or Out-houſe thereto belonging of Money, Goods, Wares, &c. to the Value of 40 s. though the Houſe be not broken, and whether any perſon be within or not.*

§ 81. *Larceny in dwelling-houſe, &c. to 40s. value.* 12 Ann. ſt. 1. c. 7. ante, 629.

Clergy is therein taken away by the ſtat. 12 Ann. ſt. 1. c. 7. from the principals, aſſiſters, and aiders on conviction, or attainder by verdict or confeſſion; or on being indicted and ſtanding mute, or not directly anſwering, or peremptorily challenging above 20. But apprentices under the age of 16, robbing their maſters, are excepted out of the act. And neither principals outlawed, nor acceſſaries before, are included in it.

2 Hawk. ch. 33. ſ. 65, 68.

What offenders within it. 2 MS. Sum. 274. Rex v. Mary Macdaniel and Eliz. Thompſon, O. B. Sept. 1784, c. r. Eyre B. (*Vide* 1 Leach, 379. S. C. and Seſſ. Pap. No. 922. (*a*).) (*b*) Ann Gould's caſe, O. B. Jan. 12th, 1780, cor. Nares J. [Lord C. B. Skynner, and Aſhhurſt J. preſent and concurring), MS. Jud. (S. C. 2 Dalt. ch. 58. R. v. Davis, alias Silk, Ante, 499.

The ſtatute has been holden not to extend to a ſtealing by a man in his own houſe; for the intention of the act was to protect the owner's property in his own houſe from the depredation of others, or the property of others lodged in the owner's houſe; thereby giving protection againſt all but the owner himſelf. The ſame point was ruled by Nares J. in another caſe (*b*), where the miſtreſs of a brothel ſtole money from a ſailor who lodged in her huſband's houſe: becauſe the ſtatute extends only to the dwelling-houſe of another; and this being the houſe of her huſband was the ſame as her own. And this caſe was afterwards approved of by Skynner C. B. Aſhhurſt, Gould, and Heath Juſtices. But the ſtatute expreſsly extends to ſervants, as appears by the preamble.

Leach, 257.) Ante, 561.

The dwelling-houſe muſt be ſuch wherein burglary may be committed, and not that which is only inhabited caſually or for a ſpecial purpoſe.

§ 82. *What a ſtealing from the houſe within the ſtatute.* Ante, ſ. 80. Campbell's caſe, O. B Jan. 1792, cor. Ld. C. B. Eyre, Buller and Willſon Js. 2 Leach, 642.

It has alſo been holden, that in order to bring a caſe within the ſtat. 12 Ann. the property ſtolen muſt be ſuch as is uſually under the protection of the houſe.

The priſoner was indicted upon the ſtat. 12 Ann. c. 7. for ſtealing in the dwelling-houſe of C. M. Adams, a bank note of 25 l. It appeared that the priſoner lodged at Mrs.

(*a*) The accomplice, tried at the ſame time with the miſtreſs of the houſe, was directed to be acquitted of the capital part of the charge.

Adams'

Ch. XVI. § 82. *In dwelling-houſes and out-houſes to 40 s. value.*

Adams' houſe, and that ſhe, having occaſion to change the note in queſtion, ſent her ſervant with it to the priſoner with that requeſt. The priſoner, after examining his purſe, ſaid, he had not money enough by him for the purpoſe, but he would go immediately to his banker's and get it changed; and accordingly he left the houſe with the bank note, and never returned. A queſtion aroſe at the trial, Whether the caſe were within the ſtatute, which was made to protect property depoſited in the houſe, and not that which was about the perſon of the party. After conviction the caſe was reſerved for the opinion of the Judges, who thought it was not a capital offence within the ſtatute.

Rex v. Owen, O. B. 1792, MS. Buller J. and MS. Jud. *The larceny muſt be of things under the protection of the houſe, and not of any perſon in it; therefore not of money out of his pocket.*

Edward Owen was indicted for ſtealing 105 guineas, the property of James Foreman, in the dwelling-houſe of Patrick Brady. Brady kept a public houſe in Holborn, into which Foreman was ſeduced by the priſoner, under pretence of dividing the value of a croſs which the priſoner picked up and pretended to have found in the ſtreet; and there the priſoner obtained the 105 guineas from the proſecutor, under exactly the ſame circumſtances as have been repeatedly given in evidence in the ring-dropping caſes. But it was objected that the caſe did not fall within the ſtat. of Ann. becauſe the proſecutor was neither the owner nor a ſettled inhabitant of the houſe in which the money was taken. It was further inſiſted, that this caſe muſt be taken as if the property of the proſecutor had been ſtolen out of his pocket, or otherwiſe from his perſon, without any deceit; and that the ſtatute was meant to protect property uſually kept or depoſited in the houſe, as contradiſtinguiſhed from property under the protection of the perſon: and Campbell's caſe was mentioned and inſiſted upon as an authority in point. On a conference of the Judges in Michaelmas term 1792, a majority of them were of opinion that this caſe was not within the ſtatute: for that to bring a caſe within it, the property muſt be under the protection of the houſe, depoſited there for ſafe cuſtody; as part of the furniture or money, plate, &c. kept in the houſe, and not things immediately under the eye or perſonal care of ſome one who happened to be in the houſe. The ſame point was again ruled in a ſimilar caſe of Rex v. Caſtledine, which was alſo referred to the Judges: where under

Supra.

John Caſtledine's caſe, O. B. Oct. 1792, MS. Buller J.

Ch. XVI. § 82. *In dwelling-houses and out-houses to 40 s. value.*

under a like pretence, the profecutor, who had been decoyed into a public houſe, was prevailed upon to produce his watch and 5 guineas, which he laid upon the table, but without any agreement that the priſoner ſhould have them; who, nevertheleſs, took them up and went off with them without the profecutor's conſent.

Poſt. f. 107.

The ſame was again ruled in Watſon's caſe in 1794.

§ 83. *Bank notes within the ſtatute.* Dean's caſe, O. B. July 1795, MS. Buller J. Seſſ. Pap. for May 1796, p. 615. (S. C. 2 Leach, 798.) Milnes' caſe, ante, f. 37. Watſon's caſe, poſt. f. 107. Poſt. f. 120. Ante, f. 36.

The ſtealing of bank notes is within the act. This was ruled by all the Judges in Dean's caſe in Eaſter term 1796. The ſame point ſeems to have been taken for granted in Milnes' caſe, and in Watſon's caſe. And the like reſolution has been made in the caſe of an indictment upon the ſtat. 8 Eliz. c. 4. for privately ſtealing from the perſon. Theſe determinations were founded on the conſideration of the ſtat. 2 Geo. 2. c. 25. whereby the ſtealing of ſuch ſecurities is put on the ſame foot as the ſtealing of goods of the like value with the money ſecured by the ſame.

§ 84. *Reſult of the ſtatutes as to clergy.*

Upon the whole it may be collected, that the ouſting of clergy in the above mentioned ſtatutes concerning larcenies and robberies in houſes depends on one or more of theſe circumſtances; either where there is a breaking of the houſe; or a putting in fear of the perſons within it; or the goods ſtolen thereiu amount to a certain value, under certain modifications. A breaking is neceſſary under the ſtats. 1 Ed. 6. c. 12. ſ. 10. 5 & 6 Ed. 6. c. 9. 39 Eliz. c. 15. ſ. 2. and 3 & 4 W. & M. c. 9. ſ. 1. as a putting in fear is under the ſame ſtats. 1 Ed. 6. c. 12. ſ. 10. and 3 & 4 W. & M. c. 9. ſ. 1. and 23 H. 8. c. 1. ſ. 3. and the value is alſo made material by 39 Eliz. c. 15. ſ. 1. and the 3 & 4 W. & M. c. 9. ſ. 1. before mentioned, and alſo by 10 & 11 W. 3. c. 23. and 12 Ann. ſt. 1. c. 7.

In Ships, &c.

§ 85. *In ſhips, &c.* 24 Geo. 2. c. 45.

By the ſtat. 24 Geo. 2. c. 45. "All and every perſon and "perſons who ſhall feloniouſly ſteal any goods, wares, or "merchandize of the value of 40 s. in any ſhip, barge, "lighter, boat, or other veſſel or craft, upon any navigable "river,

"river, or in any port of entry or diſcharge, or in any "creek belonging to ſuch river or port, or upon any wharf "or quay adjacent to ſuch river or port; or who ſhall be "preſent, aiding, and aſſiſting in committing any ſuch of-"fences, being thereof convicted or attainted, or being "indicted ſhall ſtand mute, not directly anſwer, &c. or "peremptorily challenge above 20, &c. ſhall be excluded "from the benefit of clergy."

Ch. XVI. § 85. *In ſhips, &c. on navigable rivers.*

Upon this ſtatute the conſtruction is generally confined to ſuch goods and merchandizes as are uſually lodged in ſhips, or on wharfs or quays. And therefore where George Grimes was indicted on this ſtatute for ſtealing a conſiderable ſum of money out of a ſhip in port; though great part of it conſiſted of Portugal money, not made current by proclamation, but commonly current; it was ruled not to be within the ſtatute.

2 MS. Sum. 534. Ante, f. 80. R. v. Grimes, Maidſtone Lent Aſſ. 1752, Poſt. 79. S. P. Leigh's caſe, O. B. 1764, 1 Leach, 62.

At the Old Bailey in May 1784, one Pike was tried before Adair Serjt. Recorder, on the ſtat. 24 Geo. 2. c. 45. for ſtealing a quantity of deals "in a certain barge on *the navigable river* Thames." It appeared in evidence, that as the barge with the deals, belonging to the profecutor, was navigating down the *Thames*, the lighterman, fearful of an accident, brought it into Limehouſe dock, where it was moored. By the efflux of the tide it was left aground, and in the night the boat and the deals, above the value of 40 s. were ſtolen. The court held that the offence laid was not proved within the meaning of the ſtatute. That in the conſtruction of ſtatutes, which took away the benefit of clergy, the law required that the fact laid in the indictment ſhould be ſtrictly proved: but in the preſent caſe, the evidence proved that the larceny was not committed *on the navigable river* Thames, but upon *the banks* of one of its *creeks*. That it was true, the ſtatute alſo took away the benefit of clergy from any perſon who ſhould ſteal to the amount of 40 s. "in any port of entry or diſcharge, or in any *creek* "belonging to any navigable river, port of entry or diſ-"charge:" but this being a different branch of the act, the indictment ſhould have charged the fact accordingly. The priſoner therefore was only convicted of the ſimple larceny.

Pike's caſe, O. B. 1784, 1 Leach, 357. Seſſ. Pap. No. 625. *Indictment for ſtealing deals in a barge on the Thames not proved by ſhewing that the barge was aground in a dock in a creek of the river; to which another deſcription in the ſtatute applies.*

Ch. XVI. § 86. *In ſhips in diſtreſs.*

§ 86. *In ſhips in diſtreſs.* 26 Geo. 2. c. 19. ſ. 1. *Vide* tit. Malicious Miſchief for further proviſions of this act.

So the plundering, ſtealing, or deſtroying "of any goods "or merchandizes, or other effects, from or belonging to "any ſhip or veſſel of his majeſty's ſubjects or others, which "ſhall be in diſtreſs, or which ſhall be wrecked, loſt, "ſtranded, or caſt on ſhore, in any part of his majeſty's "dominions, whether any living creature be on board or "not (*a*), or any of the furniture, tackle, apparel, proviſion, "or part of ſuch ſhip," &c. is excluded clergy by ſtat. 26 Geo. 2. c. 19.

12 Ann. ſt. 2. c. 18. ſ. 5. made perpetual by 4 G. 1. c. 12.

A ſimilar proviſion was before made by the ſtat. 12 Ann. ſt. 2. c. 18. made perpetual by ſtat. 4 Geo. 1. c. 12. whereby whoever ſhall "ſteal any pump belonging to a ſhip in "diſtreſs, or ſhall be aiding or abetting thereto," is excluded clergy.

26 Geo. 2. c. 19. 2.

By ſ. 2. of the ſtat. 26 Geo. 2. c. 19. "when goods or "effects of ſmall value ſhall be ſtranded, loſt, or caſt on "ſhore, and ſhall be ſtolen without circumſtances of cruelty, "outrage, or violence, it ſhall be lawful to proſecute for "ſuch offence by way of indictment for petit larceny; and "the offender, on conviction, ſhall ſuffer ſuch puniſhment "as the laws in caſe of petit larceny do enjoin or require."

Ante, ſ. 80. 85.

There does not ſeem to be the ſame reaſon for limiting the operation of the words "*any goods, &c. or other effects,*" in this ſtatute, in the ſame manner as in ſome other ſtatutes before mentioned; not only becauſe the word *effects* is of much more comprehenſive ſignification than the words "*wares or* "*merchandizes,*" uſed in thoſe ſtatutes; but becauſe the miſchief extends equally to every ſpecies of property, which can fall under theſe general words.

Offering ſhipwrecked goods for ſale. Sect. 4. Poſt. as to receivers.

By ſ. 4. of the ſame act "If any perſon or perſons ſhall "offer or expoſe to ſale any goods or effects whatſoever, "belonging to any ſhip or veſſel loſt, ſtranded, or caſt on "ſhore, as aforeſaid, and unlawfully taken away, or reaſonably ſuſpected ſo to have been; it ſhall be lawful for "the perſon to whom the ſame ſhall be ſo offered for ſale, "or any officer of the cuſtoms or exciſe, or any conſtable, "&c. or other peace-officer, to ſtop, take, and ſeize the "ſaid goods and effects, and with all convenient ſpeed

(*a*) This proviſion was with reference to the ſtat. 3 Ed. 1. c. 4. by which the veſſel was not to be adjudged wreck if any thing eſcaped alive.

carry

Ch XVI. § 86. *In ſhips in diſtreſs.*

"carry the ſame, or give notice of ſuch ſeizure to a juſtice "of peace: and if the perſon or perſons who ſhall have "offered the ſame for ſale, or ſome other on their behalf, "ſhall not appear before the ſaid juſtice within ten days "next after ſuch ſeizure, and make out to his ſatisfaction "the property of the ſaid goods, &c. to be in them or thoſe "by whom they were employed to ſell the ſame; then the "ſaid goods, &c. ſhall by order of the ſaid juſtice be forth-"with delivered to the uſe of the owner on payment of a "reaſonable reward, (to be fixed by the juſtice,) to the per-"ſon ſeizing: and ſuch juſtice ſhall and may commit the "perſon or perſons who have ſo offered or expoſed the ſame "to ſale to the common gaol for ſix months, or until he "ſhall have paid the owner, or any lawfully authorized to "receive it, treble the value of ſuch goods," &c.

26 G. 2. c. 19. ſ. 8. *Where proſecution by clerk of peace, or in another county.*

By ſ. 8. of the ſame act, "If oath ſhall be made before "any magiſtrate, lawfully impowered to take the ſame, of "any ſuch plunder or theft, and the examination in writing "thereupon taken ſhall be delivered to the clerk of the "peace of the county, riding, or diviſion, wherein ſuch "fact ſhall be committed, or to his deputy; or if oath ſhall "be made before any ſuch magiſtrate of the breaking any "ſuch ſhip, contrary to the aforeſaid act made in the 12th of "Queen Anne, and the examination in writing thereupon "taken ſhall be delivered to ſuch clerk of the peace, or his "deputy; then ſuch clerk of the peace ſhall cauſe the of-"fender or offenders in any of the ſaid caſes to be forth-"with proſecuted for the ſame, either in the county where "the fact ſhall be committed, or in any county next adjoin-"ing; in which adjoining county any indictment may be "laid by any other proſecutor. And if the fact be com- *Vide* poſt. f. 156. "mitted in Wales, then the proſecution ſhall or may be "carried on in the next adjoining Engliſh county. And the "neceſſary charges of ſuch proſecutions by the clerk of the "peace ſhall be paid by the treaſurer of the county, &c. "where the fact ſhall be committed, to ſuch amount as the "juſtices of the peace ſhall order. And if ſuch clerk of the "peace ſhall neglect or refuſe to carry on ſuch proſecution "in due manner, he ſhall forfeit 100l. for every ſuch "offence to any perſon or perſons who ſhall ſue for the "ſame," &c.

In

Ch. XVI. § 87. *In Northern counties.*

In Northern Counties.

§ 87. *In Northern counties.* 43 Eliz. c. 13. *Vide* ante, p. 430. the preamble, for &c.

The ſtat. 43 Eliz. c. 13. levelled againſt ſuch as are guilty of perſonal violence and rapine, in the northern counties of Cumberland, Northumberland, Weſtmoreland, and the Biſhoprick of Durham, which has been before adverted to; reciting that perſons had been carried from them into other counties as priſoners, and kept barbarouſly and cruelly, until they were redeemed by great ranſoms; and alſo that of late there had been many incurſions, robberies, and burning and ſpoiling of towns, villages, and houſes within the ſaid counties, ſo that divers ſubjects there had been forced to pay a certain rate of money, corn, cattle, or other conſideration, commonly called *Black Mail*, to divers perſons inhabiting upon or near the borders, &c. in alliance with great robbers and ſpoilers in thoſe parts, &c. enacts, that whoever ſhall ſo take away, detain, force, or impriſon, any perſons within the ſame counties, or againſt their wills, to ranſom them, or make ſpoil of their goods, &c. "or whoever "ſhall take, receive, or carry to the uſe of himſelf, or wittingly to the uſe of any other, any money, corn, cattle, or "other conſideration, commonly called Black Mail, for the "protecting or defending of him or them, (i.e. the true men) "their lands, goods or chattels from ſuch thefts, ſpoils, and "robberies as aforeſaid, and ſhall be indicted and lawfully "convicted of any the ſaid offences, or ſtand mute, or challenge peremptorily above 20, before the juſtices of aſſize, "gaol delivery, oyer and terminer, or juſtices of the peace "within any of the ſaid counties, ſhall be adjudged felons "without benefit of clergy."

Vide 6 Geo. 2. c. 37. ſ. 9, 10. regulations in aid of this act, and 23 & 24 Car. 2. c. 22. made perpetual by 31 G. 2. c. 42.

(*Vide* poſt. tit. Malicious Miſchief for other offences therein mentioned.)

The benefit of clergy is taken away "from great, known, "and notorious thieves and ſpoil-takers, both in Cumberland and Northumberland, on conviction, for theft done "within the ſame;" or otherwiſe the juſtices of aſſize, oyer and terminer, or gaol delivery, before whom they are convicted, may tranſport them for life.

18 Car. 2. c. 3. continued by 6 Geo. 2. c. 37. made perpetual by 31 Geo. 2. c. 42.

6. *To whom the Property ſtolen ſhall be charged to belong.*

§ 88. *In whom the property.* Ante, ſ. 40.

It has been already ſhewn, that ſome things are not the ſubjects of property at all, or only ſo ratione loci or privilegii,

legii, and that others are only ſuch ſub modo, that is where ſome perſon has acquired a ſpecial dominion over them. But with reſpect to things which are the regular ſubjects of property, felony may be committed in ſtealing them, though the owner be not known; for the guilt of the thief is the ſame. And he may be charged in the indictment with having ſtolen the goods of a perſon to the jurors unknown; or with having received goods ſtolen by a perſon unknown. And in ſuch caſe the king ſhall have the goods. But if the owner be really known, an indictment alleging the goods to be the property of a perſon unknown, would be improper: in that caſe the priſoner muſt be diſcharged of that indictment, and tried upon a new one for ſtealing the goods of the owner by name. And in proſecutions for ſtealing the goods of a perſon unknown, ſome proof muſt be given ſufficient to raiſe a reaſonable preſumption that the taking was felonious or *invito domino*; for it is not enough that the priſoner is unable to give a good account how he came by the goods.

Ch XVI. § 88. *Goods of perſon unknown.*

Goods of perſon unknown. 2 MS. Sum. 250. 1 Hawk. ch. 33. ſ. 29. 1 Hale, 512. 2 Hale, 182. 290. Staundf. 95. b. 4 Blac. Com. 235. poſt. tit. Receivers. Rex v. Thomas, poſt. ſ. 163.

Poſt. 657.

This ſeems to be the true ground upon which perſons indicted for ſtealing any goods in themſelves the ſubject of property, but whereof no owner can be found, are in any inſtance, (the fact of taking, &c. *lucri cauſâ* being proved,) entitled to an acquittal. For the true owner by loſing them does not loſe the property in them until ſeizure by ſome other perſon having a right to ſeize in ſuch caſes. And as the form of the indictment, laying them to be the property of a perſon unknown, is good, the only difficulty lies in proving that the taking was felonious, or *invito domino*.

§ 89. *Goods of a church.* 1 Hawk. ch. 33. ſ. 29. 1 Hale, 512.

He who ſteals the bells or other goods of a chapel in time of vacation, may be indicted for ſtealing the goods of the chapel, being in the cuſtody of ſuch and ſuch; or in the caſe of a pariſh church, they may be laid to be the goods of the pariſhioners. But in an indictment on the ſtat. 4 Geo. 2. c. 32. for ſtealing lead from Hendon church, it was holden not neceſſary to lay the property in any perſon, though it might be laid to be the property of the vicar. But that caſe turned on the particular nature of the property protected by the ſtatute.

Ante, ſ. 31. Watſ. Cler. Law, 391.

There

Ch. XVI. § 89. *Goods of a church.*

Corpſe, &c. Haynes's caſe, 12 Co. 113. 4 Blac. Com. 235*. Rex v. Lynn, 2 Term Rep. 733. MS. Tracy, 67. M. 23 Geo. 2. 3 Inſt. 110. 1 Hale, 515.

There can be no property in a dead corpſe; and therefore ſtealing it is no felony, but a very high miſdemeanor. In the caſe of Dr. Handyſide, where trover was brought againſt him for two children that grew together; Lord C. J. Willes held the action would not lie, as no perſon had any property in corpſes. But a ſhroud ſtolen from the corpſe muſt be laid to be the property of the executors, or whoever elſe buried the deceaſed, and not of the deceaſed himſelf. Some years ſince ſeveral perſons were convicted and tranſported for ſtealing leaden coffins out of the vaults in St. Andrew's, Holborn, and they were laid to be the goods of the executors (*a*). But if it do not readily appear who is the perſonal repreſentative of the deceaſed, laying it to be the goods of a perſon unknown is ſufficient. Thus at Exeter Lent aſſizes 1794 a man was tried before Buller J. for ſtealing a leaden coffin, the property of a perſon unknown; and in another count it was laid to be the property of certain perſons, being the then churchwardens. The latter, it was at once decided, could not be ſupported: and to the former it was objected, that though the coffin had lain in the ground near 60 years, yet the ſame family, of which the deceaſed had been a member, remained on the ſpot: and it did not even appear that any inquiry whatever had been made to aſcertain the fact; which ſhewed a want of reaſonable diligence in the proſecutor: but it was ruled to be ſufficient after ſo many years had paſſed. Again, if the goods of any inteſtate be ſtolen before adminiſtration, they ſhall be ſuppoſed to be the goods of the ordinary: or if an executor be appointed, the goods ſhall be ſaid to be his before probate: and they need not ſhew their title ſpecially as ordinary or executor, becauſe it is founded on their own poſſeſſion.

(*a*) Serjt. Forſter's MS.

Ante, f. 88.

1 Hale, 514.

§ 90. *Special property or poſſeſſion.* 2 MS. Sum. 249. 1 Hale, 513. 1 Hawk. ch. 33. ſ. 30. Kel. 39. 45. Burnet's MS. Sum. 67.

Any one who has a ſpecial property in goods ſtolen may lay them to be his in an appeal or indictment for larceny; as a bailee, pawnee, leſſee for years, carrier, or the like; a fortiori, they may be laid to be the property of the reſpective owners; and the indictment is good either way. But if it appear in evidence, that the party whoſe goods they are laid to be had neither the property nor the poſſeſſion, [and for this

Ch. XVI. § 90. *Goods of inteſtate, &c.*

Keilw. 70. b. pl 7. Moor, 248. Staundf. 28. b.

this purpoſe the poſſeſſion of a feme covert or ſervant is, generally ſpeaking, the poſſeſſion of the huſband or maſter,] the priſoner ought to be acquitted on that indictment. The ſame rule prevails in the caſe of goods belonging to a gueſt (*a*), ſtolen at an inn; they may be laid to be the property either of the innkeeper or the gueſt. So, goods ſtolen from a waſherwoman (*b*), who takes in the linen of other perſons to waſh, may be laid to be her goods; by Parker C. J., Tracy and Bury Js.; for perſons of this deſcription have a poſſeſſory property, and are anſwerable to their employers; and could all maintain an appeal of robbery or larceny, and have reſtitution. So an agiſter has a poſſeſſion and property againſt all but the right owner. Parker, Bury B. and Tracy J.

(*a*) Jane Todd's caſe, O. B. 4th July 1711, by Ld. C. J. Eyre and Ld. C. B. Ward, Burnet's MS. Sum. 67.

(*b*) Ralph Packer's caſe, O. B. 7th April 1714, ib. cor. Ld. C. J. MS. Burnet.

In John Woodward's caſe, who was indicted for maliciouſly and feloniouſly killing two ſheep, the property of W. Dalton, it was proved that the proſecutor had only taken the ſheep in to agiſt for another. Whereupon it was objected that the property was not well laid in the agiſter; and upon reference to the Judges in Michaelmas term 1796, one of them doubted at firſt, becauſe an agiſter of cattle is not liable for them at all events, like an inn-keeper for the goods of his gueſt. The majority, however, thought the conviction right. But the matter ſtood over till Hilary term 1797, when upon reference to 4 Inſt. 293. ſhewing that an agiſter has a poſſeſſion; and 2 Rol. Abr. 551. that he may maintain treſpaſs againſt any who takes the beaſts, all the Judges agreed that the conviction was right.

Woodward's caſe, Leiceſter Sum. Aſſ. 1796, cor. Perryn B. MS. Jud. *Property laid in agiſter of cattle.* (*vide* Moor, 543.)

(Abſent Buller J.)

James Deakin and William Smith were indicted for ſtealing ſpoons and other articles, laid in the ſecond count, (on which alone they were convicted,) to be the property of one Markham. The goods had been ſent by a tradeſman in London to Mr. Broderick at Spalding, by the Spalding coach, and were ſtolen by the priſoners at Ponderſend, out of the boot behind the coach. The queſtion was, Whether they were properly laid to be the property of Markham, who was not the owner, but only the driver of the coach; there being no contract between him and the proprietors, that he ſhould be liable for any thing ſtolen; and it not appearing that he had been guilty of any laches. The caſe being referred to the Judges, it ſtood over for ſome time; but finally the

R. v. Deakin & Smith, O. B. April 1800, cor. Groſe J. MS. Jud. *Property laid in ſtage-coachman.*

Vide Taylor's caſe, 1 Leach, 395. ad idem.

Ch. XVI. § 90. *Special property, &c.*

the conviction was holden right; the coachman having the poſſeſſion, and a ſpecial property in the goods committed to his charge.

Larceny by the owner. Ante, 558. 2 Hale, 513.

Upon the ſame principle it is that a man may be guilty of larceny or robbery of his own goods. For if A. bail goods to B. and afterwards animo furandi ſteal them from him, with deſign probably to charge him with the value: or, if A. ſend his ſervant with money, and afterwards way-lay and rob him, with intent to charge the hundred: in either caſe the felony is complete. And even in this latter caſe, I ſee no objection to laying the property of the goods in the ſervant; for though in general it may be ſaid that he has no property in them as againſt his maſter, although he has againſt every other perſon; yet having a clear right to defend his poſſeſſion againſt A.'s unlawful demand, the ſpecial property ſtill remains in the ſervant. But a taking from the ſervant of the money or goods of his maſter, in his preſence, by putting in fear, is a taking from the maſter, and the offender may be indicted of robbing him.

1 Hawk. ch. 34. ſ. 5. Burnet's MS. Sum. 73. Styl. 156. MS. Tracy, 73. 2 Show. 94. 241.

1 Hale, 507. 2 MS. Sum. 238. Sum. 64.

On the other hand, it being a ſettled principle, that neither the property nor poſſeſſion in law of goods is changed by any felonious taking of them; it follows that if A. ſteal goods of B., and after C. ſteal the ſame goods from A.; C. is a felon both as to A. and B.; and he may be indicted of ſtealing the goods of B.

§ 91. *Neceſſaries for children.* 12 Rep. 113. 1 Sid. 129.

Cloaths and other neceſſaries provided for children by their parents, are often laid to be the property of the parents, eſpecially while the children are of tender age; but it is holden good either way. At the ſeſſions at the O. B. after

MS. Tracy, 67.

Eaſter term 1701, Tracy and Turton Js. and Lovell Recorder, doubted whether the property of a gold chain, which was taken from a child's neck, who had worn it for four years, ought not to be laid to be in the father. But Tanner, who had been an ancient clerk of the court, ſaid that it had always been uſual to lay it to be the goods of the child in ſuch caſe: and that many indictments which had laid them to be the property of the father had been ordered to be altered by the Judges.

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Ch. XVI. § 91. *Neceſſaries for children.*

An indictment for ſheep ſtealing laid the property to be in Simon Dodd, the elder, S. D. the younger, John and Gilbert Dodd, and ſeveral others of the ſame name. Simon Dodd the elder proved that he and his ſon (now dead), took a farm on their joint concern, and kept a ſtock of ſheep, their joint property, upon it. The ſon died inteſtate about five years ago, leaving a widow, who died ſoon after him, and ſeveral children (the children named in the indictment). No diviſion was ever made of the ſtock; from which all the ſheep upon the farm at the time of the felony committed were bred, ſome before and ſome after the ſon's death. S. D. the elder continued to occupy the farm and uſe the ſtock as before, conſidering himſelf acting for his grandchildren, who were ſtill infants, in reſpect of one moiety; and accordingly continued to keep a regular account with them in his books. After conviction a queſtion was ſubmitted to the Judges, Whether the property were well laid jointly in the grandfather and grandchildren. And in Michaelmas term 1801, they all held it well enough: for at any rate, though in the caſe of joint traders there were no jus accreſcendi, and the remedy ſurvived: yet here the grandfather ſwearing that he held one moiety for his grandchildren, no perſon could controvert it, and he might make diſtribution among them. And ſome of the Judges alſo ſaid, that the property might have been laid to be in the grandfather alone, who was in poſſeſſion of the children's moiety as their agent.

John's Scott's caſe, Northumberland Sum. Aſſ. 1801, cor. Chambre J. MS Jud.

I now proceed laſtly to examine

§ 92. *Evidence of felonious intent.*

7. *What is ſuch Evidence of the taking and carrying away being fraudulent or wrongful, with Intent to convert the Goods to the Taker's own Uſe, and make them his own without the Conſent of the Owner, as amounts to Felony.*

The felonious intent is eſſential to the offence; and in order to make it felony, the intent to ſteal ought to be at the time when the party firſt gets poſſeſſion of the goods; ſuch a poſſeſſion at leaſt as is diſtinct from that of the owner; for a fraudulent intent, originating afterwards, to convert the goods to his own uſe is not felony: but the original felonious intent may be collected from ſubſequent acts.

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Ch. XVI. § 92. *When originating.*

This inquiry may be beſt made by conſidering the ſeveral defences by which charges of this nature are endeavoured to be palliated or denied. Theſe are,

Defences in larceny.

1. *By a Denial of the Fact itſelf, or the Party's Participation in it.*
2. *That the Goods were taken upon a Claim of Right, or by Act of Law.*
3. *By Miſtake or Accident.*
4. *As a Treſpaſſer or Wrong-Doer, without Fraud.*
5. *By finding.*
6. *By Delivery of a third Perſon, without Knowledge of the Theft by the Taker.*
7. *By Delivery from or on Behalf of the Owner; or by a Taking with his Conſent and Approbation.*
8. *By taking upon Neceſſity.*

1. *By a Denial of the Fact, &c.*

§ 93. *Evidence upon a denial of the fact. Vide* 2 Hale, 285.

It may be laid down generally, that wherever the property of one man, which has been taken from him without his knowledge or conſent, is found upon another, it is incumbent on that other to prove how he came by it; otherwiſe the preſumption is that he obtained it feloniouſly. This, like every other preſumption, is ſtrengthened, weakened, or rebutted, by concomitant circumſtances, too numerous in the nature of the thing to be detailed. It will be ſufficient to allude to ſome of the moſt prominent; ſuch as, the length of time which has elapſed between the loſs of the property and the finding it again; either as it may furniſh more or leſs doubt of the identity of it; or as it may have changed hands oftener in the mean time; or as it may increaſe the difficulty to the priſoner of accounting how he came by it: in all which conſiderations that of the nature of the property muſt generally be mingled. So the probability of the priſoner's having been near the ſpot from whence the property was ſuppoſed to be taken at the time; as well as his conduct during the whole tranſaction, both before and after the diſcovery, are material ingredients in the inveſtigation. But the bare circumſtance of finding in one's poſſeſſion property of the ſame kind which another has loſt, unleſs that other can from marks or other circumſtances ſatisfy the court and jury

Length of time.

Nature of the property. Priſoner's vicinity to the ſpot. Behaviour.

Identity.

jury of the identity of it, is not in general ſufficient evidence of the goods having been feloniouſly obtained. Though, where the fact is very recent, ſo as to afford reaſonable preſumption that the property could not have been acquired in any other manner, the court are warranted in concluding it is the ſame, unleſs the priſoner can prove the contrary. Thus a man being found coming out of another's barn; and upon ſearch, corn being found upon him of the ſame kind with what was in the barn, is pregnant evidence of guilt.

Ch. XVI. § 93. *On denial of fact.*

So perſons employed in carrying ſugar and other articles from ſhips and wharfs have often been convicted of larceny at the O. B., upon evidence that they were detected with property of the ſame kind upon them, recently upon coming from ſuch places, although the identity of the property, as belonging to ſuch and ſuch perſons, could no otherwiſe be proved. But this muſt at leaſt be underſtood of articles like thoſe above mentioned, the identity of which is not capable of ſtrict proof from the nature of them; for Lord Hale ſays he would never convict any perſon of ſtealing the goods of one unknown, merely becauſe he could not give an account how he came by them; unleſs due proof were made that a felony had been committed of thoſe goods.

2 Hale, 290. *Vide ante*, 651.

Neither is the fact of concealment, (the identity of the property not being proved,) of itſelf evidence of ſtealing, though undoubtedly very ſtrong corroborative proof of it.

Concealment. 3 Inſt. 98.

§ 94. *Confeſſion. Vide* tit. Evidence.

The confeſſion of the priſoner that he ſtole the goods is often adduced in this caſe. And here, as upon other occaſions, care muſt be taken previous to the inquiry to aſcertain with certainty that ſuch confeſſion was not procured either by promiſe or threat; in either of which caſes it ought not to be received in evidence. But it frequently happens that by means of ſuch confeſſion, ſo improperly drawn from the priſoner, the proſecutor comes to the knowledge where the goods are concealed, and in conſequence regains poſſeſſion of them: in which caſe it has been ſaid by ſome, that ſuch confeſſions ought to be received in evidence, corroborated by the fact of finding the goods in the place deſcribed by the priſoner. This, it is ſaid, does away the reaſon upon which the general rule, that confeſſions ſo improperly ob-

Ch. XVI. § 94. *Confeſſion.*

tained cannot be received in evidence, is founded; becauſe the reaſon being to guard againſt the poſſibility of an innocent perſon being from weakneſs ſeduced to accuſe himſelf, in hopes of obtaining thereby more favour, or for fear of meeting with worſe puniſhment; that reaſon is done away if ſuch confeſſion be ſubſtantiated by an actual finding of the goods accordingly in the place deſcribed, which could not probably be known to the party if he were not privy to the felony. But this opinion muſt it ſeems be taken with ſome grains of allowance; for even in ſuch caſe, the moſt that is proper to be left to the conſideration of the jury is the fact of the witneſs having been directed by the priſoner where to find the goods, and his having found them accordingly; but not the acknowledgment of the priſoner's having ſtolen or put them there, which is to be collected or not from all the circumſtances of the caſe: and this is now the more common practice.

Per Le Blanc J. in R. v. Grant and Craig, Exeter, March 1801. Per Heath J. at Exeter, about at 1790, Rex v. Marian Hodge, Wells Sum. Aſſ. 1794, cor. Grofe J. Warrickſhall's caſe, O. B. 1783, cor. Nares J. and Eyre B. 1 Leach,

298. Mezey's caſe, O. B. 1784, cor. Perryn B. and Buller Js. ib. 301. n.

Harvey's caſe, Bodmin Sum. Aſſ. 1800.

In the caſe of Richard Harvey at Bodmin Summer aſſizes 1800, Lord Eldon ſaid, that where the knowledge of any fact was obtained from a priſoner under ſuch a promiſe as excluded the confeſſion itſelf from being given in evidence, he ſhould direct an acquittal; unleſs the fact itſelf proved, would have been ſufficient to warrant a conviction without any confeſſion leading to it. And he ſo directed the jury in that caſe. In Lockhart's caſe, who was indicted for ſtealing jewels, a confeſſion having been obtained from him upon promiſes of favour that he had ſtolen the jewels, and had diſpoſed of part of them to a Mr. Grant; the latter was admitted as a witneſs to prove that he had received them from the priſoner.

Lockhart's caſe, O. B. 1785, 1 Leach, 430.

Where a priſoner has been once induced to confeſs upon a promiſe or threat; it is the common practice to reject any ſubſequent confeſſion of the ſame or like facts, though at a ſubſequent time. But in one caſe where hopes had been holden out to a priſoner to confeſs, and when brought before a magiſtrate, he refuſed unleſs upon conditions; Buller J. admitted the general rule with ſome qualification, by obſerving that there muſt be very ſtrong evidence of an explicit warning by the magiſtrate not to rely on any expected favour on that account; and it ought moſt clearly to appear that the priſoner thoroughly underſtood ſuch

ſuch warning, before his ſubſequent confeſſion could be given in evidence. Ch. XVI. § 94. *Confeſſion.*

As to what ſhall be conſidered as a threat or promiſe, ſaying to the priſoner that it would be worſe for him if he did not confeſs, or that it would be better for him if he did, is ſufficient to exclude the confeſſion, according to conſtant experience.

2. *That the Goods were taken on a Claim of Right.* § 95.

On claim of right. By the party's own act.

Goods may be ſo taken by the party's own immediate act, or by the act of the law through his means. In the firſt place it has been ſhewn that a man cannot be guilty of felony in taking his own goods, unleſs where having bailed them to another, he afterwards ſteal or rob him of them in order to charge him or the hundred. For elſe, if a man take another's trees and cut them into boards; or take the other's cloth and make it into a doublet and embroider it; or mingle the other's corn with his own: in all theſe caſes the owner may retake his boards, cloth, and the whole of the corn, (ſo much at leaſt, I preſume, as cannot eaſily be diſtinguiſhed from his own,) without being guilty of felony.

Ante, 558. 1 Hale, 513.

And here it may be proper to remark, that in any caſe if there be any fair pretence of property or right in the priſoner, or if it be brought into doubt at all, the court will direct an acquittal; for it is not fit that ſuch diſputes ſhould be ſettled in a manner to bring men's lives into jeopardy.

The owner of ground takes a horſe for damage feaſant, or a lord ſeizes it as an eſtray, though perhaps without title; yet theſe circumſtances explain the intent, and ſhew that it was not felonious, unleſs ſome act be done which manifeſts the contrary; as giving the horſe new marks to diſguiſe him, or altering the old ones; for theſe are preſumptive circumſtances of a thieviſh intent. 1 Hale, 506, 7.

After a ſeizure of uncuſtomed goods, ſeveral broke at night into the houſe where they were depoſited, with intent to retake them for the benefit of the former owner: it was holden that ſuch a deſign appearing rebutted the preſumption of a felonious deſign to ſteal, which was laid in an indictment for burglary; however elſe the parties were culpable in doing ſuch an act. Rex v. Knight and another, Ante, 510.

Ch. XVI. § 96. *On claim of right.*

§ 96. *By act of law.*

What has been juſt ſaid of a colourable title will of courſe apply in at leaſt as ſtrong a degree to the next ſubject of conſideration; where a party gets poſſeſſion of another's goods by act of law. But however difficult it may be to eſtabliſh proof of a felonious intent in ſuch caſes, yet if the fact be clearly made out, it is one of the higheſt aggravations of the offence of larceny. It is converting the proceſs of the law, which is the beſt ſecurity for property, into an inſtrument of rapine and plunder.

2 Hale, 507. 1 Hawk. ch. 33. ſ. 8. 3 Inſt. 108.

A. having a deſign to ſteal B.'s horſe, which was impounded on a diſtreſs, enters a plaint of replevin in the ſheriff's court for the horſe; and thereby getting it delivered to him, runs away with it: or intending to ſteal the goods of B. in his houſe, he delivers an ejectment fraudulently; and having obtained judgment againſt the caſual ejector, he gets poſſeſſion and goes off with the goods: it is felony in either caſe.

Farr's caſe, O. B. 1665, cor. Hyde Ch. J. Kelyng and Wild Js. Kel. 43. T. Raym. 276.

Richard Farr and Eleanor Chadwicke were indicted for breaking the houſe of Robert Stanyer, and putting his wife in fear, and ſtealing goods from thence. It appeared that the priſoners, intending to rifle the houſe in which Mrs. Stanyer lived apart from her huſband, went to an attorney, and pretending that Mrs. Stanyer was Farr's tenant, and in arrear for rent, obtained poſſeſſion of the houſe by means of a fraudulent ejectment; and at the ſame time arreſted Mrs. Stanyer under a writ of latitat, and cauſed her to be carried to priſon; and then the priſoners rifled the houſe and took away the goods, and hid ſome, and altered the marks upon the others, and ſold the reſt. And being queſtioned concerning theſe acts, and aſked what colour of title they had to the houſe or the goods, they could pretend none. But it appeared that the true landlord had received the rent of it for many years, and that no rent was in arrear. Neither could they pretend to any cauſe of action againſt Mrs. Stanyer. Upon which the jury were directed, that if they believed that the priſoners had done all this with an intent to rob, they ought to find them guilty; which was accordingly done; and they were both executed. So if under pretext or colour of a capias utlagatum, ſued out after an outlawry clandeſtinely obtained againſt a viſible man, his goods be taken with a felonious intent, it will be felony.

Ch. XVI. § 97. *By miſtake or accident.*

§ 97. *By miſtake or accident.* 2 Hale, 507, 9.

3. *By Miſtake or Accident.*

Analogous to the taking upon a claim of right is the taking by miſtake ariſing from heedleſſneſs, or from mere accident. As if one man's ſheep mix with another's flock, and he drive them with his own, or even ſheer them, not knowing or taking heed of the difference; it is no felony. But if he knew them to be another's, as by having that other's mark which he defaces, and places his own mark on them; this is evidence of a felonious intent. So it is if he appear deſirous of concealing the property, or of preventing the inſpection of the owner, or of any who might make the diſcovery: or if, being aſked, he deny the having them; although his knowledge thereof be proved. In like manner the contrary mode of conduct in theſe ſeveral reſpects is evidence to rebut the felonious intent.

§ 98. *As a treſpaſſer.* 1 Hale, 509. 4 Blac. Com. 232.

4. *On taking as a Treſpaſſer, without Fraud.*

The taking may amount only to a treſpaſs, and the circumſtances in ſuch caſe muſt guide the judgment. As where a man takes another's goods openly before him or before other perſons, otherwiſe than by apparent robbery; or having poſſeſſed himſelf of them, avows the fact before he is queſtioned.

So where a man takes another's harrow or plough, and after plowing his own land, returns it to the place whence he took it, or tells the owner of his uſing it. So taking a horſe off the common, and after riding, returning it there again, is but a treſpaſs. But if the party had ſold it, this would be declarative of the firſt taking being felonious; and in doubtful caſes the ſafeſt rule is to incline to acquittal rather than conviction.

The felonious intent being as eſſential to conſtitute the offence of robbery as of larceny, it follows that if ſuch intent be wanting, though goods be taken by ſuch force or putting in fear as would otherwiſe be ſufficient to conſtitute robbery, yet it will only amount to a treſpaſs. A traveller met a fiſherman with fiſh, who refuſed to ſell him any; and he by force and putting in fear took away ſome of his fiſh, and threw him money much above the value of it: and judgment was reſpited, becauſe of the doubt whether the intent were

Burnet's MS. 71. Lamb. 269. Crompt. Juſt. 34. b. The fiſherman's caſe, York, 26 Eliz.

Ch. XVI. § 98. *As a treſpaſſer.*

felonious on account of the money given. Such, however, ſeem properly to be queſtions for the conſideration of the jury. And the circumſtance of the party's offering the full value or more at the time ought to be left to them to ſhew that his intention was not fraudulent, and ſo not felonious: for it does not neceſſarily follow as a concluſion of law, that if the value of the thing taken be offered to be paid at the time, the intent is therefore not felonious (*a*); though it is, I apprehend, pregnant evidence in the negative. But if it appear that the offering a price be merely a pretence for fraudulently acquiring another's property (*b*); as where the owners of corn or flour were compelled by individual force, or the threats of a mob, to take much leſs than it was worth; that ſhews the intent to be fraudulent and felonious; or, according to the civil law, *lucri cauſâ:* and the parties are guilty of felony. The diſtinction in theſe caſes ſeems to turn on the fraud, which is of the eſſence of theſe offences, as was at firſt ſhewn. And this is exemplified by a caſe of ſtill greater nicety, where the original aſſault was clearly with a felonious intent; and yet the taking of the goods was no more than a treſpaſs. At the O. B. 1698, before Holt C. J. and other Judges, it was found that A. aſſaulted B. on the highway with a felonious intent, and ſearched the pockets of B. for money, but finding none, A. pulled off the bridle of B.'s horſe, and threw that and ſome bread which B. had in pannels about the highway, but did not take any thing from B.: and reſolved upon conference with all the Judges, that this was no robbery, becauſe nothing was taken from B. The better reaſon ſeems to be, that the particular goods taken were not taken with a felonious intent; for ſurely there was a ſufficient taking and ſeparation of the goods from the perſon.

(*a*) Per Groſe J. R. v. Lane and others, Bodmin Sum. Aſſ. 1796.
(*b*) Simmons's caſe, poſt. f. 128. Burrows v. Wright, 1 East's Rep. 615. and Greaſley v. Higginbottom, ib. 636.
Juſt. Inſt. 4. f. 1.

Ante, f. 2.

O. B. 1698, MS. Tracy, 71. Ex relatione Ward C. B. from his MS.

Philipps and Strong were indicted for ſtealing a mare and gelding of John Goulter. It appeared in evidence that the priſoners had gone to the ſtables of Goulter, who kept an inn at a place called Petty France, in the night of the 26th of February laſt, opened them, and taken out the horſe and mare, the ſubject of the indictment, and rode on them to Lechlade about 32 or 33 miles off, where they carried them to different inns, and left them in care of the oſtlers, directing

Philipps and Strong's caſe, Glouceſter Sp. Aſſ. 1801, cor. Lawrence J. MS. Jud.
The priſoners enter another's ſtable at night, and take out his horſes and ride them 32 miles and leave

Ch. XVI. § 98. *As a treſpaſſer.*

directing them to clean and feed them, and ſaying that they ſhould return in three hours. In the courſe of the ſame day the priſoners were taken at a diſtance of 14 miles from Lechlade, walking towards Farringdon in Berkſhire, in a direction from Lechlade. The jury being directed to conſider, whether the priſoners when they took the horſe and mare intended to make any further uſe of them than to ride them, for the purpoſe of aſſiſting them on their journey towards the place where they were going, and then to leave them to be recovered by the owner or not as it might turn out; and whether they intended to return to Lechlade, and make any further uſe of them; found the priſoners guilty; but added, they were of opinion that the priſoners meant merely to ride them to Lechlade, and to leave them there; and that they had no intention to return for them, or to make any further uſe of them. Upon this finding, at a conference firſt in Eaſter, and afterwards in Trinity term, 1801, the Judges, (diſſentiente Groſe J. et dubitante Lord Alvanley (*a*),) held it to be only a treſpaſs and no felony. For there was no intention in the priſoners to change the property, or make it their own; but only to uſe it for a ſpecial purpoſe, i. e. to ſave their labour in travelling. The Judge who diſſented thought the caſe differed from thoſe firſt above-mentioned; becauſe here there was no intention to return the horſes to the owner, but, for aught the priſoners concerned themſelves, to deprive him of them. But the reſt agreed that it was a queſtion for the jury; and that if they had found the priſoners guilty generally upon this evidence, the verdict could not have been queſtioned.

them at an inn, and are afterwards found purſuing their journey on foot. On a finding by the jury that the priſoners took the horſes merely with intent to ride and afterwards leave them, and not to return or make any further uſe of them; held treſpaſs and not larceny.

5. *On a Taking by Finding.*

§ 99. *By finding.*
1 Hale, 506, 7.
3 Inſt. 98.
1 Hawk. ch. 33. ſ. 3.
Ante, f. 88.

Another defence is, that the goods were found. This is connected in great meaſure with the firſt mentioned mode of defence. It is the moſt trite excuſe in caſes of larceny, and in general the leaſt founded. Still if the fact be ſo; as where one finds a purſe in the highway, which he takes and carries away; it is no felony; although it may be attended with all thoſe circumſtances which uſually prove a taking

(*a*) His Lordſhip, who had been recently called to the bench of C. B., not having been preſent when the caſe was firſt under conſideration, declined giving any expreſs opinion.

Ch. XVI. § 99. *On finding.*

with a felonious intent; ſuch as denying or ſecreting it. However, this muſt be underſtood where the finder really believes the goods to have been loſt by the owner, and does not colour a felonious taking under ſuch a pretence. Therefore where a man's goods are in ſuch a place where ordinarily they are or may be placed, and a perſon takes them away with a view to convert them to his own uſe, the pretence of finding is no excuſe. Thus the taking of another man's horſe from his own or his neighbour's ground or common, with intent to ſteal it, is felony. One hides a purſe of money in his corn mow; his ſervant finding it takes part of it; if by circumſtances it can appear that he knew his maſter laid it there, it is felony. But then the circumſtances muſt be pregnant; otherwiſe it may be reaſonably interpreted to be a bare finding, becauſe the purſe was depoſited in ſo unuſual a place. But where a gentleman left a trunk in a hackney coach, and the coachman took and converted it to his own uſe; held felony: for he muſt have known where he took up the gentleman and his trunk, and where he ſet him down; and therefore he ought to have reſtored it to him. A ſimilar circumſtance occurred again at the O. B. in 1786. The priſoner Wynne, who was a hackney coachman, had taken up Mr. Weldon the proſecutor, with ſeveral packages, at the Adelphi, and ſet him down in Orchard Street, where the priſoner and a ſervant took all the things out of the coach, except one corded box, which was put under the ſeat, and contained ſeveral articles; for the ſtealing of which, and the box itſelf, the priſoner was indicted. The priſoner being then diſcharged, drove off; ſoon after which the box was miſſed. In a few days the priſoner was traced and taken, and the box found, in conſequence of a direction from him, at a Jew's, uncorded, and part of the goods only in it; particularly ſeveral papers were miſſing, and among them two bonds mentioned in the indictment. The jury were of opinion under the circumſtances, that the coachman uncorded the box and deſtroyed the papers, with an intent to embezzle the goods found in the box; and found him guilty. And in Eaſter Term 1786 a majority of the Judges held the conviction proper. Auſtin's caſe at the O. B. in 1777 was there mentioned as in point.

Lamb's caſe, O. B. 1694, Serjt. Forſt. MS. *Stealing box left in hackney coach.*

Wm. Wynne's caſe, O. B. 1786, cor. Eyre B. 2 MS. Sum. 231. and MS. Gould and Buller Js. (S. C. 1 Leach, 460.) *Stealing box left in a hackney coach.*

Poſt. f. 135.

(Abſent Lord Mansfield C. J. the Ch. B. and Nares J.)

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point. On the other hand, evidence to ſhew that the finder endeavoured to diſcover the true owner, and kept the goods till it might reaſonably be ſuppoſed that he could not be found; or that he made known his acquiſition, ſo that he might make himſelf reſponſible for the value in caſe he ſhould be called upon by the owner; are circumſtances to rebut the implication of a felonious taking and converſion.

6. *On a Poſſeſſion by Delivery of a Third Perſon.*

§ 100. *By delivery from a third perſon, the party not knowing of the felony.*

It has been ſtated before that the perſon in whoſe poſſeſſion ſtolen goods are found muſt account how he came by them; otherwiſe he may be preſumed to be the thief. And it is a common mode of defence to ſtate a delivery by a perſon unknown, and of whom no evidence is given; little or no reliance can conſequently be had upon it. Yet caſes of that ſort have been known to happen where perſons really innocent have ſuffered under ſuch a preſumption; and therefore where this excuſe is urged, it is a matter of no little weight to conſider how far the conduct of the priſoner has tallied with his defence from the time when the goods might firſt be preſumed to have come into his poſſeſſion. This defence may alſo be more or leſs probable on account of the length of time which has elapſed from the loſing of the goods by the owner to the finding of them in the priſoner's poſſeſſion, which I have before adverted to.

Ante, f. 93.

Ante, 556.

§ 101. *Taking on delivery by or on behalf of the owner; or by his conſent and approbation.*

The moſt comprehenſive and moſt intricate line of defence is,

7. *That the Goods were delivered to the Priſoner by or on Behalf of the Owner; or were taken with his Conſent or Approbation:*

For if it be proved that there was no treſpaſs or felonious intent in *taking* the goods, no ſubſequent converſion of them can amount to felony.

1 Hawk. ch. 33. ſ. 2, 3.

The primary inquiry to be made is, Whether *the taking* were *invito domino*, or without the will or approbation of the owner: for this is of the very eſſence of larceny, and its kindred offence robbery. And therefore where one Salmon conſpired with Macdaniel and other perſons to procure

Rex v. Macdaniel and others, O. B. 1755, Foſt. 121. 4 Blac. Com. 230.

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procure two others, ignorant of the deſign, to rob him on the highway, in order to procure to themſelves the reward given by act of Parliament for apprehending robbers on the highway; and he accordingly went, in purſuance of ſuch agreement, to the place appointed, where the ſuppoſed robbery was effected; the caſe was holden not to amount to felony.

Norden's caſe, O. B. 1754, Foſt. 129.

Yet in another caſe one Norden, having been informed that one of the early ſtage coaches had been frequently robbed near the town by a ſingle highwayman, reſolved to uſe his endeavours to apprehend him: for which purpoſe he put a little money and a piſtol into his pocket, and attended the coach in a poſt chaiſe till the highwayman approached the carriages, and preſenting a weapon, demanded the money of the paſſengers. Norden gave him his money; and then jumping out of the chaiſe with his piſtol in his hand, with the aſſiſtance of ſome others, took the highwayman. This was ruled clearly to be robbery, and the felon was convicted. For this caſe differed widely from the former: there was no previous concert with the highwayman directly or through the medium of others that the robbery ſhould be effected, or any thing to leſſen the danger of the attempt.

Rex v. Eggington and others, Stafford Sp. Aſſ. 1801, MS. Jud. S. C. ante, 496. *The owner of goods, knowing of an intention in the priſoners to ſteal them, they having plotted ſo to do with his ſervant, directed his ſervant to carry on the buſineſs with a view to the detection of the thieves. In conſequence of which the ſervant, with the conſent of his maſter, agreed with the priſoners to open the outer door to them, and let them into the*

In Eggington's caſe beforementioned, who was indicted for burglary and larceny, it appeared that the priſoners, intending to rob Mr. Boulton's manufactory at Soho, had applied to one Phillips his ſervant, who was employed there as a watchman, to aſſiſt them in the robbery. Phillips aſſented to the propoſal of the priſoners in the firſt inſtance; but immediately afterwards gave information to Mr. Boulton, the principal proprietor, and in whom the property of the goods taken (together with other perſons his partners) was laid; *telling him what was intended, and the manner and time the priſoners were to come; that they were to go into the counting-houſe, and that he was to open the door into the front yard for them.* In return, Mr. Boulton told him *to carry on the buſineſs*; that he (Boulton) would *bear him harmleſs*; *and Mr. Boulton alſo conſented to his opening the door leading to the front yard, and to his being with the priſoners the whole time.* In conſequence of this information, Mr. Boulton removed from the counting-houſe every thing but 159 guineas and ſome

ſilver

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ingots, which he marked to furniſh evidence againſt the priſoners; and lay in wait to take them, when they ſhould have accompliſhed their purpoſe. On the 23d of December, about one o'clock in the morning, the priſoners came, and Phillips opened the door into the front yard, through which they went along the front of the building, and round into another yard behind it, called the middle yard, and from thence they and Phillips went through a door which was left open, up a ſtaircaſe in the centre building leading to the counting-houſe and rooms where the plated buſineſs was carried on: this door the priſoners bolted, and then broke open the counting-houſe, which was locked, and the deſks, which were alſo locked; and took from thence the ingots of ſilver and guineas. They then went to the ſtory above into a room, where the plated buſineſs was carried on, and broke the door open and took from thence a quantity of ſilver, and returned down ſtairs; when one of them unbolted the door at the bottom of the ſtairs which had been bolted on their going in, and went into the middle yard; where all (except one who eſcaped), were taken by the perſons placed to watch them. On this caſe two points were made for the priſoners; Firſt, that no felony was proved, as the whole was done with the knowledge and aſſent of Mr. Boulton, and that the acts of Phillips were his acts. Secondly, That if the facts proved amounted to a felony, it was but a ſimple larceny, as the building broke into was not the dwelling-houſe of any of the perſons whoſe houſe it was charged to be; and that there was no breaking, the door being left open. After conviction, the caſe was argued before all the Judges in the Exchequer Chamber; and, for the reaſons before ſtated, all the Judges agreed that the priſoners were not guilty of the burglary.

houſe, where they broke open inner apartments and took the goods. Held larceny by a majority; one doubting, becauſe of the owner's aſſent and partial encouragement to the felony by means of his ſervant.

May 9th, 1801, ante, 496.

But with reſpect to the larceny, the majority thought there was no aſſent in Boulton: that his object being to detect the priſoners, he only gave them a greater facility to commit the larceny than they otherwiſe might have had: and that this could no more be conſidered as an aſſent, than if a man, knowing of the intent of thieves to break into his houſe, were not to ſecure it with the uſual number of bolts. That there was no diſtinguiſhing between the degrees of facility

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cility a thief might have given to him. That it could only be conſidered as an apparent aſſent. That Boulton never meant that the priſoners ſhould take away his property. And the circumſtance of the deſign originating with the priſoners, and Boulton's taking no ſtep to facilitate or induce the offence until after it had been thought of and reſolved on by them, formed with ſome of the Judges a very conſiderable ingredient in the caſe; and differed it much from what it might have been if Boulton had employed his ſervant to ſuggeſt it originally to the priſoners. Lawrence J. doubted whether it could be ſaid to be done invito domino, where the owner had directed his ſervant to carry on the buſineſs; to open the door; and meant that the priſoners ſhould be encouraged by the preſence of that ſervant; and that by his aſſiſtance they ſhould take the goods, ſo as to make a complete felony; though he did not mean that they ſhould carry them away. Finally, the priſoners were recommended to mercy on condition of being tranſported for ſeven years, the puniſhment they would have been liable to for the larceny. The deciſion in the above caſe is conſonant to the rule laid down in the civil law under ſimilar circumſtances.

Vide Juſt. Inſt. lib. 4. tit. 1. ſ. 8.

This ſort of defence, that the property was delivered by and with the conſent of the owner, has been not unfrequently ſet up in the caſe of robbery from the perſon, where pretended gifts have been extorted by threats of accuſing perſons of a certain odious crime. This and other inſtances of extorted conceſſions will hereafter be conſidered more fully under the appropriate diviſion of robbery from the perſon.

§ 102. *Diſtinction as to parting with the property or only the poſſeſſion of the thing delivered.*

The next inquiry is whether the owner, in making the delivery, intended to part with the *property*, or only with the *poſſeſſion* of the thing delivered. For if he parted with the *property* to the priſoner, by whatever fraudulent means he was induced to give the credit, it cannot be felony. But if the bare *poſſeſſion* only were delivered, then it is material to inquire whether the delivery were by way of charge, or as a general bailment, or for ſome ſpecial purpoſe. And each of theſe ſeveral ſorts of delivery will furniſh matter of diſtinct conſideration, the blending whereof together has given riſe

riſe to moſt of the doubts which have occurred on this ſubject.

Ch. XVI. § 102. *Owner parting with property or poſſeſſion.*

The firſt branch of inquiry relates to thoſe caſes where perſons, led by fallacious appearance held out to them by a priſoner or thoſe with whom he was acting in concert, have given him credit for goods which without ſuch fraud he would never have obtained, and of which he previouſly intended to cheat the owners. This, where the property is intended to be transferred to the identical perſon to or for whom the delivery is made, does in no caſe amount to larceny: becauſe however fraudulent the intent may be, yet there is no treſpaſs in the taking, without which there can be no larceny or robbery. And where ſuch credit is obtained by means of falſe tokens or pretences, the legiſlature have ſupplied a particular remedy.

§ 103. *Acquiring the property by fraudulent appearances.*

Vide 1 Hale, 506.

Vide poſt. tit. Cheats.

This diſtinction between parting with the *property* or the *poſſeſſion* has been diſcuſſed and ſettled in a variety of caſes which will be mentioned. But to purſue the train of the ſubject with more regularity than a chronological arrangement of them would admit of, I ſhall begin with ſome of a recent date. Juſtin Harvey was indicted for horſe ſtealing: and it appeared in evidence that the priſoner met the proſecutor at a fair with the horſe which he had brought there for the purpoſe of ſelling it; and being known to him, propoſed to him to become the purchaſer. They walked together in the fair; and upon a view of the horſe, the proſecutor told the priſoner he ſhould have it for *L.* 8; and calling his ſervant, ordered him to deliver it to the priſoner; who immediately mounted the horſe, telling the proſecutor that he would return immediately and pay him: the proſecutor replied *very well:* and the priſoner rode away with the horſe and never returned. Gould J. ordered an acquittal; for here was a complete contract of ſale and delivery: the property as well as the poſſeſſion was entirely parted with.

Rex v. Harvey, Chelmsford Aſſ. 1787, cor. Gould J. 2 Leach, 523. *Obtaining delivery of a horſe ſold on promiſe to return immediately and pay for it; and riding off and not returning; no felony.*

Nicholſon and others were indicted for ſtealing two bank poſt-bills, the one of 20l., the other of 15l., and ſeven guineas, the property of William Cartwright. It appeared that priſoner Nicholſon introduced himſelf to the proſecutor without any previous acquaintance, at his apartments in the Charter-

R. v. Nicholſon, Jones, and Chappel, O. B. Seſſ. bef. Hil. 1794, cor. Macdonald C. B. MS. Buller J. and MS. Jud. (S. C. 2 Leach, 698.)

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Several ſharpers inveigle one to bet with them; and after ſuffering him to win at firſt contrive to ſtrip him of a large ſum on the event of a bet; which the jury find to be a preconcerted ſcheme to get his money: Yet as he parted with his property under the idea that it had been fairly won; held no felonious taking.

Charter-houſe, under pretence of inquiring what the rules of the charity were. He diſcovered that the proſecutor had ſome money, by his deſk having been opened during the converſation. Nicholſon deſired him to walk with him, and they went to a public houſe, having been joined by the priſoner Chappel. Some liquor was called for, when the other priſoner Jones came into the room, and ſaid he had come from Coventry to receive 1400l. and produced a quantity of notes. Chappel ſaid to him, "I ſuppoſe that you think that "no one has any money but you." Jones anſwered, "I'll "lay 10l. that neither of you ſhew 40l. in three hours." They all went out, Nicholſon and Chappel ſaying they ſhould go to the Spotted Horſe; and both aſked the proſecutor if he could ſhew 40l. He anſwered, he believed he could. Nicholſon accompanied the proſecutor to his room at the Charter-houſe, where the proſecutor took out of his deſk the two poſt-bills in queſtion, and five guineas. Nicholſon then adviſed him to take a guinea or two more, and he accordingly took two more. They then went to the Spotted Horſe, where Jones and Chappel were in a back room. Jones put down a 10l. note for each who could ſhew 40l. The proſecutor ſhewed his 40l. by laying down the notes and guineas; but did not recollect whether he took up the 10l. given to him. Jones then wrote four letters with chalk on the table, and going to the end of the room turned his back, and ſaid that he would bet them a guinea a-piece that he would name another letter which ſhould be made and a baſon put over it. Another letter was made, and covered with the baſon. Jones gueſſed wrong, and the others won a guinea each. Chappel and Nicholſon then ſaid, we may as well have ſome of Jones's money, for he is ſure to loſe, and we may as well make it more for we are ſure to win. The proſecutor ſtaked his two notes and the ſeven guineas. Jones then gueſſed right: and the notes lying on the table, Jones ſwept them all off, and went to the door of the room; the other priſoners ſitting ſtill. A conſtable immediately came in and apprehended the priſoners. The proſecutor ſaid, on croſs examination, that he did not know whether the 10l. note given to him by Jones on ſhewing 40l. were a real one or not. That having won the firſt wager by gueſſing the letter, if the

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the matter had ended there, he ſhould have kept the guinea. That he did not object to Jones taking his 40l. when he loſt, and would have taken the 40l. if he had won. The officers who had taken the priſoners, having ſearched them, found a great many pieces of thin paper upon them, having numbers, ſuch as, 100, 50, &c. ſomething in the manner of bank notes, the bodies of the notes being advertiſements of different kinds. No good notes were found upon them, but about eight guineas in caſh, a ſum inſufficient to have paid 40l. if Jones had loſt the wager. A lump of paper was put into the proſecutor's hands by Jones when the officers came in, which was afterwards found to contain the two genuine poſt-bills mentioned in the indictment. It was contended on the part of the priſoners that this was a mere gaming tranſaction, or at moſt only a cheat, and not a felony. And a doubt being entertained on the bench as to the latter point, it was left to the jury to conſider, whether this were a gaming tranſaction, or whether it were a preconcerted ſcheme by the priſoners, or any of them, to get from the proſecutor the poſt-bills and caſh. The jury were of opinion that it was a preconcerted ſcheme in all of them for that purpoſe; and found them guilty. But in Hilary term 1794 all the Judges held the conviction wrong: for here the *property* was parted with by the proſecutor.

R. v. Parks, O. B. Seſſ. bef. Hil. term 1794, MS. Buller J. and MS. Jud. (S. C. 2 Leach, 723). *The priſoner, with intent to defraud, orders one to ſend him goods to be paid for on delivery, and afterwards gives the ſervant who brings them bills in payment which are good for no thing. Held no larceny; for the owner's ſervant, (though his maſter did not intend to give the priſoner credit)*

At the ſame ſeſſions John Parks was indicted for ſtealing a piece of ſilk of the value of 10l., the property of Thomas Wilſon. It was proved that the priſoner had called at Wilſon's warehouſe, and having looked at ſeveral pieces of ſilk, ſelected the one in queſtion, and ſaid that his name was John Williams; that he lived at No. 6, Arabella-row, Pimlico; and that if Wilſon would ſend it that evening he would pay him for it. The proſecutor accordingly ſent his ſhopman with it, and the next morning had two notes given to him by the ſhopman: who proved that as he was taking the goods according to the direction, he met the priſoner between Hyde-park and the row; that the latter went with and took him into a room at No. 6, Arabella-row, where he delivered a bill of parcels to the priſoner; who examined it, and gave him two bills drawn by Frith and Co. at Bradford on Taylor and Co. in London. The bills were for 10l. each, but the

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goods only came to 12l. 10s. The ſhopman ſaid that he had not caſh to give the balance; to which the priſoner anſwered, that he wanted more goods and ſhould call the following day: but he ſaw no more of him till he was apprehended. The notes having been carried to Taylor and Co. were declared by them to be good for nothing; and that they had no correſpondent at Bradford. It was further proved, that before the goods were ſent from Wilſon's, they were entered in a memorandum book, and the priſoner made debtor for them; and that they were carried into the ledger about a month after in the ordinary courſe; and that the priſoner ſtill ſtood debited there for the amount. That this was Wilſon's practice in all caſes where goods were not paid for immediately. A doubt ariſing whether this were not a ſale, and ſuch a delivery as would change the property, the Chief Baron left it to the jury to conſider whether there were from the beginning a premeditated plan on the part of the priſoner to obtain the goods, without paying value for them? and whether this were a ſale by Wilſon, and a delivery of the goods with intent to part with the property; he having received bad bills in payment through the medium of his ſervant? The jury ſaid that they were of opinion that the priſoner from the beginning intended to defraud Mr. Wilſon; and that it was not Wilſon's intention to give the priſoner credit; and found him guilty. But in Hilary term 1794 the Judges were of opinion that the conviction was wrong; the *property* as well as the poſſeſſion having been parted with upon receiving that which was accepted as payment by the proſecutor's ſervant, though the bills afterwards turned out to be of no value.

parted with the property by accepting ſuch payment as was offered.

§ 104. *No difference where delivery from the owner upon credit obtained under another's name.*

It makes no difference in theſe caſes, that the credit was obtained by fraudulently uſing another's name, to whom in truth the credit was intended to be given, if the delivery of the goods were made by the owner or any other having the diſpoſing power for that purpoſe.

Coleman's caſe, O. B. June 1785, Seſſ. Pap. No. 648, (1 Leach, 339. n. S. C.) *Obtaining ſilver on pretence of ſending half guinea preſently in exchange no felony.*

In the caſe of Catherine Coleman, it appeared that ſhe went to a tradeſman's houſe, and ſaid ſhe came from a Mrs. Cook, a neighbour, who would be much obliged if he would let her have half a guinea's worth of ſilver, and that ſhe would

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would ſend the half guinea preſently. The priſoner obtained the ſilver and never returned: and this was holden no felony. This was in truth a *loan* of the ſilver, upon the faith that the amount would be repaid at another time. It was money obtained on a falſe pretence. And the ſame determination has been made in ſimilar caſes at the Old Bailey.

Atkinſon's caſe, O. B. Sept. 1799, cor. Le Blanc J. MS. Jud. *One writing a letter in the name of another to a third perſon to borrow money, which he obtains by that fraud, is only guilty of a miſdemeanor. Vide* poſt. tit. *Cheats.*

James William Atkinſon was indicted for ſtealing two bank notes, the property of William Dunn, againſt the ſtatute. It appeared that the priſoner ſent one Dale (to whom he was unknown) with a letter directed to Dunn; bidding Dale to tell Dunn that he brought the letter from Mr. Broad; and to bring the anſwer to him (the priſoner) in the next ſtreet, where he would wait for him. Dale accordingly carried to Dunn the letter, which was written in the name of Broad, a friend of Dunn's, ſoliciting the loan of 3l. for a few days; and deſiring that the money might be incloſed back in the letter immediately. Dunn thereupon ſent the bank notes in queſtion, incloſed in a letter directed to Broad, and delivered the ſame to Dale, who delivered them to the priſoner as he was firſt ordered. The letter turned out to be an impoſition. It was objected at the trial that this was no felony, becauſe the abſolute dominion of the property was parted with by the owner, though induced thereto by means of a falſe and fraudulent pretence. And on reference to the Judges after conviction, all preſent held that it was no felony; on the ground that the property was intended to paſs by the delivery of the owner; and that this caſe came within the ſtat. 33 H. 8. c. 1. againſt falſe tokens, which particularly ſpeaks of counterfeit *letters*. It was obſerved in the courſe of the debate, that this differed from Noah Pearce's caſe; for there the property did not paſs; the poſt-maſter having no property in the mail bag to part with; but here the proſecutor parted with his property when he lent it as a loan.

Mich. Term 1799, (abſent Buller J.)

Ante, f. 39.

Wilkins's caſe, O. B. Ap 1789, MS. Buller J. and MS. Jud. *The owner ſends goods by his ſervant to be delivered to A.; but B. fraudulently*

On the ſame ground the above caſe is alſo diſtinguiſhable from that of Wilkins, which happened prior to it in point of time, but does not appear to have been adverted to. John Wilkins was convicted of ſtealing a quantity of ſtockings, the property of William Waite. It appeared in evidence that the priſoner ſhortly before had met Mr. Waite's apprentice on Ludgate-Hill, and aſked him if he were going to

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Mr. Heath, a hoſier in Milk-ſtreet. The apprentice had at that time two parcels under his arm directed to Mr. Heath, containing the articles in queſtion; and having anſwered in the affirmative, the priſoner told him that he knew his maſter, and owed him for thoſe parcels; and he then gave the lad a parcel, which was afterwards found to contain two diſh-clouts of no value, telling him to take it to his maſter directly, that his maſter might forward it to a Mr. Brown: and the priſoner, with the approbation and conſent of the apprentice, took from him the two parcels containing the ſtockings. The boy then left the priſoner. But a ſuſpicion ariſing ſoon in his mind, he walked after him, overtook him, and aſked him if he was Mr. Heath; which the priſoner anſwering in the affirmative, the boy was ſatisfied, and left the priſoner with the goods, which were never afterwards recovered. On this evidence, together with the fact that the priſoner was not Mr. Heath, the jury found the priſoner guilty, and that he had gotten poſſeſſion of the goods in the manner above deſcribed, and converted them wrongfully to his own uſe. But the Recorder, doubting whether the crime amounted to felony, referred the caſe to the Judges, all of whom preſent in Hilary term 1790 were of opinion that the conviction was proper. In the printed report of this caſe, Mr. Juſtice Gould, in giving the reaſons of their judgment, lays down theſe rules as clearly ſettled; that the poſſeſſion of perſonal chattels follows the right of property in them; that the poſſeſſion of the ſervant was the poſſeſſion of the maſter, which could not be deveſted by a tortious taking from the ſervant; that this rule held in all caſes where ſervants had not the abſolute dominion over the property, but were only entruſted with the care or cuſtody of it for a particular purpoſe.

procures the delivery to himſelf by pretending to be A.: Held felony.

(Abſent Perryn B. and Heath J.) 1 Leach, 586.

Ante, 671.

The above reaſoning points out the difference between that and Parks' caſe before mentioned, where the ſervant was entruſted with the power of diſpoſing of the goods to the priſoner.

§ 105. *Delivery before ſale complete.*

It frequently happens in theſe caſes, that the priſoner goes off with the goods before any ſale is actually concluded; or where there has only been a delivery upon a condition, by way of pledge, or the like, to have the goods returned again.

In

In theſe caſes the property not being parted with by the owner, if the priſoner obtain the poſſeſſion by fraud, with intent to ſteal the goods, it amounts to felony. Sharpleſs and Greatrix were convicted of ſtealing ſix pair of ſilk ſtockings of Owen Hudſon; on which a caſe was reſerved for the conſideration of the Judges; which ſtated that Greatrix in the character of ſervant to Sharpleſs had left a note at Hudſon's ſhop, who was a hoſier, deſiring that he would ſend an aſſortment of ſilk ſtockings to his maſter's lodgings, at the Red Lamp in Queen-ſquare. The hoſier having taken them according to direction, Greatrix opened the door to him, and introduced him into a parlour, where Sharpleſs was ſitting in a dreſſing gown, his hair juſt dreſſed, and an unuſual quantity of powder over his face. Having looked at ſome of the ſtockings, and aſked the price, which he was told was 14 s. a pair, he deſired Mr. Hudſon to fetch ſome ſilk pieces for breeches, and ſome black ſilk ſtockings with French clocks. Hudſon hung the ſix pair of ſtockings which Sharpleſs had looked out on the back of the chair, and went home for the other goods; but no poſitive agreement had taken place reſpecting the ſtockings. During Hudſon's abſence the priſoners decamped with the goods, which were proved to have been afterwards pawned by one of them. The Judges were of opinion that the conviction was right; for the whole of the priſoners' conduct manifeſted a preconceived deſign to obtain a tortious poſſeſſion of the property: and the verdict of the jury imported that in their belief the evil intention preceded the poſſeſſion of the goods by them. But that even independent of that, there did not appear a ſufficient delivery to change the property.

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R. v. Sharpleſs and Greatrix, O. B. May 1772, cor. Gould J. and Adams B. 1 Leach, 108. *Goods examined by one pretending to become a purchaſer, and ſet apart from the reſt, but not actually bargained for or delivered, were afterwards carried off by him while the owner was ſent away on pretence of getting more; held felony; the property not being transferred.*

§ 106. *On agreement to diſcount.*

At the O. B. J. H. Aickles was tried for ſtealing a bill of exchange of 100l. value, the property of S. Edwards. The proſecutor had applied to ſeveral perſons to get the bill diſcounted, which was drawn by himſelf: and ſome days afterwards the priſoner, a total ſtranger to him, left this addreſs at Edwards's lodgings. "Mr. H. No. 21, Great Pulteney Street, from 6 to 7 in the evening, or from 11 to 12 in the morning." In conſequence of which Edwards called on the priſoner there, who informed him that he was in the

R. v. Aickles, O. B. Jan. 1784, cor. Aſhhurſt and Heath Js. 1 Leach, 330. *Where upon an agreement with the priſoner to diſcount a bill of exchange it was delivered into his hands to ſatisfy*

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diſcounting line, and would diſcount bills for him at the uſual premium of 2½ per cent. agency, provided they were accepted by reſponſible perſons. In three weeks time the proſecutor ſent one Croxall, his clerk, to the priſoner to know whether he would diſcount the bill in queſtion, which was accepted by Mr. R. Wells of Cornhill, to whom he referred him. The priſoner returned with Croxall to Wells' houſe, where he agreed with Edwards to diſcount the bill for 2½ per cent. agency, excluſive of the legal intereſt for two months. Edwards then delivered the bill into the hands of the priſoner, and referred him to Wells to ſatisfy himſelf that it was a genuine acceptance; which Wells affirming, the priſoner, addreſſing himſelf to Edwards, ſaid, that if he would go with him to Pulteney Street, he would give him the caſh. Edwards replied that it was not convenient for him to go; but that Croxall ſhould attend the priſoner, *and pay him the* 25*s. agency, and the diſcount on receiving the* 100*l.* On their departure Edwards whiſpered his clerk not to leave the priſoner without receiving the money, nor to loſe ſight of him; promiſing to follow them in half an hour. Croxall went with the priſoner to his lodgings in Pulteney Street, where the priſoner ſhewed him a room, and deſired him to wait while he fetched the money, ſaying it was only about three ſtreets off, and he ſhould be back again in a quarter of an hour. Croxall, however, followed him down Pulteney Street, but in turning the corner of an adjoining ſtreet, he miſſed him. He afterwards walked up and down the ſtreet for a long time, but without ſucceſs: and he and Edwards, who joined him, returned to the priſoner's lodgings, where they waited three days and nights for him in vain. Shortly after, however, the priſoner was apprehended at another place, when he expreſſed his ſorrow, and promiſed to return the bill. It was proved that the bill had been ſeen a few days before the trial in a ſtate of negociation in the hands of a Mr. Smith; and that a ſubpœna duces tecum had been ſerved upon him; but he did not appear, nor was the bill produced in evidence. It was therefore objected, Firſt, That the bill itſelf ought to have been produced in evidence. Secondly, That the facts, admitting them to be well proved, did not amount to felony. The Court left the caſe with the

himſelf in the firſt inſtance of the goodneſs of the bill, but the owner not intending to truſt him with it without receiving the money, directed his clerk to follow the priſoner to the place where the money was to be paid, and not to leave him without receiving it: held that the priſoner afterwards contriving to run away with the bill without payment was guilty of larceny, the property not being transferred before payment of the money.

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jury to conſider; firſt, Whether they thought the priſoner had a preconcerted deſign to get the note into his poſſeſſion with an intent to ſteal it? And next, Whether the proſecutor intended to part with the note to the priſoner without having the money paid firſt? The jury found the affirmative of the firſt, and the negative of the ſecond queſtion; and concluded, that the priſoner was guilty. And upon reference to all the Judges, they held the conviction proper againſt both the objections.

It may not be improper to obſerve upon the above caſe, that from the whole tranſaction it appeared that Edwards never gave credit to the priſoner. It is true he put the bill into his hand after they had agreed upon the terms on which it was to be diſcounted, that by ſhewing it to Wells he might ſatisfy himſelf that it was a genuine acceptance. But beſides that this was an equivocal act of delivery in itſelf, it ſeems ſufficiently explained by the ſubſequent acts: for Edwards, or his clerk by his direction, continued with the priſoner until he ran away, for the very reaſon, becauſe they would not truſt him with the bill. In other words, Edwards would not give the priſoner credit for the property of the bill; and that being the caſe, he could no more be ſaid to have parted with the property therein, nor as it ſeems with the legal poſſeſſion, than a tradeſman may be ſaid to do, who being deſired by a perſon coming into his ſhop to let him ſee ſome cravats, put the goods into his hands; and being aſked the price, which he mentioned, the thief offered leſs, and ran away with the goods without paying for them. This, ſays Raymond, was felony: Firſt, Becauſe he ſhould be ſaid to have taken theſe goods with a felonious intent; for the act ſubſequent, viz. his running away with them, explained his intent precedent. Secondly, Becauſe, although the goods were delivered, yet they were not out of the owner's poſſeſſion by the delivery till the property was altered by the perfection of the contract; which was but inchoate, and never perfected between the parties: and when the priſoner ran away with the goods, it was as if he had taken them up lying in the ſhop, and had ran away with them. It would bring great contempt on the juſtice of the nation, as Hawkins ſomewhere obſerves, if its laws could be evaded by ſuch tricks and contrivances as theſe. But if

Ante, 677.
Poſt. ſ. 112.
Vide Abraham Chiſſer's caſe, T. Ray. 275.

Poſt. ſ. 110.

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credit be given for the property for ever ſo ſhort a time, no felony can be committed by converting it.

§ 107. *By way of pledge or ſecurity.*

So where the delivery is by way of pledge or ſecurity, the property in the thing pledged remains in the owner, and therefore larceny may be committed of it, if ſuch delivery were obtained fraudulently and with intent to ſteal.

Patch's caſe, O. B. Feb. 1782, cor. Gould J. Perryn B. and Buller J. MS. Buller J. & 2 MS. Sum. 227. (S. C. 1 Leach, 273.) *Pretending to find a jewel, in which the proſecutor as preſent at the time was to ſhare, and inducing him to take charge of it, and to depoſit with the finder his watch, &c. until the latter ſhould redeem the jewel by paying a certain ſum of money; and this done with intent to ſteal the watch, &c.: Held larceny.*

John Patch was indicted for ſtealing a ſilver watch, gold ſeal, &c. and 7s. the property of J. Bumſtead. The priſoner and two others joined Bumſtead in a ſtreet in London; and after walking a little way with him, one of them ſtooped down and picked up a purſe which contained a ring, and a receipt for 147l., purporting to be the receipt of a jeweller for a rich brilliant diamond ring. The priſoner propoſed that they ſhould go into a public houſe, which they accordingly did, to conſider in what manner the prize ſhould be divided amongſt them. After various propoſals the priſoner at length aſked the proſecutor if it would be agreeable to him to take the ring into his own poſſeſſion, and to depoſit his money and watch, which he had before interrogated him about, as a ſecurity to return it upon receiving his portion of its value. The proſecutor aſſented, and ſigned a written agreement, dictated by the priſoner; that when the priſoner or either of the two other men returned the watch and money and 7ol., he would re-deliver to them the purſe and the ring." The proſecutor accordingly laid the watch and money mentioned in the indictment on the table, and received the ring. The priſoner beckoned the proſecutor out of the room upon pretence of ſpeaking to him in private, and in the mean time the other two men went off with the property. Their abrupt departure alarmed the proſecutor, but the priſoner told him not to be uneaſy, for he knew the two men very well, and would take care that he ſhould have his watch and money again; and when the priſoner was apprehended, he wanted to make it up. The ring was valued at 10s. It was objected that this amounted only to a fraud. But the Court, upon the authority of Pear's caſe, referred it to the jury to conſider, Whether the whole tranſaction were not a preconcerted ſcheme feloniouſly to obtain the proſecutor's property? and Gould J. who tried the priſoner, left it to the jury, Whether

Poſt. 687.

Whether the priſoner and the other two men were not all in concert together to procure by ſuch a pretext any man's property whom they might meet, and to embezzle it; which in plain words was to ſteal it? The jury found the priſoner guilty, and he was ſent to the Thames for three years. The opinions of the three Judges who preſided at the trial were founded on this, that the poſſeſſion was obtained by fraud, and the property not altered; for the proſecutor was to have it again. And therefore it was not like the caſe of goods ſold on credit, where the buyer means immediately to convert them into money, and is not able nor intends to pay for them; for there the buyer gets the abſolute property by the act and conſent of the owner.

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Moore's caſe, O. B. Ap. 1784, MS. Gould and Buller Js. and 2 MS. Sum. 228. (S. C. 1 Leach, 354.) *Inducing one to deliver 20 guineas and 4 doubloons by way of pledge for the return of a counterfeit jewel pretended to be found, and of which the party was to have half the value on his returning, it and receiving from the priſoner the 20 guineas, &c. again, and this done with intent to ſteal the money, &c. held larceny.*

The diſtinction, between parting with the *property* or with the *poſſeſſion* only, was very much conſidered in another caſe of one Humphrey Moore, who was indicted for ſtealing 20 guineas and four doubloons of John Field. A ſtranger joined company with the proſecutor in the ſtreet, and ſoon after picked up a purſe containing a ring and a receipt for 210 l. as for a brilliant diamond ring. He perſuaded the proſecutor to go into a public houſe with him, telling him he was entitled to half; and while he was looking at the ring there, the priſoner entered the room, inquired into the matter, and offered to ſettle it between them. The ſtranger ſaid he had bills to a large amount due the next day, but no money about him. Moore then inquired of the proſecutor what money he had got, who anſwered 40l. or 50l. at his lodgings at Chelſea. Moore thereupon propoſed going there, which they did; and after getting the money, they went to a public houſe in the neighbourhood, where the proſecutor put down 20 guineas and four doubloons; which the ſtranger in Moore's preſence took up and carried away, leaving the ring with the proſecutor; and having firſt appointed to meet him the next day, when he was to return the 20 guineas and four doubloons, and give the proſecutor 100 l. for his ſhare of the ring, which was then to be reſtored to him. Moore was alſo appointed to be there; and the proſecutor and the ſtranger were to give him a guinea each for his trouble. The priſoner and the ſtranger went away together, and the proſecutor ſaw no more of them either at the place appointed

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or elſewhere till the priſoner was taken up. The ring was of ſmall value. On theſe facts the jury were of opinion that the priſoner was confederated with the ſtranger, for the purpoſe of obtaining money on the pretence of ſharing the value of the ring: that in the manner and by the means above ſtated he aided the ſtranger to obtain the money of the proſecutor: and they found him guilty, ſubject to the opinion of the Court, Whether the offence amounted to felony? In November term 1784 all the Judges (except Lord Mansfield) met to conſider this caſe; and all of them, except Lord Loughborough and Lord C. B. Skynner, held the priſoner guilty. The majority thought that the money and the doubloons were delivered as a pledge, and not as a loan: ſo that though the poſſeſſion were parted with, the property was not; more eſpecially as to the doubloons, which the proſecutor clearly underſtood were to be returned the next day in ſpecie. The priſoner therefore having obtained them with a fraudulent intent to apply them to his own uſe, it was felony from the intention with which he gained the poſſeſſion: and he and his companion acting in concert together were equally guilty. The other two Judges differed on the fact, that the proſecutor had parted with the *property*. They thought the doubloons were to be conſidered as money; and that the whole was a loan on the ſecurity of the ring. And that when money was delivered by a man on ſuch an occaſion it was not in his contemplation to have the ſame identical money back again. But they admitted the rule as laid down by the other Judges from the caſes of R. v. Patch, Rex v. Pears, and other caſes which were there cited.

Watſon's caſe, O. B. Dec. 1794, MS. Buller J. and MS. Jud. (S. C. 2 Leach, 730.) *Pretending to find a valuable jewel, and offering to go halves with another, and on that pretence obtaining from her in her own houſe notes of* 100*l. value, which were to be depoſited in the priſoner's hands till the next day as a ſecurity for the jewel which was to be left in her cuſtody then, and returned to the priſoner upon his returning back the depoſit and paying the proſecutrix* 125*l. half of the ſuppoſed value of the jewel, which was a counterfeit; amounts to felony of the notes ſo received; but not capital, as for a larceny in the dwelling-houſe of more than* 40*s. the notes being in the poſſeſſion of the proſecutrix and deriving no protection from being in the houſe.*

John Watſon was convicted of ſtealing ſeveral bank notes, value 100*l.* in the dwelling-houſe of John Smith, the ſame being the property of the ſaid J. S., and the money then due, &c. againſt the ſtatute, &c. The proſecutor's wife proved that as ſhe was going along the ſtreet ſhe ſaw the priſoner ſtoop down and pick up a ſmall parcel. He ſaid he had got a prize. She cried "Halves," and ſaid it was uſual to give half of what was found. They went together into St. James's Park, where they examined the parcel in the preſence of another man (who appeared to be an accomplice of the priſoner's,) and found in it a locket with a large ſtone, and

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and a paper purporting to be the receipt of a jeweller for 250*l.* for a diamond locket. The priſoner ſaid his name was Smith, that he was the captain of a ſhip, and that he would go to a friend's houſe, where his cargo was, and bring 100*l.* towards paying the witneſs her ſhare. He was accordingly abſent about fifteen minutes, and returned ſaying that his friend was not at home. After making another pretence to go to the King's jeweller in Bond-ſtreet, which the priſoner at laſt evaded, they all proceeded to the witneſs's houſe in Mortimer-ſtreet, which they entered; the priſoner having firſt inquired who was at home, and been informed that only the witneſs's daughter was there. The witneſs then got 100*l.* in bank notes, and laid them on the table. It had been before agreed between them, that the locket ſhould be left in her cuſtody, and that ſhe ſhould *depoſit* 100*l.* in the priſoner's hands *as a ſecurity* to return him the locket the next morning; at which time *ſhe was to receive from him half the value of the locket*, as mentioned in the receipt found; *and ſhe was to have the* 100*l. depoſited in the priſoner's hands as ſuch ſecurity as aforeſaid returned back*. The priſoners took up the bank notes laid on the table, ſaid they were right, and that he would call the next morning and ſettle the whole; and after delivering up the locket, went off with the notes, and never returned again. The locket was of the trifling value of 5*s.* 6*d.* The priſoner was convicted of the ſimple felony in ſtealing the notes; but a caſe was reſerved for the opinion of the Judges, upon an objection taken that this was only a fraud and not a felony. In Hilary term 1795 all the Judges held the conviction proper for the ſimple felony; but not for the ſtealing in the dwelling-houſe, (as it was at firſt ſuppoſed that the verdict had been taken.) For they thought, as to the capital part of the charge, that as the notes were in the poſſeſſion of the proſecutrix, and derived no protection from the houſe, the caſe did not fall within the ſtatute 12 Ann. c. 7.

§ 108. *Different ſorts of poſſeſſion.*

Where it is out of diſpute that the *property* remains in the original owner, and the only queſtion is, Whether he did not ſo far part with the *poſſeſſion* of the thing taken as to exclude the idea of any treſpaſs in the taker, without which

theſe

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theſe offences cannot be committed; it is material to examine in what manner ſuch poſſeſſion was in fact parted with; whether by way of charge, general bailment, or delivery for a ſpecial purpoſe. For I think it may now be laid down as general rules; Firſt, That where notwithſtanding a delivery by the owner in fact, the legal poſſeſſion remains excluſively in him, larceny may be committed exactly the ſame as if no ſuch delivery had been made. Secondly, That where by the delivery a ſpecial property, and conſequently a legal poſſeſſion, apart from any felonious intent, would be transferred; there, if it be found that ſuch delivery were fraudulently procured with a felonious intent to convert the property ſo acquired; then alſo the taking amounts to larceny. Thirdly, That even where there is no evidence of a previous felonious intent in ſo obtaining the property, but it is acquired upon a privity of contract, ſtill larceny may be committed after any act done to determine ſuch privity of contract.

General rules as to delivery by way of charge, general bailment, or for a ſpecial purpoſe.

§ 109. *Poſſeſſion by way of charge, or ſpecial uſe.* Ante, f. 14.

If the perſon to whom goods are delivered has but the bare charge or cuſtody of them, the legal poſſeſſion remains in the owner, and the other may commit larceny by a fraudulent converſion of them to his own uſe. This rule I have before ſhewn to hold moſt expreſsly in the caſe of ſervants entruſted with the care of goods in the poſſeſſion of their maſters. The only doubt which had any foundation in reſpect to ſuch perſons was where the maſter had no previous poſſeſſion of the property diſtinct from the actual poſſeſſion of the ſervant; but that difficulty has been removed by the ſtat. 39. Geo. 3. c. 85. before referred to. The ſame rule applies to him who has a bare ſpecial uſe of goods; as in the caſe of a gueſt in the owner's houſe: for none of theſe perſons have properly ſpeaking the poſſeſſion. So if a weaver or ſilk throwſter deliver yarn or ſilk to be wrought by journeymen in his houſe, and they carry it away with intent to ſteal it, it is felony; for the entire property remains there only in the owner, and the poſſeſſion of the workman is the poſſeſſion of the owner. But if the yarn had been delivered to a weaver out of the houſe, and he having the lawful poſſeſſion of it had afterwards embezzled it, this would not be felony; becauſe by the delivery he had a ſpecial property, and not a

2 MS. Sum. 230. 231, 3. Sum. 61. Owen, 52. Moore, 248. Crompt. 25. a. b. Bro. Coron. 160. MS. Tracy, 60. 1 Hale, 506. 667. 1 Hawk. ch. 33. ſ. 6. Poph. 84. Staundf. 25. Ante, 574.

O. B. Oct. 1664. Kel. 35. Staundf. 25. a. 21 H. 7. 14.

Sum. 62. and MS. Sum. ut ſupra. 1 Hawk. ch. 33. ſ. 3.

bare charge; in the ſame manner as one who is entruſted with the care of a thing for another to keep for his uſe. Ch. XVI. § 109. *Poſſeſſion by way of charge or uſe.*

If a merchant's or banker's clerk have acceſs to the money room upon ſpecial occaſions, or be ſent to the drawer for money for a ſpecial purpoſe; or if he be ſent to bring money generally out of the drawer; and at the time he take the opportunity of purloining money for his own uſe; he is as much guilty of felony as if he had no allowed acceſs to it whatever. This was not denied in Bazeley's caſe, and therefore needs not the aid of the ſtat. 39. Geo. 3. c. 85.

Murray's caſe, O. B. Oct. 1784, cor. Ld. Loughborough, Seſſ. Pap. p. 1290.

Ante, 571.

§ 110. *Poſſeſſion in owner's preſence for ſpecial purpoſe.*

It is worthy of conſideration whether the above-mentioned diſtinction, concerning the legal poſſeſſion remaining in the owner after a delivery in fact to another, do not extend to all caſes where the thing ſo delivered for a ſpecial purpoſe is intended to remain in the preſence of the owner. For in ſuch caſe the owner cannot be ſaid to give any credit to or repoſe confidence in the party in whoſe hands it is ſo in fact placed; and the thing being intended to be returned to the owner again, and reſumable by him every moment, his dominion over it is as perfect as before; and the perſon to whom it is ſo delivered has at moſt no more than a bare limited uſe or charge, and not the legal poſſeſſion of it. In this reſpect the caſe differs from a delivery upon a contract, whereby a ſpecial property is transferred, and conſequently a diſtinct poſſeſſion. This was one of the grounds on which Chiffer's caſe was put by Raymond B. The goods which had been delivered there by the tradeſman to the cuſtomer to look at were not, ſays Raymond, out of the owner's poſſeſſion by the delivery (*a*), till the property was altered by the perfection of the contract. And this was mentioned by ſome of the Judges on the conference on Pear's caſe in 1779, as a matter proper for conſideration, Whether caſes of that deſcription, and amongſt others the caſe of the porter before Lord Holt, which will be mentioned preſently, were not governed by the principle, that the legal poſſeſſion ſtill remained in the owner of the goods notwithſtanding the delivery, he continuing preſent? though others thought that too refined, as ſetting up a legal fiction againſt the fact, which ought never to be done in

Crompt. 25. a. H. 21 H. 7. 14.

1 Hale, 505. n. f.

Ante, f. 206.

Poſt. f. 218.

Poſt. f. 115.

(*a*) Ld. C. B. Skynner was of the ſame opinion at the conference on Pear's caſe, in 17, 9.

criminal

Ch. XVI. § 110 *Poſſeſſion in owner's preſence.*

criminal caſes. Yet this fiction, ſuch as it is, is generally admitted to exiſt in the caſe of ſervants, and even in the caſe of other perſons having a ſpecial uſe of goods in the

Crompt. 25. a. owner's houſe: the beſt reaſon for which, as it appears to me, is the preſumed preſence and ſuperintendence of the owner. And it does not ſeem more unreaſonable to conſider goods in the actual preſence of the owner, out of his houſe, as being in his legal poſſeſſion, though put into another's hands for a particular purpoſe, than if ſuch goods were delivered to another for the like purpoſe in the owner's houſe

MS. Burnet, 61. during his abſence. Upon this ground too Mr. Juſtice Burnet puts the caſe of the owner in a fair delivering his horſe to another to try his paces, and other caſes of the like ſort; where, if the party run away with the property, it is felony: for, ſays he, the owner only delivered it for trial and preſent uſe, and not by way of parting with the poſſeſſion: *for goods in the preſence of the owner are in law in his poſſeſſion ſtill, though he permit an uſe to another.* But indeed moſt of theſe caſes fall within the ſcope of another leſs diſputable principle; namely, that if the poſſeſſion be obtained with a felonious intent; in other words, with a fraudulent intent to convert the property to the taker's own uſe without account, though by the delivery of the owner, it amounts to felony.

§ 111. *Upon a general or ſpecial bailment.*

This brings me to the conſideration of the two other ſpecies of poſſeſſion, upon a general or ſpecial bailment, which I ſhall conſider together; and herein there are three ſubjects of inquiry:

1. What is a bailment.
2. With what intent the thing is taken by the bailee.
3. By what acts the bailment is determined.

What a bailment.

1. Having already touched upon the difference between a charge and a bailment, it remains only to conſider what acts

1 Hale, 505. Staundf. 25. are ſufficient to amount to a delivery. A. delivers the key of his chamber to B., who unlocks the chamber and takes the goods of A., with intent to ſteal them; this is felony: becauſe, ſays Lord Hale, the goods were not delivered to him, but taken by him. This may be ſo where by ſuch delivery of the key it is not in the contemplation of the parties to make

make a delivery of the goods contained in the room; as if it be delivered upon any other ſpecial occaſion. But if the key be delivered for the purpoſe of entruſting the party with the care of the goods, I cannot ſee but that it is as much a delivery of the goods themſelves, as if each article had been put by the owner into the hands of the party. And then, although the taking of ſuch goods out of the room with a fraudulent intent to convert them might ſtill be felony, yet it would be ſo on another ground; becauſe by the act of taking the goods with ſuch intent out of the room where they were intended to remain for ſafe cuſtody, the privity of the contract would be determined in the ſame manner as if they had been delivered in a box and taken out of it afterwards. Nor do I find any ground for making a diſtinction between a delivery of goods in criminal and in civil caſes; at leaſt no ſuch diſtinction appears to exiſt at common law.

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Vide Ellis v. Hunt. 3 T. Rep. 468.

§ 112. *Taking goods by delivery of owner with felonious intent.* Sum. 61. 1 Hale, 504. &c. 2 MS. Sum. 239.

2. Upon the ſecond point: It is peculiarly the province of the jury to determine with what intent any act is done; and therefore, though in general he who has a poſſeſſion of any thing on delivery by the owner cannot commit felony thereof; yet that muſt be underſtood, firſt, where the poſſeſſion is abſolutely changed by the delivery, which I have before conſidered; and next, which is the preſent object of inquiry, where ſuch poſſeſſion is not obtained by fraud, and with a felonious intent. For if, under all the circumſtances of the caſe, it be found that a party has taken goods from the owner, though by his delivery, with an intent to ſteal them, ſuch taking amounts to felony; it being granted that there is evidence to warrant ſuch a concluſion in point of fact. I cannot illuſtrate this ſubject better than by a full and accurate account of a caſe which was much diſcuſſed by the Judges.

Pear's caſe, O.B. Sept. 1779, MS. Buller J. (S. C. 1 Leach, 253.) *Hiring a horſe on pretence of taking a journey, but in truth with intent to ſteal it, and evidencing ſuch felonious intent by immediately ſell-*

John Pear was indicted for ſtealing a black mare, the property of Samuel Finch. On the 2d July 1779 the priſoner hired the mare of Finch, who lived in London, for that day, in order to go to Sutton in Surry, and told him that he ſhould return at eight o'clock the ſame evening. Finch, before he let the priſoner the mare, inquired of him where he lived, and whether he were a houſekeeper: to which he anſwered, that he lived at No. 25 in King-ſtreet, and was only

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only a lodger. The priſoner not returning as he had promiſed, the proſecutor went the next day to inquire for him according to the direction he had given; but no ſuch perſon was to be found. It turned out that the priſoner had in the afternoon of the ſame 2d of July ſold the mare in Smithfield.

ing the horſe as ſoon as the party obtained poſſeſſion of it, is larceny.

In ſumming up this evidence to the jury, Mr. Juſtice Aſhurſt, who tried the priſoner, told them, that if they were of opinion that the priſoner hired the mare with an intent of taking the journey mentioned, and afterwards changed that intention; then, as ſhe was ſold whilſt the privity of contract ſubſiſted, they ought to acquit the priſoner. But if they were of opinion that the journey was a mere pretence to get the mare into his poſſeſſion, and that he hired her with an intention of ſtealing her; they ought to find him guilty: and he would ſave the point for the opinion of the Judges. The jury found the priſoner guilty. This caſe underwent a great deal of diſcuſſion: and the Judges delivered their opinion ſeriatim upon it, on the 4th February 1780, at Lord C. J. De Grey's houſe: and on the 22d of the ſame month Mr. Baron Perryn delivered their opinion at the O. B. as follows (*a*). (After ſtating the indictment, evidence, and finding of the jury as above ſtated,) This caſe has been maturely conſidered by all the Judges, and eleven (*b*) of them, who met for the purpoſe, delivered their opinions at large upon the ſubject: ſeven of them held the offence to be a clear felony; two of them were of opinion that it was not felony; and the other two entertained great doubts at the laſt; which doubts were founded upon two ſtatutes which he ſhould take notice of. Three out of the four diſſenting Judges agreed with the ſeven, that by the principles of the common law this was felony. But the doubts and opinions of thoſe four Judges were founded chiefly on the ſtatutes 33 H. 8. and 30 G. 2. againſt obtaining goods by falſe tokens or falſe pretences. Two of the Judges thought that as the delivery of the mare was obtained from the owner by means of aſſerting that which was falſe, viz. that the priſoner

Vide poſt. tit. Cheats.

(*a*) This judgment was ſettled and approved by ſeveral of the judges before it was delivered.

(*b*) Mr. Juſtice *Blackſtone*, the other judge who was abſent on account of illneſs, always held that it was felony.

wanted

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wanted to go a journey which he never intended to take at all; and as the two ſtatutes before mentioned had made the offence of obtaining goods by falſe tokens or falſe pretences, puniſhable as a miſdemeanor only; and the ſtat. 33. H. 8. had diſtinguiſhed the caſe of obtaining goods by falſe tokens from the caſe of obtaining goods by ſtealth; they were bound by thoſe ſtatutes to ſay, that the priſoner's offence was not felony. One of them alſo held that this was not felony by the common law; becauſe there was no actual taking of the mare by the priſoner. But ten out of the eleven Judges held it to be clear that the offence would have been felony by the common law, if the ſtatutes had never exiſted: and ſeven of them held that it was not within or at all affected by the ſtatutes of H. 8. or G. 2. That larceny was defined by Lord Coke to mean a felonious and fraudulent taking and carrying away of the goods of another. But it was ſettled by old authorities, that the taking need not be by force. If a carrier or porter received goods to carry from one place to another, and he opened the pack and ſold them; that was felony: yet in that caſe there was no taking by force, but on a delivery by the owner. That the reaſon aſſigned for the determination in Kel. 82. was becauſe the opening and diſpoſing of them declared that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a deſign of ſtealing them. So if A. cheapened goods of B.'s and B. delivered them to A. to look at, and A. ran away with them; this was felony by the apparent intent of A. T. Ray. 276. Kel. 82. So if a horſe were upon ſale, and the owner let the thief mount him in order to try him, and the thief rode away with him, it was felony. Kel. 82. So in the caſe of one Tunnard, tried at the O. B. in October Seſſions 1729, who was indicted for ſtealing a brown mare of Henry Smith's: and upon the evidence it appeared, that Smith lived in the Iſle of Ely, and lent Tunnard the mare to ride three miles; but he, inſtead of riding three miles only, rode her up to London and ſold her: this was holden to be felony. And Lord C. J. Raymond, who tried the priſoner, left it to the jury to conſider, Whether Tunnard rode away with her with an intent to ſteal her? and the jury found him guilty. That here the ſame directions were given

Poſt. f. 115.

Tunnard's caſe, O. B. 1729.

Denton J. and Hale B. aſſiſted. MS. *vide* poſt.

to

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to the jury by the learned Judge who tried the priſoner, and the jury had given the ſame verdict. That even in the caſe of burglary, which the law defined to be the breaking into a houſe in the night time with intent to commit felony, if a man procured the door of a houſe to be opened by fraud, and by that means entered into the houſe through the door-way without any actual breaking, it had been adjudged to be burglary. That in all theſe caſes the intention was the thing chiefly regarded, and fraud ſupplied the place of force. That what was the intention was a fact, which in every caſe muſt be left upon the evidence to the ſound judgment of a jury. And in this caſe the jury had found that at the time when the priſoner obtained the poſſeſſion of the mare, he intended to ſteal her. That the obtaining the poſſeſſion of the mare, and afterwards diſpoſing of her in the manner ſtated, was in the conſtruction of law ſuch a taking as would have made the priſoner liable to an action of treſpaſs at the ſuit of the owner, if he had not intended to ſteal her. For ſhe was delivered to the priſoner for a ſpecial purpoſe only, viz. to go to Sutton, which he never intended to do, but immediately ſold her. That in this light the caſe would be ſimilar to what was laid down by Lyttleton, ſ. 71, who ſays, "If I lend to one my ſheep to dung his land, or my oxen to plough the land, and he killeth my cattle, I may have treſpaſs notwithſtanding the lending." That if in ſuch a caſe treſpaſs would have lain, there could be no doubt but that in this caſe, where the felonious intent at the time of obtaining the poſſeſſion was found by the jury, that it was felony by the common law. That ten of the Judges out of the eleven, therefore, were of opinion, that if a perſon obtained the delivery of a thing by fraud and falſehood, intending at the time that he ſo obtained the delivery to ſteal it; upon the principle of the common law and the adjudged caſes which had been mentioned, if the ſtatutes had not exiſted, his offence would be felony (*a*). That the next queſtion was, Whether this offence were within

(*a*) On the debate of this caſe, Aſhhurſt J. ſaid, "Wherever there is a real and bonâ fide contract and a delivery, and afterwards the goods are converted to the party's own uſe; that is not felony. But if there be no real and bonâ fide contract, if the underſtanding of the parties be not the ſame, the contract is a mere pretence, and the taking is a taking with intent to commit felony.

or

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or at all affected by the ſtatutes of H. 8. and Geo. 2. (*a*). Seven of the Judges were of opinion, that it was not. That the ſtat. of Hen. 8. was confined to the caſes of obtaining goods *in other men's names, by falſe tokens or counterfeit letters*, made in any other man's name. The ſtat. of Geo. 2. extended that law to all caſes where goods were obtained *by falſe pretences* of any kind. But both theſe ſtatutes were confined to caſes where credit was obtained in the name of a third perſon; and did not extend to caſes where a man, on his own account, got goods with an intention to ſteal them. That beſides, the ſeven Judges held that neither of thoſe ſtatutes were intended to mitigate the common law, or to make that a leſs offence which was a greater before. On the contrary, the Legiſlature, by thoſe ſtatutes, meant to inflict a ſeverer puniſhment in the caſes of fraud than the common law had done. That in many caſes it was extremely difficult, and ſometimes impoſſible to prove what the offender's original intention was. The circumſtances evidencing a felonious intent, or the contrary, were ſo various, that Hale (509) ſays it is impoſſible to preſcribe them: they muſt be left to the conſideration of a Judge and jury. That where an original felonious intent appeared, the ſtatutes did not apply. Where no ſuch intent appeared, if the means mentioned in the ſtatutes were made uſe of, the Legiſlature had made the offender anſwerable criminally, who before by the common law of the land was only anſwerable civilly. That in the priſoner's caſe the intention was apparent, and the jury had rightly found that it was felonious. The crime then was felony, and of a nature which the ſtatute law had made puniſhable with death.

George Charlewood was indicted before Gould J. and Perryn B. for ſtealing a gelding of John Houſeman. The proſe-

R. v. Charlewood, O. B. Feb 1786, cor. Gould J. and Perryn B. 1 Leach, 456. Seſſ. Pap. No. 200 S. C.

(*a*) On the debate in this caſe Eyre B., adverting to theſe ſtatutes, ſaid he doubted if there were not a diſtinction in this reſpect between the owner's parting with the poſſeſſion and with the property in the thing delivered. That where goods were delivered upon a falſe token, and the owner meant to part with the *property* abſolutely and never expected to have the goods returned again, it might be difficult to reach the caſe otherwiſe than through the ſtatutes; aliter, where he parted with the *poſſeſſion* only: for there if the poſſeſſion were obtained by fraud, and not taken according to the agreement; it was on the whole a taking againſt the will of the owner; and if done animo furandi, it was felony. MS. Buller J.

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Obtaining a horse by pretending that another person wanted to hire it to go to B., but in truth with intent to steal it; and not going to B., but taking the horse elsewhere and selling him, held larceny.

cutor was a livery stable keeper in Crown Street, St. Ann's, Soho; and on the 4th October 1785 was applied to by the prisoner, a post-boy, for a horse, in the name of a Mr. Ely, saying that there was a chaise going to Barnet, and that Mr. Ely wanted a horse for his servant to accompany the chaise and return with it. The horse was accordingly delivered to the prisoner by the prosecutor's servant about nine o'clock in the morning. The prisoner mounted him, and on going out of the yard, said, he was going no further than Barnet. He accordingly proceeded towards Tottenham Court Road, which led to Barnet, and also, though in some degree circuitously, to Mr. Ely's house. Between three and four o'clock in the afternoon of the same day the prisoner sold the horse in Goodman's Fields for a guinea and a half, including the bridle and saddle. The horse was much injured, and appeared to have been rode very hard. The purchaser almost immediately sold his bargain for 2l. 15s. The Court observed to the jury that the Judges in Pear's case under similar circumstances with the present had determined that if the jury were satisfied under all the circumstances, that a person, at the time he obtained another's property, meant to convert it to his own use, it was felony. That there was a distinction, however, to be observed in this case, though it was so nice that it might not be obvious to common understandings; for that if they thought that the prisoner, at the time he hired the horse for the purpose of going to Barnet, really intended to go there, but finding himself in possession of the horse, afterwards determined to convert it to his own use, instead of proceeding to the place to which the horse was hired to go, it would not amount to a felonious taking. That there was yet another point for their consideration; for although the prisoner really went to Barnet, yet being obliged by the contract to re-deliver the horse to the owner upon his return to London; if they thought that he performed the journey, and returned to London (*a*); and after such return, instead of delivering it to the owner, converted it to his own use, he was thereby guilty of felony; for the end and pur-

Ante, 685.

(*a*) *Quære?* For part of the contract was *to return the horse to the owner in London*; and therefore the contract, if genuine and valid in the first instance on the part of the prisoner, would subsist after his mere return to London.

pose

pose of hiring the horse would be then over. The jury found the prisoner guilty on the first point, that at the time he hired the horse he intended to steal it: and he was afterwards executed.

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Major Semple was indicted for larceny of a post-chaise; and the following facts appeared. The prosecutor, Mr. Lycett, was a coachmaker, who let out carriages to hire. The prisoner was a gentleman who lodged in the neighbourhood, and had before hired a carriage of the prosecutor, for which he had paid. On the 1st September 1785, the prisoner, who then passed by the name of Major Harrold, hired the chaise in question of the prosecutor, saying that he should want it for three weeks or a month, as he was going a tour round the North; and it was agreed that he should pay at the rate of 5 *s.* a-day during that time; and a price of 50 guineas was talked about in case he should determine to purchase it on his return to London, which was suggested by the prisoner; but no agreement took place on the subject of the purchase. In a few days afterwards the prisoner took the chaise from Mr. Lycett's with his own horses; and it was in evidence that he was driven in it from London to an inn at Uxbridge, where he ordered a pair of horses, and went from thence to Bulstrode, and returned to the same inn, where he took fresh horses; but where he went with the chaise afterwards did not appear. No tidings were obtained of him till a year afterwards, when he was apprehended on another charge. It was attempted to distinguish this from Pear's case and Aickles' case, inasmuch as in those cases the parties had never obtained the legal possession of the property delivered to them: but that in the present case the prisoner had obtained the chaise upon a contract, which it was not proved that he had broken; for the chaise was hired generally for three weeks or a month, and not to go to any certain place: for the mere understanding that it was for the purpose of making a tour round the North made no part of the contract. During that time, therefore, he had a complete dominion over it, and the legal possession; and therefore a tortious conversion pending the contract would not be felony. Besides there was no evidence of a tortious

Major Semple's case, O. B. Sept. 1786, cor. Gould J. and Adair Serjt. Rec. Sess. Papers No. 671. (2 Leach, 470. S. C.)

One obtains possession of a chaise under pretence of hiring it for three weeks or a month, suggesting his intention to go on a tour, and he departs with it, and is not heard of for a year afterwards, when he is apprehended: and then he gives no account of the chaise: Held evidence from whence the jury may infer that he originally took it under the pretence of a hiring with intent to steal it.

Ante, 685.
Ante, 675.

 conversion;

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converſion; for *non conſtat* that the priſoner had diſpoſed of the chaiſe. The Court, however, ſaid that it was now ſettled that the queſtion of intention was for the conſideration of the jury: and that in the preſent caſe, if they ſhould be of opinion that the original taking of the chaiſe was with a felonious intent to ſteal it, and the hiring a mere pretence to enable him to effectuate that deſign, without any intention to reſtore or pay for it, it would fall preciſely within the principle of Pear's caſe, and the other deciſions which had been made; and the taking would amount to felony. For if the owner only intended to give the priſoner a qualified uſe of the chaiſe, and the priſoner had no intention to make uſe of that qualified poſſeſſion, but to convert it to his own uſe, he did not take it upon the contract, and therefore did not obtain the lawful poſſeſſion of it: but if there were a *bona fide* hiring, and a real intention of returning it at that time, the ſubſequent converſion of it could not be felony; for by ſuch contract and delivery the priſoner would have acquired the lawful poſſeſſion of the chaiſe; in which caſe his ſubſequent abuſe of that truſt would not be felony. That as to there being no proof of actual converſion in this caſe, it was not neceſſary; but the jury muſt judge of it from the circumſtances. If the priſoner had ſtaid out ſix weeks, or two months, and on his return had offered to reſtore the chaiſe to the owner, or to pay him for it, ſuch a conduct would have been evidence of an honeſt intention at the time of the hiring: but there was no account given of it, even up to that moment: that therefore raiſed a preſumption againſt the priſoner which it was incumbent on him to repel: and if he could not, the jury would have to conſider from all the facts in proof, Whether the taking were with a felonious intent or not. If it were, the caſe fell directly within the principle which governed that of Pear's, from which it could not be diſtinguiſhed. A caſe was alſo then mentioned as having been determined very lately by the Judges, where a man ordered a pair of candleſticks from a ſilverſmith to be ſent to his lodgings, whither they were ſent accordingly, with a bill of parcels, by a ſervant; and the priſoner contriving to ſend the ſervant back under ſome pretence, kept

kept the goods (*a*): and that was ruled to be felony; although they were delivered with the bill of parcels; ſuch delivery being made under an expectation by the owner of being paid the money: for the jury found that it was a pretence to purchaſe with intent to ſteal. Finally, the queſtion of intention being left to the jury in the principal caſe, they found the priſoner guilty; and he received ſentence of tranſportation for ſeven years.

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Ante, i. 106.

§ 113. *Review of the above caſes.*

I have been thus particular in ſtating the above caſes, becauſe they contain nearly the whole of what can be ſaid on the ſubject. It is to be collected from them, that if a perſon obtain the goods of another by a lawful delivery without fraud, although he afterwards convert them to his own uſe, he cannot be guilty of felony. As if a taylor have cloth delivered to him to make cloaths with; or a carrier receive goods to carry to a certain place; or a friend be entruſted with property to keep for the owner's uſe; which they afterwards ſeverally embezzle. So if plate be delivered to a goldſmith to work or to weigh, or as a depoſit, his converſion of it will not be felony. But if ſuch delivery be obtained by any fraud or falſehood, and with an intent to ſteal; though under pretence of a hiring, or even a purchaſe; if in the latter caſe no credit were intended to be given; the delivery in fact by the owner will not paſs the legal poſſeſſion ſo as to ſave the party from the guilt of felony. But if the property were intended to paſs by the delivery, there can be no felonious taking.

1 Hale, 504. MS. Burnet, 61. St undſ. 25. a. 1 Hawk. ch. 33. § 3.

1 Show. 50. Kel. 82.

§ 114. *Privity of contract determined.*

3. I come now to the laſt conſideration, which I have before ſlightly touched upon; by what acts the privity of contract is determined, ſo as to make the taking of the party with a felonious intent a new taking and treſpaſs, even after a lawful delivery by the owner. It has been before ſtated in the caſe of the delivery of a horſe upon hire or the like, that if the delivery be obtained *bona fide*, no ſubſequent wrongful converſion, pending the contract, will amount to felony. But even in ſuch caſe if the hiring be limited to a

1 Hale, 504.

Per Lord Raymond, at Exeter, 10 Geo. 1 Chapple's MS. 2 MS. Sum. 233.

(*a*) It muſt be underſtood that the priſoner ran away with them, or did ſome other act to denote an intention of withdrawing himſelf from any account for them; and that no credit was intended to be given to him; but that it was meant as a ſale for ready money only. *Vide* Edwards's caſe, ante, f. 106.

Ch. XVI. § 114. *After privity of bailment determined.*

particular time or place, and after that time be expired, or the party arrived at the proper place of re-delivery, he ride away with the horſe, and convert it to his own uſe, it will then be felony. For as was ſaid by Gould J. in Charlewood's caſe, the end and purpoſe of the hiring, for which the delivery was made, would be then over. And as it has been before ſhewn that the legal poſſeſſion follows the right of property, as ſoon as the ſpecial property of the holder is determined, the legal poſſeſſion reverts to the original owner, in the ſame manner as if there had never been any precedent delivery; after which any new taking by the party for his own uſe will in point of law be a treſpaſs; and if it be done with a felonious intent to ſteal, of which the jury are to judge, will amount to felony. In Tunnard's caſe, which has been mentioned before, where he had borrowed a horſe in the Iſle of Ely to ride three miles, inſtead of which he had ridden the horſe up to London and ſold it; Raymond C. J. Denton J. and Hale B. held it felony; becauſe the privity was determined after he had ridden further than the agreement warranted: but if there had been no ſuch agreement, the privity would have remained, and the riding away would have been no felony: and the C. J. who tried him having left it to the jury to conſider, Whether the priſoner rode away with the horſe with intent to ſteal it, they found him guilty.

Ante, 691.

Ante, 687.

Serjt. Forſter's MS.

Perhaps the circumſtances of that caſe would have warranted the finding of the jury, that the original hiring was a mere pretence to ſteal the horſe, and therefore that the original taking was felonious. At any rate theſe caſes proceeded upon an expreſs limitation as to time or uſe of the lawful poſſeſſion of the bailee, and a ſubſequent unlawful converſion with intent to ſteal, taken up after the determination of ſuch prior lawful poſſeſſion.

Leigh's caſe, Wells. Sum. Aſſ. 1800, cor. Lord Eldon, MS. Jud. *Where the jury found that one who aſſiſted in taking another's goods from a fire in his preſence but without his deſire, and who afterwards concealed and denied having them, yet took them honeſtly at firſt, and that the evil intention to convert them came on the taker afterwards; held no larceny.*

Elizabeth Leigh was indicted at Wells aſſizes, in the ſummer of 1800, for ſtealing various articles, the property of Abraham Dyer. It appeared that the proſecutor's houſe, conſiſting of a ſhop containing muſlin and other articles mentioned in the indictment, was on fire; and that his neighbours had in general aſſiſted at the time in removing his goods and ſtock for their ſecurity. The priſoner probably had removed all the articles which ſhe was charged with having ſtolen when the proſecutor's other neighbours were thus employed. And it appeared that ſhe removed ſome of the muſlin in the preſence of the proſecutor and under his obſervation, though not by his deſire. Upon the proſecutor's applying to her next morning, ſhe denied that ſhe had any of the things belonging to him; whereupon he obtained a ſearch warrant, and found his property in her houſe; moſt of the articles artfully concealed in various ways. The jury found her guilty: but it was ſuggeſted that ſhe originally took the articles with an honeſt purpoſe, as her neighbours had done, and that ſhe would not otherwiſe have taken ſome of them in the preſence and under the view of the proſecutor; and that therefore the caſe did not amount to felony. The jury were inſtructed, that, Whether ſhe took them originally with an honeſt intent was a queſtion of fact for their conſideration; that it did not neceſſarily follow from the circumſtances mentioned, that ſhe took them with an honeſt intent. But even if they were of that opinion, yet that her afterwards hiding the goods in the various ways proved, and denying that ſhe had them, in order to convert them to her own uſe, would ſtill ſupport the indictment. The jury found her guilty; but ſaid, that in their opinion, when ſhe firſt took the goods from the ſhop ſhe had no evil intention, but that ſuch evil intention came upon her afterwards. And upon reference to the judges, in Michaelmas term 1800, all (abſent Lawrence J.) held the conviction wrong: for if the original taking were not with intent to ſteal, the ſubſequent converſion was no felony, but a breach of truſt.

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§ 115. *By tortious converſion pending the contract.*

There are however ſome tortious acts before the regular completion of a contract, on which goods are delivered, which may determine the privity of it, and amount in law to a new taking from the poſſeſſion of the owner. This principle furniſhes the well-known diſtinction in the carrier's caſe (*a*), which ſeems to ſtand more upon poſitive law, not now to be queſtioned, than upon ſound reaſoning.

If a man deliver goods to a carrier to carry to a certain place, and he carry them away, it is no felony: otherwiſe, if

1 Hale, 504. 1 Hawk. ch. 33. ſ. 5. 7. 3 Inſt. 107.

(*a*) Admitted to be law in all the caſes where the queſtion has been canvaſſed.

Ch. XVI. § 115. *By tortious converſion pending bailment.*

he have a bale or trunk with goods delivered to him, and he break the bale or trunk, and take and carry away the goods with intent to ſteal them. So if he carry the whole pack to the place appointed, and then carry it away with intent to ſteal it; this is a felonious taking by the book of 13 Ed. 4. 9. for the delivery had taken effect, and the privity of the bailment was determined. But that muſt be intended, ſays Lord Hale, where *he carries them to the place, and delivers or lays them down;* for then his poſſeſſion by the firſt delivery is determined, and the taking afterwards is a new taking.

Staundf. 25. 1 Bac. Abr. 557. 4 Blac. C. m. 230. 2 MS. Sum. 233.

It appears at firſt ſight abſurd to ſay, that if the carrier never carry the package to the place appointed, but ſell the whole, it ſhall not be felony; but that if he take out a part of the goods only, it ſhall be ſo. Yet the diſtinction is well ſettled; for the carrier is truſted with the carriage of it in that condition; and if the package be loſt, ſtolen, or taken, he is anſwerable; and therefore his converſion is a breach of truſt for which the owner may recover the value of the whole in damages. But to conſtitute larceny there muſt be an unlawful taking and treſpaſs; and up to the moment of his parting with the whole package his poſſeſſion is lawful, and he has no unlawful poſſeſſion afterwards whereby to conſtitute a new taking, unleſs he break the package, or ſever part of the commodity from the reſt while it continues in his poſſeſſion.

Kel. 81, 82. 23 Ed. 4. 9.

It is true that Kelynge, in mentioning this caſe of a carrier who took goods to another than the appointed place, where he opened the packs, and took all the goods and converted them, which was ruled to be felony, puts the principle of the determination on a far different footing: not as it is ſtated in other books becauſe the privity of the bailment was thereby determined, but *becauſe his ſubſequent act of carrying the goods to another place, and there opening and diſpoſing of them to his own uſe, declareth that his intent originally was not to take the goods upon the agreement and contract of the party, but only with a deſign of ſtealing them.* There may indeed be evidence of ſuch a previous intent, ſufficient to warrant ſuch a concluſion in point of fact: and whether the particular evidence in that caſe were of ſuch a nature does not appear: but if that inference may be drawn from the mere

Vide 4 Blac. Com. 230.

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mere fact of the carrier's embezzling the goods, there is an end of the diſtinction at once as to the caſe of breaking the package and taking out the goods. For if the taking of part of the goods out of the package be evidence of the carrier's having originally intended to take the goods, not upon the agreement, but with intent to ſteal them, *a fortiori* the taking the whole package of goods itſelf, whether broken or not, and converting it, muſt be evidence of ſuch an intent: and ſo indeed Kelynge himſelf admits. The ſame reaſon is alſo adopted in the judgment on Pear's caſe; but it is quoted from Kelynge, and muſt ſtand on his authority. But all other writers, as far as I can find, have put this caſe upon the ſame footing as Lord Hale; namely, that the privity of contract is determined by the act of breaking the package which makes him a treſpaſſer; in which caſe the taking the whole, or a part of the contents, makes no difference, as ſome have ſuppoſed.

Kel. 83. Ante, 687. Poſt. 698.

At the ſeſſions at the O. B. before Mich. T. 1701, the caſe was, that a woman truſted a porter to carry a bundle for her to Wapping, and went with the porter; and in going to the place, the porter ran away with the bundle, which was loſt: and being tried for felony upon this fact, Holt C. J. directed the jury, that if they thought that the porter opened the bundle and took out the goods, it was felony, and they ought to find him guilty: and he thought that the fact, as above ſtated, was evidence of it. With ſubmiſſion to ſo high an authority, it may fairly be doubted whether there were ſufficient evidence before the jury upon this ſtatement to warrant them in finding that the porter opened the bundle and took out the goods; although we may ſuſpect with great probability that ſuch was the caſe. A different ground for the determination is ſuggeſted in another MS.; namely, that all the circumſtances of the caſe ſhewed that the porter took the bundle at the firſt with an intent to ſteal it. In Wynne's caſe there was expreſs evidence of the box having been opened by him (*a*). And ſo there was in Daniel Jones' caſe, who was the proſecutor's porter, and had the goods delivered to him to carry to a

MS. Tracy, & Denton, 62. 2 MS. Sum. 233. Ante, 664. Jones's caſe, O B. Dec. 1788, Seſſ. Pap. 1 Leach, 463. n.

(*a*) There too, the priſoner, a few days afterwards denied having ever ſeen the proſecutrix or the things, or having driven the coach at the time.

wharf

Ch. XVI. § 115. *By tortious conversion pending bailment.*

wharf to be ſhipped: And in another ſimilar caſe of John Sears, at the O. B. 1789. And the like occurred in the caſe of William Baſs, though the judgment did not turn on that fact. Another ground for the firſt-mentioned caſe of the porter was ſuggeſted by ſome of the judges in the argument of Pear's caſe, as a matter worthy of conſideration, namely, that the bundle, though delivered, being intended to continue in the owner's preſence, was in point of law in her poſſeſſion; upon which I have before ventured to offer a few obſervations which I ſee no reaſon to retract.

Ante, 566.

The ſeparation of part of the goods delivered from the reſt with a felonious intent ſeems however to be material where they are delivered as one entire body or maſs, though no caſe or package be broken; becauſe ſuch an act equally evinces a determination of the privity of contract. Thus if a miller ſteal part of the meal, though the corn were delivered to him to grind; yet this being taken out from the reſt is felony.

MS. Tracy, 60. cites 1 Roll. Abr. 73. pl. 26.

§ 116. *Concluſion.*

Upon the whole of this head of delivery by the owner, it appears that ſeveral queſtions may ariſe for the conſideration of the court and jury.

1. Whether the delivery in fact to the priſoner transferred the legal poſſeſſion to him, or whether it remained in the owner?

2. If the legal poſſeſſion were intended to be transferred, but not the abſolute property, whether ſuch delivery were obtained fraudulently, and with intent to ſteal the property? Or,

3. If obtained without ſuch intent, whether the privity of contract were at an end at the time of the converſion, ſo as to amount to a new taking and treſpaſs?

The conſequences in each of theſe ſeveral alternatives have been already ſtated.

8. *Upon a Taking through Neceſſity.*

§ 117. *On neceſſity.* 1 Hale, 54. 565. 1 Hawk. ch. 33. ſ. 20.

The laſt excuſe or more properly palliation which is ſometimes urged upon proſecutions of this nature is that the thing taken was for neceſſary food or cloathing for the body, in order

der to preſerve life. This can never be admitted as a legal defence in a country like this, where ſuch humane laws prevail for the care and maintenance of the poor. Even if the caſe exiſted in fact, it would in truth be but little excuſe that the party preferred this method of ſatisfying his neceſſity, rather than apply to the perſons charged with carrying thoſe laws into execution, becauſe perhaps of ſome trouble or apprehenſion of reproof. Yet ſtill in apportioning the puniſhment, the Court will have a tender regard to caſes of real neceſſity, which may and do ſometimes exiſt under the beſt regulated governments. A falſe ſenſe of ſhame has ſometimes tempted perſons, otherwiſe well diſpoſed, to the commiſſion of theſe offences. Sometimes, it is to be feared, they have been driven to it by the cruel and unfeeling conduct of others, who are in ſuch inſtances more juſt objects of ſeverity than the unhappy ſufferers.

Ch. XVI. § 117. *On a taking by neceſſity.*

Of Larceny or Robbery from the Perſon.

§ 118. *Introduction.*

Having in the preceding part of this chapter treated ſo largely of the component parts of the crime of larceny, it will only be neceſſary to ſhew by what additional circumſtances that crime is aggravated when the property is taken from the perſon. For what has been before ſaid of the neceſſity of a taking and carrying away, of what goods, from what perſon, by whom, and with what intent, will equally apply to the preſent ſubject; any occaſional particularities applicable to thoſe heads of inquiry having been reſpectively noticed at the time in the general view of them. The general crime then of larceny from the perſon may be aggravated in two different manners. 1ſt, Where the thing is taken from the perſon *privately without his knowledge.* 2d, Where the perſon from whom it is taken is *put in fear* at the time, or the taking is accompanied with circumſtances of *violence, threat, or terror*, which are ſufficient grounds for preſuming fear; in which caſe it aſſumes the denomination of robbery. I ſhall at preſent confine myſelf to the firſt of theſe offences.

Ch. XVI. § 119. *Clam et secretè by stat.* 8 Eliz. c. 4.

II. *Of Larceny Clam et Secretè from the Person.*

§ 119. 8 Eliz. c. 4. *Clam et secretè.*

This offence is derived from the ſtat. 8. Eliz. c. 4. which reciting that, "whereas certain evil diſpoſed perſons, commonly called cut purſes or pick purſes, but indeed by the laws of this land very felons and thieves, do confeder together, making among themſelves as it were a brotherhood or fraternity of an art or miſtery to live idly by the ſecret ſpoil of the good ſubjects of this realm; and as well at ſermons and preachings of the word of God, and in places and times of doing ſervice and common prayer, in churches, chapels, cloſets and oratories, and not only there, but alſo in the Prince's palace and preſence, and at the places and courts of juſtice, and at the times of miniſtering of the laws in the ſame, and in fairs, markets, and other aſſemblies of the people, and at the time of doing execution, &c. do, without regard to any place, time, or perſon, &c. under the cloak of honeſty by their outward apparent countenance and behaviour, ſubtily, privily, craftily, and felonioufly, take the goods of divers ſubjects from their perſons by cutting and picking their purſes, and other felonious ſlights and devices," &c. enacts (ſ. 2.), "That no perſon or perſons indicted or appealed for felonious taking of any money, goods, or chattels from the perſon of any other *privily without his knowledge*, in any place whatſoever; and thereupon found guilty by verdict, or ſhall confeſs the ſame upon his or their arraignment, or will not anſwer directly to the ſame, or ſhall ſtand wilfully &c. mute, or challenge peremptorily above 20, or ſhall be upon ſuch indictment or appeal outlawed, ſhall be admitted to the benefit of clergy, and ſhall ſuffer death," &c.

§ 120. *Offenders within the act.* 1 Hale, 529, 537. 2 Hale, 366. 2 MS. Sum. 271, 524. Steward's caſe, O. B. 1690, MS. Burnet. Foſt. 356, 418. Rex v. Baynes and others, O. B. April 1731, Serjt. Forſter's MS. (*vide tamen* S. C. 1 Leach, 9. ſomewhat different). MS. Tracy, 234.

1. The ſtatute is confined to him who actually commits the fact, and extends not to acceſſaries before or after, nor even to thoſe who are preſent aiding and abetting. And therefore where ſeveral were indicted for the fact, Raymond C. J., Denton J., and Comyns B. directed him only who took the goods to be found guilty of the privately ſtealing, and the others of the ſingle felony; which latter accordingly had

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had their clergy. This was ſo ruled by the advice of all the Judges: and ſuch is the conſtant practice at the O. B. and on the circuits. Wherefore if there be an accomplice preſent, and it cannot be told which of them took the goods, neither can be convicted of the capital part of the charge. But in Henry Sterne's caſe, for taking the Duke of Beaufort's George privily from his perſon, the Recorder, who in the preſence of three Judges laid down the ſame rule, yet left it to the jury to conſider, Whether the poſſeſſion of the George by the priſoner, recently after the loſs, were not evidence that he was the perſon who took it: but the jury only found him guilty of the ſimple larceny. In a prior caſe however Eyre B. laid no ſtreſs on this circumſtance, but directed an acquittal of the priſoners as to the capital part of the charge, both being preſent at the fact, which happened while the proſecutor was aſleep for about 10 minutes; though immediately after he awoke, the watch which had been taken from his fob during that interval was found on one of the priſoners.

Sterne's caſe, O. B. Sept. 1787, Seſſ. Pap. No. 717. 2 Leach, 531.

Mary and Bridget Murphey's caſe, O.B. Ap. 1783, cor. Eyre B. 1 Leach, 302.

2. There muſt be an actual taking from the perſon; taking in his preſence is not ſufficient, as it is in robbery.

Taking from the perſon. 2 Hale, 366. Ante, p. 598. & 646.

3. The ſtealing of notes, &c. is within the ſtatute.

4. The goods ſtolen muſt be above the value of 12d.; otherwiſe clergy is not ouſted, as in robbery: for the ſtatute was not intended to alter the nature of the crime, but only to exclude clergy, where it was before neceſſary to pray the benefit of it.

Value. 1 Hale, 529. 2 Hale, 366.

§ 121. *Taking privily.*

5. The next and principal conſideration is what ſhall be underſtood by the terms "*privily without his knowledge*;" and this affords two objects of inquiry.

1. *What ſort of a taking is meant as contradiſtinguiſhed from a taking by force?*
2. *What ſort of perſons, in reſpect of the manner in which they are circumſtanced at the time, are within the protection of the ſtatute?*

What a taking privily as to the manner.

1. Any ſort of ſecret or ſudden taking from the perſon, without putting him in fear, and without terror or open violence, ſeems within the act; though ſome ſmall force be uſed by the thief to poſſeſs himſelf of the property; provided there

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there be no reſiſtance by the owner, or injury to his perſon; and the circumſtances of the caſe ſhew that the thing was taken, not ſo much againſt as without his conſent.

Steward's caſe, O B. 30 April 1600, 2 MS. Sum. 267. cites Chapple's notes. 1 Hawk. ch. 35. ſ. 1.

In Steward's caſe it was ruled by Holt C. J. that ſnatching a hat and wig from the head of a perſon walking in the ſtreet was no robbery, becauſe the party was not put in fear; but that it was *clam et fecreté* within the ſtatute 8. Eliz. Yet the ſnatching of a hat from a man's head is put by Hawkins as an inſtance of an open larceny in contradiſtinction to *clam et fecreté*. But Yates J. thought that perhaps the doing it in a ſtreet or crowd, where the thief might not eaſily be diſtinguiſhed, might make the difference. So in Danby's caſe it was holden by Trevor and Eyre, that ſnatching a bundle from a woman in the ſtreet, and running away with it, was a taking *clam et fecreté* from the perſon. In that caſe the record of Steward's caſe above mentioned was produced. And in Corbett's caſe, O. B. 8th July 1713, there was the like determination by Price and Eyre J. In all theſe caſes a degree of force muſt have been uſed; but the circumſtances ſhewed that the property was taken rather without than againſt the conſent of the ſeveral owners; rather by means of the ſurpriſe and ſlight of hand than by open violence or terror. But it does not appear whether any of thoſe perſons whoſe property was ſo taken were themſelves eye witneſſes of the fact, ſo as to perceive the object of the thief at the moment of the act; though certainly there muſt have been a conſciouſneſs of it. I mention this, becauſe in Brown's caſe, where the priſoner took the proſecutor's watch out of his pocket while ſleeping, but who was thereby awakened juſt at the inſtant, and caught at his watch, but miſſed it. Hotham B., with the advice of Aſton J., left it to the jury whether, under the circumſtances of the caſe, they would acquit the priſoner of *privately* ſtealing, &c. and find him guilty of the ſimple larceny; as it could not be well ſaid to be *privately* ſtealing, when the proſecutor had ſeen part of the fact. In Baker's caſe, O. B. 1783, and in Macauley's caſe at the ſame ſeſſion, the priſoners, who had ſnatched property in the one inſtance from the head of the owner, and in the other from his hands, as they were reſpectively walking in the ſtreet, but without ſpeaking to them or touching or ſtopping them,

2 MS. Sum. 267.

Danby's caſe, O. B. 9 Dec. 1713, 2 MS. Sum. 267.

Corbett's caſe, ib.

Brown's caſe, O. B. about 1777, Serjt. Foſter's MS.

Baker's caſe, 1 Leach, 374.

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them, were reſpectively indicted for robbery, and acquitted, by the direction of the Court, of the capital part of the charge; without any intimation that their offences were indictable under this ſtatute. And in Plunket Horner's caſe, upon a ſimilar charge, where the property, an umbrella, was ſnatched ſuddenly out of the proſecutrix's hand, as ſhe was walking along the ſtreet, the Court ſaid that it had been ruled there about 80 years before by very high authority, that the ſnatching any thing from a perſon unawares conſtituted a robbery; but the law was now ſettled, that unleſs there were ſome ſtruggle to keep it, and it were forced from the hand of the owner, it was not ſo. And they ſaid that this ſpecies of larceny ſeemed to form a middle caſe between ſtealing privately from the perſon and a taking by force and violence. The ſame diſtinction had been taken before in Chick's caſe, O. B. December 1781. Certain it is, that all open larcenies from the perſon, as contradiſtinguiſhed from a ſtealing privily without the party's knowledge, are within the benefit of clergy, except robberies and ſuch larcenies as are committed in dwelling-houſes under particular circumſtances, which have been before ſpoken of.

Horner's caſe, O. B. Jan. 1790, cor. Buller J. and Thomſon B. ibid.

Chick's caſe, ibid. 2 MS. Sum 271.

Ante, 625. &c.

But in no caſe where the property is obtained by any ſtruggling or violence to the perſon does the offence fall within this ſtatute; as is ſhewn more particularly hereafter; when it may alſo be more properly conſidered what is a ſufficient force to conſtitute a robbery.

Poſt. 708. &c.

§ 122. *Upon whom the offence may be committed.*

2. The next point of conſideration, which is intimately blended with the preceding, is, Whether it be neceſſary that the perſon upon whom this offence is committed ſhould be capable of knowledge at the time of the fact? It was formerly holden that perſons aſleep or drunk were not within the protection of the act, which ſpeaks of places of public reſort and the like, where perſons were ſuppoſed to uſe ordinary caution, and not expoſe themſelves by careleſſneſs or miſbehaviour to theſe accidents. Upon this idea the caſe of a man was ruled at the O. B. by Aſton and Gould, Juſtices; in which it appeared that the proſecutor returning home from Vauxhall one night, and being either fatigued or in liquor fell aſleep on one of the benches on Weſtminſter bridge,

Ex relatione. Aſton J. MS. Buller J. and Serjt. Foſter's MS. *The ſtatute extends not to one drunk and aſleep in the ſtreets.*

Ch. XVI. § 122. *Clam et ſecretè by ſtat.* 8 Eliz. c. 4.

bridge, in which ſituation the priſoner ſtole his ſilver buckles. This was then ruled not to be a private taking within the act; for it was ſaid that the ſtatute meant only to protect perſons going about their lawful buſineſs in particular ſituations mentioned therein, and not ſuch idle loitering perſons as were lying about in the ſtreets. And the ſame point was afterwards ruled by Hotham B. upon the authority of the former caſe, and of another which he mentioned in the inſtance of a hackney coachman, whoſe pocket was picked while he was aſleep in his coach. Yet ſubſequent caſes more ſolemnly conſidered have put a more enlarged conſtruction upon the ſtatute in this reſpect; to protect all perſons at leaſt who have not expoſed themſelves to ſuch a loſs by their own negligence or miſbehaviour.

R. v. Reading and Jones, ... B. Dec. 1778, ibid. (S. C. 1 Leach, 276. n.)

Branny's caſe, Carliſle, Sum. Aſſ. 1786, cor. Buller J. MS. Buller J. *Picking another's pocket in the hi gh-way, who was awake but inſenſibly drunk, held within the ſtatute; the perſon having been made drunk by the artifice of the priſoner for that purpoſe.*

William Branny was indicted for privately ſtealing from the perſon of Hugh M'Guinar 43 guineas and 13 half-guineas. The proſecutor was an illiterate Iriſh drover, who ſold cattle at Ravinglaſs fair; where the priſoner, a total ſtranger to him, got acquainted with him under pretence of being his countryman; and having wormed out of him that he had received his money for his cattle, the priſoner and two of his companions followed him to Calder bridge. There the priſoner inſiſted on lying with the proſecutor, which he did; but the latter having put his money in his fob, and faſtened a pin acroſs it, preſerved it for that time. The next morning the priſoner and his companions got up before the proſecutor, and had breakfaſt ready when he came down ſtairs. They all breakfaſted together; and then the priſoner and his companions propoſed to have ſome brandy; and accordingly they had a great quantity, out of which it was contrived that the proſecutor ſhould drink half; with which he was ſo intoxicated that the landlord and his wife propoſed putting him to bed, but the priſoner and his companions ſaid they would take him away with them; and accordingly they put him on a horſe and carried him about 300 yards from the houſe, where the priſoner picked his pocket of his money without his knowledge, and left him in the road. The jury found the priſoner guilty; and alſo found that at the time when he took the money the proſecutor was awake, but inſenſibly drunk. The caſe was reſerved

reſerved for the Judges to conſider, Whether, under the circumſtances, the priſoner were guilty of a capital offence within the act? On the firſt day of Mich. T. 1786, nine Judges being preſent, they all held the conviction proper. Five of them held that the ſtatute extended to all caſes where goods were ſtolen from the perſon of another without his knowledge, whether he were awake or aſleep, drunk or ſober, &c. The other four then thought that it did not extend to the caſe of a man who was aſleep, but only to caſes where ſome craft or cunning was uſed by the priſoner: But on account of the craft and artifice uſed by the priſoner in this inſtance, they all agreed that his conviction was proper. Gould J. ſaid that the priſoner's whole conduct was *in fraudem legis.*

Ch. XVI. § 12 *Clam et ſecretè by ſtat.* 8 Eliz. c 4.

(Lord Loughborough, Aſhurſt, Hotham, Buller, and Heath, Js.)

Poſt. 706.

Thompſon's caſe, Newcaſtle Sum. Aſſ. 1786, cor. Heath J. MS. Buller J. and MS. Jud. (S. C. 2 Leach, 478.) *A maſter of a veſſel aſleep in his cabin is within the protection of the act.*

At the ſame meeting the caſe of John Thompſon was alſo taken into conſideration. He was indicted for privately ſtealing from the perſon of Jonathan Simpſon, without his knowledge, a ſilver watch. The property was proved to have been taken by the priſoner from the perſon of the proſecutor, a maſter of a ſhip then lying in the river Tyne, whilſt he was aſleep in his cabin, privately and without his knowledge. He was convicted, and Heath J. paſſed ſentence of death on him. But the counſel for the proſecution very candidly producing a caſe decided at Durham ſome years before, wherein it was ruled that the ſtatute did not extend to perſons aſleep, the caſe was reſerved for the opinion of the Judges. Upon the conſultation at this time the caſes which I have before mentioned were quoted and conſidered: but the five Judges above named held the conviction to be proper againſt the other four upon the grounds mentioned in the laſt caſe: ſo the caſe was adjourned to Hil. T. 1787, and again to Eaſter term ſucceeding, when all the Judges agreed that the conviction was proper. And this is now the received conſtruction. For in Willan's caſe, who picked the pocket of a waggoner ſleeping in the ſtables of an inn-yard while his horſes were feeding, the ſame objection being taken as to the conſtruction of the act, the Court ſaid that whatever notions might formerly have prevailed on the ſubject, it was now decided by all the Judges in Thompſon's caſe to be within the act; and

Willan's caſe, O.B. June 1788, cor. Adair Serjt. Recorder. 2 Leach, 558. *So a waggoner aſleep in the ſtables of the inn-yard.*

Ch. XVI. § 122. *Claim et ſeretè by ſtat.* 8 Eliz. c. 4.

that this had been ſince confirmed by another like caſe at Briſtol.

Margaret Kennedy's caſe, cor. Lawrence J. O. B. Jan. 1797, before all the Judges (except Buller J. abſent) in Hil. Term 1797, MS. Jud. *Aliter where proſecutor was drunk by his own default.*

But where it appeared that the proſecutor being drunk was picked up by the priſoner, a woman of the town, in the ſtreet, and went with her to a houſe, where he fell aſleep; during which time, without his perceiving it, ſhe picked his pockets of two guineas and upwards; the Judges, on reference to them after conviction, held that the caſe did not fall within the ſtat. 8. Eliz. being only ſimple larceny: and that this was diſtinguiſhable from Branny's caſe; there having been no fraud uſed by the priſoner in making the proſecutor drunk, but he having fallen into that ſtate by his own default: and that it was all to be taken as one tranſaction.

Gribble's caſe, O. B. Feb. 1782. 1 Leach, 275.

The caſe of Gribble, which was there referred to, was of the ſame ſort. The proſecutor and the priſoner having drank together in a public houſe till both were much intoxicated, afterwards went together to the priſoner's lodgings, where the proſecutor falling aſleep, the priſoner took that opportunity of ſtealing his watch: and it was ruled by the Court that the caſe was not within the ſtatute, but only ſimple larceny.

§ 123. *Indictment and verdict.* 1 Hale, 529. 2 Hale, 185. 2 MS. Sum. 266, 271. 3 Pulſtr. 71. 1 Hawk. ch. 36. ſ. 4. 2 Hale, 190. Cro. Cir. Comp. 304.

The indictment muſt lay the offence to have been done *privily without the knowledge* of the party, in exact purſuance of the words of the ſtatute; otherwiſe the priſoner will be entitled to his clergy. And ſo he is if the value be not laid as well as proved to be above 12d. But the indictment need not conclude *contra formam ſtatuti*: for this was a felony before; and the ſtatute does not inflict a new puniſhment or alter the nature of the crime, but only takes away clergy under the circumſtances. And in this, as in other aggravated larcenies, the priſoner may be acquitted of the capital part of the charge, and found guilty of ſimple larceny.

III. *Of Robbery, (properly ſo called.)*

Ch. XVI. § 124. *From the perſon by violence or terror.*

The next ſpecies of aggravated larceny from the perſon is robbery; which is a felonious taking of money or goods, to any value, from the perſon of another, or in his preſence, againſt his will, by violence or putting him in fear. Upon which ſeveral points occur for conſideration, ſome of which have been already diſpoſed of. What is a ſufficient taking, of what goods, by what perſon, from whom, and with what intent, have been treated of largely before. It remains to ſee,

§ 124. 2 MS. Sum. 258. 1 Hale, 532, 4. 4 Blac. Com. 242. Foſt. 123. Ante, 553. &c.

1. *How far the value is material.*
2. *What ſhall be ſaid to be a taking from the perſon.*
3. *What degree of violence or putting in fear is neceſſary.*

What is neceſſary to be ſhewn touching clergy; the manner of laying the offence in the indictment; and what verdict may be given thereon, will be hereafter ſtated.

1. *As to the Value.*

§ 125. *Value.* 3 Inſt. 69. Sum. 73. 1 Hawk. ch. 34. ſ. 3. 9. Staundf 27. 1 Hale, 533. *Vide* poſt. f. 138. as to clergy. Ante, 415.

It is ſufficient to ouſt clergy if the thing taken be of any value, though under 12d.; for the giſt of the offence is the force and terror. But ſome thing muſt be taken; for an aſſault with intent to rob is an offence of a different and inferior nature, which has been already mentioned.

2. *What is a taking from the Perſon.*

§ 126. *What is a taking from the perſon.* 3 Inſt. 68, 9. 1 Hale, 533. Staundf. 27. Pult. de pace, 131. b. 1 Hawk. ch. 34. ſ. 5. 4 Blac. Com. 242. Ante, 3, 4. 8. 1 Sid. 263. *Sed vide* Gouldſ. 86. *Vide* poſt. Merriman' caſe.

In robbery, it is ſufficient if the property be taken in the preſence of the owner; it need not be taken immediately from his perſon, ſo that there be violence to his perſon or putting him in fear. As where one, having firſt aſſaulted another, takes away his horſe ſtanding by him; or having put him in fear, drives his cattle out of his paſture in his preſence, or takes up his purſe which the other in his fright had thrown into a buſh, or his hat which had fallen from his head. Where robbers, by putting in fear, made a waggoner drive his waggon from the highway in the day time, but

Ch. XVI. § 126. *What is a taking from the perſon.*

but did not rob the goods till night, ſome have holden it to be a robbery from the firſt force; but others conſider that the waggoner's poſſeſſion continued till the goods were actually taken, unleſs the waggon were driven away by the thieves themſelves. But where thieves ſtruck money out of the owner's hands, and by menace drove him off ſo that he could not take it up, and then they took it up themſelves; it not being found in the ſpecial verdict that they took up the money in the ſight or preſence of the owner, the court would not intend it. And as the firſt ſtriking the money out of his hand was without putting him in fear, the priſoners were conſequently entitled to their clergy (*a*). And the ſame was reſolved by K. B. in the caſe of The King v. Grey and others, with the concurrence of all the Judges.

R. v Francis and others, 2 Stra. 1015. Com. Rep. 478. S. C.

R. v. Grey and others, E. 8 G. 2. MS. Burnet, 73.

3. *What Violence or Fear is neceſſary.*

§ 127. *Violence or Fear ſufficient.*

It was before ſtated, as part of the definition of this offence, that the property muſt be taken from the perſon by violence or by putting him in fear: and certainly it is not only true that either of theſe circumſtances is ſufficient to conſtitute the offence, but if either be laid in the indictment, it is enough; provided it appear that the property was taken without or againſt the will of the party by one or other of the means aftermentioned; ſome of which have already been alluded to in conſidering what ſhould be deemed a taking. As to the ſort of violence neceſſary to be proved, where the property is obtained in that manner, it has been already in part conſidered under the laſt diviſion of this ſubject. It was there ſhewn that no ſudden taking of a thing unawares from the perſon, as by ſnatching any thing from the hand or head, is ſufficient to conſtitute a robbery, unleſs ſome injury be done to the perſon, or unleſs there be ſome previous ſtruggle for the poſſeſſion of the property.

Per Holt C. J. at a conference of all the Judges after Trin. T. 3 Ann. MS. Tracy, 71. Dyer, 224. a. pl. 30. Poſt. f. 167. 4 Blac. Com. 242, 3. Ante, p. 555.

Ante, f. 121.

Lapier's caſe, ante, f. 4.

In Lapier's caſe before mentioned, although Mrs. Hobart's ear-ring was pulled ſo ſuddenly from her ear that ſhe had no time or opportunity for reſiſting, yet being done with ſuch violence as to injure her perſon, the blood being drawn from her ear, which was otherwiſe much hurt, the priſoner was holden guilty of robbery.

Ch. XVI § 127. *By violence.*

Davies alias Beard was indicted for taking a gentleman's ſword from his ſide *clam et fecreté*: but it appearing that the gentleman perceived that Davies laid hold of his ſword, and that he himſelf laid hold of it at the ſame time and ſtruggled for it; this was adjudged robbery.

Davies's caſe, O. B. 11 Ann. 2 MS. Sum. 267. Cites Denton's MS. MS. Tracy, 75.

In regard to taking by force under any lawful or indifferent pretence; that has been partly noticed under the firſt head of inquiry; but whatever the pretence may be, if the true intent be to ſteal under the definition before given, and the poſſeſſion be obtained by force and violence from the perſon of the owner or in his preſence, it amounts to robbery.

Ante, f. 3.

Merriman, carrying his cheeſes along the highway in a cart, was ſtopped by one Hall, who inſiſted on ſeizing them for want of a permit; (which was found by the jury to be a mere pretence for the purpoſe of defrauding Merriman, no permit being neceſſary); and on ſome altercation, they agreed to go before a magiſtrate to determine the matter. In the mean time other perſons riotouſly aſſembled on account of the dearneſs of proviſions, and in confederacy with Hall for the purpoſe, carried away the goods in Merriman's abſence. It was objected to be no robbery; there being no force uſed; but only larceny; but Hewitt J. over-ruled the objection, and left it to the jury, who found it robbery, and found a verdict for the plaintiff Merriman in an action againſt the Hundred of Chippenham, on the ſtatutes of hue and cry: and upon motion for a new trial in M. 8. Geo. 3. the Court of K. B. were clearly of the ſame opinion (*a*).

Merriman v. The Hundred of Chippenham, M. 8 G. 3. B. R. MS. Buller J.

Samuel Gaſcoigne was indicted for a highway robbery on Jane Edwards. It appeared in evidence that the proſecutrix was brought before a magiſtrate on a complaint for an aſſault upon another woman. The magiſtrate [as the priſoner alledged, though it was not produced,] made out a warrant of commitment for the proſecutrix, at the ſame time adviſing

Gaſcoigne's caſe, O. B. 1783, MS. Buller J. (S. C. 1 Leach, 313.) *A runner at the police-office taking money out of the hand and pocket of a priſoner, whom he had before handcuffed and was conducting to pri-*

(*a*) As the only doubt raiſed by the ſpecial verdict was, Whether the priſoners were or were not guilty of robbery, the Court thought that judgment could not be given againſt them on that record as for grand larceny, of which it appeared that they were guilty: therefore they were remanded to be tried for that offence on another indictment.

had

(*a*) This opinion muſt have been grounded on the conſideration, that the firſt ſeizure of the cart and goods by Hall being by violence, and whilſt the owner was preſent, conſtituted the offence a robbery. *Vide* ante, f. 126.

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the parties to make it up. The proſecutrix ſent for her huſband, and on his arrival, the affair not being ended, he went away to get bail, of which ſhe informed the magiſtrate; but the latter leaving the office, the priſoner told her that he would take her to gaol. She intreated him to ſtay till her huſband returned, but he refuſed to wait even a quarter of an hour. He then aſked her if ſhe would have a coach, which ſhe declined; but a coach was ſent for. She then beſought him not to ſend her away from her family till her huſband returned, and ſhe offered him a ſhilling which ſhe had in her hand if he would permit her to ſtay till her huſband's return; but he refuſed, and kicked her into a coach, and handcuffed her to a man who was then going to priſon, and who had before reſcued himſelf, as the priſoner alledged. The priſoner alſo came into the coach, and put his handkerchief to her mouth, and took the ſhilling out of her hand, and ſaid, "this will buy us a glaſs a-piece." He then aſked her for more money, and ſaid he would bring her back; and immediately put his hand in her pocket, and took all the money he could find, which was 3s., and ſaid he would carry her back. He then ſtopped the coach at an ale-houſe, and bid the coachman call for gin, which he drank, and gave the coachman a glaſs, and offered the proſecutrix a glaſs, which ſhe ſeveral times refuſed; but he inſiſted ſhe ſhould drink it. He gave the ſhilling he firſt took from her to pay for it, and took 6d. in change. She made no complaint then, as he had promiſed to carry her back, but ſaid if he would do ſo, he ſhould be welcome to the other 3s.; inſtead of that ſhe was carried to priſon. No part of the money was ever returned to the proſecutrix; but the coachman ſaid that the priſoner paid for the coach either 1s. or 1s. 6d. The priſoner was not a conſtable or officer, but at that time attended the public office; nor did it appear that he in particular had any order to carry the proſecutrix to priſon. Nares J. left the caſe to the jury, with this direction, that if they thought the priſoner had originally, when he forced the proſecutrix into the coach, a felonious intent of taking her money, and that he made uſe of the violence of the handcuffs as a means to prevent her making reſiſtance, and that he did take the money with a felonious intent, they ſhould find him guilty; otherwiſe they ſhould acquit him.

ſon, under pretence of letting her go home, and paying for coach-hire and liquor which he had himſelf ordered, is guilty of robbery; the jury finding that all this was done with a felonious deſign to get her money; although the party in cuſtody had before offered him the money if he would let her go home, and repeated the offer after he had taken it in that manner.

The jury found him guilty, and added, that he had a felonious intent of getting what money the woman had; and that the putting of her in the ſtate proved was only a colourable mean of carrying his felonious intent into execution. In Mich. T. 1783, all the Judges were of opinion that this was robbery.

Ch. XVI. § 127. By violence.

See the judgment delivered by Aſhhurſt J. O. B. Jan. 1784, Seſſ. Pap. p. 295.

§ 128. Fear.

Robbery may alſo be conſtituted by putting in fear as well as by force; or perhaps in ſtrictneſs it may be ſaid that fear will ſupply the place of force. Yet it is not neceſſary that actual fear ſhould either be laid in the indictment, or ſtrictly and preciſely proved; provided the property be taken with ſuch circumſtances of violence or terror, or threatening by word or geſture, as would in common experience induce a man to part with it from an apprehenſion of perſonal danger; for the law, *in odium ſpoliatoris*, will preſume fear where there appears to be ſo reaſonable a ground for it. But it is neceſſary that it be taken againſt the will of the party. If a man be knocked down without previous warning, and ſtripped of his property while ſenſeleſs, he can with no propriety be ſaid to be put in fear; and yet that would undoubtedly be robbery. So a colourable gift, which in truth was extorted by fear, amounts to a taking and treſpaſs in law. As if a perſon with a drawn ſword, or other circumſtances of terror indicating a felonious intent, beg alms of another, who gives it him through miſtruſt and apprehenſion of violence, the offence is the ſame notwithſtanding the pretence. So it is whether there were any weapon drawn or not: or whether it were an offenſive weapon: or whether the perſon aſſaulted delivered his money upon the other's command, or afterwards gave it him upon his ceaſing to uſe force, and aſking it for alms; for the owner was put in fear by the aſſault, and there remained a reaſonable ground for its continuance.

Foſt. 128, 9. 1 Hale, 533, 4. per Holt C. J. at a meeting of the Judges after Trin. Term, 7 Ann. MS. Tracy & Denton. 71. 2 MS. Sum. 264. 4 Blac. Com. 243.

Ante, p. 555.

1 Hawk. ch. 34. f. 6. Foſt. 128.

The ſame rule holds, although the thing taken were not really within the original contemplation of the robber, nor the object of his purſuit at the time.

Blackham aſſaulted a woman with intent to commit a rape, and ſhe without any demand from him offered him money, which the priſoner took and put into his pocket, but

Rex v. Blackham, Trin. Term 1787, 2 MS. Sum. 262. MS. Gould J. and MS. Jud.

Ch XVI. § 128. *By force.*

but continued to treat her with violence to effect his original purpoſe, till he was interrupted by the approach of another perſon. This was holden to be robbery by a conſiderable majority of the Judges: for the woman, from violence and terror occaſioned by the priſoner's behaviour, and to redeem her chaſtity, offered the money, which it was clear ſhe would not have given voluntarily; and the priſoner, by taking it, derived that advantage to himſelf from his felonious conduct; though his original intent were to commit a rape.

Taking money to deſiſt from a rape.

Taplin's caſe, O. B. June 1780, cor. Nares J. MS. Buller J. *Vide* Brown's caſe, poſt.

During the riots in London in the year 1780, a boy with a cockade in his hat knocked violently at the door of the proſecutor Mahon, who thereupon opened it; and the boy ſaid to him, "God bleſs your honour, remember the poor mob." Mahon told him to go along; on which he ſaid, "Then I will go and fetch my captain." He went; and the mob, to the amount of 100, armed with ſticks and what elſe they could get, ſoon after came, headed by the priſoner Thomas Taplin on horſeback, having his horſe led by the ſame boy. On their coming up, the byſtanders ſaid, "You muſt give them money;" and the boy ſaid, "Now I have brought my captain." Some of the mob ſaid, "God bleſs this gentleman, he is always generous." Mahon then aſked the priſoner, "How much?" who anſwered, "Half-a-crown, Sir." On which Mahon, who had before only intended to give a ſhilling, gave the priſoner the half-crown. On this the mob gave three cheers, and went to the next houſe. This was holden robbery.

Rex v. Simons, Cornwall Lent Aſſ. 1773, 2 MS. Sum. 262. MS. Gould J. and MS. Jud. Ante, f. 98.

If a perſon by force or threats compel another to give him goods, and by way of colour oblige him to take, or if he offer, leſs than the value; this is alſo robbery. As where the priſoner took a buſhel and an half of wheat worth 8s. and forced the owner to take 13½d. for it, threatening to kill her if ſhe refuſed; this was clearly holden to be a robbery by all the Judges upon a conference.

Spencer's caſe, York Sum. Aſſ. 1783, cor. Buller J. MS. Buller J.

Again in the caſe of one Spencer, the proſecutor Anderton ſwore, that having in his poſſeſſion corn belonging to other perſons, the priſoner came to him, together with a great mob marching in military order; and one of the mob ſaid, that if he would not ſell, they were going to take it away;

away; and the priſoner ſaid that they would give 30s. a-load, and if he would not take that, they would take the corn away; on which the proſecutor ſold that for 30s. which was worth 38s.: this was ruled to be robbery, and the priſoner was convicted and executed.

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§ 129. *Fear of what nature.*

It remains further to be conſidered of what nature this fear may be. This is an inquiry the more difficult, becauſe it is no where defined in any of the acknowledged treatiſes upon this ſubject. Lord Hale propoſes to conſider what ſhall be ſaid a putting in fear, but he leaves this part of the queſtion untouched. Lord Coke and Hawkins do the ſame. Mr. Juſtice Foſter ſeems to lay the greateſt ſtreſs upon the neceſſity of the property's being taken *againſt the will of the party*, and he lays the circumſtance of fear out of the queſtion; or that at any rate when the fact is attended with circumſtances of violence or terror, the law *in odium ſpoliatoris* will preſume fear if it be neceſſary, where there appears to be ſo juſt a ground for it. Mr. Juſtice Blackſtone leans to the ſame opinion. But neither of them afford any preciſe idea of the nature of the fear or apprehenſion ſuppoſed to exiſt. Staundford defines robbery to be a felonious taking of any thing from the perſon or in the preſence of another *openly, and againſt his will*; and Bracton alſo reſts it upon the latter circumſtance. I have the authority of the Judges as mentioned by Willes J. in delivering their opinion in Donally's caſe, at the O. B. 1779, to juſtify me in not attempting to draw the exact line in this caſe; but thus much I may venture to ſtate, that on the one hand the fear is not confined to an apprehenſion of bodily injury; and on the other hand it muſt be of ſuch a nature as in reaſon and common experience is likely to induce a perſon to part with his property againſt his will, and to put him as it were under a temporary ſuſpenſion of the power of exerciſing it through the influence of the terror impreſſed; in which caſe fear ſupplies, as well in ſound reaſon as in legal conſtruction, the place of force, or an actual taking by violence, or aſſault upon the perſon.

1 Hale, 534. 3 Inſt. 68. 2 Hawk. ch. 34. Foſt. 123. 128.

Vide poſt. f. 132.

4 Blac. Com. 242.

Staundf. lib. 1. c. 20.

Brac. lib. 3. fo. 150. b.

Donally's caſe, poſt. 715.

Before I ſtate the caſes which have occurred in modern times on this ſubject, I ſhall mention a caſe of robbery on this head, inſtanced by nearly all the writers on the ſubject, which

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by ſome does not appear to have been clearly underſtood.

Staundf. 27. 1 Hale, 532. 3 Inſt. 68. 1 Hawk. ch. 34. ſ. 1.

Thieves come to rob *A.*, and finding little about him, enforce him by menace of death to ſwear to bring them a greater ſum, which he does accordingly (*a*); this is robbery; not for the reaſon aſſigned by Hawkins, becauſe the money was delivered while the party thought himſelf bound in conſcience to give it by virtue of the oath which in his fear he was compelled to take; which manner of ſtating the caſe affords an inference that the fear had ceaſed at the time of the delivery, and that the owner then acted ſolely under the miſtaken compulſion of his oath. But the true reaſon is given by Lord Hale and others; *becauſe the fear of that menace ſtill continued upon him at the time he delivered the money*; and therefore the indictment need not be more ſpecial than in ordinary caſes.

§ 130. *On accuſation of an unnatural crime.*

R. v. Jones, alias Evans, O. B. Feb. 1776, cor. Hotham, B. MS. Gould J. Serjt. Foſter's MS. (S. C. Leach, 164.) *Extorting money by threatening to charge the party with an unnatural crime, is robbery.*

The priſoner was indicted in the uſual form for a highway robbery. The facts proved were, that the priſoner, an entire ſtranger to the proſecutor, followed him out of the theatre, where they had accidentally met, into the ſtreet, and aſked him whether he did not chooſe to drink; the proſecutor replying that it was his intention ſo to do, the priſoner followed him into a public houſe, where they drank ſome porter: after which the priſoner aſked him what he meant by thoſe liberties that he had taken with his perſon at the play-houſe; and on the proſecutor's expreſſing his ſurpriſe at what he meant, the other continued in the ſame ſort of ſtrain, which frightened the proſecutor very much; and he went out intending to get away from him: but the priſoner followed and ſeized him by the arm, threatening to raiſe the mob if he attempted to run; and telling him that he had offered him an indignity not to be borne, and for which nothing could make ſatisfaction. The proſecutor then being exceedingly terrified, aſked him what he would

(*a*) This caſe was alluded to by one of the judges at the conference on Reane's caſe aftermentioned (ſ. 132.), who obſerved that it was not exactly as ſtated by Lord Hale. That it ſeemed a more immediate act than appeared by that book; and was to be found in *Fitz. Abr. Coron.* 464. 4 *Hen.* 4. *Staundf.* 27. *a.* *E.* 42 *Ed.* 3. 14. *b.*

would have him do. The priſoner replied that he muſt make him a preſent; which he explained by ſaying that he muſt give him what money he had about him: on which the proſecutor gave him 3 guineas and 12s. being all he had. The other took it, and inſiſted on more, all the time holding the proſecutor faſt by the arm; and at laſt followed him home, and called again the next morning, and got ſome more money. It was left to the jury to conſider, Whether the proſecutor were put in fear, and under that impreſſion had parted with his money. And the jury declared that they thought ſuch an accuſation would ſtrike a man with as much or more terror than if he had a piſtol at his head; and they found the priſoner guilty: but judgment was reſpited to take the opinion of the Judges, whether theſe circumſtances would ſupport a conviction for a highway robbery. In Eaſter T. 1776, nine Judges preſent agreed that the conviction was proper: for to conſtitute robbery there was no occaſion to uſe weapons or real violence; but that taking money from a man in ſuch a ſituation as rendered him not a free man; as if a perſon ſo robbed were in fear of a conſpiracy againſt his life or character, was ſuch a putting in fear as would make the taking of his money under that terror a robbery; and they approved of Brown's caſe in point, which was tried before Eyre B. when Recorder.

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(Abſent De Grey C. J. and Aſhurſt J. and one vacancy.)

Brown's caſe, O. B. Oct. 1763.

Robert Harrold was afterwards convicted for a ſimilar robbery, with the approbation of the Judges.

Harrold's caſe, alias Hutton, O. B. June 1778.

This matter was again moſt deliberately conſidered in Donolly's caſe, who was tried at the O. B. 1779, for a highway robbery. It appeared that as the proſecutor was paſſing through Soho-Square one evening, he was accoſted by the priſoner (a ſtranger to him), with a deſire that he would give him a preſent. The proſecutor aſked for what? the priſoner anſwered, "You had better comply, or I will take "you before a magiſtrate, and accuſe you of an attempt to "commit an unnatural crime." The proſecutor then gave him half a guinea, which the priſoner ſaid was not ſufficient; but the other had no more in his pocket. Two days afterwards, in the evening, the proſecutor again met the priſoner in Oxford-Road, who made uſe of the ſame threats as before, telling the proſecutor that he knew what paſſed in Soho-

R. v. Jas. Donolly, O. B. Feb. 1779, cor. Buller J. MS. Buller J. and MS. Jud. (S. C. 1 Leach, 229.) *Obtaining money from another by force of a threat of carrying him before a magiſtrate and accuſing him of an unnatural crime, is robbery.*

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Soho-Square, and unleſs he would give him more money, he would take him before a magiſtrate, and accuſe him of the ſame attempt; adding, that it would go hard with him, unleſs he could prove an alibi. The proſecutor then went into an adjoining ſhop, whither the priſoner followed him, and ſtaid at the outſide of the door. The proſecutor took a guinea out of his pocket and gave it to the ſhopkeeper, deſiring him to give it to the man at the door, which was done; and the priſoner then departed. The proſecutor then depoſed that he was exceedingly alarmed on both occaſions, and under that alarm gave the money. That he was not aware what were the conſequences of ſuch a charge, but apprehended it might coſt him his life. The jury were deſired to conſider, 1ſt, Whether, upon the evidence, they were ſatisfied that the proſecutor delivered his money through fear and under an apprehenſion that his life was in danger? Or 2dly, If they did not think that the proſecutor apprehended his life was in danger, whether the money were not obtained by means of the priſoner's threats, and againſt the will of the proſecutor? For if it were, even in that caſe, though he were not in fear of his life, the crime would amount to robbery. The jury found the priſoner guilty; and ſaid they were ſatisfied that the proſecutor delivered his money through fear and under an apprehenſion that his life was in danger.

There being ſome difference of opinion among the Judges on this caſe, they directed it to be argued before them, which was done on 29th April 1779, at Lord C. J. De Grey's houſe, preſent all the Judges; when after very full conſideration, they at length all agreed that the caſe amounted to robbery. In the courſe of their debate, many of the Judges touched on the queſtion which I have before alluded to, as to the nature of the fear moving the party to part with his property in caſes where no actual violence was employed to obtain it; which I think the more worthy of remark as I do not find any expreſs authority upon the ſubject in point. I ſhall therefore ſhortly advert to the grounds of their opinion.

Buller J. held firſt that the caſes which had been decided on this ſubject, [and which have been before ſtated], concluded

concluded the preſent queſtion. And ſecondly, that independent of thoſe caſes, this was robbery on general principles. For which he relied chiefly on Foſt. 128 and 1 Hale, 533, 4. That to conſtitute a robbery, it was not neceſſary that there ſhould be any weapon drawn, or an actual laying of hands on another, which in fact ſeldom happened. But if ſuch threats were uſed as would impoſe terror on a reaſonable man's mind, and would leave him not a free agent, but induce him to part with his money againſt his will, it was robbery, in whatever words the threat was conveyed. Whether a thief, who ſtopped a man, ſaid, "Give me your money," "deliver your money," or "make me a preſent;" it was equally robbery; for the intention was the ſame, namely, to force the man ſo attacked to part with his money againſt his will. That if nothing more had been ſaid in this caſe than "give me a preſent," he ſtill thought it would have been a robbery; for that was a demand of money: and if that demand were ſo made as to impoſe a fear on the mind of the perſon attacked, and under that fear he parted with his money, it brought the caſe exactly within the definitions of robbery given by Lord Hale and Mr. Juſtice Foſter. But the ſubſequent words uſed were a threat of immediate violence and perſonal injury; and the priſoner's ſaying, when the proſecutor had given him half-a-guinea, that it was not ſufficient, was a plain proof that he meant to force from him all the money he had about him. He alſo held that a fair argument was to be drawn from the ſtatute 7 G. 2. c. 21. which made it felony for any perſon by menaces or in a violent manner to demand money with intent to rob: and the ſtat. 30 G. 2. c. 24. which makes it a tranſportable offence to ſend a letter threatening to accuſe, &c. with a view or intent to extort money. For it could not be ſuppoſed that the legiſlature would not at the ſame time have provided for caſes where money actually was obtained, as where there was only an attempt to obtain it, unleſs they had been ſatisfied that if the money were obtained it was a robbery.

Perryn B. was at firſt of opinion that this was not robbery. He diſtinguiſhed it from Brown's caſe, where there was actual violence uſed in the aſſault, and laying Ante, 715.

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Ante, 714.

on the party; and alſo from Jones's caſe, where there was a continual force and violence, a mob and crowd, to whoſe reſentment and violence the proſecutor apprehended he ſhould be delivered up. That the caſe depended on the definition of robbery, which Lord Hale and Hawkins agreed was a felonious and violent taking againſt the party's will; and he thought it neceſſary, in all caſes of robbery, either that there ſhould be actual force or a threat of it; as to deliver the party to the mob, or to carry him to a horſe pond, or the like; which he thought would be ſufficient. But that here the party had his option either to deliver his money or not, and it was rather a caſe of giving than taking. However, after hearing the opinions and reaſons of the other Judges, he deſired to retract his opinion, and concurred with them that this was robbery.

HOTHAM B. ſaid, that as to the former caſes determined on this ſubject, there was in each ſo much of force as, abſtracted from other conſiderations, would conſtitute robbery. But the queſtion was, Whether getting money from a perſon under ſuch a threat as the preſent, without actual force, were robbery? That he was clearly ſatisfied that it was not neceſſary, in order to conſtitute a robbery, where the property was obtained by means of a threat, without actual force, that there ſhould be a fear of death in the party robbed, or an immediate fear of danger to his perſon. In the caſes put in argument, of one man walking with his child, who delivered his money to another, upon a threat that unleſs he did ſo that he would deſtroy the child (*a*); or of another man parting with his money, in order to ſave his houſe from being fired; he had no doubt but that in either caſe it was ſufficient to conſtitute robbery. That if a man parted with his money under ſuch circumſtances as that he could not reſiſt the demand without fear of injury to his perſon or property, the offence was complete. In this caſe there was a

(*a*) Bracton, lib. 2. cap. 5. (in treating f. 13. & 14. Quod donatio ſit gratuita et non coacta; et quid ſit metus;) ſays, fo. 16. b. "Et non ſolum excuſatur quis "qui exceptionem habet, ſi ſibi ipſi inferatur vis vel metus; ſed etiam ſi ſuis; "ut ſi filio vel filiæ, fratri vel ſoroſi, vel aliis domeſticis et propinquis; ſicut de "eodem Falcone, qui tenuit in priſonâ fratrem cujuſdam, donec frater ejuſdem "qui fuit extra priſonam dedit ei quoddam maneriuum."

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fear of diſgrace, if not of life, in being carried through the ſtreets under a charge of this nature; the fear of which did not leave the party a free agent to reſiſt or comply with the demand. That Mr. Juſtice Foſter, in his definition of robbery, conſidered the doing of the act *violently* or *againſt the will of the party*, as ſynonimous terms: and whether the party were obliged to part with his money from fear of perſonal danger, or of loſs of character, was the ſame thing; it being equally againſt his will in either caſe.

EYRE B. expreſſed himſelf in great doubt at firſt, though he ſtated the leaning of his opinion to be that it was robbery. He ſaid his difficulty lay in drawing the line between robbery, and extorting money by undue influence. As to the notion of putting in fear, it had been carried a great deal too far, as connected with the definition of this offence. It ſeemed to him to be rather a conſequential than eſſential part of the offence. It had been decided that putting in fear need not be laid in the indictment. If there were a taking by force, though no fear, it was never doubted but that it amounted to robbery. That the firſt and general definition of the offence was a violent and felonious taking from the perſon. An old author [Weſt, Symbol. 90.] ſays a violent taking from the perſon, becauſe in law it impoſes fear. The old precedents of indictments never ſtated the putting in fear: there were many ſuch in Weſt: others ſtated *in corporali timore*; but *in fear of life* was of very modern introduction. That in the caſe mentioned from Dyer, 224 b. pl. 30. it was holden no robbery, becauſe there was no putting in fear: but there the indictment did not lay the offence to have been done *violenter*. Perhaps from that time this form of indictment grew into uſe. That as to the caſe where the owner delivered his money on demand, it muſt amount to a conſtructive taking, in order to make it robbery. If a piſtol were preſented to a man, though nothing were ſaid, it was a conſtructive force. That there muſt be fear either in the caſe of a conſtructive or an actual taking; but it was a conſtructive fear. A menace of any kind which operated ſo far on a man as to put him in his own apprehenſion under a neceſſity of delivering his money to another,

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who meant to ſteal it, was a conſtructive force: and if the owner were laid under a moral neceſſity of delivering his money to another, it was a conſtructive taking. At the concluſion of the debate the learned Judge declared himſelf perfectly well ſatisfied that this amounted to robbery.

Nares J. ſaid, he ſpoke with diffidence, though he had a formed opinion that this was robbery, according to the legal definition of it by Lord Hale and Hawkins taken together. That an actual aſſault was not neceſſary; putting in fear was equal to it. By Staundf. 27. a. if one menace another to deliver his money immediately or he will kill him, it is robbery as much as if he took it from his perſon. Dalton indeed ſays, that the taking muſt be by force or violence; but he had miſtaken Dyer, 224. b. That here it was found by the jury that the proſecutor delivered his money under an apprehenſion that he was in fear of his life. Should it be ſaid in anſwer that he did not know the law; that made no difference. The queſtion was, What effect the threat had on his mind? If he ſo apprehended it, it was ſufficient. That it would be of the utmoſt ill conſequence to ſay, that a man might have the ingenuity to get money from another as much againſt his will as if he had preſented a piſtol to his breaſt, and yet he ſhould not be puniſhed for it. That larceny was a felonious and fraudulent taking of the goods of another, &c. and this was a ſpecies of fraud practiſed by the priſoner; and the money having by means of it been obtained as much againſt the will of the party as if he had ſhot at him, the offence amounted to robbery.

Aſhhurſt J. ſaid, he was very averſe to extend the law to caſes not formerly conſidered as falling under the crime; but ſtill the law ſhould keep pace with the times, if it could be done without an extenſion of the principles on which it was founded. And he conſidered the principle which governed the offence of robbery to be, where money was taken from another againſt his will under ſuch circumſtances of violence or terror as did not leave him a free agent. That in burglary ſuch conſtructions had taken place as were neceſſary to meet the frauds by which the law was endeavoured to be evaded. Breaking and entering a houſe, in common acceptation meant the breaking of a door or window, and going into

into the houſe: but yet it had been conſtrued to extend to breaking a pane of glaſs, and putting in the hand of the perſon. The ſame latitude had taken place in the conſtruction of this offence. The caſe of a man taking money to a robber, in conſequence of an oath impoſed on him by the latter, was a fear upon the mind only, and no fear of perſonal danger at the time. So here, if the proſecutor were not in fear of his life, yet if he were induced to part with his money under a fear for his character, it was a terror on the mind, and amounted to robbery.

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Blackſtone J. ſaid, that the difficulty of the caſe was in drawing the line for the firſt time. That Jones's caſe was law; but it turned on the circumſtance of force and violence, which gave a reaſonable apprehenſion of immediate danger. There was a threat to deliver the party up to the mob as a ſodomite, beſides the circumſtance of laying hold of his arm. That to conſtitute robbery there muſt either be violence or a putting in fear of it. There was no caſe in which one or the other had not been holden neceſſary. The primary idea of robbery was, that the act muſt be done with violence: putting in fear was only a conſtructive conſequential violence. But the principal queſtion was, What it ſhould be a fear of? and he thought the menaces or apprehenſion muſt be of violence likewiſe. If that line were departed from, there was no telling where to ſtop. If this ſpecies of fear were holden ſufficient, any other may be ſo. That dureſs *per minas* was defined to be fear of life or bodily harm. Bracton ſaid it muſt be ſuch a fear as would fall *in conſtantem virum*; and 2 Inſt. 483. was to the ſame effect. Threatning to burn a man's houſe was no dureſs. That as to the caſe put of threatening the life of a child, it would be a clear violence on the parent or guardian. The violence egreſſus eſt è perſonâ; and death might enſue from non-compliance. If the fear were of ſuch a nature, to avoid the effects of which the true man might kill the perſon, that would be robbery. But that if the threats were of a more peaceable kind, as to ſtrip his eſtate, or the like, it would not be robbery. That none of thoſe conſequences followed in the caſe of threats to diſgrace, as in caſe of threats of violence. That taking by violence or againſt the will of the party were

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not ſynonimous terms. That as to the threat of taking the profecutor before a magiſtrate, although it were a threat of corporal violence, he did not think it was alone a ſufficient reaſon for diſtinguiſhing the other caſes from the preſent, or to make it a robbery: for if it were not ſufficient to threaten to proſecute, it could not be ſo to lay hold of a man for the purpoſe of proſecuting him; and he did not think it ſo material what the profecutor apprehended, as what he had reaſon to fear. As to the caſe of the oath, he did not know how to give an anſwer to it: if it were new, he ſhould not think it law; but it was eſtabliſhed. Finally however, after hearing the opinion of the other Judges, he changed his own, and concurred with them that it was robbery. He thought that the threat of immediately taking the profecutor before a magiſtrate was a ſtrong circumſtance; but he ſtill doubted upon thoſe caſes where there was a demand without any threat or violence.

Willes J. ſaid, he was under leſs difficulty of giving his opinion on this caſe, than he ſhould be to draw the line what threat ſhould or ſhould not be ſufficient in robbery. That there muſt be a felonious taking and an actual or conſtructive violence to conſtitute robbery. As to the felonious taking, the circumſtance of a ſtranger's calling upon a young man unknown to him in the ſtreet to give him a preſent, and threatening him if he refuſed, left no doubt of his felonious intent to take money from the profecutor, which he obtained by means of ſuch threats. (In alluſion to many caſes which had been urged by the priſoner's counſel, of money obtained from others by threats of various ſorts; as to diſcover to an huſband that the party had committed adultery with his wife; to inform a ſchoolmaſter or military officer of offences committed by a boy or ſoldier, and the like;) he obſerved, that no preciſe anſwer was neceſſary to be given; they muſt depend upon circumſtances, and eſpecially upon the queſtion, Whether any antecedent felonious deſign exiſted in the perſon obtaining money by ſuch means. That as to the queſtion, whether there were any actual or conſtructive violence; the idea of actual violence here muſt be given up, becauſe there was no touching of the profecutor's perſon. But he thought there was a conſtructive

violence. That the threat of taking him immediately before a magiſtrate was, under thoſe circumſtances, a threat of raiſing the mob on him. That the law was very liberal in conſtructive burglaries for the prevention of the offence; as making uſe of falſe pretences to get into the houſe, or fraudulently ſuing out the proceſs of courts, &c. or prevailing on a child by fraud to open the door. The laying of hands on the party he thought made no difference. That in Jones's caſe, which was very deliberately conſidered, that circumſtance was not relied on: that this was as much a violence in reality on the party: and conſtructive violence ſupplied the place of actual violence.

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Gould J. ſaid, that he was much diſpoſed to cloſe with the opinion thrown out that money obtained under a terror impoſed by a charge either affecting life or corporal puniſhment, would amount to robbery. Robbery originally meant an actual and violent taking immediately from the perſon; but in proceſs of time the Judges found it neceſſary to ſupply the place of an actual taking from the perſon; and a taking in his preſence was holden to be the ſame thing. That there were many other caſes of conſtructive taking mentioned in Francis's caſe. That when a man *animo furandi* demanded money, whether he ſaid, "give me your money," "make me a preſent," or words of the ſame import, it was robbery. In Crompt. Juſt. 31 *b.* a demand of money, and obtaining it without a weapon or force uſed, was holden to amount to robbery. The grounds were the demand of the offender *animo furandi*, and the apprehenſion in the party's mind that force would follow; which ſupplied the place of actual force. It was comprehended in the language and demand that force would be uſed. If nothing more had been ſaid to the profecutor than that he had better comply, it would have been a robbery: but beſides, there was a threat to take him before a magiſtrate. That there was no authority which ſaid that a battery was neceſſary: that an illicit demand of money *animo furandi* was an aſſault; and a threat to take a party before a magiſtrate was a threat of actual force. The priſoner threatened to uſe that force which he was maſter of to force and drag the profecutor before a magiſtrate.

Com. Rep. 478.

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Lord Ch. Baron *Skynner* thought there was ſufficient evidence of a felonious aſſault to make the party deliver his money, ſo as to amount to robbery. The attack implied violence, and menaces equal to violence amounted to ſuch in conſtruction of law; and if they anſwered the purpoſe, came within Lord Hale's definition of robbery. That the menace in queſtion was moſt likely to produce the effect of compelling the proſecutor to part with his money: no menace being better calculated to unman the mind as had appeared in ſo many inſtances.

Lord Ch. J. *De Grey* ſaid, that as far as this caſe went he had no difficulty, and beyond that he thought it unneceſſary to give any opinion. It was agreed that actual force or terror was neceſſary to conſtitute robbery. Actual force perhaps there was none in this caſe; but there was terror. He thought it extraordinary that no caſe had decided of what nature the terror muſt be. Mr. Juſtice Foſter had ſaid, there muſt be violence or terror for the ſafety of the perſon, but he did not ſay that the fear muſt proceed from the perſon threatening: If there were a fear for the perſon of the party, he conſidered that ſufficient. That there was no neceſſity for a weapon drawn was a rule well laid down by Hawkins and Lord Hale; and the aſſault ſpoken of by them was evidently a conſtructive and not an actual aſſault. That Lord Hale did not ſeem to think it neceſſary there ſhould be a terror of life. So it appeared from Harman's caſe, where the reaſon alledged why it did not amount to robbery was becauſe the fear aroſe after the purſe was taken; which afforded a fair inference that it was of ſuch a nature as would have conſtituted robbery, if the money had been delivered in conſequence of it. That here the priſoner's intent was clearly felonious, and the mean he employed to obtain the money was a threat of danger to the proſecutor's perſon, if he did not comply. If he refuſed, he was to be carried before a magiſtrate by force. The threat implied that the offender would ſwear to the truth of the charge; the neceſſary conſequence of which was commitment; and if the charge were believed on the trial, the puniſhment was corporal. That it would be dangerous to ſay how far the terror muſt extend, or what was ſuch as might fall *in conſtantem*

Poſt. 726, 736.

ſtantem virum. In caſes where no weapon was uſed there might really be no terror. However the caſe in queſtion clearly amounted to robbery. Suppoſe a threat to ſhoot a man's wife or children at a little diſtance from him, muſt he not be in terror? He reſerved giving any opinion as to the caſes of threats to deſtroy a man's houſe or property; but thought that the expreſſion of a man's not being left a free agent was too looſe and ambiguous. The rule he would adhere to was that expreſſed in Hale and Hawkins. There was no ground, however, to warrant laying it down as a general rule, that the danger muſt ariſe from the perſon threatening: nor could he agree that there muſt be a well grounded terror; though if it were neceſſary, he thought this was ſuch; and he was clearly of opinion that the caſe amounted to robbery.

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Lord *Mansfield* C. J. was of opinion, that the true nature and original definition of robbery was a felonious taking of property from the perſon of another by force: in which there were three things to be obſerved: firſt, That it muſt be done felonioufly, which went to the intent of the taker. Secondly, That it muſt be taken from the perſon of another. Thirdly, That it muſt be taken by force. That all the reſt which was to be found in the books on this ſubject formed no part of the definition of the offence, but aroſe from legal conſtruction, in order to prevent an evaſion of the law. That as to the felonious intent there could be no doubt: whatever was done afterwards was the mode of executing the intent. That if the conſtruction of the law had been confined to a literal adherence to the definition of robbery, many ways of avoiding it would have been left open. If a man were knocked down and his money taken from him while he remained inſenſible, that would fall within the true definition of robbery, although there could be no fear exiſting in the mind of the party robbed. Again, if the owner threw down his money, or had it not about his perſon at the time, though it were in his preſence; theſe by conſtruction have been holden to be equivalent to an actual taking from the perſon. So as to the force, conſtructive force was equivalent to actual force. If the owner delivered his money, or were made to ſtand ſtill whilſt the thief took

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it up, that amounted in conſtruction of law to a taking by force; becauſe it was the effect of terror operating on the mind which induced his acquieſcence: and if the property were delivered or ſuffered to be taken by the owner through terror impreſſed on his mind, and in order to get rid of that terror, it was a taking by force, and amounted to robbery. That it was clear that no actual danger to the owner need exiſt: for if a tinder-box or candleſtick were uſed inſtead of a piſtol, it was ſtill robbery. That here the ſtrongeſt perſonal force was uſed. The proſecutor was accoſted by a perſon whom he had never ſeen before: he diſcovered him to be a villain: the ſtranger demanded a preſent: that alone would have been ſufficient; but he went further, and told the proſecutor that *he had better* comply with the demand: that was a threat. Then he threatened he would carry him before a magiſtrate. Was the proſecutor bound to believe that he was in his way to the magiſtrate, or that the priſoner would go no further than he threatened? He thought this was a threat of perſonal injury. The inſtance of terror mentioned in Hale was not ſo ſtrong as this: the purſe was taken there without the owner's knowledge: and upon his afterwards ſeeing it in the thief's hand, and demanding it, the latter ſaid, "Villain, if thou ſpeakeſt of thy purſe, I "will pluck thy houſe over thy ears, and drive thee out of "the country, as I did John Somers." This, ſaid Lord Hale, was ruled not to be robbery; becauſe the *words of menace* were uſed after the taking of the purſe. From thence it was plainly to be inferred, that it was ſuch a menace as, had the purſe been obtained by means of it, would have amounted to robbery. That in truth when a villain came and demanded money, no one knew what he would do: and when it was obtained by threat, it was a conſtructive violence. That it was manifeſt that the mode adopted by the priſoner was a mere evaſion, as he ſuppoſed, of the law, and intended as ſuch: his primary intent was to obtain money by a highway robbery. Ultimately all the Judges held that it was robbery.

Poſt. 736.

O.B. May 10th, 1779, Seſſ. Pap. No. 5, p. 3. Serjt. Forſter's MS.

In the May ſeſſion following, Willes J. in giving judgment, after noticing the definition of robbery by Lord Hale and others to the ſame effect, obſerved that the following ingredients

ingredients were neceſſary to conſtitute that offence: 1. A felonious intent, or *animus furandi*. 2. Some degree of violence or putting in fear. 3. A taking from the perſon of another. He obſerved that he ſhould confine himſelf to ſhew that the priſoner's offence came within the above deſcription, as the Judges did not mean to draw the line as to what ſhould or ſhould not conſtitute robbery; and therefore they declined giving an anſwer to the caſes put by the priſoner's counſel; ſaying that every caſe muſt depend upon its own circumſtances; but that the facts in this caſe warranted them in ſaying; as to the firſt point, that there was a felonious intention in the priſoner to rob the proſecutor. Upon the ſecond point, that the putting in fear was not neceſſary to be laid in the indictment; ſo that the fact were charged to be done violently and againſt the will of the party. Nor was the circumſtance of actual fear neceſſary to be proved; but that the law, *in odium ſpoliatoris*, would preſume it. In like manner it had been often holden that actual violence was not neceſſary, but that conſtructive violence was ſufficient: for where ſuch a terror was impreſſed on the mind as did not leave the party a free agent; and in order to get rid of that terror, he delivered his money, it was robbery. It was alſo clear that no actual danger was neceſſary; for a man might commit a robbery without having any offenſive weapon; and though a tinder-box or candleſtick were uſed. For when a villain came and demanded a man's money, no one knew to what length he would proceed. That here the ſituation of the proſecutor was that of a young gentleman accoſted at night in the ſtreet by a ſtranger, whom he had never before ſeen, and muſt have ſuſpected to be a villain, who demanded a preſent. Even that ſeemed ſufficient; but the ſtranger went on and told him that he had better comply, &c. That was a threat of a perſonal injury; for he had every thing to fear, in being dragged through the ſtreets as a culprit charged with an unnatural crime. That, therefore, was a reaſonable fear; which might operate *in conſtantem*, as well as *in meticuloſum virum*. It had, he ſaid, been urged on behalf of the priſoner, that this was a fraudulent extorting, and not a taking by violence. But in many caſes fraud would ſupply the want of violence;

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(1 Leach, 231. more at large.)

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violence; as in the caſe of burglary, where breaking was neceſſary to be laid in the indictment, and yet getting admiſſion into a houſe under colour of law or pretence of taking a lodging or buſineſs had been often holden ſufficient evidence of the breaking into the houſe. But the Judges, he obſerved, did not entirely determine this caſe on that ground, but were of opinion that there was proof of a conſtructive violence, which they thought was ſufficient. As to the third point, that there was clearly a taking from the perſon; though a taking in the preſence of the party would have been ſufficient. After citing the above-mentioned caſes of Jones, Brown, and Harrold, he obſerved that in thoſe caſes there was this difference from the preſent, that there was ſome actual violence proved, as taking by the collar or arm: but that the Judges all held that that did not make any material diſtinction, but that ſufficient was proved in this caſe for the jury to find the priſoner guilty of robbery.

Ante, 714, 715.

Staple's caſe, O. B. 1779.

In the October ſeſſions following, John Staples was convicted of a ſimilar offence, and executed.

Hickman's caſe, O. B. July 1783, MS. Buller J. MS. Crown Caſ. Ref. and MS. Jud.

It is robbery to extort money from a perſon by threatening to charge him with an unnatural crime; though he parted with his money only from fear for his character and from no other fear.

O. B. Feb. 1784, Seſſ. Pap. p. 295. (S. C. 1 Leach, 310.)

Daniel Hickman was indicted for robbing John Millard in St. James's Palace of two guineas. He obtained the money from the proſecutor by charging him with a ſimilar crime as in the foregoing caſes; and by threatening that if he did not make him ſatisfaction he would bring a ſerjeant and a file of men to take him up before a magiſtrate. The proſecutor ſwore that he parted with his money for fear of loſing his character, and that he had no other fear. The jury found the priſoner guilty: but as ſome on the bench thought that this caſe differed from that of Donally, it was reſerved for the opinion of the Judges; who in November 1783 were all of opinion that it was robbery. Aſhhurſt J. afterwards delivered their opinion; that this did not materially differ from the caſe of Donally; for that the true definition of robbery is the ſtealing or taking from the perſon or in his preſence property of any amount, with ſuch a degree of force or terror as to induce the party unwillingly to part with his property: and that whether the terror aroſe from real or expected violence to the perſon, or from a ſenſe of injury to the character, the law made no kind of difference: for to moſt men the idea of loſing their fame and reputation was equally

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equally if not more terrific than the dread of perſonal injury. That the principal ingredient in robbery was a man's being forced to part with his property. And that the Judges were unanimouſly of opinion, that upon the principles of law and the authority of former deciſions, a threat to accuſe a man of having committed the greateſt of all crimes was a ſufficient force to conſtitute the crime of robbery by putting in fear.

§ 131. *On threat to burn houſe.*

R. v. J. Aſtley and E. Aſtley, Stafford Sum. Aſſ. 1792, cor. Groſe J. MS. Buller J. and MS. Jud.

The priſoners threatened to bring a mob from Birmingham (then in a ſtate of riot and diſturbance), and burn the proſecutor's houſe down if he did not give them money, which he did under fear of that threat; held robbery.

No caſe however has gone further than a very recent one of James and Ezekiel Aſtley, who were indicted for robbing Jonathan Grundy. It appeared that the priſoners and a perſon unknown went to a public houſe near Birmingham, during the time of the late riots, which was three or four hundred yards from Mr. Grundy's houſe, early in the morning, where one of them ſaid that they were going up to Mr. Grundy's houſe, "and if he did not turn out the whack, his houſe would be down by two o'clock in the morning;" on which the ſtranger obſerved that he himſelf would do it; that he was the head of the mob, and had 3 or 400 men at command at any time; with other like diſcourſe. They all departed towards Mr. Grundy's houſe; but before they arrived there they ſaw his ſervant at a little diſtance from it, whom they accoſted: James Aſtley telling him he was come as a friend to let Mr. Grundy know that this man (the ſtranger) was the head of the mob, and the firſt man who had entered all the places which were deſtroyed at Birmingham. They then ſeeing Mr. Grundy come out of his houſe, pulled off their hats, and ſhouted Church and King. Mr. Grundy did the ſame, advancing towards the priſoners in much alarm, when the ſtranger accoſted him, ſaying, "I am come out of friendſhip to you, Mr. Grundy, to let you know your houſe is marked to come down to-morrow morning at two o'clock, I am the head of the mob: they are 2000 ſtrong in Birmingham. I muſt have ſomething to make my men drink. I can bring 2 or 300 in an hour's time, or keep them back." Mr. G. ſaid, "As to ſomething to drink, you ſhall have any thing you have a mind for." The ſtranger ſaid, "I muſt have money." Mr. Grundy pulled out half-a-crown from his pocket, and offered it to him; but the ſtranger refuſed it,

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it, and turned away with expreſſions of contempt. Mr. Grundy then aſked what he wanted; the ſtranger replied, he muſt have 20 guineas; and on Mr. Grundy ſaying that he had not ſo much in his houſe, the other told him, that if he did not give him ſomething handſome for his men to drink, his houſe ſhould come down. Mr. Grundy ſaid, that he might have 9 or 10 guineas, which the ſtranger aſked to ſee: and as Mr. Grundy was taking his purſe out of his pocket, James Aſtley told him he might depend upon it that the other man was the head of the mob, and the like ſort of diſcourſe which had paſſed before concerning his power; particularly, that he was the firſt man who had entered every houſe that had been deſtroyed. Mr. Grundy was ſo ſtruck with that expreſſion that he immediately took the money out of his purſe (9 guineas and a half,) which he gave to the ſtranger; who counted it, and demanded to have ſomething to drink. They all went then into Mr. Grundy's houſe, where they had liquor, and in going away aſſured him that he ſhould be protected. Mr. Grundy ſaid, that he was greatly alarmed, but not for his perſon: that no injury was threatened to his perſon: that when he delivered his money his apprehenſion was, that if he had refuſed ſo to do, the priſoners would have gone to Birmingham, and have returned with other perſons, and pulled down his houſe and plundered it before he could have removed his wife, who was in the houſe in great agitation, as the priſoners had threatened, and in the ſame manner as different houſes in Birmingham had been before pulled down. It appeared that the priſoners had a ſmall ſhare of the money afterwards. It was objected on their behalf, that there was no evidence of robbery, inaſmuch as the proſecutor did not deliver his money from any immediate fear of danger to himſelf or his property, but from an apprehenſion of future injury to his houſe by pulling it down. And the counſel for the Crown admitting it to be a new caſe, Groſe J. propoſed to have a ſpecial verdict found; but on account of the priſoners' ſituation, it was agreed that the truth of the evidence ſhould be left to the jury, and if they ſhould find the priſoners guilty, the judgment ſhould be reſpited, and the facts ſubmitted to the Judges for their opinion, whether the evidence amounted to robbery. The jury found

found the priſoners guilty; ſaying that they were ſatisfied that Mr. Grundy did not deliver his money from any apprehenſion of danger to his life or perſon, but from an apprehenſion that if he refuſed, his houſe would at ſome future time be pulled down, as the priſoners and the ſtranger threatned, in the ſame manner as other houſes in Birmingham had been before. In Michaelmas term 1792 a majority of the Judges held this to be robbery (*a*).

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I find a note of a caſe very ſimilar to the above determined by the Judges in 1773. One Simons, who had been a ringleader in the late riots among the tinners in *Cornwall*, came with above ſeventy of his companions to the houſe of one Thomas Rowe, and ſaid, they would have from him the ſame as they had had from his neighbours, which was one guinea, elſe they would tear down his mow of corn and level his houſe. He gave them a crown to appeaſe them; the priſoner ſwore he would have 5 s. more, which Rowe, being terrified, gave him. They then opened a caſk of cyder by force, and drank part of it, and eat his bread and cheeſe, and the priſoner carried away a piece of meat. He was indicted for robbing Rowe of 10s. in his dwelling-houſe by aſſault, and putting him in fear. But there was alſo another count, for putting the proſecutor in fear, and taking from him in his dwelling-houſe a quantity of cyder, pork, and bread: and it was holden robbery in the dwelling-houſe.

R. v. Simons, Eaſt. T. 1773, Serjt. Forſter's MS. *vide* another caſe againſt the ſame priſoner on a different indictment. Ante, p. 712. *On threat to tear down corn and level houſe, &c.*

Another caſe of the like ſort occurred upon the trial of ſome of the rioters in the year 1780. The indictment was for robbing the proſecutor Daking in his dwelling-houſe; into which Daking ſwore that the priſoner William Brown and another man entered; and being aſked by him what they wanted, Brown having a drawn ſword in his hand ſaid with an oath, "Put one ſhilling into my hat, or I have a party that can deſtroy your houſe preſently:" on which the proſecutor gave him a ſhilling. *Another witneſs* preſent ſwore, that the priſoner alſo uſed the expreſſion, that "if he (Daking) would keep the blood within his mouth, he muſt give the ſhilling." The offence was holden to be robbery.

Brown's caſe, O. B. June 1780, cor. Nares J. MS. Buller J.

(*a*) Qu. If the threat of burning down a man's dwelling-houſe by a mob do not in itſelf convey a threat of perſonal danger to the occupiers?

All

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All theſe however were caſes of urgency: the threats were of immediate, or ſpeedy and ſignal miſchief, and the execution of them could not have been impeded by any ordinary prudence or firmneſs, or by any recurrence to the protection of the law. But the following caſe is of another deſcription.

Rex v. Wood and Knewland, O.B. Jan. 1796, cor. Heath J. MS. Jud. *Perſons under pretence of an auction get a woman into a houſe and compel her, by threats of carrying her before a magiſtrate and to priſon for not paying for a lot pretended to have been bid for by her, to pay them* 1*s. through fear of priſon, and for the purpoſe of obtaining her liberty, but without fear of any other perſonal violence: held dureſs and not robbery.*

Nathaniel Wood and James Knewland were indicted for robbing Sarah Wilſon in the dwelling-houſe of Knewland. Upon the evidence it appeared that as the proſecutrix was paſſing by the door of an auction-room in the Strand, ſhe was ſolicited by Wood to enter, and on her repeatedly declining it he puſhed her into the room, in which about twenty perſons were aſſembled. Here ſhe was much preſſed to bid for ſome articles, which ſhe refuſed, alleging the force which had been put upon her; and attempted to quit the room; but this was prevented by the company: when finding ſhe could not otherwiſe obtain her liberty ſhe bid 6d., and again attempted to depart; but was prevented by Knewland. And the auctioneer having knocked down the goods at 14s. 6d. Knewland ſaid they were her's and he muſt have the money as they were knocked down to her. On her again complaining that ſhe had been forced into the room, and proteſting that ſhe had not the money, Knewland ſaid, if ſhe could not pay all ſhe muſt leave her bundle, or pay half-a-guinea till ſhe could raiſe the remainder. She however refuſed both: on which he ſaid, *that ſhe ſhould go to Bow-ſtreet, and from thence to Newgate, there to be impriſoned till ſhe could raiſe the money.* He then ordered the door to be ſhut and a conſtable ſent for. The priſoner Wood ſoon after entered with a pretended conſtable, who was directed by Knewland to take her to Bow-ſtreet, and from thence to Newgate. The conſtable inſiſted on being paid for his trouble, and threatened to take her away unleſs ſhe paid 1s., Knewland all the while having one hand on her ſhoulder and the other on her bundle. She then paid the conſtable 1s., *being in bodily fear of priſon,* for the purpoſe of obtaining her liberty. Being aſked whether ſhe were not impreſſed with fear by Knewland laying hold of her and her parcel, ſhe anſwered in the negative; ſaying, *that ſhe only parted with her money to avoid being carried to Bow-ſtreet, and from thence to*

to Newgate; and not out of fear or apprehenſion of any other perſonal force or violence. The jury were directed, that if they believed this to be a combination and conſpiracy of the priſoners to procure the money of the proſecutrix under the pretence of an auction, they ſhould find them guilty; which they accordingly did. And the queſtion was reſerved for the opinion of the Judges, Whether the facts ſtated amounted to robbery? In Hilary term 1796, eight Judges being aſſembled, the conviction was holden wrong: conſidering this as the caſe of a ſimple dureſs, for which, according to all the books, the party injured had a civil remedy by action, which could not be if the fact amounted to felony. In the courſe of the debate Groſe J. obſerved, that though he did not agree with the Birmingham caſe, where money obtained by a threat to bring a mob and burn the proſecutor's houſe was holden to be robbery; yet if that were law he could not diſtinguiſh this caſe from it on principle. But Eyre C. J. ſaid, that this was very different from the Birmingham caſe; and nothing more than ſimple dureſs. That the queſtion in ſuch caſes for the jury was, Whether the money were delivered under the impreſſion of terror? If the terror were of ſuch a kind as to diſable the party from reſiſtance, it was a taking by force. But that was not the caſe here. The proſecutrix had a choice of difficulties, and choſe to pay her money rather than undergo the trouble of being carried before a magiſtrate.

Ch. XVI. § 131. *Fear, of what nature.*

(Abſent Aſhhurſt J. Hotham B. Perryn B. and Buller J.)

R. v. Aſtley, ante, p. 729.

In the February following, the opinion of the Judges was delivered by Aſhhurſt J.; in the courſe of which he obſerved, that there was no reaſon for ſuch a degree of terror in this caſe as to induce the proſecutrix to part with her money; ſhe might have known that having done no wrong, if ſhe had been taken to priſon, the law would have taken her under its protection and ſet her free. And that the law did not allow the fear of being ſent to priſon to be a ſufficient ground of terror to conſtitute a robbery.

Feb. 1796, O.B. Seſſ. Pap. p. 408. (S. C. 2 Leach, 833.)

§ 132. *Where no force, there muſt be terror in fact.*

If the property be not taken by actual violence, but the owner deliver it in conſequence of prior threats, ſuch delivery muſt be enforced by terror actually felt at the time; otherwiſe there is neither actual nor conſtructive violence in the

Ch. XVI. § 132. *Fear in fact, where no violence.*

the taking, and conſequently no robbery. By this principle the caſe before mentioned of delivering money upon a compulſive oath muſt be governed.

Vide ante, f. 129. Reane's caſe, O. B. June, 1794, cor. Perryn B. MS. Jud.

If the property be not taken by violence nor parted with thro' fear, it is no robbery, though there were ſufficient legal and reaſonable ground for fear, as upon a threat to charge one with an unnatural crime.

James Reane and another were indicted, the one for a robbery on the highway, the other as acceſſary before the fact. The proſecutor depoſed, that on the 19th of May 1794 he met the priſoner Reane, who was an entire ſtranger to him, in the ſtreet, who aſked him for money, and ſaid he was in great diſtreſs. The proſecutor did not give him any thing, and left him muttering ſomething which he did not diſtinctly hear. The next day, meeting Reane again in the ſtreet, he again aſked for money; and being refuſed, told the proſecutor it ſhould be worſe for him. A few days afterwards Reane accoſted the proſecutor again in the ſtreet, and talked of his having committed indecencies with him, and that ſomebody had ſeen it. The proſecutor ſaid he knew not what he meant, and went away. The next day he received a letter from Reane containing the like inſinuation, and mentioning his place of reſidence; in conſequence of which the proſecutor was induced to write to him, appointing to meet him in the ſtreet to hear what he had to ſay. He accordingly met him there, when Reane told that he could prove that he had committed indecencies with him in the Park, and that a third perſon had ſeen it. The proſecutor was ſtruck with the charge. At the ſame time the other priſoner Watkins came up to them and repeated the ſame charge, of which he ſaid he had been the witneſs. The proſecutor then obſerved to them that it was a horrid charge. On which Watkins ſaid, "You have great intereſt with the preſent Government; and I ſhould be glad of a place in the cuſtoms or exciſe, or where clerks were." The proſecutor ſaid he would get him one, and Watkins went away. Reane then ſaid, "You have given that man a certainty; I will have one too." The proſecutor anſwered that he ſhould. The next day Reane told him that he had conſidered what he would have, which was 20*l.* and a bond for 50*l.* annually. The proſecutor replied that he could not do it then, but if he would wait a few days he would bring him the money and the bond. He afterwards met Reane and offered him the money, which he would not

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not take without the bond; upon which the proſecutor gave him both. This was the ſubſtance of the tranſaction. The proſecutor further depoſed, that at the beginning of the buſineſs he apprehended injury to his perſon or character; but at the time when Reane took the money and bond he had no ſuch apprehenſion, but parted with both for the purpoſe of bringing the priſoners to juſtice, and with that view only. That he did not deliver the money voluntarily, nor ſhould have parted with the money or bond unleſs for the ſeveral applications which had been made to him by the priſoners, but that he was under no fear or apprehenſion when he parted with them. It was objected on the part of the priſoners, that to conſtitute robbery there muſt be violence or fear of danger to the perſon or character, and that ſuch violence or fear muſt exiſt at the time when the money was parted with; which did not exiſt in this caſe: and further, that Reane had been entrapped into the commiſſion of the offence. The priſoners, however, were found guilty; but judgment was reſpited to take the opinion of the Judges upon the caſe. In Trinity term 1794 the Judges (abſent Buller J.) inclined to think that this was not robbery; there being neither violence nor fear at the time when the proſecutor parted with his property. Eyre C. J. obſerved, that it would be going a ſtep further than any of the caſes to hold this to be robbery. The principle of robbery was violence: where the money was delivered through fear, that was conſtructive violence. That the principle he had acted upon in ſuch caſes was, to leave the queſtion to the jury, Whether the defendant had by certain circumſtances impreſſed ſuch a terror on the proſecutor as to render him incapable of reſiſting the demand? Therefore when the proſecutor ſwore that he was under no apprehenſion at the time, but gave his money only to convict the priſoners, he negatived the robbery. That this was different from Norden's caſe, where there was actual violence: for here there was neither actual nor conſtructive violence. A man might be ſaid to take by violence who deprived the other of the power of reſiſtance, by whatever means he did it. And he ſaw no ſenſible diſtinction between a perſonal violence to the party himſelf, and the caſe put by one of the Judges of a man holding

Ante, 666.

Ch. XVI. § 132. *Fear at the time of the fact.*

holding another's child over a river and threatening to throw it in unleſs he gave him money. The Judges, however, thought the matter deſerving of further conſideration. But in Hilary term 1795 (abſent Buller J.), they held the conviction wrong; there being neither actual nor conſtructive violence.

§ 133. *Fear after the taking not ſufficient.* Harman's caſe, Hil. 17 Jac. 2. Roll. Rep. 154. 1 Hale, 534. Ante, 726.

It is not enough that the fear ariſe after the property is taken. Harman being on horſeback deſired Halfpenny to open a gap for him; and while he was ſo doing, Harman took the opportunity unperceived to pick his pocket of his purſe. Halfpenny turning round and ſeeing the purſe in Harman's hand, demanded it of him, who then menaced Halfpenny (in the manner before mentioned) and went away with the purſe. On an indictment for robbery, the priſoner was holden guilty of ſimple larceny only; the property being obtained by ſtealth, and not by violence or putting in fear; the words of menace being uſed after the taking.

IV. *Of Grand and Petit Larceny and Robbery, and their Puniſhments.*

1. *Grand and Petit Larceny.*

§ 134. *Grand and petit larceny.* 1 Hale, 503. 530. 2 Inſt. 189. 2 MS. Sum. 255. Staundf. 24. b. *Vide* Ld. Lytt. Hiſt. of Hen. 2. 2 vol. 4to. 470. 4 Blac. Com. 229, 238. (*Vide* ſt. Weſtm. 1. c. 15 and Weſtm. 2. c. 25.) Hale ut ſupra, & 517. 4 Blac. Com. 237.

In grand larceny the value of the property taken muſt be above 12d. If it be only of that value or under, it is but petit larceny: and in theſe proſecutions the valuation ought to be reaſonable; for when the ſtat. of Weſtm. 2. c. 25. was made, ſilver was but 20d. an ounce, and at the time Lord Coke wrote, it was worth 5s. and it is now higher (*a*). The nature of the offence is the ſame in both; they are both felony, though they differ in the degrees of their puniſhment, and in ſome other particulars. At common law the judgment for grand larceny is of death, but the party may pray the benefit of his clergy, unleſs in caſes

(*a*) I am informed that the average price of late years has been about 5*s.* 3*d.* but in the courſe of the laſt war it roſe at times to about 6*d.* more.

where

where he is ouſted by particular ſtatutes, which have been already noticed: and he ſhall alſo loſe his goods. In petit larceny the offender was only ſubject to whipping, or other corporal puniſhment leſs than death, by which is now underſtood impriſonment: and in this caſe alſo the party forfeits his goods on conviction. But in robbery, whatever be the value, the judgment is of death. But though every larceny include a treſpaſs, yet upon an indictment for larceny, if the taking appear not to be felonious, though amounting to a treſpaſs, the defendant is entitled to a general acquittal.

Ch. XVI. § 134. *Grand and petit larceny.* 3 Inſt. 69. 218. 2 MS. Sum. 257. 1 Hale, 533, 2. 2 Hale, 349. 1 Hawk. ch. 34. ſ. 9. Ante, ſ. 125. Joiner's caſe, O. B. 1664. Kel. 29.

§ 135. *By ſtatute.*

In the puniſhment of grand and petit larceny ſeveral alterations have been introduced by ſtatute, many of which have been already enumerated in ſome of the preceding diviſions of this head of offences. To which may be added in this place the general ſtatute of the 3 W. & M. c. 9. ſ. 2. which enacts, that "if any perſon or perſons be indicted "for any offence, for which by virtue of any former ſtatute "he or they are excluded from the benefit of clergy, if he "or they had been thereof convicted by verdict or confeſ-"ſion; if he or they ſhall ſtand mute, or will not anſwer "directly to the felony, or ſhall challenge peremptorily "above 20, or ſhall be outlawed thereupon, he or they ſhall "not be admitted to the benefit of clergy." This does not extend to larcenies which have been ouſted of clergy by ſubſequent ſtatutes.

3 W. & M. c. 9. ſ. 2. *Standing mute, &c. ouſted of clergy, where offender before ouſted on conviction.*

By the ſtat. 18 Eliz. c. 7. ſ. 3. perſons to whom clergy is allowed, may, for their further correction, be impriſoned for any time not exceeding a year, in the diſcretion of the juſtices before whom ſuch allowance is had.

18 Eliz. c. 7. ſ. 3. *Impriſonment not exceeding a year.*

The ſtat. 5 Ann, c. 6. ſ. 2. enacts, "that where any per-"ſon or perſons ſhall be convicted of any theft or larceny, "and ſhall have the benefit of this act allowed thereon, or "ought, by the laws in force before the making of the ſaid "act (*a*), to be burnt in the hand for ſuch offence, ſhall be "burnt in the hand as formerly; and the judge or juſtices, "before whom ſuch offender or offenders ſhall be tried and "convicted, ſhall alſo at their diſcretion adjudge that ſuch

5 Ann. c. 6. *Burning in the hand, and commitment to the houſe of correction.*

(*a*) The firſt ſection of this act repeals the ſtat. 10 & 11 *W.* 3. *c.* 23. which ſubjected certain offenders guilty of theſts or larcenies, who were allowed their clergy, to be burnt on the left cheek inſtead of the hand: which is the act here

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" offender, &c. ſhall be committed to ſome houſe of correc-
" tion or public work-houſe within the county, city, &c.
" where ſuch conviction ſhall be, there to remain for any
" time not leſs than ſix months nor exceeding two years, to
" be accounted from ſuch conviction; and ſuch offenders
" ſhall be there kept at hard labour during ſuch time as ſhall
" be ſo adjudged and recorded:" and in caſe of refuſal or neglect to labour as they ought, the maſter or keeper of ſuch houſe, &c. is required to give them due correction. By ſ. 3. in caſe of eſcape a method is pointed out of inflicting further puniſhment on the delinquent. Under this ſtat. the Judge has a diſcretion whether he will impriſon at all or not.

Ex parte Brownfell, B. R. Tr. 18 G. 3. 2 MS. Sum. 257.

Tranſportation. 4 Geo. 1. c. 11. ſ. 1. *Vide* ante, ſ. 10.

By ſtat. 4 Geo. 1. c. 11. "where any perſon or perſons ſhall be
" convicted of grand or petit larceny, or any felonious ſtealing
" or taking of money or goods and chattels, either from the
" perſon or the houſe of any other, or in any other manner,
" and who by law ſhall be entitled to the benefit of clergy,
" and liable only to the penalties of burning in the hand or
" whipping (except perſons convicted for receiving or buy-
" ing ſtolen goods, knowing them to be ſtolen), it ſhall and
" may be lawful for the court before whom they were con-
" victed, or any court holden at the ſame place, (or holden
" at any other place for the ſame county, &c. by ſtat. 6
" Geo. 1. c. 23. ſ. 1. with the like authority,) if they think
" fit, inſtead of ordering any ſuch offenders to be burned in
" the hand or whipped, to order that ſuch offenders ſhall be
" ſent to ſome of his Majeſty's colonies and plantations in
" America, for the ſpace of ſeven years." And the ſame courts ſhall have power to make over ſuch offenders by order of court to the uſe of any perſon who ſhall contract for their tranſportation. And now by ſtat. 19 Geo. 3. c. 74. ſ. 1. when any perſons are convicted in England or Wales of grand or petit larceny, or any other crime puniſhable by tranſportation to America, the Court may, if it thinks fit, order them to be tranſported to any parts beyond the ſeas, either in America or elſewhere, not exceeding ſuch terms as they were liable to be tranſported for to his Majeſty's colonies in America.

19 G. 3. c. 74. *Vide* general title *Tranſportation.*

And

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And by ſ. 27. of the ſtat. 19 G. 3. c. 74., "for the more ſe-
" vere and effectual puniſhment of atrocious and daring offen-
" ders, where any male perſon at any ſeſſion of oyer and ter-
" miner or gaol delivery to be holden for London, or any
" county in England, or for the royal franchiſe of Ely, or at
" any great ſeſſion for the county palatine of Cheſter, or within
" the principality of Wales, ſhall be lawfully convicted of
" grand larceny, or any other crime except petit larceny,
" for which he ſhall be liable by law to be tranſported to
" any parts beyond the ſeas, it ſhall and may be lawful for
" the court before whom he ſhall be ſo convicted, or any
" court holden for the ſame place with like authority, if it
" thinks fit, in the place of ſuch puniſhment by tranſporta-
" tion, to order and adjudge that ſuch perſon, appearing to
" be of competent age and free from any bodily infirmity,
" ſhall be puniſhed by being kept on board ſhips, &c. (i. e.
" the hulks), and be employed in hard labour, &c. in the
" Thames, or any other navigable river or port, &c. in Eng-
" land appointed by his Majeſty in Council, &c. for ſuch term
" not leſs than one year, nor exceeding five years; or in
" caſe ſuch offender ſhall be liable to be tranſported for 14
" years, not exceeding ſeven years, as ſuch court ſhall or-
" der and adjudge."

Hard labour in the hulks.

See other general proviſions, tit. *Felony*, &c.

And by the ſame ſtat. ſ. 3. "when any perſon ſhall, in any of
" the courts beforementioned (*a*), be lawfully convicted of any
" felony within the benefit of clergy, for which the party is li-
" able to be burned in the hand, it ſhall and may be lawful for
" the court before whom any perſon ſhall be ſo convicted, or
" any court holden for the ſame place with the like authority,
" if they think fit, inſtead of ſuch burning to impoſe upon
" ſuch offender a moderate pecuniary fine: or otherwiſe it
" ſhall be lawful, inſtead of ſuch burning (except in caſe of
" manſlaughter), to order and adjudge the offender to be
" whipped publicly or privately, once or oftener, but not ex-
" ceeding three times; ſuch private whipping to be in the
" preſence of not leſs than two perſons beſides the offen-
" der and officer who inflicts it; and in caſe of females, in
" the preſence of females only;" and ſuch fine or whip-

Fine in lieu of burning;

or whipping in lieu of burning, except in manſlaughter.

(*a*) i. e. "at any ſeſſion of oyer and terminer, or gaol delivery, or at any quar-
" ter or general ſeſſion of the peace, &c. within England, or at any great ſeſſion
" for the county palatine of Cheſter, or within the principality of Wales."

Ch. XVI. § 135. *Grand and petit Larceny.*

ping shall have the same legal effect as burning. And by s. 4. nothing in this act shall be taken to abridge the power of the Court to imprison (as before,) if it thinks fit.

By stat. 31 Geo. 3. c. 35. no person shall be an incompetent witness by reason of a conviction for petit larceny.

§ 136. *Whether grand or petit larceny.* Ante, 736.

I have before thrown out a hint touching the propriety of the jury's assessing a reasonable value on the goods stolen; besides which some other circumstances remain to be noted in drawing the line between grand and petit larceny. 2 MS Sum. 256. 1 Hale, 530, 1. 1 Hawk. ch. 33. s. 32, 33. Staundf. 24. b. If two steal goods above the value of 12d. from the same person at the same time, this is grand larceny in both; for it is one entire felony, and both are guilty of the whole. But if the acts of each were several at several times, and the goods taken at each time of the value of 12d. only or under, though from the same person, and put in the same indictment; it is only petit larceny in each. And so it seems the practice is, if one steal goods of the same person at different times, of the value of 12d. or under each time, but altogether exceeding that value: for though some writers on the crown law consider that in strictness it amounts to grand larceny, yet that may be well doubted; for as no number of grand larcenies being distinct acts, which when added together would make such a sum as amounts to a capital felony if taken at one time, under certain circumstances of aggravation; if taken at several times, will, under the same circumstances, deprive the party of clergy; so no number of distinct petit larcenies amount to grand larceny. And so it was holden in Petrie's case, on an indictment on the stat. 12 Ann. c. 7. for stealing to the amount of 40s. in a dwelling-house. The prisoner was servant to the prosecutor, and had at different times purloined his master's property to a very considerable amount; but it did not appear that he had ever taken to the amount of 40s. at any one time: on this ground he was acquitted of the capital part of the charge by the direction of the Court. And the same point was ruled by Ashhurst J. in a subsequent case. But it may vary the consideration, if the property of several persons, lying together in one bundle or chest, or even in one house, be stolen together at one time; for there the value of all may

Rex v. Petrie, O. B. Jan. 1784, 1 Leach, 329.

Rex v. Farley, Surrey Lent Ass. 1786, 2 MS. Sum. 256. 1 Hale, 531.

be put together so as to make it grand larceny, or to bring it within a statute that ousts clergy, for it is one entire felony. Ch. XVI. § 136. *Grand and petit larceny.*

§ 137. *Jury to ass's the value.* Atkinson's case, Lydia Hudson's case, O. B. Dec. 1740, Serjt. Forster's MS.

It was said by Willes C. J. and Chapple J., that upon taking verdicts on indictments for larceny, the jury ought always to be asked as to the value; because if they did not find the value, it would be like taking a verdict in a civil action for the plaintiff, without ascertaining the amount of the damages. For the value found by the jury ascertained the degree of the offence, whether it were grand or petit larceny, or whether it were grand larceny, excluded clergy or not. But that in cases of robbery, burglary, horse stealing, or the like, there could be no occasion to ask the question. Yet Lord Hale says, that if a man could possibly steal a horse worth only 12d.; or break a house in the day time and steal goods thereout only of that value, no person in the house being put in fear, (which would amount to robbery, and so the value be immaterial;) this would be but petit larceny, notwithstanding the stat. 5 and 6 Ed. 6.; for that statute altered not the nature of the offence, but takes away clergy where clergy was allowed before, namely, where the offence was capital, as in the case of grand larceny. So if a man steal only 12d. out of another's pocket *clam et secretè*, there can only be judgment as for petit larceny; although the stat. 8 Eliz. c. 4. takes away clergy from that offence.

1 Hale, 531. Ante, 634. 1 Hale, 531.

Uriah Pearles was indicted for stealing a bay gelding of the value of 23s. 6d. On the evidence it appeared to be a worthless animal turned upon a common, and as the witnesses said, fit only for a dog horse. Mr. Justice Foster recommended it to the jury to find the prisoner guilty to the value of 12d.; which they did; and he was transported.

Pearles's case, Bedford, 13th March 1755, Serjt. Forster's MS.

2. *Robbery.*

§ 138. *Robbery, clergy.* *Vide* ante, f. 134. 2 Hale, 349.

In all cases of robbery from the person, whatever be the value of the property taken, the judgment is of death.

The stat. 3 W. & M. c. 9. s. 1. enacts, "That all and "every person or persons that shall rob any other person, "or shall comfort, aid, abet, assist, counsel, hire, or com- "mand any person or persons to commit such offence, be- "ing

3 W. & M. c. 9. s. 1. Ante, p. 629.

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" ing thereof convicted or attainted, or being indicted " thereof and ſtanding mute, or not directly anſwering, or " challenging peremptorily above 20, ſhall not have the be- " nefit of clergy."

1 Ed. 6. c. 12. ſ. 10. founded on 23 H. 8 c. 1. ſ. 3. & 25 H. 8. c. 3. ſ. 2. Ante, p. 625.

This ſtatute is more general than the ſtat. 1 Ed. 6. c. 12. ſ. 10. which confines the deſcription of the offence to " robbing any perſon in or near the highway," and ouſts the principal of clergy, on attainder or conviction, or being indicted or appealed, and found guilty by verdict, or confeſſion on arraignment, or not anſwering directly, or ſtanding mute. The ſtat. 4 & 5 Ph. & M. c. 4. which follows the words of the ſtat. 1. Ed. 6. ouſts of clergy the acceſſaries before (viz. ſuch as " maliciouſly command, hire, or coun- " ſel,") in all caſes, including the challenging more than 20, which is omitted in the ſtat. of Ed. 6.; but which omiſſion is expreſsly ſupplied upon indictment by ſtat. 3 & 4 W. & M. c. 9. ſ. 3.: and according to the reaſoning of Lord Hale and Mr. Juſtice Foſter, which has been before adverted to, the ſtat. 4 & 5 Ph. & M. will operate to take away clergy from the principal in all caſes where it takes it from the acceſſary. But acceſſaries after in robbery have the benefit of clergy.

4 & 5 Ph. & M. c. 4. Ante, p. 627.

Ante, 631.

2 Hale, 350.

§ 139. *Robbery, &c. in another county.* 25 H. 8. c. 3. 5 & 6 Ed. 6. c. 10. 3 W. & M. c. 9.

By the ſtat. 25 H. 8. c. 3. 5 & 6. Ed. 6. c. 10. ſ. 2. and 3 W. & M. c. 9. ſ. 3. perſons indicted of larceny in one county, and convicted or attainted thereof, or who upon their arraignment ſhall ſtand mute, or challenge peremptorily above 20, or ſhall not directly anſwer, ſhall loſe the benefit of clergy, if it appear by evidence or examination at the trial, that the ſame felonies were robberies or burglaries in another county. Theſe ſtatutes, and the conſtruction thereon, will be ſet forth at large in another place.

Poſt. ſ. 157.

V. *Of Principals, Acceſſaries, and Receivers.*

§ 140. *Principals and acceſſaries.*

The ſame general rules which govern in other caſes reſpecting principals and acceſſaries apply alſo to theſe offences, and are therefore unneceſſary to be repeated here. But the caſe of receivers of ſtolen goods being peculiar to the ſubject under

diſcuſſion, this, and ſome particularities reſpecting principals and acceſſaries in theſe offences, require to be ſpecially noticed in this place.

Ch XVI. § 140. *In aggravated larcenies.*

In aggravated larcenies.

Though it be true that in larceny and robbery all thoſe who come to ſteal or rob are principals, although the fact may be only committed by one of them, and are ſubject to the ſame puniſhment; yet it is otherwiſe as to larcenies deprived of clergy under particular circumſtances; ſuch as the caſe of ſtealing privately from the perſon, under the ſtat. 8 Eliz. c. 4. and 39 Eliz. c. 15. for breaking and entering a houſe, &c. and ſtealing to the value of 5 s.; [though in the latter caſe the deficiency is ſupplied by the ſtat. 3 & 4 W. & M. c. 9.:] in which caſes the abettors at the fact are not excluded from clergy, but remain liable only to the penalties of ſimple larceny.

Foſt 356. Innis's caſe, 1 Leach, 9. Ante, ſ. 75. 119.

In petit larceny.

In petit larceny there can be no acceſſaries either before or after (*a*), although it be felony; becauſe it is not ſuch as judgment of death ought by law to be paſſed upon it: but procurers and counſellors are principals as in treſpaſs. With reſpect to grand larceny, the common law reſpecting acceſſaries ſtands upon the ſame footing as in other felonies. But there is a deſcription of acceſſaries after the fact peculiar to larceny which requires diſtinct conſideration; and theſe are

1 Hale, 530. 616. 2 Inſt. 183. 12 Rep. 81. 2 Hawk. ch. 29. Cro. Eliz. 750. 2 MS. Sum. 414.

Receivers of ſtolen Goods.

§ 141. *Receivers.*

At common law no receivers were acceſſaries but ſuch as received or harboured the thief himſelf: the receiving of the ſtolen goods only did not make a man acceſſary, without taking a reward to favour the felon's eſcape. If the owner received back his goods ſimply and without any agreement to favour the felon in his proſecution, it was lawful: but if he received them upon an agreement not to proſecute, or to proſecute faintly, it was called theftbote, and puniſhable by impriſonment and ranſom. But now by ſtat. 3 W. & M. c. 9. ſ. 4. " If any perſon or perſons ſhall buy or receive " any goods or chattels that ſhall be felonioufly taken or " ſtolen from any other perſon knowing the ſame to be " ſtolen, he or they ſhall be taken and deemed an acceſſary

2 MS. Sum. 396. 1 Hale, 619. 620. 4 Blac. Com. 38. 132, 3.

3 W. & M. c. 9. ſ. 4. *Made acceſſaries after the fact to the felony.*

(*a*) Yet in R. v. Reddeard, E. 11 Ann. (De Grey's MS.) Powell J. ſaid it was a vulgar error to think that petit larceny, or any felony, capital or not, may not have acceſſaries after the fact. Serjt. Forſter's MS.

Ch. XVI. § 141. *Trial and punishment.*

" or acceſſaries to ſuch felony after the fact, and ſhall incur " the ſame puniſhment as an acceſſary, &c. after the felony " committed."

5 Ann. c. 31. ſ. 5.

The ſtat. 5 Ann. c. 31. ſ. 5. enacts to the ſame effect in general words, " That if any perſon or perſons ſhall receive " or buy *any* goods or chattels that ſhall be feloniouſly taken " or ſtolen from *any other* perſon knowing the ſame to be " ſtolen; or ſhall receive, harbour, or conceal *any* burglars, " felons, or thieves, knowing them to be ſo; he or they ſhall " be taken as acceſſary or acceſſaries to the ſaid felony or " felonies; and being legally convicted by the teſtimony of " one or more credible witneſſes, ſhall ſuffer death as a felon " convict." But though the enacting words are thus general, yet not only the title(1) and other previous proviſions of the act, but alſo the recital to the clauſe in queſtion are all confined to the offences of burglary and houſebreaking; and yet the ſubſequent clauſe, which has words of reference to this clauſe, ſeems always to have been taken generally.

Poſt. ſ. 142.

Tranſportation. 4 G. 1. c. 11. ſ. 1. *Vi.* 1 East's Rep. 309.

And by ſtat. 4 G. 1. c. 11. " Perſons convicted of receiving " or buying ſtolen goods knowing them to be ſtolen may " be tranſported for 14 years." But they muſt pray the benefit of the ſtatute (*a*). And the felony muſt be ſuch as admits of acceſſaries at law (*b*): for if the principal be convicted of petit larceny only, the receiver of the goods is not puniſhable as an acceſſary, though the words of the ſtatute be general; as was holden in Evans's caſe by all the Judges. But this has been ſince ſupplied by the ſtat. 22 Geo. 3. c. 58. aftermentioned, with certain exceptions.

(*a*) By all the Judges, Serjt. Foſter's MS.

(*b*) 2 MS. Sum. 399. R. v. Evans, O. B. 1749, Poſt. 73.

22 Geo. 3. c. 58. Poſt. ſ. 142.

§ 142. Poſt. 373. MS. Tracy, 126. 1 Hale, 619. 2. MS. Sum. 399.

Before theſe acts the receiving of ſtolen goods was merely a miſdemeanor; but now the miſdemeanor is merged in felony; and therefore a proſecution for a miſdemeanor only would be illegal and improper. This however is to be underſtood of thoſe caſes only where the principal can be come at, ſo as to give an opportunity of convicting the receiver as an acceſſary to the felony. For till the ſtat. 1 Ann. the receiver could not be proſecuted or puniſhed at all before the principal thief was tried and convicted. On this account the receiver, who is generally the employer and patron of the thief,

(1) The title is " an act for the encouraging the diſcovery and apprehending " of *houſebreakers*."

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thief, very often eſcaped with impunity; for if he could keep the thief out of the way, he the receiver could not be tried, and therefore went unpuniſhed. To remedy this inconvenience the ſtat. 1 Ann. ſt. 2. c. 9. ſ. 2. enacts, " that " it ſhall and may be lawful to proſecute and puniſh every " ſuch perſon and perſons buying or receiving any ſtolen " goods, knowing the ſame to be ſtolen, as for a miſde- " meanor; to be puniſhed by fine and impriſonment; " though the principal felon be not before convicted of the " ſaid felony; which ſhall exempt the offender from being " puniſhed as acceſſary, if the principal ſhall be afterwards " convicted."

1 Ann. ſt. 2. c. 9. ſ. 2. *Receiver puniſhable as for a miſdemeanor.*

And by ſtat. 5 Ann. c. 31. ſ. 6. (immediately following the clauſe before ſet forth) it is provided, " that if any ſuch " principal felon cannot be taken, ſo as to be proſecuted and " convicted for any ſuch offence, yet nevertheleſs it ſhall " and may be lawful to proſecute and puniſh every ſuch " perſon and perſons buying or receiving any goods ſtolen " by any ſuch principal felon, knowing the ſame to be " ſtolen, as for a miſdemeanor, to be puniſhed by fine and " impriſonment, or other ſuch corporal puniſhment as the " court ſhall think fit; although the principal felon be not " before convicted of the ſaid felony: which ſhall exempt " the offender from being puniſhed as acceſſary, if ſuch " principal felon ſhall be afterwards taken and convicted."

5 Ann. c. 31. ſ. 6. *Vide* ante, 744.

Upon a conviction under the laſtmentioned clauſes of the ſtatutes of Ann. as for a miſdemeanor, the puniſhment is by impriſonment, or at the diſcretion of the Judge, as in caſes of miſdemeanor.

2 MS. Sum. 400. Tipping's caſe, B. K. E. 11 G. 3.

But the ſtat. 4 Geo. 1. c. 11. which ſubjects receivers to tranſportation for 14 years, does not extend to proſecutions under the ſtatutes of Anne for a miſdemeanor only. And where the principal is amenable to juſtice, the receiver ought ſtill to be proſecuted as an acceſſary to the felony, and not for a miſdemeanor only (*a*).

By all the Judges, 2 MS. Sum. 399.

Poſt. 373.

(*a*) There is a caſe of Rex v. Pollard and Taylor, M. 11 G. 1. 2 Ld. Ray. 1370. which ſeems to ſay, that the proſecutor has an option to proſecute the receiver for a miſdemeanor or for a felony, whether the principal can be taken or not. But this is denied by Mr. Juſtice Foſter (p. 374) to be law to that extent. *Vide* the S. C. poſt. 164.

Jonathan

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Jonathan Wild's caſe, O. B. Seſſ. bef. Eaſt. Term, 5 G. 1. Serjt. Forſter's MS. & Select Caſ. of Evid. 57.

Jonathan Wild was indicted for a miſdemeanor in receiving ſtolen goods, knowing, &c. But it appearing that the principal felons had been convicted and executed, it was objected that this indictment would not lie, being only given by the ſtat. 5 Ann. where the principal felon cannot be taken and convicted. And Pratt C. J. being of that opinion, the defendant was acquitted.

Wilkes's caſe, Warwick Lent Aſſ. 1774, MS. Gould J. MS. Crown Caſ. Ref. Serjt. Forſter's MS. (S. C. 1 Leach, 221.)

Receiver may be indicted for miſdemeanor, though proſecutor might once have ſecured the principal, but neglected to do ſo.

William Wilkes was convicted on the ſtat. 3 W. & M. c. 9. ſ. 4. and 5 Ann. c. 31. ſ. 6. for receiving ſtolen goods, as for a miſdemeanor: but judgment was reſpited on a doubt, which was referred to the Judges. For it appeared that Innis, the proſecutor, had been in company with a perſon in London a few months before, who confeſſed himſelf to be the principal felon, and whom he then had an opportunity of taking into cuſtody, but had neglected ſo to do; becauſe the other had promiſed to go down to Warwick to give evidence againſt the receiver: and no opportunity of taking him had ſince occurred: for though the proſecutor had met the principal again by appointment, yet then he was reſcued by ſome of his companions; and though the priſoner applied immediately for a warrant to retake him, yet he could not afterwards be met with; nor was he in fact taken at the time of finding the indictment. In Trinity term 1774, ſeven of the Judges againſt four were of opinion that there ought to be judgment on the conviction. The four thought that where a proſecutor had it once in his power to take the principal, and neglected it, it took the caſe out of the ſtat. of Q. Ann. But the ſeven held that the word *cannot* in the ſtatute muſt be applied to the time of the proſecution for the miſdemeanor, if the principal be then without colluſion out of cuſtody, which was the caſe here. For though the proſecutor had acted weakly and negligently at firſt, yet when he had the principal a ſecond time in his power, he was reſcued by force; and all due diligence was afterwards uſed to apprehend him.

22 G. 3. c. 58. ſ. 1. *Vide* poſt. 749. and Stott's caſe, poſt.

Receiver may be proſecuted for a miſdemeanor whether principal be amenable to juſtice or not.

But now by the ſtat. 22 G. 3. c. 58. it is enacted, "that "in all caſes whatſoever, where any goods or chattels (except lead, iron, copper, braſs, bell-metal, and ſolder,) "(the receiving of which is provided for by ſtat. 29 Geo. 2. "c. 30. after mentioned,) ſhall have been feloniouſly taken "or

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"or ſtolen; whether the offence of the principal ſhall "amount to grand larceny or ſome greater offence, or to "petit larceny only; (except where the perſon or perſons "actually committing the felony ſhall have been already "convicted of grand larceny or of ſome greater offence;) "every perſon who ſhall buy or receive any ſuch goods and "chattels, knowing the ſame to have been ſo taken or "ſtolen, ſhall be deemed guilty of and may be proſecuted "for a miſdemeanor, and ſhall be puniſhed by fine, im- *Puniſhable by fine, impriſonment, or whipping.* "priſonment, or whipping, as the court of Quarter Seſſions, who are hereby empowered to try ſuch offender, "or as any other court before whom he, &c. ſhall be tried "ſhall think fit; although the principal felon or felons be "not before convicted of the ſaid felony; and whether he, "ſhe, or they is or are amenable to juſtice or not. And in "caſes where the felony actually committed ſhall amount to "grand larceny or to ſome greater offence, and where the "perſon or perſons actually committing ſuch felony ſhall "not be before convicted, ſuch offender or offenders ſhall "be exempted from being puniſhed as acceſſary or acceſſaries if ſuch principal felon or felons ſhall be afterwards "convicted."

Power to ſearch for ſtolen goods.

By ſ. 2. of the ſame act, "one juſtice of the peace on "complaint made before him on oath, that there is reaſon "to ſuſpect that ſtolen goods are knowingly concealed in "any dwelling-houſe, out-houſe, garden, yard, croft, or "other place or places, may by warrant under his hand and "ſeal cauſe every ſuch dwelling-houſe, &c. to be ſearched "in the day-time: and the perſon or perſons knowingly "concealing the ſaid ſtolen goods or any part thereof, or "in whoſe cuſtody the ſame or any part thereof ſhall be "found, he, ſhe, or they being privy thereto, ſhall be "deemed guilty of a miſdemeanor, (and may be brought "before a juſtice of peace, and made amenable to anſwer "the ſame by warrant), and being thereupon convicted by "due courſe of law ſhall be puniſhed in the manner afore-"ſaid." This not to repeal any former law for the puniſhment of ſuch offenders.

Ch. XVI. § 143. *What goods, &c. within the acts.*

As to what ſhall be conſidered as "goods and chattels" within theſe ſtatutes of W. & M. and Ann., it has been holden (*a*) that they include ſheep, and by the ſame reaſoning fowls and other animals. And thus the receivers of ſtolen horſes have been brought within theſe acts, who are not included in the ſtat. 31 Eliz. c. 12. ſ. 5. which ouſts clergy as well from the acceſſaries after as before the fact, for the reaſon before given (*b*). But it has been often determined, and ſeems now to be ſettled, that receivers of *money* (*c*) ſtolen are not within the ſtatutes: For which, this reaſon may be aſſigned, that though "*goods and chattels*" may in a large ſenſe take in *money*; yet the intent of theſe acts only extended to the receipt of ſuch kind of goods and chattels, the property in which, being generally and in its nature capable of being aſcertained by outward marks and circumſtances, made it more difficult for the thief to diſpoſe of them without the aid of the receiver, by whom he was thus encouraged and protected: whereas money has not in general any ſuch diſtinguiſhing marks, and it requires no aid from a receiver to give effect to the theft. And if every receiver of money which happened to have been ſtolen were liable to be called to account for it, it might be attended with ſerious inconvenience to the public in their general dealings; it being always difficult, and ſometimes impoſſible, to account for the poſſeſſion of each individual coin which paſſes in circulation. In analogy to this a majority of the Judges, in 1787, ruled that *bank notes*, &c. were not within the ſtatutes againſt ſuch receivers. That was the caſe of Sadi and Wm. Morris. The indictment charged that Sadi alias George Horn in the dwelling-houſe of S. S. feloniouſly ſtole, &c. one promiſſory note called a bank note, value 290 *l.* marked, &c. and another note, &c. (of the ſame ſort), the property of the ſaid S. S. againſt the form of the ſtatute, and that Wm. Morris the aforeſaid promiſſory notes called Bank notes, &c. the ſame *being the property and chattels* of the ſaid S. S. feloniouſly received and had, knowing them to be ſtolen, &c. After conviction it was moved in arreſt of judgment on behalf of Morris, that the indictment was defective in charging the notes to be *chattels*; and further that the receiving

§ 143.
(*a*) 2 MS. Sum. 393. cites R. v. Tipping, B. R. Eaſt. 11 G. 3. and R. v. Nott, Glouceſter Sp. Aſſ. 1779. and R. v. Morris, O. B. July 1779, cor. Nares and Buller Js.
(*b*) Ante, 616.
(*c*) Serj. Forſter's MS. & infra; and Ann Guy's caſe, O.B. 1782, 1 Leach, 276. So R. v. Davidſon, Carliſle, 1766, cor. Bathurſt J. 3 Burn's Juſt. tit. *Larceny*, ſ. 8. *Vide* ante, 643. ſame conſtruction on ſt. 10 & 11 W. 3. c. 23.

R. v. Sadi and Morris, O. B. July 1787, MS. Buller J. MS. Jud. *Vide* S. C. ante, ſ. 37. (S. C. 2 Leach, 525.)

Ch. XVI. § 143. *Of what goods and chattels.*

ceiving ſuch notes was not within any of the before-mentioned ſtatutes. Theſe objections were argued by counſel before ten of the Judges, aſſembled at Serjeant's Inn, in Michaelmas term 1787, when ſeven of them were of opinion that the conviction was bad, on the ground that the receiving bank notes knowing them to be ſtolen was not within the ſtatute of William, which they thought attached only on the receivers of property which came under the denomination of *goods and chattels* at the time when the act paſſed: and one of the ſeven thought that ſuch would have been the conſtruction if the ſtat. 2 G. 2. had preceded that of King William. But two of the Judges were ſtrongly of a different opinion, to which the other alſo inclined; conſidering it as a conſequence of law, that where a new felony was created by ſtatute, it drew after it all the incidents of felony at common law, and therefore included acceſſaries before and after. They thought that the ſt. 2 G. 2. c. 25. ſ. 3. having made it felony to ſteal bank notes in like manner as if the party had ſtolen goods of the like value, the receivers of ſuch property ſtood in the like predicament as the receivers of other goods and chattels. And the opinion of the majority in the above-mentioned caſe ſeems to have been much ſhaken by the reſolution of all the Judges in Dean's caſe and other caſes which have been before mentioned, wherein bank notes by the operation of the ſtat. 2 G. 2. were holden to be within the ſtat. 12 Ann. c. 7. againſt ſtealing money, goods, &c. to the value of 40*s.* out of the dwelling-houſe.

(Abſent Lord Mansfield, and Ld. C. B. Eyre.)

Ante, 743.

(Gould and Aſhhurſt J.)
(Ld. Loughborough.)

Dean's caſe, 1795. Ante, ſ. 88. and Seſſ. Pap. for May 1796, p. 615.

§ 144. *Lead, iron, braſs, copper, bell-metal, ſolder.* 29 G. 2. c. 30. ſ. 1. Ante, 746.

The Legiſlature have alſo made particular proviſions in a variety of caſes againſt receivers of certain ſtolen goods. It was before remarked that certain articles were excepted out of the general ſtatute of the 22 G. 3. c. 58.: theſe were before ſpecially provided for by the ſt. 29 G. 2. c. 30. ſ. 1. which reciting that "whereas the practice of ſtealing lead, iron, "copper, braſs, bell-metal, and ſolder, fixed to, or lying or be- "ing in or upon houſes, out-houſes, mills, warehouſes, work- "ſhops, and other buildings, areas, yards, vaults, gardens, "orchards, or other places; and alſo the ſtealing of ſuch "materials from ſhips, barges, lighters, boats, and other "veſſels and craft, upon navigable rivers, in ports of entry "or diſcharge, creeks and docks belonging thereto, and alſo "from

Ch. XVI. § 144. *Lead, iron, braſs, copper, bell-metal, ſolder.*

" from off wharfs, quays, and other places, is become a " great and notorious evil, by reaſon of the difficulty in ap- " prehending and convicting the thieves, and the ſtill greater " difficulty of diſcovering and convicting the buyers or re- " ceivers thereof; which buyers or receivers are the prin- " cipal cauſe of the commiſſion of ſuch thefts; and in re- " gard that the ſaid offences are committed in ſuch cloſe " and clandeſtine manner that there can be no witneſs to " the ſame, but ſuch who is or are the partakers of the of- " fence: and whereas if the buyers and receivers of lead, " iron, copper, braſs, bell-metal, or ſolder, knowing or " having reaſonable cauſe to ſuſpect the ſame to be ſtolen " or unlawfully come by, were made original offenders, " and puniſhable independent of the apprehenſion and con- " viction of the thief; and if the apprehending, proſecut- " ing, and convicting the offenders in both kinds were ren- " dered more eaſy and ſpeedy, it might more effectually " tend to the diſcovery and ſuppreſſion of the ſaid of- " fences:" For remedy whereof enacts, " That from and " after the 1ſt of October 1756, every perſon who ſhall buy " or receive any lead, iron, copper, braſs, bell-metal, or " ſolder, knowing the ſame to be unlawfully come by; or " ſhall privately buy or receive any ſtolen lead, iron, copper, " braſs, bell-metal, or ſolder, by ſuffering any door, win- " dow, or ſhutter to be left open or unfaſtened between " ſun-ſetting and ſun-riſing for that purpoſe; or ſhall buy " or receive the ſame, or any of them, at any time, in any " clandeſtine manner from any perſon or perſons whatſo- " ever; ſhall, being thereof convicted by due courſe of law, " although the principal felon or felons has not or have not " been convicted of ſtealing the ſame, be tranſported for " 14 years to any of his majeſty's colonies or plantations in " America according to the laws in force for the tranſporta- " tion of felons."

By ſ. 11. This ſhall not extend to repeal any former law then in being for the puniſhment of ſuch offenders: but no offender puniſhed by this act ſhall be afterwards liable to be puniſhed by any ſuch former law.

Though the firſt-mentioned clauſe inflicts ſo ſevere a puniſhment, and the act itſelf is framed in such a manner

as to beget a doubt whether the legiſlature did not conſider the receiver as a felon, yet it is not ſo enacted in terms. It ſpeaks indeed of the *principal felon*; and the offender is directed to be tranſported according to the laws in force for the tranſportation of *felons*, on conviction by due courſe of law; and in the ſubſequent clauſes other minor offences of the ſame deſcription are ſpecifically declared to be *miſdemeanors*; and by a ſubſequent clauſe all ſuch miſdemeanors are ſubjected to a ſummary juriſdiction, and puniſhable by forfeitures and corporal puniſhment; and the ſame conſtruction ſeems to be implied in the act of the 21 G. 3. after mentioned: yet I believe the practice has been to indict upon the ſtat. 29 G. 2. as for a miſdemeanour (*a*); that is, I preſume where the principal has not been before convicted of felony: for by the general act of 3 W. 3. c. 9. before mentioned, receivers in general are made acceſſaries after the fact to the felony; and by ſtat. 4 G. 1. c. 11. they may be tranſported for 14 years. But the ſtat. 29 G. 2. c. 30. ſ. 1. is more comprehenſive in the deſcription of the offenders than the general acts againſt receivers. In the caſe of lead, iron, &c. affixed to buildings and ſtolen therefrom, the receiver is by the ſtat. 4 G. 2. c. 32. and 21 G. 3. c. 26. before mentioned, made liable to the ſame puniſhment as if he had ſtolen the goods; which is tranſportation for 7 years, or impriſonment and whipping.

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Vide R. v. Wyer, poſt. ſ. 145.

Vide Exception in ſtat. 22 G. 3. c. 58. ante, 747. and Wild's caſe, ante, 746.

Ante, 743.

Ante, ſ. 30.

By the ſtat. 21 G. 3. c. 69. entitled an act to *explain and amend* the ſtat. 29 G. 2. reciting that act, and that it had been found by experience to prevent many felonies being committed in reſpect to the ſeveral articles mentioned therein, but that the metal called *pewter* not being included, evil diſpoſed perſons had taken advantage thereof, and the ſtealing of *pewter pots* and *other pewter*, and the buying and receiving the ſame, knowing the ſame to be ſtolen, was become a great evil; enacts, " That after the 1ſt of *Auguſt* " 1781, every perſon who ſhall buy or receive any *pewter-* " *pot or other veſſel*, or *any pewter* in any form or ſhape " whatever, knowing the ſame to be ſtolen or unlawfully " come by; or ſhall privately buy or receive any ſtolen pew- " ter by ſuffering any door, window, or ſhutter to be left open

21 G. 3. c. 69. *Pewter.*

(*a*) So it appeared on inquiry in R. v. Stott: *vide* poſt.

" or

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" or unfaſtened between ſun-ſetting and ſun-riſing for that " purpoſe; or ſhall buy or receive the ſame at any time in " any clandeſtine manner from any perſon or perſons what- " ſoever; ſhall, being thereof convicted by due courſe of " law, although the *principal felon or felons* has not or have " not been convicted of *ſtealing* the ſame, be tranſported in " like manner as *other felons* are directed to be tranſported by " law for any time not exceeding ſeven years, or be kept " and detained in priſon and therein kept to hard labour for " any time not exceeding three years nor leſs than one year; " and within that time (if ſuch court think fit) ſuch offender " and offenders ſhall be once or oftener but not more than " three times publicly whipped."

Vide ante, and R. v. Wyer, poſt. ſ. 145.

29 G. 2. c. 30. ſ. 1. *Not confined to raw materials.*

It has been conſidered by ſome, that the act of the 29 Geo. 2. c. 30. relates to the metals therein mentioned only in their common or raw ſtate, as contradiſtinguiſhed from wrought goods: and upon the argument of the caſe of Rex v. Stott in Hil. 39 Geo. 3. B. R. a caſe of Rex v. Scott was cited to that effect, as having been ſo ruled by the late Mr. Serjt. Adair, Ch. J. of Cheſter; in which he ſaid that the ſame conſtruction had been put upon the ſtatute during his experience at the Old Bailey while Recorder of London. But there is great difficulty in adopting ſuch a conſtruction; for the ſtatute ſpeaks of lead, iron, &c. *fixed to houſes*, which cannot be in their raw ſtate; but the metals muſt in ſome reſpect be manufactured, and be either bars, bolts, rails, ſheets of lead, or in ſome other form capable of a more ſpecific deſcription than merely lead, iron, or copper. That this ſtatute was not intended to be ſo confined ſeems evident from the preamble of the ſtat. 21 Geo. 3. c. 69. before ſet forth, from whence it muſt be collected that the Legiſlature conſidered that if *pewter* generally had been mentioned in the former law, it would have reached the caſe of receiving pewter pots after they were ſtolen; and that *pewter* was a ſufficient deſcription of every thing manufactured out of it, and that the form or ſhape did not make that deſcription leſs proper. Beſides, it is difficult to conceive that the ſtat. 29 Geo. 2. ſhould recite that the practice of ſtealing iron, &c. had become a great and notorious evil, if it meant only to prevent the ſtealing ſuch pieces of iron, &c. to which no appropriate name or deſcription could be given.

MS. poſt. Scott's caſe, Cheſter Sp. Aſſ. 1798.

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The caſe of Rex v. Stott above mentioned was an indictment for a miſdemeanor (removed by writ of error from the Quarter Seſſions) for receiving ſtolen iron knowing it to be ſtolen, which was laid in the indictment as ſo many " pieces of iron called ſtrokes," ſo many " pieces of iron," and ſo many " pieces of iron called horſe-ſhoes," of a value under 1s. on which judgment of impriſonment for a year had been given by the court below after conviction. The Court of B. R. gave no direct opinion on the ſubject; but intimated great doubt, Whether, as the general act of the 22 G. 3. c. 58. expreſsly excepted *iron*, any other judgment could be paſſed than that of tranſportation directed by the ſtat. 29 G. 3. c. 30.? on which doubt the priſoner's counſel waved any further proſecution of the writ of error.

Rex v. Stott, Hil. 39 Geo. 3. B. R. MS.

§ 145. *Receivers of goods ſtolen on the Thames.*

By ſt. 2 G. 3. c. 28. " Every perſon who ſhall buy or receive " any part of the cargo or loading of, or any goods, ſtores, " or things of or belonging to any ſhip or veſſel in the river " Thames, knowing the ſame to be ſtolen or unlawfully " come by; or ſhall privately buy or receive any ſuch goods " ſtores, or things, or any part of ſuch cargo or loading, by " ſuffering any door, window, or ſhutter to be left open or " unfaſtened between ſun-ſetting and ſun-riſing for that pur- " poſe; or ſhall buy or receive the ſame or any of them at " any time in any clandeſtine manner from any perſon or " perſons whomſoever, ſhall, being thereof convicted by due " courſe of law, although the principal felon or felons, " offender or offenders, has or have not been convicted of " ſtealing or unlawfully procuring the ſame, be tranſported " for 14 years, &c.

2 G. 3. c. 28. ſ. 12. *Vide* poſt. tit. *Malicious Miſchief—Cutting Cordage, &c. with intent to ſteal.*

Vide ſt. 39 & 40 Geo. 3. c. 87. for preventing depredations on the River, ſ. 16. & 21.

The offence of receiving under this act has been deemed felony, though the ſtatute do not declare ſo expreſsly in this clauſe. For by the ſtat. 3 & 4 W. & M. c. 9. ſ. 4. receivers of ſtolen goods may be proſecuted as felons: and though by ſtat. 1 Ann. ſt. 2. c. 9. ſ. 2. they may be puniſhed as for a miſdemeanor where the principal felon is not convicted; yet ſ. 14. of the 2 G. 3. ſeems to conſider them as felons; for thereby any perſon ſtealing or unlawfully receiving ſuch ſtolen goods knowingly ſhall, on diſcovering two other offenders, be entitled to a pardon for all *ſuch felonies*. In truth the ſtatute ſeems only to have made the receiving of the goods under

R. v. Wyer, 2 Term Rep. 77.

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such circumſtances evidence of their having been received by the party, knowing them to have been ſtolen.

39 & 40 G. 3. c. 87. f. 22. *Such receivers ſhall plead inſtanter.*

However the legiſlature ſeem to have conſidered it only as a miſdemeanor by the ſt. 39 & 40 G. 3. c. 87. f. 22. which, reciting that "whereas by the ſt. 2 G. 3. c. 28. perſons guilty of "certain offences are puniſhable by tranſportation for 14 "years, but the ſaid offences not being by the ſaid act de- "clared to be felony, the trial thereof may in all caſes be "put off by means of a traverſe to the next Seſſions after "the finding of the bill of indictment for the ſame, and the "offender be in the mean time bailed (*a*), whereby juſtice has "been in many inſtances eluded;" for remedy thereof enacts, "that from the paſſing of the act whenever any in- "dictment ſhall be found againſt any perſon for any of the "ſaid offences, the perſon ſo indicted ſhall plead to the ſaid "indictment without having time to traverſe the ſame, as "is uſual in caſes of miſdemeanors."

§ 146. *Receivers of jewels, plate, &c.* 10 G. 3. c. 48.

By ſtat. 10 G. 3. c. 48. "Every perſon who ſhall buy or "receive any ſtolen jewel or jewels, or any ſtolen gold or "ſilver plate, watch, or watches, knowing the ſame to have "been ſtolen, ſhall, in all caſes where ſuch jewel or jewels, "or gold or ſilver plate, ſhall have been feloniouſly ſtolen, "accompanied with a burglary actually committed in the "ſtealing the ſame, or ſhall have been feloniouſly taken by "a robbery on the highway, be triable as well before con- "viction of the principal felon in ſuch felony and burglary, "or robbery, whether he ſhall be in or out of cuſtody, as "after his conviction. And if any perſon ſo buying or re- "ceiving ſuch jewel or jewels, or gold or ſilver plate, ſhall "be convicted thereof, he ſhall be adjudged guilty of fe- "lony, and tranſported for 14 years," &c.

R. v. E. Moſes, Kent Sum. Aſſ. 1783, cor. Gould J. MS. Gould and Buller J. MS. Crown Caſ. Ref. and MS. Jud. *A cornelian ſeal is a jewel within the act.*

Under this ſtatute Eſther Moſes was indicted at the Kent Summer aſſizes 1783, before Gould J. The indictment ſet forth a robbery of Mr. Drummond in the highway of a watch, gold watch-caſe, a red cornelian ſeal ſet in gold, and a white one, alſo ſet in gold; and then charged that the priſoner received the ſtolen watch, jewels, and gold plate above mentioned, knowingly, againſt the form of the ſtatute. The

(*a*) In R. v. Wyer (ante) the Court refuſed to bail the priſoner, on the ſuppoſition that the offence was felony.

words "*watch or watches*" are omitted in the latter part of the ſtatute, which makes the felony. And the priſoner being convicted, judgment was reſpited to take the opinion of the Judges, Whether the receiving a gold watch and ſuch ſeals, knowing them to have been ſtolen, (being taken by robbery in the highway,) were a felony within the act? This was firſt debated by all the Judges in Mich. term 1783, and adjourned for further conſideration to Hil. term ſucceeding; when ten Judges preſent (and one abſent and concurring) held the priſoner well convicted. Some thought the gold in the watch might be deemed *plate*; but others thought that was not the meaning of the ſtatute: but all held that the *ſeals* ſet in gold came under the word *jewels*.

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§ 147. *Receivers of other goods before ſpecified.*

Alſo the receiving of other ſtolen goods knowingly has been before noticed, in treating of ſeveral particular deſcriptions of property, the ſtealing of which has been prohibited under ſpecial penalties; amongſt theſe may be reckoned the receiving of ſtolen woollen, linen, and cotton goods, and garden plants, &c. So by ſtat. 25 G. 2. c. 10. every perſon who ſhall buy or receive any wad or black cawke, otherwiſe black lead, ſo unlawfully taken and carried as is therein before mentioned, ſhall be deemed guilty of felony, and on conviction be ſubject to all the pains and penalties which perſons can or may by the laws and ſtatutes of the realm be ſubject to for buying or receiving ſtolen goods or chattels knowingly.

Ante, f. 28. &c.

Black lead. Ante, f. 32.

§ 148. *Naval and military ſtores of the King.*

Having before touched upon the offence of ſtealing naval and military ſtores, it remains now to conſider how the law ſtands with regard to receivers of ſuch ſtores.

9 & 10 W. 3. c. 41. made a public act by ſt. 1 G. 1. ſt. 2. c. 25. f. 14. Ante, f. 53.

By the ſtat. 9 & 10 W. 3. c. 41. reciting, "that not- "withſtanding the laws made for preventing the ſtealing "and embezzling of the King's ſtores of war and naval "ſtores, thoſe frauds, thefts; and embezzlements are fre- "quently practiſed, and the convicting of ſuch offenders is "rendered difficult and impracticable, by reaſon it rarely "happens that direct proof can be made of ſuch offenders "immediate taking, embezzling, or carrying away any of his "majeſty's ſaid ſtores, &c. out of his ſtorehouſes, docks,

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" ſhips, &c. or other places for keeping and preſerving the " ſame, but only that ſuch goods are marked with the King's " mark, and found in the cuſtody and poſſeſſion of the perſon " accuſed, &c.; for preventing ſuch embezzlements for the fu- " ture, and for the more effectual execution of the laws already " in force againſt ſuch embezzlements and thefts," it is enacted, " that it ſhall not be lawful for any perſon or perſons what- " ſoever, other than perſons authoriſed by contracting with " the King's principal officers or commiſſioners of the navy, " ordnance, or victualling-office, for his majeſty's uſe, to " make any ſtores of war or naval ſtores whatſoever with " the marks uſually uſed to and marked upon his majeſty's " ſaid warlike and naval or ordnance ſtores; viz. any cord- " age of three inches and upwards, wrought with a white " thread laid the contrary way; or any ſmaller cordage, " viz. from three inches downwards, with a twine in lieu of " a white thread, laid to the contrary way as aforeſaid; or " any canvas wrought or unwrought, with a blue ſtreak in " the middle; or any other ſtores with the broad arrow, by " ſtamp, brand, or otherwiſe; upon pain that every ſuch " perſon or perſons who ſhall make ſuch goods ſo marked as " aforeſaid, not being a contractor with his majeſty's prin- " cipal officers or commiſſioners of the navy, ordnance, or " victuallers, for his majeſty's uſe, or employed by ſuch " contractor for that purpoſe as aforeſaid, ſhall for every " ſuch offence forfeit ſuch goods, and 200l. with coſts of " ſuit, one moiety to the King, the other to the informer, to " be recovered by action of debt," &c.

No warlike or naval ſtores, except for the king's uſe, ſhall be made with the king's marks.

Perſons in whoſe cuſtody ſuch marked ſtores are found, and who ſhall conceal the ſame, ſhall forfeit ſuch goods and 200 l. and be impriſoned till payment.
Vide poſt. 9 G. 1. c. 8. ſ. 3. and *vide* ſ. 149. Cole's caſe.

By ſ. 2. " Such perſon or perſons in whoſe cuſtody, poſ- " ſeſſion, or keeping ſuch goods or ſtores marked as afore- " ſaid ſhall be found, not being employed as aforeſaid; and " ſuch perſon or perſons who ſhall conceal ſuch goods or " ſtores marked as aforeſaid, being indicted and convicted " of ſuch concealment, or of the having ſuch goods found " in his cuſtody, poſſeſſion, or keeping, ſhall forfeit ſuch " goods and 200l., together with the coſts of proſecution; " one moiety to the King, and the other to the informer, to " be recovered as aforeſaid, and ſhall alſo ſuffer impriſon- " ment till payment and performance of the ſaid forfeiture; " unleſs ſuch perſon ſhall upon his trial produce a certificate

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" under the hand of three or more of the King's officers or " commiſſioners of the navy, ordnance, or victuallers, ex- " preſſing the numbers, quantities, or weights of ſuch goods " as he or ſhe ſhall then be indicted for, and the occaſion " and reaſon of ſuch goods coming to their hands or poſ- " ſeſſion."

Extended to timber, &c. by 2 G. 1. c. 8.

In addition to which, by the ſtat. 9 Geo. 1. c. 8. ſ. 3. " Every perſon lawfully convicted of having in their cuſtody " any timber, thick ſtuff, or plank, marked with the broad " arrow, by ſtamp, brand, or otherwiſe, or of concealing " any timber, &c. ſo marked, ſhall ſuffer, forfeit, and pay " as for having, keeping, or concealing any other warlike, " naval, or ordnance ſtores, contrary to the ſaid act" of King William.

9 & 10 W. 3. c. 41. ſ. 4. *Commiſſioners may ſell ſuch ſtores with certificates.*

By ſ. 4. of the ſt. 9 & 10 W. 3. the commiſſioners, &c. may ſell and diſpoſe of any of the ſaid ſtores ſo marked, &c. as theretofore, and the buyers may keep and enjoy the ſame without incurring the penalty of this or any other law, on producing a certificate or certificates under the hand and ſeal of three or more of the ſaid principal officers or commiſſioners, &c. that they bought ſuch goods from them, or from ſuch perſon or perſons as bought the ſaid ſtores from the ſaid officers, &c. at any time before ſuch ſtores were found in their cuſtody: " in which certificate or certificates the quantities of ſuch " ſtores ſhall be expreſſed, and the time when and where " bought of the ſaid commiſſioners; who, or any three or " more of them, are directed to give to ſuch perſon or per- " ſons who deſire the ſame, and have bought or ſhall here- " after buy any of the ſaid ſtores, within 30 days after the " ſale and delivery of the ſaid ſtores ſo ſold, or to be ſold as " aforeſaid."

Or lend them to ſhips in diſtreſs.

Sect. 8. provides that the King's ſtores may be lent by the ſaid officers or commiſſioners of the navy, or any chief commander of any of the King's ſhips at ſea, to any merchant ſhip in diſtreſs or otherwiſe, as before the act, in caſe ſuch goods be reſtored with all poſſible conveniency, and the perſons ſo borrowing have ſuch certificate as aforeſaid, which ſuch officers, &c. are empowered to grant.

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1 Geo. 1. ſt. 2. c. 25. made perpetual by 9 G. 1. c. 8. ſ. 3. *Summary juriſdiction to inquire and puniſh for ſmall embezzlements, &c.*

By ſtat. 1 Geo. 1. ſt. 2. c. 25. ſ. 3. "The ſaid principal officers and commiſſioners of the navy, or any one or more, ſhall have power to inquire, and by warrant under hand and ſeal to empower any perſon to ſearch for the ſame in all places, in like manner as juſtices of peace may do in caſe of felony, and puniſh the offenders by ſuch fine and impriſonment as aforeſaid, (*i. e.* (by ſ. 1.) ſuch fine not exceeding 20s., and impriſonment not exceeding a week, either in the next gaol, or in the cuſtody of the meſſengers attendant on them; and they may alſo diſcharge the party from ſuch fine and impriſonment; and on non-payment of the fine ſo impoſed and not remitted, may impriſon the offender till payment, or otherwiſe cauſe him to be ſent to the houſe of correction next to the place where the offence was committed, there to be kept to hard labour for two months; which fine is to be paid to the clerk of the cheſt at Chatham;) the value of the goods ſo embezzled or filched away not exceeding 20s. and cauſe the goods to be brought in again: and if the offence require a ſeverer puniſhment, then they, any one or more of them, may commit ſuch offender to the next gaol, or to the cuſtody of their meſſenger aforeſaid, till he enter into recognizance with ſurety or ſureties, according to the nature of the offence, to appear and anſwer to the ſame in the court of Exchequer or other court where the King ſhall queſtion him for the ſame within a year following, on proceſs duly ſerved for that purpoſe on ſuch offender."

By ſ. 4. a ſummary juriſdiction is given to certain officers to inquire of and puniſh embezzlements of ſuch ſtores under the value of 20s.

9 G. 1. c. 8. *Juriſdiction to mitigate penalty and commit to gaol, &c.*

The ſtat. 9 Geo. 1. c. 8. ſ. 4. (referring to the offences deſcribed in the 2d ſect. of the ſtat. 9 & 10 W. 3. c. 41. and the additional proviſion made by the 3d ſect. of the ſaid act 9 Geo. 1. c. 8.) provides, "That it ſhall and may be lawful for any judge, juſtice, &c. before whom any offender ſhall be convicted of any of the offences before recited, enacted, or mentioned in this act, to mitigate the penalty for the ſame as they ſhall ſee cauſe, and to commit the offender ſo convicted to the common gaol of the county, &c. where the offence ſhall be committed until payment of the penalty and forfeiture impoſed by this or the ſaid former

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former act, or mitigated as aforeſaid; or to puniſh ſuch offender corporally, by cauſing him to be publicly whipped or committed to ſome public workhouſe, there to be kept to hard labour for ſix months, or a leſs time, in the diſcretion of ſuch judge," &c. And by ſ. 5. "Where any diſpute ſhall ariſe between the perſons on whoſe informations or oaths any offender or offenders againſt this or the former act ſhall be proſecuted and convicted, touching any right or title to any of the forfeitures or penalties before mentioned, or any part thereof, the judge, juſtice, or juſtices before whom ſuch offender or offenders ſhall be convicted ſhall examine the matter, and finally determine the ſame."

Diſpute as to title to penalties.

17 G. 2. c. 40. ſ. 10.

Then the ſtatute 17 Geo. 2. c. 40. ſ. 10. reciting the act of the 9 & 10 W. 3. c. 41. againſt the making, &c. ſtores with the King's marks, and the having ſuch ſtores ſo marked, or concealing the ſame, or the additional ſtores mentioned in the 3d ſect. of the ſtat. 9 Geo. 1. c. 8. and reciting alſo the laſt-mentioned clauſes (ſ. 4 & 5.) of the ſame act; and that "whereas ſome doubts had ariſen touching the method of trial and puniſhment of offenders againſt the ſaid recited acts, whether they might be indicted and tried for the offences in the ſaid acts mentioned, and whether any judge, or juſtice of aſſize, or juſtices of peace at ſeſſions might hear, try, and determine the ſame, and on conviction ſet ſuch fine or mitigate the ſame, &c.; or whether ſuch offenders, in order for recovering the ſaid forfeitures and penalties inflicted by the ſaid act could only be proceeded againſt by action of debt, &c. in ſome court of record at Weſtminſter; by reaſon of which doubts offenders indicted, &c. had eſcaped, &c.; for explaining the ſame, declares and enacts, that it ſhall and may be lawful for any judge, juſtice, or juſtices at the aſſizes, or juſtices of peace at the general quarter ſeſſions, &c. to hear, try, and determine by indictment or otherwiſe *all or any* the crimes or offences mentioned in the ſaid recited acts, and that the judge, &c. before whom ſuch offenders ſhall be indicted or tried and convicted of all or any the offences in the ſaid recited acts mentioned, may impoſe any fine not exceeding 200l. on ſuch offender or offenders, one moiety to the King, and the other to the informer; and may mitigate the ſaid penalty and forfeitures inflicted by the ſaid recited acts, or either of them;

Judges at the aſſizes or juſtices of peace at quarter ſeſſions may impoſe any fine not exceeding 200 l. for any offence within the 9 & 10 W. 3. c. 41. and 9 G. 1. c. 8. and may mitigate, &c. or in lieu thereof inflict corporal puniſhment.

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" and to commit the offenders ſo convicted and fined to the " common gaol of the county or place where the offence " was committed until payment thereof, &c.; or in lieu " thereof, to puniſh ſuch offenders in the premiſes corpo- " rally, by cauſing them to be publicly whipped, and com- " mitted to ſome houſe of correction or public workhouſe, " there to be kept to hard labour for three months, or leſs " time, in the diſcretion of ſuch judge," &c.

Bland's caſe, Mich. 1793. B. R. 2 Leach, 678.

Under this clauſe it is holden, that the Court have authority to adjudge the offender to ſuffer corporal puniſhment, although he be ready and offer to pay the penalty of 200l.

§ 149. 39 & 40 Geo. 3. c. 89. intitled " An act for the " better prevent- " ing the embez- " zlement of his " majeſty's na- " val, ordnance, " and victualling " ſtores."

The ſtat. 39 & 40 Geo. 3. c. 89. ſ. 1. reciting the acts of the 22 Car. 2. c. 5. 9 & 10 W. 3. c. 41. 9 Geo. 1. c. 8. and 17 Geo. 2. c. 40. ſ. 10. and that " notwithſtanding the " penalties and puniſhments inflicted by the ſaid recited " acts, the ſtealers, embezzlers, and receivers of his majeſ- " ty's warlike and naval, ordnance, and victualling ſtores " had greatly increaſed, ſo that it had become neceſſary to " make ſome *further* and more effectual proviſion for pre- " venting their wicked practices in future;" enacts, " that " from and after the paſſing of the act (28th July 1800) " every perſon or perſons, (ſuch perſon or perſons not being " a contractor or contractors, or employed as in the ſaid " recited act of the 9 & 10 W. 3. is mentioned,) who ſhall " willingly or knowingly *ſell or deliver*, or cauſe or procure " to be ſold or delivered, to any perſon or perſons whomſo- " ever; or who ſhall willingly or knowingly *receive or have* " in his, her, or their cuſtody, poſſeſſion, or keeping, any " ſtores of war, or naval, ordnance, or victualling ſtores, " or any goods whatſoever marked as in the ſaid re- " cited acts are expreſſed, or any canvas marked either " with a blue ſtreak in the middle, or with a blue ſtreak " in a ſerpentine form, or any bewper, otherwiſe called " buntin, wrought with one or more ſtreaks of raiſed " tape; (the ſaid ſtores of war, or naval, ordnance, or " victualling ſtores, or goods above mentioned, or any of " them being in a raw or unconverted ſtate, or being new, " or not more than one-third worn); and ſuch perſon or " perſons who ſhall *conceal* ſuch ſtores or goods, or any of " them, marked as aforeſaid, ſhall be deemed *receivers of* " *ſtolen goods* knowing them to have been ſtolen, and ſhall

Every perſon (not a contractor, &c.) who ſhall knowingly, &c. ſell or deliver, or receive or have in his poſſeſſion any naval, ordnance, or victualling ſtores, &c. in a raw ſtate, or new, or not more than one third worn, and ſuch perſon who ſhall conceal the ſame, ſhall be deemed a receiver of ſtolen goods knowingly, and be tranſported for 14 years;

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" on conviction be tranſported beyond the ſeas for the term " of fourteen years, in like manner as other receivers of " ſtolen goods are directed to be tranſported, &c. unleſs " ſuch perſon or perſons ſhall upon their trial produce a cer- " tificate under the hands of three or more of his majeſty's " principal officers or commiſſioners of the navy, ordnance, " or victualling, expreſſing the numbers, quantities, or " weights of ſuch ſtores or goods as they ſhall then be in- " dicted for, and the occaſion or reaſon of ſuch ſtores or " goods coming to their hands or poſſeſſion."

unleſs he produce a certificate from the commiſſioners, &c. accounting for ſuch ſtores.

Perſons in whoſe cuſtody ſhall be found canvas or buntin marked, &c. (not being new, &c.) or who ſhall be convicted of any offence contrary to 9 & 10 W. 3. relating to warlike ſtores, &c. ſhall beſides the forfeiture of 200l. (which may be mitigated) ſuffer corporal puniſhment.

By ſ. 2. " Such perſon or perſons, (not being a contractor " or contractors, or employed as aforeſaid,) in whoſe cuſto- " dy, poſſeſſion, or keeping any of the ſaid ſtores called " canvas, marked with a blue ſtreak in a ſerpentine form, " or bewper, otherwiſe buntin, wrought as above mention- " ed, ſhall be found, (ſuch canvas or bewper, &c. not being " charged to be new, or not more than one-third worn,) " and all and every perſon and perſons, who ſhall be con- " victed of any offence contrary to ſo much of the ſaid re- " cited act of the 9 & 10 W. 3. as relates to the making, or " the having in poſſeſſion or concealing any of his majeſty's " warlike, or naval, or ordnance ſtores, marked as therein " ſpecified, ſhall, beſides forfeiting ſuch ſtores and 200l. " and coſts as therein mentioned, be corporally puniſhed by " pillory, whipping, and impriſonment, or by any or either " of the ſaid ways and means, in ſuch manner and for ſuch " ſpace of time as to the judge or juſtices before whom ſuch " offender, &c. ſhall be convicted ſhall ſeem meet, &c. " Provided that ſuch judge or juſtices may mitigate the ſaid " penalty of 200l. as they ſhall ſee cauſe."

Not to exempt contractors, except as to ſtores bonâ fide made up for his majeſty, or returned to them.

" Provided (ſ. 3.) that nothing in this act, or in the ſaid " recited act of the 9 & 10 W. 3. ſhall be deemed to ex- " tend to exempt from the operation of this or the ſaid re- " cited act any perſon or perſons being contractors, or " employed as in the ſaid laſt-mentioned act is mentioned, " except only ſo far as concerns ſtores or goods, marked as " aforeſaid, which ſhall be *bonâ fide* provided, made up, or " manufactured by ſuch perſons, or by their order, and " which ſhall not have been before delivered into his majeſ- " ty's ſtore; unleſs, having been ſo delivered, they ſhall have

" been

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" been ſold or returned to ſuch perſons by the commiſſion-
" ers of his majeſty's navy, ordnance, or victualling re-
" ſpectively."

§ 150. *Defacing marks on the King's ſtores, felony, and tranſportation for 14 years.*

Sect. 4. enacts, " That if any perſon or perſons ſhall,
" from and after the paſſing of this act, (28th July 1800,)
" wilfully and fraudulently deſtroy, beat out, take out, cut
" out, deface, obliterate, or eraſe, wholly or in part, any of
" the marks in the ſaid act of the 9 & 10 W. 3. or in this
" act mentioned, or any other mark whatſoever denoting the
" property of his majeſty, &c. in or to any warlike or naval,
" ordnance, or victualling ſtores; or cauſe, procure, employ,
" or direct any other perſon or perſons ſo to do, for the
" purpoſe of concealing his majeſty's property in ſuch
" ſtores; ſuch perſon or perſons ſhall be deemed guilty of
" felony, and ſhall, on conviction, be tranſported to parts
" beyond the ſeas for 14 years in like manner as other
" felons," &c.

§ 151. *Perſons not tranſported for a firſt offence againſt this act, and guilty of a ſecond offence againſt this or the ſtat. 9 & 10 W. 3. ſhall be tranſported for 14 years.*

By ſ. 5. " If any perſon or perſons hereafter convicted of
" any offence contrary to this act, for which he ſhall not
" have been tranſported; or, contrary to the ſaid recited act
" of the 9 & 10 W. 3., ſhall be guilty of a ſecond offence,
" either contrary to that act or the preſent act, which
" would not otherwiſe, as the firſt offence, ſubject them to
" tranſportation, and ſhall be thereof legally convicted;
" ſuch perſon or perſons ſhall, by judgment of the court
" wherein they ſhall be ſo convicted, be tranſported for
" 14 years, in like manner as other offenders," &c.

Returning from tranſportation before term expired, death.

By ſ. 6. " Perſons ſo tranſported, &c. returning into any
" part of Great Britain or Ireland before the expiration of
" the term, &c. ſhall ſuffer as felons, and have execution
" awarded againſt them, as perſons attainted of felony,
" without benefit of clergy."

Court may commute tranſportation for corporal puniſhment and fine.

" Provided (ſ. 7.) that it ſhall and may be lawful for the
" court before whom any offender ſhall be indicted and
" convicted of all or any of the crimes or offences herein
" before mentioned to be puniſhable with tranſportation, to
" mitigate or commute ſuch puniſhment, by cauſing the
" offender or offenders to be ſet on the pillory, publicly
" whipped, fined, or impriſoned, or by all or any one or
" more

" more of the ſaid ways and means, as ſuch court in its Ch XVI. § 151.
" diſcretion ſhall think fit; one moiety of which fine (if any *King's ſtores.*
" impoſed) ſhall be to his majeſty, &c. and the other moie-
" ty to the informer; and alſo to order ſuch offender or
" offenders to be impriſoned until ſuch fine be paid."

§ 152. *Reward on diſcovery.*

By ſ. 8. perſons diſcovering to the navy, ordnance, or victualling boards, or apprehending, or firſt informing againſt any offenders guilty of ſtealing or embezzling ſuch ſtores, or of any of the offences mentioned in the ſaid ſtat. 9 & 10 W. 3. or in the preſent act before mentioned, which ſhall not be proſecuted in the ſummary way after preſcribed, ſhall on conviction receive, for every ſuch offence ſo diſcovered, 20l. over and above any ſhare of penalty or fine they may be entitled to as informers, ſo as the ſame do not amount to more than 20l.; or, (if amounting to more than 20l.,) ſhall fail to be paid by the offenders on whom inflicted for three calendar months after conviction, or if they be detained by ſentence of impriſonment, for three calendar months next after the expiration of ſuch ſentence. And by ſ. 9. diſputes reſpecting the title to ſuch rewards ſhall be determined by any of the commiſſioners of the navy, &c. on oath before the ſame, or any juſtice of peace. By ſ. 10. the commiſſioners of the navy, &c. ſhall cauſe ſuch reward to be paid by the treaſurer of the navy or ordnance, on producing a certificate under the hand of the clerk of aſſize, or other proper officer of the court before whom ſuch offenders ſhall be tried, certifying the conviction, and that the informer's ſhare of any penalty or fine inflicted on ſuch offender or offenders does not amount to more than 20l.; or if amounting to more, hath failed to be paid by ſuch offender or offenders for three months after conviction, or if impriſoned by ſentence for three months after the expiration of ſuch impriſonment; for which certificate the ſaid clerk, &c. ſhall charge no more than 5s.

Search warrants.

By ſ. 11. any commiſſioner of the navy, &c. or juſtice of peace may grant warrants to ſearch houſes, ſhips, &c. in the day-time, and in caſe any ſtores or goods marked as before mentioned ſhall on ſuch ſearch be found, to cauſe the ſame and the offenders to be brought before ſuch commiſſioner or juſtice of peace, to be bound over, &c.

The

Ch. XVI. § 152. *King's ſtores.*

Summary juriſdiction.

The act then proceeds to create ſeveral miſdemeanors; amongſt others, the not accounting to the ſatisfaction of ſuch commiſſioner or juſtice for the poſſeſſion of ſuch ſtores, &c. which miſdemeanors are determinable in a ſummary manner before the ſame perſons: and by ſ. 18. authority is given to any ſuch principal officer or commiſſioner of the navy, &c. or juſtice of peace, &c. "to hear and determine any complaint againſt any perſon (not being a contractor or employed as aforeſaid) for unlawfully ſelling or delivering, or cauſing or procuring to be ſold or delivered, or for receiving or having in their cuſtody, poſſeſſion, or keeping, or for concealing, any ſtores of war, or naval, ordnance, or victualling ſtores or goods marked as aforeſaid, of any value, in the whole not exceeding 20s." And on conviction (founded on complaint exhibited within three calendar months after the offence committed) they are empowered to inflict a fine on the offender, to be levied as therein mentioned; from which an appeal is given to the Quarter Seſſions. And then,

Not to prevent proſecutions againſt receivers, &c. ſo as the party be not twice puniſhed.

By ſ. 24. it is "enacted and declared, that nothing therein before contained, which gives to any commiſſioner or juſtice, &c. authority to hear and determine offences in a ſummary way, ſhall extend to prevent parties accuſed of ſelling or delivering, or of having in their cuſtody, poſſeſſion, or keeping, or of receiving or concealing, any of the ſtores marked as above mentioned, under the value of 20s. from being proſecuted as receivers of ſtolen goods under this act, or for unlawfully having the ſame in their cuſtody, or concealing the ſame, under the ſaid acts of the 9 & 10 W. 3. 9 Geo. 1. or 17 Geo. 2. in any court of record, oyer and terminer, or otherwiſe, as they might have been if no ſuch authority had been given; or to take away from any perſon or court any power, &c. or authority which they had for the hearing and determining of ſuch offences, in caſe no authority to hear and determine the ſame in a ſummary way had been given; ſo as that the ſame perſon ſhall not be puniſhed twice for the ſame offence."

By the 29th ſect. the proviſions of the act are extended to Scotland.

The

Ch. XVI. § 153. *What a receiving or having, &c.*

The moſt general queſtion which occurs upon this body of ſtatutes is, What ſhall be ſaid to be a receiving or having? or in other words, Who is liable to be indicted as a receiver within the meaning of the ſeveral proviſions?

§ 153. *What a receiving or having in poſſeſſion.* Ante, 743, 4, 746.

As to what general evidence ſhall be ſaid to conſtitute a receiver under the ſtatutes of William and Anne, and 22 Geo. 3. c. 58. it is to be obſerved, that the words of thoſe acts are in the diſjunctive, "receive *or* buy." Therefore it follows, that in order to conſtitute a receiver generally ſo called, it is not neceſſary that the goods ſhould be actually purchaſed by him: neither does it ſeem neceſſary that the receiver ſhould have any intereſt whatever in the goods: it is ſufficient if they be in fact received into his poſſeſſion in any manner *malo animo*, as to favour the thief; or without lawful authority expreſs, or to be implied from circumſtances; as in the caſe after mentioned, determined by Mr. Juſtice Foſter on the Weſtern circuit. This diſtinction is however to be noted, that in general caſes under the ſtatutes laſt mentioned the receiver is averred to have knowledge that the goods were ſtolen; which may be collected from circumſtances; and by Lord Hale, the buying goods at an under value is preſumptive evidence that the buyer knew they were ſtolen. But under the ſtatutes for protecting the King's ſtores, the King's mark denotes the original ownerſhip; and there the *onus probandi* lies on the party to account ſatisfactorily for his poſſeſſion according to the regulations preſcribed, otherwiſe the bare fact of poſſeſſion concludes him. But even here the preſumption of the *malus animus* ariſing from the bare fact of poſſeſſion may be rebutted by circumſtances, as in the following caſe:

Vide 1 Hale, 619, 620.

Foſt. Append. 439. edit. of 1792. *One became poſſeſſed on the death of her huſband of canvas ſtores, which had been purchaſed by him in his lifetime at a public ſale, and had been many years made up into houſhold furniture, but no*

A widow woman was indicted before Mr. Juſtice Foſter upon the Weſtern circuit on the ſtat. 9 & 10 W. 3. c. 41. for having in her cuſtody divers pieces of canvas marked with the King's mark in the manner deſcribed in the act; ſhe not being a perſon employed by the commiſſioners of the navy to make the ſame for the King's uſe. The canvas was marked as charged in the indictment, and was clearly proved to be ſuch as was made for the uſe of the navy, and to have been found in the defendant's cuſtody. The defendant

Ch. XVI. § 153. *What a receiving or having, &c.*

evidence was given of any certificate of such sale being lawful as required by stat. 9 & 10 W. 3. or of any excuse allowed by the act; yet the possession being by act of law without fraud; held not within the penalty of the statute.

fendant did not attempt to shew that she was within any exception of the act, as being a person employed to make canvas for the use of the navy: nor did she offer to produce any certificate from any officer of the crown, touching the occasion and reason of such canvas coming into her possession. Her defence was, that when there happened to be in his majesty's stores a considerable quantity of old sails, no longer fit for that use, it had been customary for the persons intrusted with the stores to make a public sale of them in lots, larger or smaller as best suited the purpose of the buyers; and that the canvas produced in evidence, which happened to have been made up long since, some for table-linen and some for sheeting, had been in common use in the defendant's family a considerable time before her husband's death, and upon his death came to the defendant, and had been used in the same public manner by her to the time of the prosecution. This was proved by some of the family, and by the woman who had frequently washed the linen. This sort of evidence was strongly opposed by the counsel for the crown, who insisted, that, as the act allows of but one excuse, the defendant, unless she could avail herself of that, could not resort to any other. That if the canvas were really bought of the commissioners, or of persons acting under them, there ought to have been a certificate taken at the time of the purchase; and the second section admits of no other excuse. But the Judge was of opinion, that though the clause of the statute, which directs the sale of these things, had not pointed out any other way for indemnifying the buyer than the certificate; and though the second section seemed to exclude any other excuse for those in whose custody they should be found: yet still the circumstances attending every case which might seem to fall within the act ought to be taken into consideration; otherwise a law calculated for wise purposes might by too rigid a construction of it be made a handle for oppression. There was no room to say, that this canvas came into the possession of the defendant by any act of her own. It was brought into family use in the lifetime of her husband, and it continued so to the time of his death; and by act of law it came to her. Things of that kind had been frequently exposed to public sale;

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sale; and though the act pointed out an expedient for the indemnity of the buyers, yet probably few buyers, especially where small quantities had been purchased at one sale, had used the caution suggested to them by the act. And if the defendant's husband really bought the linen at a public sale, but neglected to take a certificate, or did not preserve it, it would be contrary to natural justice, after such a length of time, to punish her for his neglect. He therefore thought the evidence given by the defendant proper to be left to the jury; and directed them, That if, upon the whole evidence, they were of opinion, that the defendant came to the possession of the linen without any fraud or misbehaviour on her part, they should acquit her; and she was accordingly acquitted.

Cole's case, Winchester, March 1801. cor. Le Blanc J. MS. Jud. *Difference between receiving and having in possession.*

An indictment charged that Thomas Cole, on the 28th January 1801, unlawfully, willingly, and knowingly did *receive and have* in his custody, possession, and keeping certain naval stores of the King, being all marked with the broad arrow, he not being a contractor, &c. against the statute, &c. The jury found the prisoner guilty; but said they did not find that he *received* the stores after the 28th July 1800, but only that he had them in his possession after that day. Judgment was thereupon respited to take the opinion of the Judges; a majority of whom inclined to think, that the statute was to be construed in the disjunctive, and the word *or* (receive *or* have) not to be taken as *and*: but because of the disagreement of some, and that the case was not likely to occur again, the prisoner, on the finding of the jury, was recommended to mercy. It seemed however to be agreed that the case was not within the stat. 9 & 10 W. 3. c. 41. because the goods were not charged to have been found in the prisoner's possession.

§ 154. *Difference between receiving and stealing.*

Some cases have turned on the distinction between the cases of accomplice and receiver in general.

Rex v. Dyer and Disting, Exeter Sum. Ass. 1801. cor. Graham B. MS.

Dyer and Disting were indicted for stealing a quantity of barilla, the property of M. Hawker. The fact appeared to be, that the barilla was on board a Swedish ship at Plymouth consigned to Hawker. That Hawker employed Dyer, who was the master of a large boat, for the purpose of bringing

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ing the barilla on ſhore; and Diſting, together with ſeveral others, were employed as labourers in removing the barilla after it was landed to Hawker's warehouſes. The jury found, that while the barilla was in Dyer's boat, ſome of his ſervants without his privity, conſent, or participation ſevered ſome of the barilla from the reſt where it was ſtowed, and removed it to another part of the boat, where they concealed it under ſome rope. But they alſo found, that Dyer afterwards aſſiſted the other priſoner and the perſons on board who had before ſeparated this part from the reſt *in removing it from the boat for the purpoſe of carrying it off.*

It was objected for the priſoner Dyer, that his offence was not that of a principal, as laid in the indictment, but that of receiver or acceſſary after the fact. But Graham B., before whom the trial was had, thought, that ſo long as the barilla remained in the boat the offence as to Dyer could not be ſaid to be complete, but that it was one continuing tranſaction to the time of the complete carrying off of it from the boat: and he directed the jury accordingly; who found the fact ſpecially as above ſtated, and that both the priſoners were guilty. Graham B. however deferred paſſing ſentence till the next day, when he ſaid that after conſultation with the other Judge (Mr. Juſtice Le Blanc) he was now fully ſatisfied that his opinion was well founded. That though for ſome purpoſes, as with reſpect to thoſe concerned in the actual taking and ſeparation, the offence would have been complete, as being an aſportation in point of law, yet with reſpect to Dyer, who joined in the ſcheme before the barilla had been actually taken out of the boat, where it was properly depoſited for the purpoſe of being landed, and who aſſiſted in the act of carrying it off from thence, it was one continuing tranſaction, and could not be ſaid to be completed till the removal of the commodity from ſuch place of depoſit; and Dyer having aſſiſted in the act of carrying it off, was therefore guilty as principal.

Rex v. Atwell, and O'Donnell and others, at the ſame time.

Another caſe aroſe out of the ſame tranſaction. The reſt of the barilla was lodged in M. Hawker's warehouſe. While it was there, it appeared that ſeveral perſons employed as labourers or ſervants by him entered into a conſpiracy to ſteal ſome of it; and accordingly ſome of them who had acceſs to the warehouſe removed a parcel of it nearer to the door

door than it was before in the courſe of the morning; and about nine at night theſe perſons together with Atwell and O'Donnell, who had in the mean time agreed to purchaſe it of the others, came to the warehouſe yard, and aſſiſted the others, who took it out of the warehouſe, in carrying it away from thence. They being all indicted as principals in the felony, the ſame objection was made as before, that theſe two were only receivers or acceſſaries after the fact, the felony being complete before their participation in the tranſaction: but after the like conſideration in this caſe as in the other, Graham B. ſaid, that ſo long as the goods remained in the warehouſe, which was the lawful place of their depoſit, although to ſome purpoſes, as to thoſe who ſevered this parcel from the reſt for the purpoſe of ſtealing it, and more conveniently removing it afterwards, the felony might be ſaid to be complete; yet it was a continuing tranſaction as to thoſe who joined in the ſame plot before the goods were finally carried away from the premiſes: and all the defendants having concurred in or been preſent at the act of removing them from the warehouſe wherein they were lawfully depoſited, they were all principals. And accordingly all the priſoners, found guilty on both indictments as principals in the two ſeveral tranſactions, received ſentence of tranſportation for ſeven years.

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Taking a Reward to help to ſtolen Goods.

§ 155 *a.* *Taking a reward to help to ſtolen goods.*

This is a kindred offence growing in truth out of the character of a receiver of ſtolen goods: for theſe confederates of the thieves, who are difficult to be diſcovered, frequently diſpoſe of the goods ſtolen to the owners for a reward, under the pretence of helping them again to their ſtolen goods: it is therefore further provided by the ſt. 4 G. 1. c. 11. that whenever any perſon taketh money or reward, directly or indirectly, under pretence or upon account of helping any perſon or perſons to any ſtolen goods or chattels; every ſuch perſon ſo taking money or reward as aforeſaid (unleſs ſuch perſon doth apprehend or cauſe to be apprehended ſuch felon who ſtole the ſame, and cauſe him to be brought to trial for the ſame, and give evidence againſt him) ſhall be guilty of felony, and ſuffer

4 G. 1. c. 11. ſ. 4.

 the

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" the pains and penalties of felony, according to the nature " of the felony committed in ſtealing ſuch goods, and in " ſuch and the ſame manner as if ſuch offender had himſelf " ſtolen ſuch goods and chattels in the manner and with " ſuch circumſtances as the ſame were ſtolen."

Reward, &c.

By ſtat. 6 Geo. 1. c. 23. ſ. 9. whoſoever ſhall diſcover, apprehend, and proſecute to conviction of felony without benefit of clergy any offender againſt the above law ſhall be entitled to a reward of 40l. for every ſuch offender, and a certificate, &c.

O. B. 1725. 4 Blac. C m. 132. Poſt. ſ. 166.

On the above ſtatute of the 4 G. 1. the noted Jonathan Wild was convicted and executed; the principal felon being examined as a witneſs on the part of the crown.

Rex v. John Drinkwater, O. B. 1740. Leach, 18. *Whether offender triable after death of principal before conviction.*

Yet in Drinkwater's caſe it was doubted, the principal felon being dead, and not having been convicted of the offence, whether the perſon receiving the reward to help to the ſtolen goods could be convicted. The report ſays that the court (conſiſting, as appears, of Ld. C. J. Lee and Denton J.) conceived it to be a caſe of very great importance and of the firſt impreſſion, and therefore reſerved it for the opinion of the Judges; which was never publicly communicated; but the priſoner, after remaining ſome time in goal, was diſcharged. This reſult of the matter, if accurately ſtated, ſeems to import that the objection prevailed: but it is very queſtionable whether the doubt there could have been founded on the ground ſuggeſted in the argument of the counſel for the priſoner, which was that the principal was not convicted, nor the record of ſuch conviction given in evidence to ſupport the allegation of her having committed the felony. For, without inquiring whether the principal had been previouſly convicted in Jonathan Wild's caſe, the very terms of the ſtatute itſelf preclude the ſuppoſition of a conviction of the principal being a neceſſary preliminary to the trial and puniſhment of the offender under this ſtatute; for it ſtates that the offender, " *unleſs he doth apprehend or cauſe " to be apprehended the felon who ſtole the goods, and cauſe ſuch " felon to be brought to his trial for the ſame, and give evidence " againſt him,* ſhall be guilty of felony, *and ſuffer the pains " and penalties of felony,*" &c. I therefore rather preſume that the true ground of the doubt entertained there was, becauſe

It ſeems he had not. *Vide* the argument in Drinkwater's caſe, 1 Leach, 21, 2.

becauſe by the death of the principal the ſtipulated condition had become impoſſible to be performed without any default of the defendant.

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In proſecutions on this ſtatute it ſeems proper to aver that the defendant had not apprehended or cauſed to be apprehended the principal, &c. ſuch reſervation being in the enacting clauſe, and part of the deſcription of the offence.

Advertiſing a Reward for the Return of ſtolen Goods, &c.

§ 155. (*b*) 25 G. 2. c. 36. *Advertiſing a reward for ſtolen goods, &c. ſubjected to forfeiture.*

In furtherance of the laws againſt receivers, and to check as much as poſſible their nefarious traffic, it is alſo enacted by ſtat. 25 Geo. 2. c. 36. ſ. 1. " That any perſon " publicly advertiſing a reward, with no queſtions aſked, " for the return of things which have been ſtolen or loſt, " or making uſe of any words in ſuch public advertiſement " purporting that ſuch reward ſhall be given or paid, with- " out ſeizing or making inquiry after the perſon producing " ſuch things ſo ſtolen or loſt; or promiſing or offering in " any ſuch public advertiſement to return to any pawn- " broker or other perſon who may have bought, or advanced " money by way of loan upon, ſuch things ſo ſtolen or loſt, " money ſo paid or advanced, or any other ſum of money " or reward for the return of ſuch thing; and any perſon " printing or publiſhing ſuch advertiſement; ſhall reſpec- " tively forfeit the ſum of 50l. for every ſuch offence to " any perſon who will ſue for the ſame."

VI. *Of the Trial, Indictment, Appeal, Evidence, Verdict, and Clergy.*

§ 156. *Trial.* 2 Hale, 163.

The offences of larceny and robbery, like all others, muſt be tried in the ſame county or juriſdiction wherein they were committed. In aſcertaining which it is neceſſary to advert to two leading principles from which certain deviations which will be noticed are exceptions.

1 Hale, 507, 8. 536. 2 Hale, 163. 1 Hawk. ch. 33. ſ. 9. 2 Hawk. ch. 25. ſ. 31. 2 MS. Sum. 251. 439.

1. That the poſſeſſion of goods ſtolen by the thief is a larceny in every county into which he carries the goods; becauſe the legal poſſeſſion ſtill remaining in the true owner, every moment's continuance of the treſpaſs and felony

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amounts to a new caption and aſportation. And therefore if one ſteal goods in the county of A. and carry them into the county of B. he may be indicted or appealed of larceny in the latter county; though he can only be charged with robbery in the county where the force or putting in fear was.

Stealing at ſea.
1 Hawk. ch. 33. ſ. 9.
3 Inſt. 113.
13 Co. 53.
2 MS. Sum. 285. 430.

To this however there are ſome exceptions; as where the original taking is ſuch whereof the common law cannot take cognizance; as of goods obtained by theft or robbery at ſea, and afterwards carried into ſome county; in which caſe the common law gives no juriſdiction to inquire of the felony.

In Scotland.

Rex v. Anderſon and others, Carliſle Sum. Aſſ. 1763. cor. Gould J. and afterwards before all the judges in Nov. 1763. MS. Crown Caſ. Reſ. 16. 2 MS. Sum. 251. 410, 1. 13 G. 3. c. 31. ſ. 4.

And the ſame exception prevailed till lately in caſes where the original taking was in Scotland: it was ruled that a felon in ſuch caſe could not be indicted in Cumberland where he was taken with the goods. But now by the ſtat. 13 Geo. 3. c. 31. ſ. 4. "If any perſon or perſons having ſtolen or "otherwiſe feloniouſly taken money, cattle, goods, or other "effects in either part of the united kingdom (i. e. of Scotland and England) ſhall afterwards have the ſame money, "&c. or any part thereof in their poſſeſſion or cuſtody in "the other part of the united kingdom, it ſhall and may "be lawful to indict, try, and puniſh ſuch perſon or perſons for theft or larceny in that part of the united kingdom where they ſhall ſo have ſuch money, &c. in their "poſſeſſion or cuſtody; as if the ſaid money, &c. had been "ſtolen in that part of the united kingdom."

Receivers.

And by ſ. 5. "if any perſon or perſons in either part of "the united kingdom ſhall hereafter receive or have any "money, cattle, goods, or other effects, ſtolen or otherwiſe feloniouſly taken in the other part of the united "kingdom, knowing the ſame to be ſtolen or otherwiſe "feloniouſly taken; every ſuch perſon or perſons ſhall be "liable to be indicted, tried, and puniſhed for ſuch offence "in that part of the united kingdom where they ſhall ſo "receive or have the ſaid money, &c. in the ſame manner "to all intents and purpoſes as if the ſaid money, &c. had "been originally ſtolen or otherwiſe feloniouſly taken in "that part of the united kingdom."

Wales. Wreck.
26 G. 2. c. 19. ſ. 8. ante, ſ. 86.

Alſo in the caſe of plundering the effects of any veſſel wrecked or in diſtreſs, which is ouſted of clergy by the ſtat. 26 Geo. 2. c. 19. before adverted to, it is enacted, ſ. 8. "That

"That if the fact be committed in Wales, then the pro- "ſecution ſhall or may be carried on in the next adjoining "Engliſh county," in the manner therein mentioned.

Ch. XVI. § 156. *Wales. Wreck.*

Parry and Roberts were indicted on this ſtatute in Salop for an offence committed in the iſle of Angleſea; and the objection was taken that Cheſhire was "the next adjoining "Engliſh county," (of which evidence was given;) and therefore that the trial ought to have been there and not in Salop. It was obſerved that there was a difference between the penning of the ſtatute 26 H. 8. c. 6. ſ. 6. which gives the general juriſdiction to the Engliſh Judges to try offences committed in Wales, and that of the 26 Geo. 2. c. 19. ſ. 8. in queſtion; for the former of thoſe ſtatutes ſays, "that the juſtices of gaol delivery, &c. in the ſhire or "ſhires of England *where the king's writ runneth* next ad- "joining to the lordſhip, marches, or other place in Wales "where the offence was committed ſhall have full power "and authority," &c. But the ſtat. 26 Geo. 2. omits the words "*where the king's writ runneth.*" But all the Judges in Nov. 1774 were of opinion that it was no miſtrial: that "the next adjoining Engliſh county" in the latter ſtatute meant, as in the former, "where the king's writ runneth;" namely, that the offence ſhould be tried by an Engliſh judge and jury: and that Cheſter was not to be conſidered as an Engliſh county within either of thoſe acts.

Rex v. Parry and Roberts, Salop Sum. Aſſ. 1774. MS. Gould J. (*Vide* S. C. 1 Leach, 125.) *Salop, and not Cheſhire, is "the "next adjoining "Engliſh county" to Angleſea, within the meaning of the ſtatute; being the next where the King's writ runs.*

With the like view of ſecuring an impartial trial the 8th ſection of the ſame act of 26 Geo. 2. c. 19. gives an option to the proſecutor, even where the fact is committed in an Engliſh county, to proſecute in the adjoining Engliſh county.

Ante, p. 649.

§ 157. *Aggravated larcenies.*

2. The ſecond leading principle which governs the trial of theſe offences is, that where clergy is ouſted on circumſtances of aggravation, ſuch circumſtances muſt *all* be proved to have happened within the county in which the offender is tried; otherwiſe the fact of the larceny only being eſtabliſhed in that county, he will be entitled to clergy.

25 H. 8. c. 3. 5 & 6 Ed. 6. c. 10. *Goods obtained by burglary or robbery in another county.*

To this an exception is furniſhed by the ſtat. 25 H. 8. c. 3. (revived and confirmed by the ſtat. 5 & 6 Ed. 6. c. 10.) which, reciting (ſ. 1.) "that felons and robbers committed "divers

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1 Hale, 529.

" divers heinous robberies and burglaries in one ſhire, and " conveyed the ſpoil into another ſhire, and had been there " taken, indicted, and arraigned upon feloniouſly ſtealing " the ſaid goods, and not upon the robbery or burglary; " for that it was not committed in the ſame ſhire where " they had been ſo indicted or arraigned; by reaſon of " which the ſaid felons, robbers, and burglars had the be- " nefit of their clergy;" enacts (ſ. 3.) " that if any perſon " or perſons be indicted of felony for ſtealing any goods or " chattels in any county within the realm of England, and " thereupon arraigned and be found guilty, or ſtand mute " of malice, or challenge peremptorily above the number " of twenty perſons, as is aforeſaid; or will not upon his ſaid " arraignment directly anſwer to the ſame felony; that then " the ſame perſon and perſons ſo arraigned and found guilty, " or who ſtand mute of malice, or challenge peremptorily " above the number of twenty perſons, or will not directly " anſwer to the law, ſhall loſe and be put from the benefit " of their clergy, in like manner and form as they ſhould " have been if they had been indicted and arraigned and " found guilty in the ſame county where the ſame robbery " or burglary was done or committed; if it ſhall appear to " the juſtices before whom any ſuch felons or robbers be " arraigned, by evidence given before them, or by examina- " tion, that the ſame felonies whereupon they be ſo ar- " raigned had been ſuch robberies or burglaries in the ſame " ſhire where ſuch robberies or burglaries were committed " or done, by reaſon whereof they ſhould have loſt the be- " nefit of their clergy by force of the ſaid ſtatute, in caſe they " had been found guilty thereof in the ſame ſhire where " ſuch robberies or burglaries were ſo committed or done."

2 Hawk. ch. 33. ſ. 81.
1 Hale, 518, 519.
2 MS. Sum. 253. Sum. 241.

These ſtatutes extended not to outlaws or perſons appealed, nor to offences committed out of England, nor to ſuch ſtealing as is excluded from clergy by ſubſequent ſtatutes: but theſe omiſſions are, except as to appeals, ſupplied

3 W. & M. c. 9. ſ. 3.

by the ſtat. 3 W. & M. c. 9. ſ. 3. whereby " If any perſon " or perſons indicted of felony for ſtealing of any goods or " chattel in any county of England, Wales, or town of " Berwick-upon-Tweed, and thereof be convicted or at- " tainted, or upon arraignment ſtand mute, or will not di- " rectly

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4 Bac. Com. 305.

" rectly anſwer to the indictment, or challenge peremptorily above twenty, &c. he or they ſhall be excluded from " the benefit of clergy, if it appear upon evidence or examination before the juſtices that the ſaid goods or chattel " were taken by robbery, or burglary, or in any other manner, in any other county, whereof if ſuch perſon or perſons had been convicted by a jury of the ſaid other county, he or they *are* excluded by virtue of this or any other " act from having the benefit of clergy."

2 MS Sum. 253. 440. 544. MS. Tracy, 241. *Vi.* 1 Hale, 519, 520. & 1 Ed. 6. c. 12. 11 Co. 31.

But this ſtatute does not extend any more than the former to larcenies ouſted of clergy by ſubſequent ſtatutes; for the words are " *are* excluded." And neither of theſe ſtatutes extends to appeals or to acceſſaries. It is alſo obſerved that theſe ſtatutes, ſpeaking only of counties, do not extend to caſes where the thief is taken with the goods in a liberty or corporation. But this I apprehend muſt at leaſt be intended where ſuch liberty or corporation has juriſdiction of the felony, and the trial is had there.

2 MS. Sum. 253. 439. 2 Hawk. ch. 33. ſ. 83. 1 Hale, 536. 2 Hale, 349. 351.

It ſeems plainly to be underſtood, though not expreſſed in the ſtatute of King William, that the offender muſt have been poſſeſſed of the goods in the county in which the trial is had, otherwiſe he cannot be convicted of larceny in ſuch county. Hence it is, if the value of the goods ſo found there do not exceed 12d. the offender can only have the proper judgment for petit larceny, and no other, in reſpect of the robbery, &c. proved in another ſhire upon the evidence or examination: for being convicted of no offence which will warrant a judgment of death, and conſequently having no need to demand clergy, he cannot be hurt by being excluded from the benefit of it.

§ 158. *Appearing on evidence or examination.*

2 Hawk. ch. 33. ſ. 82. & 28. & 31. 2 Hale, 348. 1 And. 114. 2 MS. Sum. 253.

The words of the ſtatute of W. & M. " if it appear upon " evidence or examination," &c. are to be intended not only where the party is found guilty by the jury upon plea of not guilty, but alſo where he ſtands mute or challenges peremptorily above twenty, or will not directly anſwer, or is outlawed, or confeſſes. The ſame words in the ſtat. of Hen. 8. could not apply to the caſe of outlawry, that being omitted in the former part. And Lord Hale was of opinion that they did not extend to the caſe of a confeſſion

1 Hale, 518.

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upon record. Yet it ſeems that though the latter might not fall within the ſtat. of Hen. 8. it is within that of W. & M. which has the words "*convicted or attainted.*" But the reaſoning of Hawkins goes to both ſtatutes; for he ſays that a ſtatute taking away clergy from thoſe who ſhall be *found guilty* extends as well to thoſe who ſhall *confeſs* themſelves guilty upon record, as to thoſe who ſhall be found ſo by verdict; for the former are found guilty by the court on conviction from their own mouths, which is evidence of the higheſt nature poſſible.

2 MS. Sum. 253. 439. 543. Dub. 2 Hawk. ch. 33. ſ. 28.

And if the indictment contained an averment that the goods were taken by robbery, &c. in another county, to which the priſoner pleaded guilty; that may be thought to get rid of the difficulty above ſuggeſted; for then the fact would clearly appear to the court by examination of the record itſelf.

1 Hale, 518. 2 Hawk. ch. 33. ſ. 82. 2 MS. Sum. 253. 440. 543.

It is agreed, however, on all hands, that there is no need to make any entry on the record that it appears by ſuch evidence or examination that the felony was originally committed in a different county, and was of ſuch a nature that the offender could not have had his clergy there; though it is uſual to make ſuch entry. It is alſo ſaid to be uſual to write in the margin of the indictment that it is for robbery, &c. in another county.

Butler's caſe, O. B. jan. 1720. Serjt. Forſter's MS.

Butler was indicted for ſtealing goods of great value from Sir Juſtinian Iſham and others. Upon evidence it appeared that they were robbed upon the highway in Hertfordſhire, and that the goods were found upon the priſoner in Middleſex: and it appearing alſo in evidence that the priſoner was the perſon who robbed them in Hertfordſhire, he received ſentence of death, and was executed.

R. v. Evan Evans, O. B. Aug. 1706. Burnet's MS. 69. 2 MS. Sum. 544.

But in Evan Evans's caſe, who was indicted for larceny at the O. B.; it appearing that the goods were taken from the owner by robbery in Eſſex; but there being no evidence that the priſoner was preſent, unleſs the finding of the goods upon him in Middleſex, he had his clergy upon mature deliberation by Holt C. J. and two other Judges.

Yet quære in the above caſe if the evidence of finding the goods on the priſoner were of ſuch a nature as would be evidence

evidence againſt him of his having committed the robbery in the county where the fact happened?

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It is ſaid that Eyre C. J. (*a*) was of opinion, that it was diſcretionary in the Judge by theſe ſtatutes, whether he would examine into the circumſtances of the fact in the other county ſo as to ouſt the priſoner of clergy. But I know of no principle whereon to found ſuch a diſcretion in a Judge to admit or refuſe legal evidence. But what was alſo ſaid by the ſame Judge is deſerving of conſideration, that in order to ouſt clergy on the ſtatute it muſt be by counterplea to the prayer of clergy.

Serjt. Forſter's MS.

(*a*) The firſt of that name.

Vi. 2 MS. Sum. 254.

Receivers. Ante, ſ. 142.

With reſpect to the trial of the receivers of ſtolen goods, I have already noticed what was neceſſary to be ſtated in this reſpect in what was before ſaid touching the general deſcription of theſe offenders.

Indictment, Evidence, and Verdict.

§ 159. *Form of indictment in larceny.*

The next object of conſideration is the form of the indictment in larceny, and the general evidence applicable thereto, to warrant the finding of the jury on the charge as laid. Much of this branch of the ſubject having been already very fully conſidered, in treating of the ſeveral conſtituent parts of the offence, I ſhall do little more than advert to the former heads. 1. The indictment for ſimple larceny ought to ſtate the kind of goods ſtolen: merely charging the priſoner with having ſtolen *the goods and chattels* of another is not ſufficient: Though the unneceſſary addition of thoſe words has been holden not to vitiate an indictment otherwiſe good. But bills, bank notes, &c. may be deſcribed in a general manner, and need not be ſet out verbatim. It is the more neceſſary to ſtate the deſcription of the property in order that it may appear upon the face of the indictment that the thing taken is ſuch whereof larceny may be committed. And therefore, if primâ facie it is not the ſubject of larceny, as an animal feræ naturæ, the indictment muſt ſhew it to be dead, tame, or confined, in which ſtate it may be the ſubject of individual property. There is this further reaſon too, that the court may be enabled to ſee what judgment ought to be pronounced upon the whole of the indict-

Ante, ſ. 27, &c. 2 Hale, 182, 3.

Ante, ſ. 601, 2.

Ante, 607. 652.

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ment. However, it has been ruled that a charge of ſtealing a piece of linen of A. N. without laying it to be his *goods and chattels*, was uncertain and bad; and therefore it is not ſafe to omit them; though that caſe may have turned more upon the ſuppoſed want of a ſufficient allegation that the lined was the property of A. N. than upon the omiſſion of thoſe particular words. Alſo the number of things ſtolen of the ſame kind ſhould be ſtated, as 20 ſheep, &c.: and whatever property is omitted to be ſtated in an appeal of larceny is in ſtrictneſs conſiſcated. 2. The indictment ſhould ſtate the value of the goods, in order that it may appear whether the offence be grand or petit larceny; and the value of each of the ſeveral kinds of property ſpecified in the indictment ought properly to be added. 3. Alſo to whom the property of the goods ſtolen belongs: in which reſpect nothing remains to be added to what was before noted, except that there is no need to give any addition to the owner; though ſometimes it may be convenient for diſtinction ſake to do ſo. 4. The indictment muſt allege that the priſoner *took and carried away* the goods. Lord Hale refines on this when he ſays, that it ſhould be *cepit et aſportavit* in caſe of dead chattels, *cepit et abduxit* in the caſe of a horſe, *cepit et effugavit* in caſe of ſheep, &c. 5. The offence muſt be charged to be committed *feloniouſly* as in caſe of other felonies: ſaying only that the priſoner *ſtole* the goods, &c. is not ſufficient. Other matters are referable to the general head of indictment.

Long's caſe, Cro. Eliz 490. 2 Hawk. ch. 25. ſ. 71.

Sum. 184.

2 Hale, 183.

2 Hale, 181.

Dy. 99.

Ante, 650, &c. 2 Hale, 182.

2 Hale, 184.

1 Hale, 504, 8.

Ante, 554.

Stroundf. 24. b. *Vide* Kel. 29. and Rex v. Scofield, Cald. 401. Ante, f. 134.

One indicted of grand larceny may be convicted and have judgment of petit larceny only; but not of treſpaſs.

§ 160. *In aggravated larcenies.*

1 Hale, 517. 523. 535. 561. 2 Hawk. ch. 33. ſ. 25. MS. Burnet, 79. (*Vide* ante, Burglary, p. 515.) Ante, f. 157.

In all caſes of aggravated larceny from which clergy is excluded by ſtatute, the indictment ought to ſtate preciſely, and the evidence ought to eſtabliſh, the ſubſtantial and diſtinguiſhing facts which conſtitute the offence; with the exception before noticed as to robbery and burglary in another county: and if either the indictment or the proof be defective in any one particular the priſoner is entitled to be acquitted of the capital part of the charge; though the offence proved, if it had been properly laid, would have been ouſted of clergy by ſome other ſtatute. But the indictment may

may be ſo framed as to include ſeveral capital charges, and if any one be proved the offender will be ouſted of clergy. As where the charge is for breaking and entering the dwelling houſe in the night and ſtealing therein to the amount of 40 s.; he may be acquitted of the burglary and found guilty of ſtealing to the amount of 40 s. in the dwelling houſe; from which clergy is ouſted by the ſtat. 12 Ann. c. 7. And in all caſes of aggravated larcenies he may be convicted of the ſimple larceny if that be proved, although the indictment conclude againſt the form of the ſtatute. Yet ſuch a concluſion is not neceſſary to ouſt clergy where the indictment is framed upon a ſtatute ouſting clergy under circumſtances from that which was before felony at common law. As to the form of entering the verdict in ſuch caſes, what was before ſaid in another place will ſuffice.

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Ante, tit Burglary, p 515. 1 Hale, 535, 561.

Ante, 516, &c.

§ 161. *Larceny and robbery in houſes, &c.*

In the particular inſtances of larceny and robbery in houſes, &c. the ſeveral offences relating to which have been before largely diſcuſſed; in order to ouſt the offender of clergy ſome or other of theſe things muſt be ſtated in the indictment: 1. a breaking of the houſe, ſome perſon being therein; or, 2. a putting in fear of ſome perſon therein, which muſt be ſtated to be done by the priſoner; in both which caſes there muſt be an entry likewiſe charged; and the value of the goods taken muſt be above 12 d. and ſo laid in the indictment, otherwiſe the offence amounts but to petit larceny, and does not require the benefit of clergy; or, 3. a breaking and entering in the day time and ſtealing to the value of 5 s. no perſon being in the houſe at the time; or, 4. ſtealing privately in a ſhop, &c. to the value of 5 s. though no perſon be therein; or, 5. a ſtealing in a dwelling houſe or outhouſe to the value of 40 s. In all theſe inſtances the indictment ought alſo to ſet forth the general deſcription of the goods and their value, and of the houſe out of which they were taken; in order that the caſe may appear on the face of the record to be brought within one or other of the ſeveral ſtatutes. It is alſo proper upon indictments under theſe ſtatutes not only to ſtate in whom the property of the goods ſtolen is, as before expreſſed, but alſo the name of the owner of the houſe out of which they are taken. In

Ante, 623, &c.

Ante, 635.

Vide ante, 644.

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White's caſe, O. B. Feb. 1783. 1 Leach, 286.

Woodward's caſe, O. B. Oct. 1785. cor. Adair Serjt. R. ib. 287. *vide* Trapſhaw's caſe, ante, 506.

R. v. Davis, alias Silk, O. B. 1800. MS. Jud. ante, 499.

Robbery. Ante, f. 138. *Vide* poſt. f. 168. *Vide* ante, p. 415. Ante, 741.

White's caſe, where the priſoner was indicted for burglary and ſtealing goods in the dwelling houſe of J. S. to the amount of above 40s. it not appearing to be J. S.'s houſe, Gould and Buller Js. held that the priſoner could neither be convicted of the burglary nor upon the ſtat. 12 Ann. c. 7. The like was ruled in Woodward's caſe, for ſtealing in the dwelling houſe of Sarah Lunns, whoſe name turned out to be S. London. Trapſhaw's caſe was reſerved on a doubt whether the indictment, which was framed on the ſtat. 3 & 4 W. & M. c. 9. for breaking and entering the dwelling houſe of J. L. in the day time, his wife being therein, and ſtealing goods, properly laid it to be the dwelling houſe of J. L.; but the judges on conference thought it right. And in the caſe of an indictment laying the larceny to be in a *dwelling* houſe to the value of 40s. it has been expreſsly holden by all the Judges, that as the houſe was not ſuch wherein burglary might be committed, the priſoner could not be convicted within the ſtat. 12 Ann. c. 7. The materiality, however, of ſuch an averment is entirely out of the queſtion upon an indictment for robbery, where it has been holden to be mere ſurpluſage, and that it may be rejected. But that turns on the ſtat. 3 W. & M. c. 9. which ouſts clergy in all caſes of robbery generally; and therefore the place where the offence is committed is mere matter of form. But under the ſtatutes in queſtion the place is of the eſſence of the offence ſo far as reſpects clergy, and therefore ought to be accurately deſcribed in the indictment.

§ 162. *Indictments for larceny of particular goods, or by particular perſons.*

In reſpect to indictments for larceny of particular goods, or by particular perſons, from whence clergy has been ouſted by different ſtatutes, it ſeemed more convenient to ſtate all the determinations upon the conſtruction of ſuch ſtatutes under the reſpective heads into which they were diſtributed; to which I refer.

§ 163. *Indictment againſt receivers.*

Rex v Stott, H. 39 G. 3. B. R. Ante, 753.

Allegation of time and place.

The indictment againſt a receiver of ſtolen goods need not allege time and place to the fact of ſtealing the goods: it is ſufficient if they be alleged to the fact of the receipt. This was expreſsly decided upon conſideration in Stott's caſe, upon an indictment againſt him as a receiver of pieces of

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of iron, which was removed into B. R. by writ of error after judgment againſt him of impriſonment by the Quarter Seſſions; though ultimately the court gave no opinion on the reſt of the caſe, the writ of error being abandoned by the priſoner. It appeared on inquiry of the clerks of aſſize of the Weſtern and Oxford circuits, and of the clerk of the arraigns at the Old Bailey, that ſuch had always been the form of indictment uſed by them.

Thomas's caſe, O. B. May 1766. 2 MS. Sum. 400. MS. Jud. Ante, 651. *Principal unknown.* Infra.

In the caſe of John Thomas the indictment was for receiving goods ſtolen by perſons unknown: which was objected to be inſufficient in not aſcertaining the principal thief, and that it ought to appear to whom in particular the priſoner was acceſſary. This objection being referred to the Judges, they were unanimouſly of opinion that the indictment was good; that the great view of the ſtatutes was to reach the receivers where the principal thieves could not eaſily be diſcovered.

(*Vide* Kirnan's caſe, tit. Indictment—Surpluſage.) Ante, 765.

Where the principal however is known, it ſeems proper to ſtate it according to the truth: and the common form of the indictment is to ſtate the fact of ſtealing the goods by the principal, and the receipt of them by the receiver, he then and there well knowing the ſaid goods and chattels to have been feloniouſly ſtolen, &c. But poſſeſſion alone of the king's ſtores, with the king's marks, is ſufficient to conſtitute the offence by ſtatute, unleſs accounted for in the manner before ſtated. And it is ſufficient if the thing received be the ſame in fact as that which was ſtolen, though paſſing under a new denomination, as where the principal was charged with ſtealing a live ſheep, and the acceſſary with receiving 20 lb. of mutton, *part of the goods ſtolen.*

Cowell and Green's caſe, ante, f. 48.

§ 164. *For miſdemeanor.*

Baxter's caſe, Trin. T. 1792. MS. Buller J.

On an indictment upon the ſtat. 22 Geo. 3. c. 58. ſ. 1. againſt a receiver for a miſdemeanor, on which he was convicted, the caſe came before ten of the Judges preſent at a conference in Trinity term 1792, who were of opinion that the ſecond count, which ſtated the felony to be petit larceny only, was good; this being a miſdemeanor: and that the firſt count was alſo good, which ſtated that the principal was unknown; for that was equivalent to ſaying that he was not convicted. And the majority agreed that the

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the averment that the principal was not convicted was not neceſſary in any caſe; for it would be a negative averment, which, if laid, need not be proved by the proſecutor; but was evidence for the defendant; and if proved by him, would entitle him to an acquittal for the miſdemeanor. This latter point was alſo determined by B. R., into which the record was brought by certiorari, upon a motion in arreſt of judgment. Neither is it neceſſary in ſuch an indictment to aver that the principal cannot be taken.

Rex v. Baxter, M. 32 G. 3. 5 Term Rep. 83. Rex v. Pollard and Taylor, 2 Ld. Ray. 1370. 3 MS. Sum. 44.

Vide ante, f. 142.

§ 165. *Averring conviction of principal.*

The receiver being, by the ſtat. 3 W. & M. c. 9. ſ. 4. made an acceſſary after the fact to the felony, the ſame method of charging the principal fact which obtains in caſe of acceſſaries in general will ſuffice againſt the receiver.

Hyman's caſe, Kingſton aſſizes 1801. cor. Heath J. MS. Jud. *Sufficient in indictment against receivers to ſtate conviction (without attainder) of principal, and ſubſequent receipt of goods with knowledge.* *Vide* Indictment —Acceſſaries.

In Hyman's caſe, the indictment ſtated, that at the gaol delivery of Newgate, holden on Wedneſday the 18th of February laſt, James Barnes was *convicted* on an indictment for burglary in the dwelling houſe of William Kerr, at Sunbury in the county of Middleſex, and ſtealing therein the goods and chattels there mentioned; and that after the ſaid burglary and felony was done and committed, the priſoner, on the 9th day of the ſaid February, the ſaid goods and chattels felonioufly did receive and have, well knowing the ſame to have been ſtolen and carried away, againſt the ſtatute, &c. The priſoner was convicted; and it was moved in arreſt of judgment that the indictment was bad, becauſe it was not ſtated therein that the principal was *attainted*; and Heath J. reſerved the point for the opinion of all the Judges; who all held the indictment good, as well on the authority of a number of precedents at the O. B. and on the home circuit, where the ſame form of indictment had been uſually purſued, as alſo on the conſideration of the ſtat. 1 Ann. ſt. 2. c. 9. ſ. 1, 2.

§ 166. *Principal a witneſs.*

It is now agreed that the principal, though not convicted or pardoned, may be examined as a witneſs againſt the receiver. In Patram's caſe, and in Haſlam's caſe, which were proſecutions for the miſdemeanor on the ſtat. 22 Geo. 3. c. 58. the principal felons, though not convicted, were admitted as witneſſes on the part of the crown. The ſame

Patram's caſe, Bridgewater Sum. Aſſ. 1787. cor Groſe J. MS. Haſlam's caſe, O. B. 1786. 2 Leach, 467. and before all the judges.

was

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was done in Jonathan Wild's caſe, on a proſecution on the ſtat. 4 Geo. 1. c. 11. for taking a reward to help to ſtolen goods.

Wild's caſe, ante, f. 155.

§ 167. *In robbery.*

The form of indictment for robbery is principally diſtinguiſhable from that for larceny in theſe particulars, that it ſtates an aſſault upon the perſon, and a taking of his goods, &c, by violence or putting him in fear, though both theſe are uſually added. It may run thus, That the defendant, on, &c. with force and arms, at, &c. in and upon J. S. &c. feloniouſly did make an aſſault, and him the ſaid J. S. in bodily fear and danger of his life then and there feloniouſly did put, and certain goods of ſuch a value of the ſaid J. S. from his perſon and againſt his will then and there feloniouſly and violently did ſteal, take, and carry away, &c.

1 Hawk. ch. 34. ſ. 10. Crown Circuit Comp. 339. Co. Entr. 358. b.

The aſſault muſt be laid to be made feloniouſly; otherwiſe though the putting in fear and the taking be afterwards laid to be done feloniouſly, the indictment is ill.

R. v. Pelfryman and Randal, O. B. Oct. 1791. cor Hotham B. and Heath J. 2 Leach, 641.

The taking muſt be charged to be with violence from the perſon and againſt the will of the party: but it does not appear certain that the indictment ſhould alſo charge that he was put in fear; though this is uſual, and therefore ſafeſt to be done. But in the conference on Donally's caſe, where this ſubject was much conſidered, it was obſerved by Eyre B. that the more ancient precedents did not ſtate the putting in fear, and that though others ſtated the putting in corporal fear, yet the putting in fear of life was of modern introduction. Other Judges conſidered that the gift of the offence was the taking, &c. by violence, and that the putting in fear was only a conſtructive violence, ſupplying the place of actual force. In general, however, as was before obſerved, no technical deſcription of the fact is neceſſary, if upon the whole it plainly appear to have been committed with violence againſt the will of the party.

Foſt. 128. 1 Hale, 534. 2 Inſt. 68. *Vide* Crompt. 246. b. 247. and Weſt. Symb. Donally's caſe, ante, 719.

Ante, f. 127.

At the O. B. 1766, Thomas Smith was indicted for aſſaulting the proſecutor with force and arms, and putting him in corporal fear, and taking a ſum of money from his perſon againſt his will. The priſoner's counſel objected that, according to Lord Hale, all indictments of robbery muſt ſhew that

Smith's caſe, 2 MS. Sum. 261. & MS. Gould J.

1 Hale, 534.

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that the taking was done *violenter*: and as that was not charged in the preſent indictment, the priſoner was entitled to his clergy. This point being reſerved for the opinion of the Judges, they all agreed that a robbery was ſufficiently deſcribed in this indictment. That the word *violenter* was no technical term eſſentially neceſſary in the indictment: if it appeared upon the whole that the fact was committed with violence it was ſufficient to conſtitute a robbery: and here it was charged that the priſoner put the proſecutor in fear, and took the money from his perſon againſt his will. It was all one continued act, begun with putting the proſecutor in fear, and completed by taking the money from him againſt his will. That Lord Hale, in the paſſage referred to, was inaccurate in his expreſſion; but the definition which he gave of robbery was, a felonious taking from the perſon with violence; and if the fact were ſo deſcribed in the indictment as to anſwer the definition, it came up to Lord Hale's own doctrine.

1 Hale, 534,5,6.

But here, as in all complicated larcenies, the priſoner may be acquitted of the circumſtances of aggravation, namely, the fear or violence, and found guilty of the ſimple larceny. Yet where upon an indictment for robbery from the perſon, a ſpecial verdict was found ſtating facts which in judgment of law did not amount to a taking from the perſon, but ſhewed a larceny of the party's goods; yet as the only doubt referred to the court by the jury was, Whether the priſoners were or were not guilty of the felony and robbery charged againſt them in the indictment, the Judges thought that judgment as of larceny could not be given upon that finding; but they remanded the priſoners to be tried upon another indictment for that offence.

Rex v. Francis and others, before all the judges at Serjeants' Inn, Com. Rep. 478. Rep. temp. Hardw. 215.

§ 168. *Allegation of place.*

Many nice caſes have been determined as to what ſhould be conſidered as a robbery in or near the king's highway, and as to the manner of laying it in the indictment; which it ſeems was moſt uſually done in the diſjunctive, "in or near," &c. But theſe are now become unneceſſary to be conſidered ſince the paſſing of the ſtat. 3 W. & M. c. 9. firſt mentioned in all caſes at leaſt falling within the ſtatute; more eſpecially after the ſeveral ſubſequent determinations which

1 Hale, 535, 6. MS. Burnet, 74.

Ante, 741.

which have been made. Several malefactors took a houſe, and ſent for a tradeſman thither under pretence of buying goods from him, and robbed him there. The indictment alleged the offence to have been committed *near the king's highway:* and it was holden to be within the ſtat. of 1 Ed. 6. c. 12. ſ. 10. But this may well be doubted, if ſuch really were the determination; for the device of charging a robbery in the dwelling houſe to be near the king's highway ſeems to confound diſtinct offences. It is more probable that it was holden to fall within the ſtat. 3 W. & M. c. 9. which is ſufficient to reach ſuch a caſe without any device of that kind. For that ſtatute is ſo generally worded that it takes in all ſorts of robbery, either in a highway, houſe, or elſewhere. And this is the more probable from a ſubſequent caſe of Summers and others, who were in the like manner indicted for a robbery near the highway, and taking 13 l. from the perſon of J. H.; on which a ſpecial verdict was found that J. H went to an alehouſe in Smithfield, and there was ſet upon and robbed. And all the Judges, at Serjeant's Inn, on the 25th May 1705, held, that though the indictment were ſpecial for a robbery near the highway, and this in a houſe was not ſo; yet as the ſtat. 3 Will. & M. took away clergy in all robberies, the priſoners ſhould not have their clergy. Again, in the caſe of Darnford and Newton, at the O. B. Gould J. Hotham B. and Buller J. determined upon the ſame principle; where the robbery was in a houſe in a ſtreet hired by one of the priſoners for the purpoſe, but not inhabited by any one; and the indictment charged the robbery to have been committed in the dwelling houſe of that priſoner.

Ch. XVI. § 168. *In robbery.*

2 MS. Sum. 264. Fowler's caſe, O. B. 10 W. 3.

Ante, 625.

Ante, 629.

R v. Summers and others, O. B. 20th Feb 1705. 2 MS. Sum 264. 547. by a note of Nares J. Ex relatione Parker C. B. from Mr. J. Price's MS.

R. v. Darnford and Newton, O. B Sept 1780. 2 MS. Sum. 264. 547.

And, lately, all the Judges held that one Wardle was ouſted of clergy upon an indictment charging him with robbing another in a field near the highway; on a finding by the jury that he was guilty of the robbery, but not near the highway.

Wardle's caſe, Derby Lent Aſſ. 1800 cor. Chambre B. MS. Buller J. & MS. Jud.

It is equally immaterial, as was juſt before obſerved, in the caſe of robbery, whether the ownerſhip of the houſe be properly deſcribed in the indictment.

John Pye was convicted upon an indictment which charged him with robbing Robert Fernyough in the dwell-

Pye's caſe, Warwick, 1796. cor. Thomſon B. MS. Buller J. & MS. Jud.

Ch. XVI. § 168. *In robbery.*

ing houſe of Aaron Wilday. The fact was committed in a houſe, but it did not appear who was the owner of it. But on reference to the Judges, in Eaſter term 1790, they all held the conviction proper.

S. Johnſtone's caſe, 1793. cor. Aſhhurſt J. MS. Buller J.

Suſannah Johnſtone was convicted on an indictment for robbing Richard Dicken, in the dwelling houſe of *Joſeph* Johnſtone, at Birmingham. The robbery was committed by the wife in the huſband's houſe, whoſe chriſtian name could not be proved. But in Eaſter term 1793 all the Judges held the conviction proper.

§ 169. *Appeal.*
Sum. 184. 2 Hawk. ch. 23. ſ. 44. 47. Keilw. 70. pl. 7. *Vide* ante, i. 90.

Concerning the appeal of larceny or of robbery, it lies by the party grieved againſt the felon; and a ſpecial property in the goods, though not a bare charge, is ſufficient to maintain it: in which caſe the ſpecial owner may either declare generally as for his own goods, or ſpecially as for the goods of the owner in his poſſeſſion; and if two joint owners be robbed, the ſurvivor may have an appeal; but it muſt expreſsly appear whoſe goods they were, in order to ſhew that the plaintiff is entitled to the appeal. But though a man were robbed at ſeveral times before by the ſame perſon, he ſhall have but one appeal.

2 Hawk. ch. 23. ſ. 78.

Sum. 184. Hawk. ut ſupra.

As in the caſe of an indictment ſo in appeal, if one be robbed in the county of A. and the felon go with the goods into the county of B. an appeal of robbery lies in A.; but of larceny only in B.; for the ſtat. 25 H. 8. c. 3. extends only to the caſe of indictments. So if A. be robbed by B., who is robbed of the ſame goods by C., A. may have an appeal of larceny againſt C.

Ante, p. 771, 2.

Sum. 185. 2 Hawk. ch. 23. ſ. 48. 52. Staundf. 62. 1 Hal. ſ. 170.

There does not ſeem to be any preciſe limit of time for this appeal, provided there be freſh ſuit, of which the court are to judge in their diſcretion; as is elſewhere ſhewn. But it ſeems moſt proper to call in aid the aſſiſtance of the ſame jury which tries the felon, or an inqueſt of office to inquire ſpecially, concerning ſuch freſh ſuit.

VII. *Of*

VII. *Of Reſtitution of ſtolen Goods.*

Ch. XVI. § 170. *On appeal.*

§ 170. *Reſtitution of ſtolen goods.* 1 Hale, 538.

There are ſeveral methods by which the party robbed, or whoſe goods are ſtolen, may have reſtitution;

1. By Appeal of Robbery or Larceny;
2. By ſtat. 21 H. 8. c. 11. on Indictment;
3. By the Courſe of the Common Law.
4. By ſtat. 31 Eliz. c. 12. in caſe of horſe-ſtealing.

By appeal. 2 MS. Sum. 609. 611, 12. 1 Hale, 538. 540, 1. Crompt. Juſt. 191. 2 Hawk. c. 23. ſ. 49, &c. Kel. 96. Bro. Abr. Judges, pl. 26.

1. The appeal muſt be brought upon freſh ſuit; but the time and manner of the purſuit is not now tied down to ſuch ſtrictneſs as formerly: for though the felon be taken by other perſons, as the ſheriff, &c. yet if the party robbed come within the year and enter his appeal, that is deemed a freſh ſuit, provided he had uſed reaſonable diligence ſoon after the felony to apprehend and proſecute the felon; of which the juſtices, in diſcretion, are to judge; though without hue and cry raiſed. 2. If the principal felon, or any one of ſeveral, be convicted or attainted on ſuch appeal; or ſuch conviction become impoſſible notwithſtanding the endeavour of the appellant; as by the death of the felon after he is taken, or a prior attainder at the ſuit of another; and the freſh ſuit be found by the verdict or by an inqueſt of office; the appellant ſhall have reſtitution of ſuch of the goods as are mentioned in the appeal, notwithſtanding a ſeizure by the lord, or a ſale in market overt: but the goods omitted are forfeited to the king; and ſo are all the goods upon a falſe appeal, where it appears that the appellee did not come to the goods by felony. But the uſe of appeals is in a great meaſure ſuperſeded by the reſtitution given,

Poſt. 789.

§ 171. By 21 H. 8. c. 11. 2 MS. Sum. 610. 2 Hawk. ch. 23. ſ. 55, &c. 1 Hale, 542.

2. By the ſtat. 21 H. 8. c. 11. which firſt gave reſtitution upon an indictment; whereby it is enacted, "That if any "felon or felons do rob or take away any money, goods, or "chattels from any of the king's ſubjects, from their per- "ſons or otherwiſe, within this realm; and thereof the ſaid "felon or felons be indicted, and after arraigned of the "ſaid felony and found guilty thereof, or otherwiſe attaint- "ed, by reaſon of evidence given by the party ſo robbed, or "owner of the ſaid money, goods, or chattels, or by any

Ch. XVI. § 171. By ſtat. 21 H. 8. c. 11.

"other by their procurement; that then the party ſo "robbed or owner ſhall be reſtored to his ſaid money, "goods, and chattels; and that as well the juſtices of gaol "delivery as other juſtices before whom any ſuch felon or "felons ſhall be found guilty or otherwiſe attainted, by "reaſon of evidence given by the party ſo robbed or owner, "or by any other by their procurement, have power by this "act to award from time to time writs of reſtitution for the "ſaid money, goods, and chattels, in like manner as though "any ſuch felon or felons were attainted at the ſuit of the "party in appeal."

Vide Cas. temp. Hardwicke, 349. 1 Hale, 543, 6. 4 Blac Com. 363. Kel. 48. 2 Inſt. 714. MS. Tracy, 276.

The writ of reſtitution has fallen into diſuſe; but upon production of the goods at the trial the court orders them to be reſtored to the owner, without any inquiry as to freſh ſuit; and if not reſtored, he may maintain trover for them after conviction; and this notwithſtanding a ſale in market overt, as is now fully eſtabliſhed. But reſtitution can only be had from the perſon in poſſeſſion of the goods at the time of or after the felon's attainder. Therefore if a party purchaſe them bonâ fide in market overt, and ſell them again before conviction, no action will lie againſt him for the value, though notice were given to him not to ſell.

Horwood v. Smith, 2 Term Rep. 750.

2 MS. Sum. 612, 613. Staundf. 167. 1 Hale, 542. 545. 2 Hawk. ch. 23. ſ. 56. Kel 48, 9. 3 Inſt. 242. 4 Blac. Com. 363.

The conſtruction of the above ſtatute with reſpect to reſtitution upon conviction is in a great meaſure governed by the rules reſpecting appeals; though in one reſpect it is more favourable to the owner: for in proſecutions under this ſtatute the practice is to award reſtitution, though there be no freſh ſuit, nor any inqueſt concerning the ſame, as is neceſſary in caſe of appeals. Yet if it appear that the owner has been guilty of groſs neglect in proſecuting, Hawkins thinks that the court, in analogy to the proceedings in appeal to which the ſtatute refers, may in their diſcretion deny reſtitution under this ſtatute. Perhaps it might be thought ſufficient in ſuch a caſe to put the party to ſue out his writ of reſtitution: for I find no inſtance where the writ itſelf has been denied on this ground; and the general opinion is that it cannot. If the teſtator be robbed, or the ſervant be robbed of his maſter's goods, the executor or maſter procuring conviction of the felon ſhall have reſtitution. Yet if divers perſons be robbed, they muſt all in ſtrictneſs convict the

2 Inſt. 714.

Ch. XVI. § 171. By ſtat. 21 H. 8. c. 11.

the thief in order to entitle themſelves to reſtitution. But the practice is after the felon is convicted upon one indictment, if the goods of other perſons be found upon him, and brought into court, the court uſually orders reſtitution to all who were ready to proſecute: or this may be done on an inqueſt of office, if there be any doubt as to the property. But the owner of ſtolen goods is not ſtrictly entitled to have reſtitution of any other goods than thoſe ſpecified in the indictment; for the offender might have eſcaped by the omiſſion.

Ante, 787.

2 MS. Sum. 612.

If the thief ſell the goods, and be immediately taken with the money, and the goods cannot be heard of, it has been queſtioned whether the proſecutor ſhall have the money. One book ſeems to incline to the negative opinion; but that when examined ſtrictly only goes to eſtabliſh that the proſecutor is not entitled to ſeize other goods, which for ought appears may be diſtinct goods of the felon, in lieu of thoſe which were taken by him. But where it is clearly aſcertained that the money is the produce of the goods ſtolen, it has been expreſsly adjudged to be within the equity of the ſtatute giving reſtitution. As in Hanberrie's caſe, where a ſervant took gold from his maſter and changed it into ſilver: and in Harris's caſe, where one ſtole cattle, which he ſold in market overt, and was immediately after apprehended with the money. And herewith Lord Hale agrees.

W. Jones, 148. *Vide* Sty. 347.

Hanberrie's caſe, Cro. Eliz. 661. per Fenner J. Harris's caſe, Noy, 128. 1 Hale, 542. & *vide* Golightly v. Reynolds, M. 13 G. 3. B. R. Loft. 90.

But the ſtatute is confined to the reſtitution of goods ſtolen, and extends not to ſuch as are obtained by fraud. And therefore where the owner proſecuted one to conviction who had obtained goods from him by fraud, and repoſſeſſed himſelf of the goods, which in the mean time had been pawned to another for a valuable conſideration without notice, it was holden that the pawnee might maintain trover for them againſt the original owner.

Parker v. Patrick, 5 Term Rep. 175. Rex v. Deveaux and others, 2 Leach, 665.

§ 172. *By common law.*

3. By common law. The neceſſity of proſecuting and convicting or attainting the felon in order to have reſtitution, is only when the property is changed by ſome intermediate act; as by the felon's waiving them in his flight; the ſeizing of them by the King's officers under ſuſpicion of felony; or by the lord of the manor; or by a ſale in market overt.

2 MS. Sum. 612. 614. Kel. 48. 2 Hawk. ch. 23. ſ. 49. 1 Hale, 546. 4 Blac. Com. 363.

Ch. XVI. § 172. *At common law.*

overt. For otherwiſe the owner may at common law peaceably retake them wherever he may find them, without any writ of reſtitution. But if the owner take them back from the offender with intent to favour him, it is unlawful, and puniſhable by fine and impriſonment. And ſo is the practice (now prohibited by ſtatute) which prevailed much at one time of advertiſing a reward for bringing ſtolen goods, and no queſtions to be aſked; which Lord Macclesfield declared to be a kind of compounding of felony, by ſtopping inquiry and proſecution in conſequence of the owner's obtaining the goods again. But after conviction it is clearly no crime to take the goods again whereſoever they are found; for having proſecuted the law againſt the offender, the owner is entitled to reſtitution whenever he pleaſes; and may bring trover againſt any perſon in whoſe hands the goods are.

1 Hale, 546. n. *Vide* ante, 771. & ſ. 141.

§ 173. 31 Eliz. c. 12. *In horſe ſtealing.* Ante, ſ. 47.

4. Special proviſion has been made for reſtitution in the inſtance of horſe-ſtealing, by the ſtat. 31 Eliz. c. 12. which for avoiding horſe-ſtealing requires certain entries to be made, &c. in the toller's books of the ſale of horſes in markets and fairs, and provides, (ſ. 4.) "That if any horſe, "mare, gelding, colt, or filly ſhall be ſtolen, and after ſhall "be ſold in open fair or market, and the ſame ſale ſhall be "uſed in all points and circumſtances as aforeſaid, that yet "nevertheleſs the ſale of any ſuch horſe, &c. within ſix "months next after the felony done, ſhall not take away "the property of the owner from whom the ſame was "ſtolen, ſo as claim be made within ſix months by the party "from whom the ſame was ſtolen, or by his executors or "adminiſtrators, or by any other by any of their appointment, at or in the town or pariſh where the ſame horſe, "&c. ſhall be found, before the mayor or other head officer "of the ſame town or pariſh, if the ſame horſe, &c. ſhall "happen to be found in any town corporate or market "town, or elſe before any juſtice of peace of that county "near to the place where ſuch horſe, &c. ſhall be found, if "it be out of a town corporate or market town; "and ſo as proof be made within forty days then "next enſuing by two ſufficient witneſſes, to be produced "and

"and depoſed before ſuch head officer or juſtice (who by "virtue of this act ſhall have authority to miniſter an oath "in that behalf,) that the property of the ſame horſe, &c. "ſo claimed, was in the party by or from whom ſuch claim "is made, and was ſtolen from him within ſix months next "before ſuch claim of any ſuch horſe, &c. but that the "party from whom the ſaid horſe, &c. was ſtolen, his executors or adminiſtrators, ſhall and may at all times after, "notwithſtanding any ſuch ſale or ſales in any fair or open "market thereof made, have property and power to have, "take again, and enjoy the ſaid horſe, &c. upon payment or "readineſs, or offer to pay, to the party that ſhall have the "poſſeſſion and intereſt of the ſame horſe, mare, gelding, "colt, or filly, if he will receive and accept it, ſo much "money as the ſame party ſhall depoſe and ſwear before "ſuch head officer or juſtice of peace, (who by virtue of "this act ſhall have authority to miniſter and give an oath "in that behalf,) that he paid for the ſame *bonâ fide*, without fraud or colluſion; any law, ſtatute, or other thing to "the contrary notwithſtanding."

Ch. XVI. § 173. *In horſe ſtealing.*

For other matters, *vide* general heads, Rewards, Pardon, Expences, &c.