

A portrait of Sir William Blackstone, an 18th-century English jurist, wearing a white wig and a red robe, holding a book. The background is dark and textured.

# Commentaries on the Laws of England

Vol. 4

**Sir William Blackstone**

COMMENTARIES  
ON THE LAWS  
OF ENGLAND  
BOOK THE FOURTH (1769)

WILLIAM BLACKSTONE, Esq.



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**BOOK 4:**  
**Public Wrongs**

## CHAPTER 1 Of the Nature of Crimes; and Their Punishment

WE are now arrived at the fourth and last branch of these commentaries; which treats of public wrongs, or crimes and misdemeanors. For we may remember that, in the beginning of the preceding volume,<sup>1</sup> wrongs were divided into sorts or species; the one private, and the other public. Private wrongs, which are frequently termed civil injuries, were the subject of that entire book: we are now therefore, lastly, to proceed to the consideration of public wrongs, or crimes and misdemeanors; with the means of their prevention and punishment. In the pursuit of which subject I shall consider, in the first place, the general nature of crimes and punishments; secondly, the persons capable of committing crime; thirdly, their several degrees of guilt, as principals or accessories; fourthly, the several species of crimes, with the punishment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and, sixthly, the method of inflicting those punishments, which the law has annexed to each several crime and misdemeanor.

FIRST, as to the general nature of crimes and their punishment: the discussion and admeasurement of which forms in every country the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the pleas of the crown: so called, because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public right belonging to that community, and is therefore in all cases the proper prosecutor for every public offense.<sup>2</sup>

THE knowledge of this branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjust to it its adequate and necessary penalty, is of the utmost importance to every individual in the state, For (as a very great master of the crown law<sup>3</sup> has observed upon a similar occasion) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vice and ungovernable passions of other, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a willful disobedience may expose us, is a matter of universal concern.

IN proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly forming and enforcing it. It should be founded upon principles that are permanent, uniform, and universal; and always conformable to the dictates of truth and justice, the feelings of humanity, and the indelible rights of mankind: though it sometimes (provided there be no transgression of these eternal boundaries) may be modified, narrowed, or enlarged, according to the local or occasional necessities of the state which it is meant to govern. And yet, either from a want of attention to these principles in the first concoction of the laws, and adopting in their stead the impetuous dictates of avarice, ambition, and revenge; from retaining the discordant political regulations, which successive conquerors or factions have established, in the various revolutions of government; from giving a lasting efficacy to sanctions that were intended to be temporary, and made (as lord Bacon expresses it) merely upon the spur of the occasion; or from, lastly, too hastily employing such means as are greatly disproportionate to their end, in order to check the progress

of some very prevalent offense; from, or from all, of these causes it has happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I shall not here enter into any minute inquiry concerning the local constitutions of other nations; the inhumanity and mistaken policy of which have been sufficiently pointed out by ingenious writers of their own.<sup>4</sup> But even with us in England, where our crown-law is with justice supposed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties less uncertain and arbitrary; where all our accusations are public, and our trials in the face of the world; where torture is unknown, and every delinquent is judged by such of his equals, against whom he can form no exception nor even a personal dislike; ) even here we shall occasionally find room to remark some particulars, that seem to want revision and amendment. These have chiefly arisen from too scrupulous an adherence to some rules of the ancient common law, when the reasons have ceased upon which those rules were founded; from not repealing such of the old penal laws as are either obsolete or absurd; and from too little care attention in framing and passing new ones. The enacting of penalties, to which a whole nation shall be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill; but be calmly and maturely considered by persons, who know what provisions the law has already made to remedy the mischief complained of, who can from experience foresee the probable consequences of those which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil. It never usual in the house of peers even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report thereon.<sup>5</sup> And surely equal precaution is necessary, when laws are to be established, which may affect the property, liberty, and perhaps even lives, of thousands. Had such a reference taken place, it is impossible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciously) the mound of a fishpond, whereby any fish shall escape; or cut down a cherry tree in an orchard.<sup>6</sup> Were even a committee appointed but once in an hundred years to revise the criminal law, it could not have continued to this hour a felony without benefit of clergy, to be seen for one month in the company of persons who call themselves, or are called, Egyptians.<sup>7</sup>

IT is true, that these outrageous penalties, being seldom or never inflicted, are hardly known to be law by the public: but that rather aggravates the mischief, by laying a snare for the unwary. Yet they cannot but occur to the observation of any one, who has undertaken the task of examining the great outlines of the English law, and tracing them up to their principles: and it is the duty of such a one to hint them with decency to those, whose abilities and stations enable them to apply the remedy. Having therefore premised this apology for some of the ensuing remarks, which might otherwise seem to favor of arrogance, I proceed now to consider (in the first place) the general nature of crimes.

1. A **CRIME**, or misdemeanor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemeanors; which, properly speaking, are mere synonymous term: though, in common usage, the word, “crimes,” is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler name of “misdemeanors” only.

THE distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties, due to the whole community, considered as community, in its social aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public, which of us is in possession of the land: but treason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the very being of society; which cannot possibly subsist, where actions of this sort are suffered to escape with impunity.

IN all cases the crime includes an injury: every public offense is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community. Thus treason in imagining the king's death involves in it conspiracy against an individual, which is also a civil injury: but as this species of treason in its consequences principally tends to the dissolution of government, and the destruction thereby of the order and peace of society, this denominates it a crime of the highest magnitude. Murder is an injury to the life of an individual; but the law of society considers principally the loss which the state sustains by being deprived of a member, and the pernicious example thereby set, for others to do the like. Robbery may be considered in the same view: it is an injury to private property; but, were that all, a civil satisfaction in damages might atone for it: the public mischief is the thing, for the prevention of which our laws have made it a capital offense. In these gross and atrocious injuries the private wrong is swallowed up in the public: we seldom hear any mention made of satisfaction to the individual; the satisfaction to the community being so very great. And indeed, as the public crime is not otherwise avenged than by forfeiture of life and property, it is impossible afterwards to make any reparation for the private wrong; which can only be had from the body or goods of the aggressor. But there are crimes of an inferior nature, in which the public punishment is not so severe, but it affords room for a private compensation also: and herein the distinction of crimes from civil injuries is very apparent. For instance; in the case of battery, or beating another, the aggressor may be indicted for this at the suit of the king, for disturbing the public peace, and be punished criminally by fine and imprisonment: and the party beaten may also have his private remedy by action of trespass for the injury, which he in particular sustains, and recover a civil satisfaction in damages. So also, in case of a public nuisance, as digging a ditch across a highway, this is punishable by indictment, as a common offense to the whole kingdom and all his majesty's subjects: but if any individual sustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make ample satisfaction, as well for the private injury, as for the public wrong.

UPON the whole we may observe, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view: *viz.* not only to redress the party injured, by either restoring to him his right, if possible; or by giving him an equivalent; the manner of doing which was the object of our inquiries in the preceding book of these commentaries: but also to secure to the public the benefit of society, by preventing or punishing every breach and violation of those laws, which the sovereign power has thought proper to establish, for the government and tranquility of the whole. What those breaches are, and how prevented or punished, are to be considered in the present book.

II. THE nature of crimes and misdemeanors in general being thus ascertained and distinguished, I proceed in the next place to consider the general nature of punishments: which are evils or inconveniences consequent upon crimes and misdemeanors; being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehavior in those, to regulate whose conduct such laws were respectively made. And herein we will briefly consider the power, the end, and the measure of human punishment.

1. AS to the power of human punishment, or the right of the temporal legislator to inflict discretionary penalties for crimes and misdemeanors.<sup>8</sup> It is clear, that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution: and if that power is vested in any one, it must also be vested in all mankind; since all are by nature equal. Whereof the first murderer Cain was so sensible, that we find him<sup>9</sup> expressing his apprehensions, that whoever should find him would slay him. In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of punishing offenses against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community. And to this precedent natural power of individuals must be referred that right, which some have argued to belong to every state, (though, in fact, never exercised by any) of punishing not only their own subjects, but also foreign ambassadors, even with death itself; in case they have offended, not indeed against the municipal laws of the country, but against the divine laws of nature, and become liable thereby to forfeit their lives for their guilt.<sup>10</sup>

AS to offenses merely against the laws of society, which are only *mala prohibita* [wrong because prohibited], and not *mala in se* [wrong in itself]; the temporal magistrate is also empowered to inflict coercive penalties for such transgressions: and this by the consent of individuals; who, in forming societies, did either tacitly or expressly invest the sovereign power with a right making laws, and of enforcing obedience to them when made, by exercising, upon their nonobservance, severities adequate to the evil. The lawfulness therefore of punishing such criminals is founded upon this principle, that the law by which they suffer was by their own consent; it is part to the original contract into which they entered, when first they engaged in society; it was calculated for, and has long contributed to, their own security.

THIS right therefore, being thus conferred by universal consent, gives to the state exactly the same power, and no more, over all its members, as each individual member had naturally over himself or others. Which has occasioned some to doubt, how far a human legislature ought to inflict capital punishments for positive offenses; offenses against municipal law only, and not against the law of nature; since no individual has, naturally, a power of inflicting death upon himself or other for actions in themselves indifferent. With regard to offenses *mala in se*, capital punishments are in some instances inflicted by the immediate command of God himself to all mankind; as, in the case murder, by the precept delivered to Noah, their common ancestor and representative,<sup>11</sup> “whoso sheds man's blood, by man shall his blood be shed.” In other instances they are inflicted after the example of the creator, in his positive code of laws for the regulation of the Jewish republic; as in the case of the crime against nature. But they are sometimes inflicted without such express warrant or



example, at the will and discretion of the human legislature; as for forgery, for robbery, and sometimes for offenses of a lighter kind. Of these we are principally to speak: as these crimes are, none of them, offenses against natural, but only against social, rights; not even robbery itself, unless it be a robbery from one's person: all others being an infringement of that right of property, which, as we have formerly seen,<sup>12</sup> owes its origin not to the law of nature, but merely to civil society.

THE practice of inflicting capital punishments, for offenses of human institution, is thus justified by that great and good man, Sir Matthew Hale:<sup>13</sup> “when offenses grow enormous, frequent, and dangerous to a kingdom or state destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom or its inhabitants, severe punishment and even death itself is necessary to be annexed to laws in many cases by the prudence of lawgivers.” It is therefore the enormity, or dangerous tendency, of the crime that alone can warrant any earthly legislature in putting him to death that commits it. It is not its frequency only, or the difficulty of otherwise preventing it, that will excuse our attempting to prevent it by a wanton effusion of human blood. For, though the end of punishment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws. Every humane legislator will be therefore extremely cautious of establishing laws that inflict the penalty of death, especially for slight offenses, or such as are merely positive. He will expect a better reason for his so doing, than that loose one which generally is given; that it is found by former experience that no lighter penalty will be effectual. For is it found upon farther experience, that capital punishments are more effectual? Was the vast territory of all the Russias worse regulated under the late empress Elizabeth, than under her sanguinary predecessors? Is it now, under Catherine II, less civilized, less social, less secure? And yet we are assured, that neither of these illustrious princesses have throughout their whole administration, inflicted the penalty of death: and latter has, upon, full experience of its being useless, nay even pernicious, given orders for abolishing it entirely throughout her extensive dominions.<sup>14</sup> But indeed, were capital punishments proved by experience to be a sure and effectual remedy, that would not prove the necessity (upon which the justice and propriety depend) of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far. For instance, the damage done to our public roads by loaded wagons is universally allowed, and many laws have been made to prevent it; none which have hitherto proved effectual. But it does not therefore follow, that it would be just for the legislature to inflict death upon every obstinate carrier, who defeats or eludes the provisions of former statutes. Where the evil to be prevented is not adequate to the violence of the preventive, a sovereign that thinks seriously can never justify such a law to the dictates of conscience and humanity. To shed the blood of our fellow creature is a matter that requires the greatest deliberation, and the fullest conviction of our own authority: for life is the immediate gift of God to man; which neither he can resign, nor can it be taken from him, unless by the command or permission of him who gave it; either expressly revealed, or collected from the laws of nature or society by clear and indisputable demonstration.

I WOULD not be understood to deny the right of the legislature in any country to enforce its own laws by the death of the transgressor, though persons of some abilities have doubted it; but only to suggest a few hints for the consideration of such as are, or may hereafter become, legislators. When a question arises, whether death may be lawfully inflicted for this or that transgression, the wisdom of the laws must decide it: and to this public judgment or decision all private judgments must

submit; else there is an end of the principle of all society and government. The guilt of blood if any, must lie at their doors, who misinterpret the extent of their warrant; and not at the doors of the subject, who is bound to receive the interpretations, that are given by the sovereign power.

2. As to the end, or final cause of human punishments. This is not by way of atonement or expiation for the crime committed; for that must be left to the just determination of the supreme being: but as a precaution against future offenses of the same kind. This is effected three ways: either by the amendment of the offender himself; for which purpose all corporal punishments, fines, and temporary exile or imprisonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, “*ut poena* (as Tully<sup>15</sup> expresses it) *ad paucos, metus ad omnes perveniat*” [“that few may suffer, but all may dread punishment”]; which gives rise to all ignominious punishments, and to such executions of justice as are open and public: or, lastly, by depriving the party injuring of the power to do future mischief; which is effected by either putting him to death, or condemning him to perpetual confinement, slavery, or exile. The same one end, of preventing future crimes, is endeavored to be answered by each of these three species of punishment. The public gains equal security, whether the offender himself be amended by wholesome correction; or he be disabled from doing any farther harm: and if the penalty fails of both these effects, as it may do, still the terror of his example remains as a warning to other citizens. The method however of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it: therefore the pains of death, and perpetual disability by exile, slavery, or imprisonment, ought never to be inflicted, but when the offender appears incorrigible: which may be collected either from a repetition of minuter offenses; or from the perpetration of some one crime of deep malignity, which itself demonstrates a disposition without hope or probability of amendment and in such cases it would be cruelty to the public, to defer the punishment of such criminal, till he had an opportunity of repeating perhaps the worst of villainies.

3. AS to the measure of human punishments. From what has been observed in the former articles we may collect, that the quantity of punishment can never be absolutely determined by any standing invariable rule; but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be the best calculated to answer the end of precaution against future offenses.

HENCE it will be evident, that what some have so highly extolled for its equity, the *lex talionis* or law of retaliation, can never be in all cases an adequate or permanent rule of punishment. In some cases indeed it seems to be dictated by natural reason; as in case of conspiracies to do an injury, or false accusations of the innocent: to which we may add that law of the Jews and Egyptians, mentioned by Josephus and Diodorus Siculus, that whoever without sufficient cause was found with any mortal poison in his custody, should himself be obliged to take it. But, in general, the difference of persons, place, time provocation, or other circumstances, may enhance or mitigate the offense; and in such cases retaliation can never be proper measure of justice. If a nobleman strikes a peasant, all mankind will see, that if a court of justice awards a return of the blow, it is more than a just compensation. On the other hand, retaliation may sometimes be too easy a sentence; as, if a man maliciously should put out the remaining eye him who had lost one before, it is too slight a punishment for the maimer to lose only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered; by decreeing, in imitation of

Solon's law,<sup>16</sup> that he who struck out the eye a one-eyed man, should lose both his own in return. Besides, there are many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And we may add, that those instances, wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same hurt he has done to his neighbor, and no more; but this correspondence between the crime and punishment is barely a consequence from some other principle. Death is ordered to be punished with death; not because one is equivalent to the other, for that would be expiation, and not punishment. Nor is death always an equivalent for death: the execution of a needy decrepit assassin is poor satisfaction or the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honors, and his fortune. But the reason upon which this sentence is grounded seems to be, that this is the highest penalty that man can inflict, and tends most to the security of the world; by removing one murderer from the earth, and setting a dreadful example to deter others: so that even this grand instance proceeds upon other principles than those of retaliation. And truly, if any measure of punishment is to be taken from the damage sustained by the sufferer, the punishment ought rather to exceed than equal the injury: since it seems contrary to reason and equity, that the guilty (if convicted) should suffer no more than the innocent has done before him; especially as the suffering of the innocent is past and irrevocable, that of the guilty is future, contingent, and liable to be escaped or evaded. With regard indeed to crimes that are incomplete, which consist merely in the intention, and are not yet carried into act, as conspiracies and the like; the innocent has a chance to frustrate or avoid the villainy, as the conspirator has also a chance to escape his punishment: and this may be one reason why the *lex talionis* is more proper to be inflicted, if at all, for crimes that consist in intention, than for such as are carried into act. It seems indeed consonant to natural reason, and has therefore been adopted as a maxim by several theoretical writers,<sup>17</sup> that the punishment, due to the crime of which one falsely accuses another, should be inflicted on the perjured informer. Accordingly, when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment of such only as preferred malicious accusations against others; it being enacted by statute 37 Edw. III. c. 18. that such as preferred any suggestions to the king's great council should put in sureties of taliation; that is, to incur the same pain that the other should have had, in case the suggestion were found untrue. But, after one year's experience, this punishment of taliation was reject, and imprisonment adopted in its stead.<sup>18</sup>

But though from what has been said it appears, that there cannot be any regular or determinate method of rating the quantity of punishments for crimes, by any one uniform rule; but they must be referred to the will and discretion of the legislative power: yet there are some general principles, drawn from the nature and circumstances of the crime, that may be of some assistance in allotting it an adequate punishment.

AS, first, with regard to the object of it: for the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury, and of course under this aggravation the punishment should be more severe. Therefore treason in conspiring the king's death is by the English law punished with greater rigor than even actually killing any private subject. And yet, generally, a design to transgress is not so flagrant an enormity, as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking; so that it requires more obstinacy

in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it: and it is an encouragement to repentance and remorse, even till the last stage of any crime, that it never is too late to retract; and that if a man stops even here, it is better for him than if he proceeds: for which reasons an attempt to rob, to ravish, or to kill, is far less penal than the actual robbery, rape, or murder. But in the case of a conspiracy, the object whereof is the king's majesty, the intention will deserve the highest degree of severity: not because the intention is equivalent to the act itself; but because the greatest rigor is no more than adequate to a treasonable purpose of the heart, and there is no greater to inflict upon the actual execution itself.

AGAIN: the violence of passion, or temptation, may sometimes alleviate a crime; as theft, in case of hunger, is far more worthy of compassion, than when committed through avarice, or to supply one in luxurious excesses. To kill a man upon sudden and violent resentment is less penal, than upon cool deliberate malice. The age, education, and character of the offender; the repetition (or otherwise) of the offense; the time, the place, the company wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate the crime.<sup>19</sup>

FARTHER: as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures those be most severely punished, which are the most destructive of the public safety and happiness:<sup>20</sup> and, among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit: according to what Cicero observes,<sup>21</sup> “*ea sunt animadvertenda peccata maxime, quae difficillime praecaventur.*” [“Offences should be most severely punished which are most difficult to guard against.”] Hence it is, that for a servant to rob his master is in more cases capital, than for a stranger: if a servant kills his master, it is a species of treason; in another it is only murder: to steal a handkerchief, or other trifle, privately from one's person, is made capital; but to carry off a load of corn from an open field, though of fifty times greater value, is punished with transportation only. And in the island of Man, this rule was formerly carried so far, that to take away a horse or an ox was there no felony, but a trespass; because of the difficulty in that little territory to conceal them or carry them off: but to steal a pig or a fowl, which is easily done, was a capital misdemeanor, and the offender was punished with death.<sup>22</sup>

LASTLY, as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action,<sup>23</sup> that crimes are more effectually prevented by the certainty, than by the severity, of punishment. For the excessive severity of laws (says Montesquieu<sup>24</sup>) hinders their execution: when the punishment surpasses all measure, the public will frequently out of humanity prefer impunity to it. Thus the statute 1 Mar. St. 1. c. 1. recites in its preamble, “that the state of every king consists more assuredly in the love of the subject towards their prince, than in the dread of laws made with rigorous pains; and that laws made for the preservation of the commonwealth without great penalties are more often obeyed and kept, than laws made with extreme punishments.” Happy had it been for the nation, if the subsequent practice of that deluded princess in matters of religion, had been correspondent to these sentiments of herself and parliament, in matters of state and

government! We may farther observe that sanguinary laws are a bad symptom of the distemper of any state, or at least of its weak constitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished: under the emperors severe punishments were revived; and then the empire fell.

IT is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect either in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much easier to extirpate than to amend mankind: yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniously proposed,<sup>25</sup> that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least: but, if that be too romantic an idea, yet at last a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offenses of an inferior rank. Where men see no distinction made in the nature and gradations of punishment, the generality will be led to conclude there is no distinction in the guilt. Thus in France the punishment of robbery, either with or without murder, is the same:<sup>26</sup> hence it is, that thought perhaps they are therefore subject to fewer robberies, yet they never rob but they also murder. In China murderers are cut to pieces, and robbers not: hence in that country they never murder on the highway, though they often rob. And in England, besides the additional terrors of speedy execution, and a subsequent exposure or dissection, robbers have a hope of transportation, which seldom is extended to murderers. This has the same effect here as in China: in preventing frequent assassination and slaughter.

YET, though in this instance we may glory in the wisdom of the English law, we shall find it more difficult to justify the frequency of capital punishment to be found therein; inflicted (perhaps inattentively) by a multitude of successive independent statutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than an hundred and sixty have been declared by act of parliament<sup>27</sup> to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. So dreadful a list, instead of diminishing, increases the number of offenders. The injured, through compassion, will often forbear to prosecute: juries, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offense: and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy. Among so many chances of escaping, the needy or hardened offender overlooks the multitude that suffer; he boldly engages in some desperate attempt, to relieve his wants or supply his vices; and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity has taught him to contemn.

## NOTES

1. Book III. ch. 1.
2. See Vol.1. p. 268

3. Sir Michael Foster. pref. to rep.
4. Baron Montesquieu, marquis Beccaria, etc.
5. See Vol. II. p. 345.
6. Stat. 9 Geo. 1. c. 22. 31Geo. II. c. 42.
7. Stat. 5 Eliz. c. 20.
8. See Grotius, de j. b. & p. 1.2, c. 20. Pufendorf, L. of Nat. and N. b. 8, c. 3.
9. Gen. 4:14.
10. See Vol. 1. pag.254.
11. Gen. 9:6.
12. Book IF. ch. 1.
13. 1 Hal. P.C.13.
14. Grand instructions for framing a new code of laws for the Russian empire. § 210.
15. pro client. 46.
16. Pott.Ant. b.1. c.26.
17. Beccar. c. 15.
18. Stat. 38 Edw .III. c. 9.
19. Thus Demosthenes (in his oration against Midias) finely works up the aggravations of the insult he had received. "I was abused, says he, by my enemy, in cold blood, out of malice, not by heat of wine, in the morning, publicly, before strangers as well as citizens; and that in the temple, whither the duty of my office called me."
20. Beccar. c. 6.
21. pro Sexto Roscio, 40.
22. 4 Inst. 285.
23. Beccar. c. 7.
24. Sp. L. b. 6. c. 13.
25. Beccar. c. 6.
26. Sp. L. b. 6. c. 16.
27. See Ruffhead's index to the statutes, (tit. felony) and the acts which have since been made.

## CHAPTER 2

### Of the Persons Capable of Committing Crimes

HAVING, in the preceding chapter, considered in general the nature of crimes, and punishments, we are next led, in the order of our distribution, to inquire what persons are, or are not, capable of committing crimes; or, which is all one, who are exempted from the censures of the law upon the commission of those acts, which in other persons would be severely punished. In the process of which inquiry, we must have recourse to particular and special exceptions: for the general rule is, that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves.

ALL the several pleas and excuses, which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will. An involuntary act, as it has no claim to merit, so neither can it induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable. Indeed, to make a complete crime, cognizable by human laws, there must be both a will and an act. For though, *in foro conscientiae* [in the court of conscience], a fixed design or will to do an unlawful act is almost as heinous as the commission of it, yet, as no temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than as they are demonstrated by outward action, it therefore cannot punish for what it cannot know. For which reason in all temporal jurisdictions an overt act, or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will, before the man is liable to punishment. And, as a vicious will without a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws, there must be, first, a vicious will; and, secondly, an unlawful act consequent upon such vicious will.

NOW there are cases, in which will does not join with the act: 1. Where there is a defect of understanding. For where there is no discernment, there is no choice; and where there is on choice, there can be no act of the will, which is nothing else but a determination of one's choice, to do or to abstain from a particular action: he therefore, that has no understanding, can have no will guide his conduct. 2. Where there is understanding and will sufficient, residing in the party; but not called forth and exerted at the time of the action done: which is the case of all offenses committed by chance or ignorance. Here the will sits neuter; and neither concurs with the act, nor disagrees to it. 3. Where the action is constrained by some outward force and violence. Here the will counteracts the deed; and is so far from concurring with, that loathes and disagrees to, what the man is obliged to perform. It will be the business of the present chapter briefly to consider all the several species of defect in will, as they fall under some one or other of these general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the first class; misfortune, and ignorance, which may be referred to the second; and compulsion or necessity, which may properly rank in the third.

1. FIRST, we will consider the case of infancy, or nonage; which is a defect of the understanding. Infants, under the age of discretion, ought not to be punished by any criminal prosecution whatever.<sup>1</sup> What the age of discretion is, in various nations is matter of some variety. The civil law distinguished the age of minors, or those under twenty five years old, into three stages: *infantia*

[infancy], from the birth till seven years of age; *pueritia* [childhood], from seven to fourteen; and *pubertas* [puberty] from fourteen upwards. The period of *pueritia*, or childhood, was again subdivided into two equal parts; from seven to ten and an half was *aetas infantiae proxima* [age nearest infancy]; from ten and an half to fourteen was *aetas pubertati proxima* [age nearest puberty]. During the first stage of infancy, and the next half stage of childhood, *infantiae proxima*, they were not punishable for any crime.<sup>2</sup> During the other half stage of childhood, approaching to puberty, from ten and an half to fourteen, they were indeed punishable, if found to be *doli capaces*, or capable of mischief; but with many mitigations, and not with the utmost rigor of the law. During the last stage (at the age of puberty, and afterwards) minors were liable to be punished, as well capitally, as otherwise.

THE law of England does in some cases privilege an infant, under the age of twenty one, as to common misdemeanors; so as to escape fine, imprisonment, and the like: and particularly in cases of omission, as not repairing a bridge, or a highway, and other similar offenses:<sup>3</sup> for, not having the command of his fortune till twenty one, he wants the capacity to do those things, which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at least liable as others to commit) for these an infant, above the age of fourteen, is equally liable to suffer, as a person of the full age of twenty one.

WITH regard to capital crimes, the law is still more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion. By the ancient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open:<sup>4</sup> and from thence till the offender was fourteen, it was *aetas pubertati proxima*, in which he might, or might not, be guilty of a crime, according to his natural capacity or incapacity. This was the dubious stage of discretion: but, under twelve, it was held that he could not be guilty in will, neither after fourteen could he be supposed innocent, of any capital crime which he in fact committed. But by the law, as it now stands, and has stood at least ever since the time of Edward the third, the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in these case our maxim is, that "*malitia supplet aetatem*" ["malice is equivalent to age"]. Under seven years of age indeed an infant cannot be guilty of felony;<sup>5</sup> for then a felonious discretion is almost an impossibility in nature: but at eight years old he may be guilty of felony.<sup>6</sup> Also, under fourteen, though an infant shall be *prima facie* [at first sight] adjudged to be *doli incapax* [incapable of guile]; yet if it appear to the court and jury, that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. Thus a girl of thirteen has been burnt for killing her mistress: and one boy of ten, and another of nine years old, who had killed their companions, have been sentenced to death, and he of ten years actually hanged; because it appeared upon their trials, that the one hid himself, and the other hid the body he had killed; which hiding manifested a consciousness of guilt, and a discretion to discern between good and evil.<sup>7</sup> And there was an instance in the last century, where a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly.<sup>8</sup> Thus also, in very modern times, a boy of ten years old was convicted on own confession of murdering his bedfellow; there appearing in his whole behavior plain tokens of a mischievous discretion: and, as the sparing this boy merely on account of his tender years might be of dangerous consequence to the public, by



propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment.<sup>9</sup> But, in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt or contradiction.

II. THE second case of a deficiency in will, which excuses from the guilt of crimes, arises also a defective or vitiated understanding, *viz.* in an idiot or a lunatic. For the rule of law as to the latter, which may easily be adapted also to the former, is, that “*furiosus furore solum punitur*” [“madness alone punishes a madman”]. In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself.<sup>10</sup> Also, if a man in his sound memory commits a capital offense, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.<sup>11</sup> Indeed, in the bloody reign of Henry the eighth, a statute was made,<sup>12</sup> which enacted, that if a person, being *compos mentis* [of sound mind], should commit high treason, and after fall into madness, he might be tried in his absence, and should suffer death, as if he were of perfect memory. But this savage and inhuman law was repealed by the statute 1 & 2 Ph. & M.c.10. “For,” as is observed by Sir Edward Coke,<sup>13</sup> “the execution of an offender is for example, *ut poena ad paucos, metus ad omnes perveniat*: but so it is not when a madman is executed; but should be a miserable spectacle, both against law, and of extreme inhumanity and cruelty, and can be no example to others.” But if there be any doubt, whether the party be *compos* or not, this shall be tried by a jury. And if he be so found a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment, of any criminal action committed under deprivation of the senses: but, if a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency.<sup>14</sup> Yet, in the case absolute madmen, as they are not answerable for their actions, they should not be permitted the liberty of acting unless under proper control; and, in particular, they ought not to be suffered to go loose, to the terror of the king's subject. It was the doctrine of our ancient law, that persons deprived of their reason might be confined till they recovered their senses,<sup>15</sup> without waiting for the forms of a commission or other special authority from the crown: and now, by the vagrant acts,<sup>16</sup> a method is chalked out for imprisoning, chaining, and sending them to their proper homes.

III. THIRDLY; as to artificial, voluntarily contracted madness, by drunkenness or intoxication, which, depriving men of their reason, puts them in a temporary frenzy; our law looks upon this as an aggravation of the offense, rather than as an excuse for any criminal misbehavior. A drunkard, says Sir Edward Coke,<sup>17</sup> who is *voluntarius daemon* [a voluntary demon], has no privilege thereby; but what hurt or ill soever he does, his drunkenness does aggravate it: *nam omne crimen ebrietas, et incendit, et detegit* [drunkenness excites to and discloses every crime]. It has been observed, that the real use of strong liquors, and the abuse of them by drinking to excess, depend much upon the temperature of climate in which we live. The same indulgence, which may be necessary to make the blood move in Norway, would make an Italian mad. A German therefore, says the president Montesquieu,<sup>18</sup> drinks through custom, founded upon constitutional necessity; a Spaniard drinks

through choice, or out of the mere wantonness of luxury: and drunkenness, he adds, ought to be more severely punished, where it makes men mischievous and mad, as in Spain and Italy, than where it only renders them stupid and heavy, as in Germany and more northern countries. And accordingly, in the warmer climate of Greece, a law of Pittacus enacted, “that he who committed a crime, when drunk, should receive a double punishment;” one for the crime itself, and the other for the ebriety which prompted him to commit it.<sup>19</sup> The Roman law indeed made great allowances for this vice: “*per vinum delapsis capitalis poena remittitur*” [“capital punishment is remitted, where occasioned by ebriety”].<sup>20</sup> But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, (though real) will not suffer any man thus to privilege one crime by another.<sup>21</sup>

IV. A FOURTH deficiency of will, is where man commits an unlawful act by misfortune or chance, and not by design. Here the will observes a total neutrality, and does not cooperate with the deed; which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we shall find more occasion to speak hereafter; at present only observing, that if any accidental mischief happens to follow from the performance of a lawful act, the party stands excused from all guilt: but if a man be doing anything unlawful, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offense, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehavior.<sup>22</sup>

V. FIFTHLY, ignorance or mistake is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action:<sup>23</sup> but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so; this is wilful murder. For a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defense. *Ignorantia juris, quod quisque tenetur scire, neminem excusat* [ignorance of the law, which everyone is presumed to know, does not excuse], is as well the maxim of our own law,<sup>24</sup> as it was of the Roman.<sup>25</sup>

VI. A SIXTH species of defect of will is that arising from compulsion and inevitable necessity, These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free-will, which God has given to man, it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion.

1. OF this nature, in the first place, is the obligation of civil subjection, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientiae*, or whether the inferior in this case is not bound to obey the divine, rather than the human law, it is not my

business to decide; though the question I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff, who burnt Latimer and Ridley, in the bigoted days of queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavored to restore superstition under the holy auspices of its merciless sister, persecution.

AS to persons in private relations; the principal case, where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the wife to her husband: for neither son or a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master;<sup>26</sup> though in some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment, even for capital offenses. And therefore if a woman commit theft, burglary, or other civil offenses the laws of society, by the coercion of her husband; or merely by his command, which the law construes a coercion; or even in his company, his example being equivalent to a command; she is not guilty of any crime: being considered as acting by compulsion and not of her own will.<sup>27</sup> Which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of king Ina the West Saxon.<sup>28</sup> And it appears that, among the northern nations on the continent, this privilege extended to any woman transgressing in concert with a man, and to any servant that committed a joint offense with a freeman: the male or freeman only was punished, the female or slave dismissed; “*proculdubio quod alterum libertas, alterum necessitas impelleret.*”<sup>29</sup> [“Because doubtless the one did it of his own free will, the other of necessity.”] But (besides that in our law, which is a stranger to slavery, no impunity is given to servants, who are as much free agents as their masters) even with regard to wives, this rule admits of an exception in crimes that are *mala in se*, and prohibited by the law of nature, as murder and the like: not only because these are of a deeper dye; but also, since in a state of nature no one is in subjection to another, it would be unreasonable to screen an offender from the punishment due to natural crimes, by the refinements and subordinations of civil society. In treason also, (the highest crime which a member of society can, as such, be guilty of) no plea of coverture shall excuse the wife; no presumption of the husband's coercion shall extenuate her guilt:<sup>30</sup> as well because of the odiousness and dangerous consequence of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself as a subject has forgotten to pay. In inferior misdemeanors also, we may remark another exception; that wife may be indicted and set in the pillory with her husband, for keeping a brothel: for this is an offense touching the domestic economy or government of the house, in which the wife has a principal share; and in also such an offense as the law presumes to be generally conducted by the intrigues of the female sex.<sup>31</sup> And in all cases, where the wife offends alone, without the company or command of her husband, she is responsible for her offense, as much as any feme-sole.

2. ANOTHER species of compulsion or necessity is what our law calls *duress per minas*;<sup>32</sup> or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors; at least before the human tribunal. But then that fear, which compels a man to do an unwarrantable action, ought to be just and well grounded; such, “*qui cadere possit in virum constantem, non timidum et meticulosum*” [“as might seize a courageous man, not timid or fearful”], as Bracton expresses it,<sup>33</sup> in the words of the civil law.<sup>34</sup> Therefore, in time

of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace.<sup>35</sup> This however seems only, or at least principally, to hold as to positive crimes, so created by the laws of society; and which therefore society may excuse; but not as to natural offenses, so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore though a man be violently assaulted, and has no other possible means of escaping death, but by killing an innocent person; this fear shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent.<sup>36</sup> But in such a case he is permitted to kill the assailant; for there the law of nature, and self-defense its primary canon, have made him his own protector.

3. THERE is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which without such obligation would be criminal. And that is, when a man has his choice of two evils set before him, and, being under a necessity of choosing one, he chooses the least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive, than active; or, if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity, where a man by the commandment of the law is bound to arrest another for any capital offense, or to disperse a riot, and resistance is made to his authority: it is here justifiable and even necessary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue. for the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public; and therefore excuse felony, which the killing would otherwise amount to.<sup>37</sup>

4. THERE is yet another case of necessity, which has occasioned great speculation among the writers upon general law; viz. whether a man in extreme want of food or clothing may justify stealing either, to relieve his present necessities. And this both Grotius<sup>38</sup> and together with many other of the foreign jurists,<sup>39</sup> hold in the affirmative; maintaining by many ingenious, humane, and plausible reasons, that in such cases the community of goods by kind of tacit concession of society is revived. And some even of our own lawyers have held the same;<sup>40</sup> though it seems to be an unwarranted doctrine, borrowed from the notions of some civilians: at least it is now antiquated, the law of England admitting no such excuse at present.<sup>41</sup> And this its doctrine is agreeable not only to the sentiments of many of the wisest ancients, particularly Cicero,<sup>42</sup> who holds that "*suum cuique incommodum ferendum est, potius quam de alterius commodis detrahendum*" ["every one must bear his own inconvenience, rather than detract from the convenience of another"]; but also to the Jewish law, as certified by king Solomon himself:<sup>43</sup> "if a thief steal to satisfy his soul when he is hungry, he shall restore sevenfold, and shall give all the substance of his house:" which was the ordinary punishment for theft in that kingdom. And this is founded upon the highest reason: for men's properties would be under a strange insecurity, if liable to be invaded according to the wants of others; of which wants no man can possibly be an adequate judge, but the party himself who pleads them. In this country especially, there would be a peculiar impropriety in admitting so dubious an excuse: for by our laws such sufficient provision is made for the poor by the power of the civil magistrate, that it is impossible the most needy stranger should ever be reduced to the necessity of thieving to support nature. This case of a stranger is, by the way, the strongest instance put by baron Pufendorf, and whereon he builds his principal arguments: which, however they may hold upon the continent, where the parsimonious industry of the natives orders every one to work or starve, yet

must lose all their weight and efficacy in England, where charity is reduced to a system, and interwoven in our very constitution. Therefore our laws ought by no means to be taxed with being unmerciful, for denying this privilege to the necessitous; especially when we consider, that the king, on the representation of his ministers of justice, has a power to soften the law, and to extend mercy in cases of peculiar hardship. An advantage which is wanting in many states, particularly those which are democratical: and these have in its stead introduced and adopted, in the body of the law itself, a multitude of circumstances tending to alleviate its rigor. But the founders of our constitution thought it better to vest in the crown power of pardoning particular objects of compassion, than to countenance and establish theft by one general undistinguishing law.

VII. IN the several cases before-mentioned, the incapacity of committing crimes arises from a deficiency of the will. To these we may add one more, in which the law supposes an incapacity of doing wrong from the excellence and perfection of the person; which extend as well to the will as to the other qualities of his mind. I mean the case of the king: who, by virtue of his royal prerogative, is not under the coercive power of the law;<sup>44</sup> which will not suppose him capable of committing a folly, much less crime. We are therefore, out of reverence and decency, to forbear any idle inquiries, of what would be the consequence if the king were to act thus and thus: since the law deems so highly of his wisdom and virtue, as not even to presume it possible for him to do anything inconsistent with his station and dignity; and therefore has made no provision to remedy such a grievance. But of this sufficient was said in a former volume,<sup>45</sup> to which I must refer the reader.

## NOTES

1. Hawk. P. C. 2.
2. Inst. 3. 20. 10.
3. 1 Hal. P. C. 20, 21, 22.
4. LL. Athelstan. Wilk. 65.
5. Mirr. c. 4. § 16. 1. Hal. P. C. 27.
6. Dalt. Just. c. 147.
7. 1. Hal. P. C. 26, 27.
8. Emlyn on 1 Hal. P. C. 25.
9. Foster. 72.
10. 3 Inst. 6.
11. 1 Hal. P. C. 34.
12. 33 Hen. VIII. c. 20
13. Inst. 6.
14. 1 Hal. P. C. 31.
15. Bro. Abr. tit. corone. 101.
16. 17 Geo. II. c. 5.
17. 1. Inst. 247.

18. Sp. L.b. 14. c. 10.
19. Puff. L. of N. b. 8. c. 3.
20. Ff. 49. 16 .6.
21. Plowd. 19.
22. 1 Hal. P. C. 39.
23. Cro. Car. 538.
24. Plowd. 343.
25. Ff. 22. 6. 9.
26. Hawk. P. C. 3.
27. 1 Hal. P. C. 45.
28. cap. 57.
29. Stiernhook *de jure Sueon.* l.2. c. 4.
30. 1 Hal. P. C. 47.
31. 1 Hawk. P. C. 2, 3.
32. See Vol. 1. pag. 131.
33. l.2.f. 16.
34. Ff. 4. 2. 5, & 6.
35. 1 Hal. P. C. 50.
36. Ibid. 51.
37. 1 Hal. P. C. 53.
38. *de jure* b. & p. l.2. c. 2.
39. L. of Nat. and N. l.2. c. 6.
40. Briton, c. 10. Mirr. c. 4. § 16.
41. 1 Hal. P. C. 54.
42. de off. l.3. c. 5.
43. Prov. 6:30.
44. 1 Hal. P. C. 44.
45. Book. I. ch. 7. pag. 244.

### CHAPTER 3 Of Principals and Accessories

IT having been shown in the preceding chapter what persons are, or not, upon account of their situation and circumstances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among persons that are capable of offending; *viz.* as principal, and as accessory.

1. A MAN may be principal in an offense in two degrees. a principal, in the first degree, is he that is that is the actor, or absolute perpetrator of the crime; and, in the second degree, he who is present, aiding, and abetting the fact to be done.<sup>1</sup> Which presence need not always be an actual immediate standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance.<sup>2</sup> And this rule has also other exceptions: for, in case of murder by poisoning, a man may be a principal felon, by preparing and laying the poison, or giving it to another (who is ignorant of its poisonous quality<sup>3</sup>) for that purpose; and yet not administer it himself, nor be present when the very deed of poisoning is committed.<sup>4</sup> And the same reasoning will hold, with regard to other murders committed in the absence of the murderer, by means which he had prepared before-hand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast, with an intent to do mischief, or exciting a madman to commit murder, so that death thereupon ensues; in every of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an accessory, that necessarily pre-supposing a principal; and the poison, the pitfall, the beast, or the madman cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty, either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal: and if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist.<sup>5</sup>

II. AN accessory is he who is not the chief actor in the offense, nor present at its performance, but is someway concerned therein, either before or after the fact committed. In considering the nature of which degree of guilt, we will, first, examine what offenses admit of accessories, and what not: secondly, who may be an accessory before the fact: thirdly, who may be an accessory after it: and, lastly, how accessories, considered merely as such, and distinct from principal, are to be treated.

1. AND, first, as to what offenses admit of accessories, and what not. In high treason there are no accessories, but all are principals: the same acts, that make a man accessory in felony, making him a principal in high treason, upon account of the heinousness of the crime.<sup>6</sup> Besides it is to be considered, that the bare intent to commit treason is many times actual treason; as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, there can be no accessories before the fact; since the very advice and abetment amount to principal treason. But this will not hold in the inferior species of high treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in those no advice to commit them, unless the thing be actually performed, will make a man a principal traitor.<sup>7</sup> In petit treason, murder, and felonies of all kinds, there may be accessories: except only in those offenses, which by judgment of law are sudden and unpremeditated, as manslaughter and the like; which therefore cannot have any accessories before the fact.<sup>8</sup> But in petit larceny, or

minute thefts, and all other crimes under the degree of felony, there are no accessories; but all persons concerned therein, if guilty at all, are principals:<sup>9</sup> the same rule holding with regard to the highest and lowest offenses; though upon different reasons. In treason all are principals, *propter odium delicti* [because of the degree of offense]; in trespass all are principals, because the law, *quae de minimis non curat* [does not recognize slight matters], does not descend to distinguish the different shades of guilt in petty misdemeanors. It is a maxim, that *accessorius sequitur naturam sui principalis* [an accessory follows the condition of his principal]:<sup>10</sup> and therefore an accessory cannot be guilty of a higher crime than his principal; being only punished, as a partaker of his guilt. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though, had he been present and assisting, he would have been guilty as principal of petty treason, and the stranger of murder.<sup>11</sup>

2. As to the second point, who may be an accessory before the fact; Sir Matthew Hale<sup>12</sup> defines him to be one, who being absent at the time of the crime committed, does yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessory; for such procurance is necessary to make him an accessory; for if such procurer, or the like, be present, he is guilty of the crime as principal. If A then advises B to kill another, and B does it in the absence of A, now B is principal, and A is accessory in the murder. And this hold, even though the party killed be not *in rerum natura* [in the nature of things (born)] at the time of the advice given. As if A, the reputed father, advises B the mother of a bastard child, unborn, to strangle it when born, and she does so; A is accessory to this murder.<sup>13</sup> And it is also settled,<sup>14</sup> that whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule; that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other. As if A commands B to beat C, and B beats him so that he dies; B is guilty of murder as principal, and A as accessory. But if A commands B to burn C's house; and he, in so doing, commits a robbery; now A, though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and inconsequential nature.<sup>15</sup> But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, that he dies; the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titius, and the manner of its execution is a mere collateral circumstance.<sup>16</sup>

3. AN accessory after the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon.<sup>17</sup> Therefore, to make an accessory *ex post facto* [after the fact], it is in the first place requisite that he knows of the felony committed.<sup>18</sup> In the next place, he must receive, relieve, comfort, or assist him. And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him.<sup>19</sup> So likewise to convey instruments to a felon to enable him to break jail, or to bribe the jailer to let him escape, makes a man an accessory to the felony. But to relieve a felon in jail with clothes or other necessaries, is no offense: for the crime imputable to species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law.<sup>20</sup> To buy or receive stolen goods, knowing them to be stolen, falls under none of these descriptions: it was therefore at common law, a mere misdemeanor, and not the receiver accessory to the theft, because he received the goods only,



and not the felon:<sup>21</sup> but now by the statutes 5 Ann. c.31. and 4 Geo. I.c.11. all such receivers are made accessories, and may be transported for fourteen years. In France this is punished with death: and the Gothic constitutions distinguished also three sorts of thieves, “*unum qui consilium daret, alterum qui contractaret, tertium qui receptaret et occuleret; pari poenae singulos obnoxios.*”<sup>22</sup> [“He who plans a robbery, he who commits it, and thirdly he who receives and conceals; each is liable to an equal degree.”]

THE felony must be complete at the time of the assistance given: else it makes not the assistant an accessory. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent: this does not make him accessory to the homicide, for till death ensues there is no felony committed.<sup>23</sup> But so strict is the law where a felony is actually complete, in order to do effectual justice, that the nearest relations are not suffered to aid or receive one another. If the parent assists his child, or the child his parent, if the brother receives his brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any of them committed a felony, the receivers become accessories *ex post facto*.<sup>24</sup> But a feme covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord.<sup>25</sup>

4. THE last point of inquiry is, how accessories are to be treated, considered distinct from principals. And the general rule of the ancient law (borrowed from the Gothic constitutions<sup>26</sup>) is this, that accessories shall suffer the same punishment as their principals: if one be liable to death, the other is also liable:<sup>27</sup> as, by the law of Athens, delinquents and their abettors were to receive the same punishment.<sup>28</sup> Why then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons. 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted: the commission of an actual robbery being quite a different accusation, from that of harboring the robber. 2. Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy a distinction is made between them: accessories after the fact being still allowed the benefit of clergy in all cases; which denied to the principals, and accessories before the fact, in many cases; as in petit treason, murder, robbery, and wilful burning.<sup>29</sup> And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even before the fact, the latter to be created with a little less severity than the former, it might prevent the perpetration of many crimes, by increasing the difficulty of finding a person to execute the deed itself; as his danger would be greater than that of his accomplices, by reason of the difference of his punishment.<sup>30</sup> 3. because formerly no man could be tried as accessory, till after the principal was convicted, or at least at the same time with him: though that law is now much altered, as will be shown more fully in its proper place. 4. Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal; for an acquittal of receiving or counseling a felon is no acquittal of the felony itself: but it is matter of some doubt, whether, if a man be acquitted as principal, he can be afterwards indicted as accessory before the fact; since those offenses are frequently very near allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also.<sup>31</sup> But it is clearly held, that one acquitted as principal may be indicted as an accessory after the fact; since that is always an offense of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other. Upon these reasons the distinction of principal and accessory will appear to be highly necessary; though the punishment is still much the same with regard to

principals, and such accessories as offend *a priori* [beforehand].

### NOTES

1. 1 Hal. P. C. 615.
2. Foster. 350.
3. Ibid. 349.
4. 3 Inst. 138.
5. 1 Hal. P.C. 617. 2 Hawk. P.C. 315.
6. 3 Inst. 138. 1 Hal. P.C. 613.
7. Foster. 342.
8. 1 Hal. P.C. 615.
9. Ibid. 613.
10. 3 Inst. 139.
11. 2 Hawk. P.C. 315.
12. 1 Hal. P.C. 615, 616.
13. Dyer. 186.
14. Foster. 125.
15. 1 Hal. P.C. 617.
16. 2 Hawk. P.C. 316.
17. 1 Hal. P.C. 618.
18. 2 Hawk. P.C. 319.
19. 2 Hawk. P.C. 317, 318.
20. 1 Hal. P.C. 620, 621.
21. 1 Hal. P.C. 620.
22. Stiernhook *de jure Goth.* l.3. c. 5.
23. 2 Hawk. P.C. 320.
24. 3 Inst. 10 § 2 Hawk. P.C. 320.
25. 1 Ibid. P.C. 621.
26. See. Stiernhock. Ibid.
27. Inst. 188.
28. Pott. *antia.* b.1.c.20.
29. 1 Hal. P.C. 615.
30. Beccar. c. 37.
31. 1 Hal. P.C. 625, 626. 2 Hawk. P.C. 373. Foster. 361.

## CHAPTER 4 Of Offenses Against God and Religion

IN the present chapter we are to enter upon the detail of the several species of crimes and misdemeanors, with the punishment annexed to each by the law of England. It was observed, in the beginning of this book,<sup>1</sup> that crimes and misdemeanors are a breach and violation of the public rights and duties, owing to the whole community, considered as a community, in its social aggregate capacity. And in the very entrance of these commentaries<sup>2</sup> it was shown, that human laws can have no concern with any but social and relative duties; being intended only to regulate the conduct of man, considered under various relations, as a member of civil society. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society:<sup>3</sup> and, of consequence, private vices, or the breach of mere absolute duties, which man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law; any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes. Thus the vice of drunkenness, if committed privately and alone, is beyond the knowledge and of course beyond the reach of human tribunals: but if committed publicly, in the face of the world, its evil example makes it liable to temporal censures. The vice of lying, which consists (abstractedly taken) in a criminal violation of truth, and therefore in any shape derogatory from sound morality, is not however taken notice of by our law, unless it carries with it some public inconvenience, as spreading false news; or some social injury, as slander and malicious prosecution, for which a private recompense is given. And yet drunkenness and lying are *in foro conscientiae* [in the court of conscience] as thoroughly criminal when they are not, as when they are, attended with public inconvenience. The only difference is, that both public and private vices are subject to the vengeance of eternal justice; and public vices are besides liable to the temporal punishments of human tribunals.

ON the other hand, there are some misdemeanors, which are punished by the municipal law, that are in themselves nothing criminal, but are made so by the positive constitutions of the state for public convenience. Such as poaching, exportation of wool, and the like. These are naturally no offenses at all; but their whole criminality consists in their disobedience to the supreme power, which has an undoubted right for the well-being and peace of the community to make some things unlawful which were in themselves indifferent. Upon the whole therefore, though part of the offenses to be enumerated in the following sheets are against the revealed law of God, others against the law of nature, and some are offenses against neither; yet in a treatise of municipal law we must consider them all as deriving their particular guilt, here punishable, from the law of man.

HAVING premised this caution, I shall next proceed to distribute the several offenses, which are either directly or by consequence injurious to civil society, and therefore punishable by the laws of England, under the following general heads: first, those which are more immediately injurious to God and his holy religion; secondly, such as violate and transgress the law of nations; thirdly, such as more especially affect the sovereign executive power of the state, or the king and his government; fourthly, such as more directly infringe the rights of the public or common wealth; and, lastly, such as derogate from those rights and duties, which are owing to particular individuals, and in the preservation and vindication of which community is deeply interested.

FIRST then, such crimes and misdemeanors, as more immediately offend Almighty God, by openly transgressing the precepts of religion either natural or revealed; and mediately, by their bad example and consequence, the law of society also; which constitutes that guilt in the action, which human tribunals are to censure.

I. OF this species the first is that of apostasy, or a total renunciation of Christianity, by embracing either a false religion, or no religion at all. This offense can only take place in such as have once professed the true religion. The perversion of a Christian to Judaism, paganism, to other false religion, was punished by the emperors Constantius and Julian with confiscation of goods;<sup>4</sup> to which the emperors Theodosius and Valennian added capital punishment, in case the apostate endeavored to pervert others to the same iniquity.<sup>5</sup> A punishment too severe for any temporal laws to inflict: and yet the zeal of our ancestors imported it into this country; for we find by Bracton,<sup>6</sup> that in his time apostates were to be burnt to death. Doubtless the preservation of Christianity, as a national religion, is, abstracted from its own intrinsic truth, of the utmost consequence to the civil state: which a single instance will sufficiently demonstrate. The belief of a future state of rewards and punishments, the entertaining just ideas of the moral attributes of the supreme being, and a firm persuasion that he superintends and will finally compensate every action in human life (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our savior Christ) these are the grand foundation of all judicial oaths; which call to witness the truth of those, which perhaps may be only know to him and the party attesting: all moral evidence therefore, all confidence in human veracity, must be weakened by irreligion, and overthrown by infidelity. Wherefore all affronts to Christianity, or endeavors to depreciate its efficacy, are highly deserving of human punishment. But yet the loss of life is a heavier penalty than the offense, taken in a civil light, deserves: and, taken in a spiritual light, our laws have no jurisdiction over it. This punishment therefore has long ago become obsolete; and the offense of apostasy was for a long time the object only of the ecclesiastical courts, which corrected the offender *pro salute animae* [for the good of the soul]. But about the close of the last century, the civil liberties to which we were then restored being used as a cloak of maliciousness, and the most horrid doctrine subversive of all religion being publicly avowed both in discourse and writings, it was found necessary again for the civil power to interpose, by not admitting those miscreants<sup>7</sup> to the privileges of society, who maintained such principle as destroyed all moral obligation. To this end it enacted by statute 9&10; W. III. c.32. that if any person educated in, or having made profession of, the Christian religion, shall in writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the holy scriptures to be of divine authority, he shall upon the first offense be rendered incapable to hold any office of trust; and, for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years imprisonment without bail. To give room however for repentance; if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.

II. A SECOND offense is that of heresy which consists not in a total of Christianity, but of some of its essential doctrines, publicly and obstinately avowed: being defined, “*sententia rerum divinarum humano sensu excogitata, palam docta, et pertinaciter defensa*” [“religious doctrines of human invention, openly taught and pertinaciously defended.”]<sup>8</sup> And here it must also be acknowledged that particular modes of belief or unbelief, not tending to overturn Christianity itself, or to sap the foundations of morality, are by no means the object of coercion by the civil magistrate. What

doctrines shall therefore be adjudged heresy, was left by our old constitution to the determination of the ecclesiastical judge; who had herein a most arbitrary latitude allowed him. For the general definition of an heretic given Lyndewode,<sup>9</sup> extends to the smallest deviations from the doctrines of holy church: “*haereticus est qui dubitat de fide catholica, et qui negligit servare ea, quae Romana ecclesia statuit, seu servare decreverat.*” [“A heretic is one who doubts concerning the Catholic faith, and who neglects to observe those things which the Roman church has appointed or ordained.”] Or, as the statute 2 Hen. IV. C.15. expresses it in English, “teachers of erroneous opinions, contrary to the faith and blessed determination of the holy church.” Very contrary this to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness. And what ought to have alleviated the punishment, the uncertainty of the crime, seems to have enhanced it in those days of blind zeal and pious cruelty. It is true, that the sanctimonious hypocrisy of the canonists went first no farther than enjoining penance, excommunication, and ecclesiastical deprivation, for heresy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods *in pios usus* [for pious uses]. But in the meantime they had prevailed upon weakness of bigoted princes to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital offense: the Romish ecclesiastics determining, without appeal, whatever they pleased to be heresy, and shifting off to the secular arm the odium and drudgery of executions; with which they themselves were too tender and delicate to intermeddle. Nay they pretended to intercede and pray, on behalf of the convicted heretic, *ut citra mortis periculum sententia circa eum moderetur* [that the sentence might be mitigated so as not to imperil his life]:<sup>10</sup> well knowing at the same time that they were delivering the unhappy victim to certain death. Hence the capital punishments inflicted on the ancient Donatists and Manicheans by the emperors Theodosius and Justinian:<sup>11</sup> hence also the constitution of the emperor Frederic mentioned by Lyndewode,<sup>12</sup> adjudging all persons without distinction to be burnt by fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution,<sup>13</sup> ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it should be lawful for good catholics to seize and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the pope, of disposing even of the kingdoms of refractory princes more dutiful sons of the church. The immediate event of this constitution was something singular, and may serve to illustrate at once the gratitude of the holy see, and the just punishment of the royal bigot: for upon the authority of this very constitution, the pope afterwards expelled this very emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou.<sup>14</sup>

CHRISTIANITY being thus deformed by daemon of persecution upon the continent, we cannot expect that our own island should be entirely free from the same scourge. And therefore we find among our ancient precedents<sup>15</sup> a writ *de haeretico comburendo* [for burning a heretic], which is thought by some to be as ancient as the common law itself. However it appears from thence, that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself in a provincial synod; and that the delinquent was delivered over to the king to do as he should please with him: so that the crown had a control over the spiritual power, and might pardon the convict by issuing no process against him; the writ *de haeretico comburendo* being not a writ of course, but issuing only by the special direction of the king in council.<sup>16</sup>

BUT in the reign of Henry the fourth, when eyes of the Christian world began to open, and the seeds of the protestant religion (though under the opprobrious name of lollardy<sup>17</sup>) took root in this kingdom; the clergy, taking advantage from the king's dubious title to demand an increase of their own power, obtained an act of parliament,<sup>18</sup> which sharpened the edge of persecution to its utmost keenness. For, by that synod, might convict of heretical tenets; and unless the convict abjured his opinions, or if after abjuration he relapsed, the sheriff was bound *ex officio* [officially], if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the statute 2Hen. V.c.7. lollardy was also made a temporal offense, and indictable in the king's courts; which did not thereby gain an exclusive, but only a concurrent jurisdiction with the bishop's consistory.

AFTERWARDS, when final reformation of religion began to advance, the power of the ecclesiastics was somewhat moderated: for though what heresy is, was not then precisely defined, yet we are told in some points what it is not: the statute 25 Hen.VIII.c.14. declaring, that offenses against the see of Rome are not heresy; and the ordinary being thereby restrained from proceeding in any case upon mere suspicion; that is, unless the party be accused by two credible witnesses, or an indictment of heresy be first previously found in the king's courts of common law. And yet the spirit of persecution was not then abated, but only diverted into a lay channel. For in six years afterwards, by statute 31.Hen.VIII.c.14. the bloody law of the six articles was made, which established the six most contested points: popery, transubstantiation, communion in one kind, the celibacy of the clergy, monastic vows, the sacrifice of the mass, and auricular confession; which points were “determined and resolved by the most godly study, pain, and travail of his majesty: for which his most humble and obedient subjects, the lords spiritual and temporal and the commons, in parliament assembled, did not only render and give unto his highness their most high and hearty thanks,” but did also enact and declare all oppugners [opposers] of the first to be heretics, and to be burnt with fire; and of the five last to be felons, and to suffer death. The same statute established a new and mixed jurisdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on destroying the supremacy of the bishops of Rome, and establishing all other their corruptions of the Christian religion.

I SHALL not perplex this detail with the various repeals and revivals these sanguinary laws in the two succeeding reigns; but shall proceed directly to the reign of queen Elizabeth; when the reformation was finally established with temper and decency, unsullied with party rancor, or personal caprice and resentment. By statute 1 Eliz. c.1. all former statutes relating to heresy are repealed, which leaves the jurisdiction of heresy as it stood at common law; *viz.* as to the infliction of common censures, in the ecclesiastical courts; and, in case of burning the heretic, in the provincial synod only.<sup>19</sup> Sir Matthew Hale is indeed of a different opinion, and holds that such power resided in the diocesan also; though he agrees, that in either case the writ *de haeretico comburendo* was not demandable of common right, but grantable or otherwise merely at king's discretion.<sup>20</sup> But the principal point now gained, was, that by this statute a boundary is for the first time set to what shall be accounted heresy; nothing for the future being to be so determined, but only such tenets, which have been heretofore so declared, 1. By the words of the canonical scriptures; 2. By the first four general councils, or such others as have only used the words of the holy scriptures; or, 3. Which shall hereafter be so declared by the parliament, with the assent of the clergy in convocation. Thus was heresy reduced to a greater certainty than before; though it might not have been the worse to

have defined it in terms still more precise and particular: as a man continued still liable to be burnt, for what perhaps he did not understand to be heresy, till the ecclesiastical judge so interpreted the words the canonical scriptures.

FOR the writ *de haeretico comburendo* remained still in force; and we have instances of its being put in execution upon two Anabaptists in the seventeenth of Elizabeth, and two Arians in the ninth of James the first. But it was totally abolished, and heresy again subjected only to ecclesiastical correction, *pro salute animae*, by virtue of the statute 29. Car. II. c.9. For in one and the same reign, our lands were delivered from the slavery of military tenures; our bodies from arbitrary imprisonment by the *habeas corpus* act; and our minds from the tyranny of superstitious bigotry, by demolishing this last badge of persecution in the English law.

IN what I have now said I would not be understood to derogate from the just right of the national church, or to favor a loose latitude of propagating any crude undigested sentiments in religious matters. Of propagating, I say; for the bare entertaining them, without an endeavor to diffuse them, seems hardly cognizable by any human authority. I only mean to illustrate the excellence of our present establishment, by looking back to former times. Everything is now as it should be: unless perhaps that heresy ought to be more strictly defined, and no prosecution permitted, even in the ecclesiastical courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions, it seems necessary for the support of the national religion, that the officers of the church should have power to censure heretics, but not to exterminate or destroy them. It has also been thought proper for the civil magistrate again to interpose, with regard to one species of heresy, very prevalent in modern times: for by statute 9&10; W.III.c.32. if any person educated in the Christian religion, or professing the same, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy trinity to be God, or maintain that there are more Gods than one, he shall undergo the same penalties and incapacities, which were just now mentioned to be inflicted on apostasy by the same statute. And thus much for the crime of heresy.

III. ANOTHER species of offenses against religion are those which affect the established church. And these are either positive, or negative. Positive, as by reviling its ordinances: or negative, by non-conformity to its worship. Of both of these in their order.

1. AND, first, of the offense of reviling the ordinances of the church. This is a crime of much grosser nature than the other of mere non-conformity: since it carries with it the utmost indecency, arrogance, and ingratitude: indecency, by setting up private judgment in opposition to public; arrogance, by treating with contempt and rudeness what has at least a better chance to be right, than the singular notions of any particular man; and ingratitude, by denying that indulgence and liberty of conscience to the members of the national church, which the retainers to every petty conventicle enjoy. However it is provided by statutes 1 Edw. VI. c.1. and 1 Eliz. c.1. that whoever reviles the sacrament of the lord's supper shall be punished by fine and imprisonment: and by statute 1 Eliz. c.2. if any minister shall speak anything in derogation of the book of common prayer, he shall be imprisoned six months, and forfeit a year's value of his benefice; and for the second offense he shall be deprived. And if any person whatsoever shall in plays, songs, or other open words, speak anything in derogation, depraving, or despising of the said book, he shall forfeit for the first offense an hundred marks; for the second four hundred; and for the third shall forfeit all his goods chattels,

and suffer imprisonment for life. These penalties were framed in the infancy of our present establishment; when the disciples of Rome and of Geneva united in inveighing with the utmost bitterness against the English liturgy: and the terror of these laws (for they seldom, if ever, were fully executed) proved a principal means, under providence, of preserving the purity as well as decency of our national worship. Nor can their continuance to this time be thought too severe and intolerant; when we consider, that they are leveled at an offense, to which men cannot now be prompted by any laudable motive; not even by a mistaken zeal for reformation: since from political reasons, sufficiently hinted at in a former volume,<sup>21</sup> it would now be extremely unadvisable to make any alterations in the service of the church; unless it could be shown that some manifest impiety or shocking absurdity would follow from continuing it in its present form. And therefore the virulent declamations of peevish or opinionated men on topics so often refuted, and of which the preface to the liturgy is itself a perpetual refutation, can be calculated for no other purpose, than merely to disturb the consciences, and poison the minds of the people.

2. NON-CONFORMITY to the worship of the church is the other, or negative branch of this offense. And for this there is much more to be pleaded than for the former; being a matter of private conscience, to the scruples of which our present laws have shown a very just and Christian indulgence. For undoubtedly all persecution and oppression of weak consciences, on the score of religious persuasions, are highly unjustifiable upon every principle of natural reason, civil liberty, or sound religion. But care must be taken not to carry this indulgence into such extremes, as may endanger the national church: there is always a difference to be made between toleration and establishment.

NON-CONFORMISTS are of two sorts: first, such as absent themselves from the divine worship in the established church, through total irreligion, and attend the service of no other persuasion. These by the statutes of 1 Eliz. c.2. 23 Eliz. c.1. and 3 Jac.I.c.4. forfeit one shilling to the poor every lord's day they so absent themselves, and 20£ to the king if they continue such default for a month together. And if they keep any inmate, thus irreligiously disposed, in their house, they forfeit 10£ per month.

THE second species of non-conformists are those who offend through a mistaken or perverse zeal. Such were esteemed by our laws, enacted since the time of the reformation, to be papists and protestant dissenters: both of which were supposed to be equally schismatics in departing from the national church; with this difference, that the papists divide from us upon material, though erroneous, reasons; but many of the dissenters upon matters of indifference, or, in other words, upon no reason at all. However the laws against the former are much more severe than against the principles of the papists being deservedly looked upon to be subversive of the civil government, but not those of the protestant dissenters. As to the papists, their tenets are undoubtedly calculated for the introduction of all slavery, both civil and religious: but it may with justice be questioned, whether the spirit, the doctrines, and the practice of the sectaries are better calculated to make men good subjects. One thing obvious to observe, that these have once within the compass of the last century, effected the ruin of our church and monarchy; which the papists have attempted indeed, but have never yet been able to execute. Yet certainly our ancestors were mistaken in their plans of compulsion and intolerance. The sin of schism, as such, is by no means the object of temporal coercion and punishment. If through weakness of intellect, through misdirected piety, through



perverseness and acerbity of temper, or (which is often the case) through a prospect of secular advantage in herding with a party, men quarrel with the ecclesiastical establishment, the civil magistrate has nothing to do with it; unless their tenets and practice are such as threaten ruin or disturbance to the state. He is bound indeed to protect the established church, by admitting none but its genuine members to offices of trust emolument: for, if every sect was to be indulged in a free communion of civil employments, the ides of a national establishment would at once be destroyed, and the episcopal church would be no longer the church of England. But, this being once secured, all persecution for diversity of opinions, however ridiculous or absurd they may be, is contrary to every principle of sound policy and civil freedom. The names and subordination of the clergy, the posture of devotion, the materials and color of the minister's garment, the joining in a known or an unknown form of prayer, and other matters of the same kind, must be left to the option of every man's private judgment.

WITH regard therefore to protestant dissenters, although the experience of their turbulent disposition in former times occasioned several disabilities and restrictions (which I shall not undertake to justify) to be laid them by abundance of statutes,<sup>22</sup> yet at length the legislature, with spirit of true magnanimity, extended that indulgence to these sectaries, which they themselves, when in power, had held to be countenancing schism, and denied to the church of England. The penalties are all of them suspended by the statute 1 W.&M. st.2. c.18. commonly called the toleration act; which exempts all dissenters (except papists, and such as deny the trinity) from all penal laws relating to religion, provided they take the oaths of allegiance and supremacy, and subscribe the declaration against popery, and repair to some congregation registered in the bishop's court or at the sessions, the doors whereof must be always open: and dissenting teachers are also to subscribe the thirty nine articles, except those relating to church government and infant baptism. Thus are all persons, who will approve themselves no papists or oppugners of the trinity, left at full liberty to act as their conscience shall direct them, in the matter of religious worship. But by statute 5 Geo. 1. c.4. no mayor, or principal magistrate, must appear at any dissenting meeting with the ensigns of his office,<sup>23</sup> on pain of disability to hold that any other office: the legislature judging it a matter of propriety, that a mode of worship, set up in opposition to the national, when allowed to be exercised in peace, should be exercised also with decency, gratitude, and humility.

AS to papists, what has been said of the protestant dissenters would hold equally strong for a general toleration of them; provided their separation was founded only upon difference of opinion in religion, and their principles did not also extend to a subversion of the civil government. If once they could be brought to renounce the supremacy of the pope, they might quietly enjoy their seven sacraments, their purgatory, and auricular confession; their worship of relics and images; nay even their transubstantiation. But while they acknowledge a foreign power, superior to the sovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good subjects.

LET us therefore now take a view of the laws in force against the papists; who may be divided into three classes, persons professing popery, popish recusants convict, and popish priests. 1. Persons professing the popish religion, besides the former penalties for not frequenting their parish church, are by several statutes, too numerous to be here recited,<sup>24</sup> disabled from taking any lands either by descent or purchase, after eighteen years of age, until they renounce their errors; they must at the

age of twenty one register their estates before acquired, and all future conveyances and wills relating to them; they are incapable of presenting to any advowson, or granting to any other person any avoidance to the same, in prejudice of the two universities; they may not keep or teach any school under pain of perpetual imprisonment; they are liable also in some instances to pay double taxes; and, if they willingly say or hear mass, they forfeit the one two hundred, the other one hundred marks, and each shall suffer a year's imprisonment. Thus much for persons, who from the misfortune of family prejudices or otherwise, have conceived an unhappy attachment to the Romish church from their infancy, and publicly profess its errors. But if any evil industry is used to rivet these errors upon them, if any person sends another abroad to be educated in the popish religion, or to reside in any religious house abroad for that purpose, or contributes anything to their maintenance when there; both the sender, the sent, and the contributor, are disabled to sue in law or equity, to be executor or administrator to any person, to take any legacy or deed of gift, and to bear any office in the realm, and shall forfeit all their goods and chattels, and likewise all their real estate for life. And where errors are also aggravated by apostasy, or perversion, where a person is reconciled to the see of Rome or procures others to be reconciled, the offense amounts to high treason. 2. popish recusants, convicted in a court of law of not attending the service of the church of England, are subject to the following disabilities, penalties, and forfeitures, over and above those before-mentioned. They can hold no office or employment; they must not keep arms in their houses, but the same may be seized by the justices of the peace; they may not come within ten miles of London, on pain of 100 £; they can bring no action at law, or suit in equity; they are not permitted to travel above five miles from home, unless by license, upon pain of forfeiting all their goods; and they may not come to court, under pain of 100£ No marriage or burial of such recusant, or baptism of his child, shall be had otherwise than by the ministers of the church of England, under other severe penalties. A married woman, when recusant, shall forfeit two thirds of her dower or jointure, may not be executrix or administratrix to her husband, nor any part of his goods; and during the coverture may be kept in prison, unless her husband redeems her at the rate of 10£ a month, or the third part of all his lands. And, lastly, as a feme-covert recusant may be imprisoned, so all others must, within three months after conviction, either submit and renounce their errors, or, if required so to do by four justices, must abjure and renounce the realm: and if they do not depart, or if they return without the king's license, they shall be guilty of felony, and suffer death as felons. There is also an inferior species of recusancy, (refusing to make the declaration against popery enjoined by statute 30 Car.II. St.2. when tendered by the proper magistrate which, if the party resides within ten miles of London, makes him an absolute recusant convict; or, if at a greater distance, suspends him from having any seat in parliament, keeping arms in his house, or any horse above the value of five pounds. This is the state, by the laws now in being, of a lay papist. But, 3. The remaining species or degree, *viz.* popish priests, are in a still more dangerous condition. By statute 11&12; W. III. c.4. popish priests or bishops, celebrating mass or exercising any parts of their functions in England, except in the houses of ambassadors, are to perpetual imprisonment. And by the statute 27 Eliz. c.2. any popish priest, born in the dominions of the crown of England, who shall come over hither from beyond sea, or shall be in England three days without conforming and taking the oaths, is guilty of high treason: and all persons harboring him are guilty of felony without the benefit of clergy.

THIS is a short summary of the laws against the papists, under their three several classes, of persons professing the popish religion, popish recusants convict, and popish priests. Of which the president Montesquieu observes,<sup>25</sup> that they do all the hurt that can possibly be done in cold blood. But in

answer to this it may be observed, (what foreigners who only judge from our statute book are not fully apprized of) that these laws are seldom exerted to their utmost rigor: and indeed, if they were, it would be very difficult to excuse them. For they are rather to be accounted for from their history, and the urgency of the times which produced them, than to be approved (upon a cool review) as a standing system of law. The restless machinations of the Jesuits during the reign of Elizabeth, the turbulence and uneasiness of the papists under the new religious establishment, and the boldness of their hopes and wishes for the succession of the queen of Scots, obliged the parliament to counteract of dangerous a spirit by laws of a great, and perhaps necessary, severity. The powder-treason, in the succeeding reign, struck a panic into James I, which operated in different ways: it occasioned the enacting of new laws against the papists; but deterred him from putting them in execution. The intrigues of queen Henrietta in reign of Charles I, the prospect of a popish successor in that of Charles II, the assassination-plot in the reign of king William, and the avowed claim of a popish pretender to the crown, will account for the extension of these penalties at those several periods of our history. But if a time should ever arrive, and perhaps it is not very distant, when all fears of a pretender shall have vanished, and the power and influence of the pope shall become feeble, ridiculous, and despicable, not only in England but in every kingdom of Europe; it probably would not then be amiss to review and soften these rigorous edicts; at least till the civil principles of the roman catholics called again upon the legislature to renew them: for it ought not to be left in the breast of every merciless bigot, to drag down the vengeance of these occasional law upon inoffensive, though mistaken, subject; in opposition to the lenient inclinations of the civil magistrate, and to the destruction of every principle of toleration and religious liberty.

IN order the better to secure the established church against perils from nonconformists of all denominations, infidels, Turks, Jews, heretics, papists, and sectaries, there are however two bulwarks erected; called the corporation and test acts: by the former of which<sup>26</sup> no person can be legally elected to any office relating to the government of any city or corporation, unless, within a twelvemonth before, he has received the sacrament of the lord's supper according to the rites of church of England: and he is also enjoined to take the oaths of allegiance and supremacy at the same time that he takes the oath office: or, in default of either of these requisites, such election shall be void. The other, called the test act,<sup>27</sup> directs all officers civil and military to take the oaths and make the declaration against transubstantiation, in the court of king's bench or chancery, the next term, or at the next quarter sessions, or (by subsequent statutes) within six months, after their admission; and also within the same time to receive the sacrament of the lord's supper, according to the usage of the church of England, in some public church immediately after divine service and sermon, and to deliver into court a certificate thereof signed by the minister and church-warden, and also to prove the same by two credible witnesses; upon forfeiture of 500£ and disability to hold the said office. And of much the same nature with these is the statute 7 Jac. I.c.2. which permits no persons to be naturalized or restored in blood, but such as undergo a like test: which test having been removed in 1753, in favor of the Jews, was the next session of parliament restored again with some precipitation.

THUS much for offense, which strike at our national religion, or the doctrine and discipline of the church of England in particular. I proceed now to consider some gross impieties and general immoralities, which are taken notice of and punished by our municipal law; frequently in concurrence with the ecclesiastical, to which the censure of many of them does also of right appertain; though with a view somewhat different: the spiritual court punishing all sinful enormities

for the sake of reforming the private sinner, *pro salute animae*; while the temporal courts resent the public affront to religion and morality, on which all government must depend for support, and correct more for the sake of example than private amendment.

IV. THE fourth species of offenses therefore, more immediately against God and religion, is that of blasphemy against the Almighty, by denying his being or providence; or by contumelious reproaches of our Savior Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offenses punishable at common law by fine and imprisonment, or other infamous corporal punishment:<sup>28</sup> for Christianity is part of the laws of England.<sup>29</sup>

V. SOMEWHAT allied to this, though in an inferior degree, is the offense of profane and common swearing and cursing. By the last statute against which, 19 Geo. II. c.21. which repeals all former ones, every laborer, sailor, or soldier shall forfeit 1 s. for every profane oath or curse, every other person under the degree of a gentleman 2 s. and every gentleman or person of superior rank 5 s. to the poor of the parish; and, on a second conviction, double; and, for every subsequent conviction, treble the sum first forfeited; with all charges of conviction: and in default of payment shall be sent to the house of correction for ten days. Any the peace may convict upon his own hearing, or the testimony of one witness; and any constable or peace officer, upon his own hearing, may secure any offender and carry him before a justice, and there convict him. If the justice omits his duty, he forfeits 5£ and the constable 40 s. And the act is to be read in all parish churches, and public chapels, the Sunday after every quarter day, on pain of 5£ to be levied by warrant from any justice. Besides this punishment for taking God's name in vain in common discourse, it is enacted by statute 3 Jac. I. c.21. that if in any stage play, interlude, or show, the name of the holy trinity, or any of the persons therein, be jestingly or profanely used, the offender shall forfeit 10£ one moiety to the king, and the informer.

VI. A SIXTH species of offenses against God and religion, of which our ancient books are full, is a crime of which one knows not well what account to give. I mean the offense of witchcraft, conjuration, enchantment, or sorcery. To deny the possibility, nay, actual existence, of witchcraft and sorcery, is at once flatly to contradict the revealed word of God, in various passages both of the old and new testament: and the thing itself is a truth to which every nation in the world has in its turn borne testimony, by either examples seemingly well attested, or prohibitory laws, which at least suppose the possibility of a commerce with evil spirits. The civil law punishes with death not only the sorcerers themselves, bur also those who consult them;<sup>30</sup> imitating in the former the express law of God,<sup>31</sup> “thou shalt not suffer a witch to live.” And our own laws, both before and since the conquest, have been equally penal; ranking this crime in the same class with heresy, and condemning both to the flames.<sup>32</sup> The president Montesquieu<sup>33</sup> ranks them also both together, but with a very different view: laying it down as an important maxim, that we ought to be very circumspect in the prosecution of magic and heresy; because the most unexceptionable conduct, the purest morals and the constant practice of every duty in life, are not a sufficient security against the suspicion of crimes like these. And indeed the ridiculous stories that are generally told, and the many impostures and delusions that have been discovered in all ages, are enough to demolish all faith in such a dubious crime; if the contrary evidence were not also extremely strong. Wherefore it seems to be the most eligible way to conclude, with an ingenious writer of our own<sup>34</sup> though one cannot

give credit to any particular modern instance of it.

OUR forefathers stronger believers, when they enacted by statute 33 Hen.VIII.c.8. all witchcraft and sorcery to be felony without benefit of clergy; and again by statute 1Jac.I.c.12. that all persons invoking any evil spirit, or consulting, covenanting with, entertaining, employing, feeding, or rewarding any evil spirit; or taking up dead bodies from their graves to be used in any witchcraft, sorcery, charm, or enchantment; or killing or otherwise hurting any person by such infernal arts; should be guilty of felony without benefit of clergy, and suffer death. And, if any person should attempt by sorcery to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt man or beast, though the same were not effected, he or she should suffer imprisonment and pillory for the first offense, and death for the second. These acts continued in force till lately, to the terror of all ancient females in the kingdom: and many poor wretches were sacrificed thereby to the prejudice of their neighbors, and their own illusions; not a few having, by some means or other, confessed the fact at the gallows. But all executions for this dubious crime are now at an end; our legislature having at length followed the wise example of Louis XIV in France, who thought proper by an edict to restrain the tribunals of justice from receiving informations of witchcraft.<sup>35</sup> And accordingly it is with us enacted by statute 9 Geo. II. c.5. that no prosecution shall for the future be carried on against any person for conjuration, witchcraft, sorcery, or enchantment. But the misdemeanor of persons pretending to use witchcraft, tell fortunes, or discover stolen goods by skill in the occult sciences, is still deservedly punished with a year's imprisonment, and standing four times in the pillory.

VII. A SEVENTH species of offenders in this class are all religious impostors: such as falsely pretend an extraordinary commission from heaven; or terrify and abuse the people with false denunciations of judgments. These, as tending to subvert all religion, by bringing it into ridicule and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment.<sup>36</sup>

VIII. SIMONY, or the corrupt presentation of any one to an ecclesiastical benefice for gift or reward, is also to be considered as an offense against religion; as well by reason of the sacredness of the charge which is thus profanely bought and sold, as because it is always attended with perjury in the person presented.<sup>37</sup> The statute 31 Eliz. c.6. (which, so far as it relates to the forfeiture of the right of presentation, was considered in a former book<sup>38</sup>) enacts, that if any patron, for money or any other corrupt consideration or promise, directly or indirectly given, shall present, admit, institute, induct, install, or collate any person to an ecclesiastical benefice or dignity, both the giver and taker shall forfeit two value of the benefice or dignity; one moiety to the king, and the other to any one who will sue for the same. If persons also corruptly resign or exchange their benefices, both the giver and taker shall in like manner forfeit double the value of the money or other corrupt consideration. And persons who shall corruptly ordain or license any minister, or procure him to be ordained or licensed, (which is the true idea of simony) shall incur a like forfeiture of forty pounds; and the minister himself of ten pounds, besides an incapacity to hold any ecclesiastical preferment for seven years afterwards. Corrupt elections and resignations in colleges, hospitals, and other eleemosynary corporations, are also punished by the same statute with forfeiture of the double value, vacating the place or office, and a devolution of the right of election for that turn to the crown.

IX. PROFANATION of the lord's day, or sabbath-breaking, is a ninth offense against God and religion, punished by the municipal laws of England. For, besides the notorious indecency and scandal, of permitting any secular business to be publicly transacted on that day, in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes by the help of conversation and society the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit: it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness: it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labor, without any stated times of recalling them to worship of their maker. And therefore the laws of king Athelstan<sup>39</sup> forbid all merchandising on the lord's day, under very severe penalties. And by the statute 27 Hen.VI.c.5. no fair or market shall be held on the principal festivals, Good Friday, or any Sunday (except the four Sundays in harvest) on pain of forfeiting the goods exposed to sale. And, since, by the statute 1 Car. I.c.1. no persons shall assemble, out of their own parishes, for any sport whatsoever upon this day; nor, in their parishes, shall use any bull or bear baiting, interludes, plays, or other unlawful exercises, or pastimes; on pain that every offender shall pay 3s. 4d. to the poor. This statute does not prohibit, but rather impliedly allows, any innocent recreation or amusement, within their respective parishes, even on the lord's day, after divine service is over. But by statute 29 Car.II.c.7. no person is allowed to work on the lord's day, or use any boat or barge, or expose any goods to sale; except meat in public houses, milk at certain hours, and works of necessity or charity, on forfeiture of 5 s. Nor shall any drover, carrier, or the like, travel upon that day, under pain of twenty shillings.

X. DRUNKENNESS is also punished by statute 4 Jac. I.c.5. with the forfeiture of 5s; or the sitting six hours in the stocks: by which time the statute presumes the offender will have regained his senses, and not be liable to do mischief to his neighbors. And there are many wholesome statutes, by way of prevention, chiefly passed in the same reign of king James I, which regulate the licencing of ale-houses, and punish persons found tippling therein; or the masters of such houses permitting them.

XI. THE last offense which I shall mention, more immediately against religion and morality and cognizable by the temporal courts, is that of open and notorious lewdness: either by frequenting houses of ill fame, which is an indictable offense;<sup>40</sup> or by some grossly scandalous and public indecency, for which the punishment is by fine and imprisonment.<sup>41</sup> In the year 1650, when the ruling powers found it for their interest to put on the semblance of a very extraordinary strictness and purity of morals, not only incest and adultery were made capital crimes; but also the repeated act of keeping a brothel, or committing fornication, were (upon a second conviction) made felony without benefit of clergy.<sup>42</sup> But at the restoration, when men from an abhorrence of the hypocrisy of the late times fell into a contrary extreme, of licentiousness, it was not thought proper to renew a law of such unfashionable rigor. And these offenses have been ever since left to the feeble coercion of the spiritual court, according to the rules of the canon law; a law which has treated the offense of incontinence, nay even adultery itself, with a great degree of tenderness and lenity; owing perhaps to the celibacy of its first compilers. The temporal courts therefore take no cognizance of the crime of adultery, otherwise than as a private injury.<sup>43</sup>

BUT, before we quit this subject, we must take notice of the temporal punishment for having bastard children, considered in a criminal light; for with regard to the maintenance of such illegitimate offspring, which is a civil concern, we have formerly spoken at large.<sup>44</sup> By the statute 18 Eliz. c.3. two justices may take order for the punishment of the mother and reputed father; but what that punishment shall be, is not therein ascertained: though the contemporary exposition was, that a corporal punishment was intended.<sup>45</sup> By statute 7 Jac. I.c.4. a specific punishment (*viz.* commitment to the house of correction) is inflicted on the woman only. But in both cases, it seems that the penalty can only be inflicted, if the bastard becomes chargeable to the parish: for otherwise the very maintenance of the child is considered as a degree of punishment. By the last mentioned statute the justices may commit the mother to the house of correction, there to be punished and set on work for one year; and, in case of a second offense, till she find sureties never to offend again.

### NOTES

1. See pag.5.
2. See Vol. 1. pag. 123, 124.
3. Beccar. ch. 8.
4. Cod. 1.7.1.
5. Ibid. 6.
6. l. 3. c. 9.
7. Mescroyantz in our ancient law-books is the name of unbelievers.
8. 1 Hal. P.C. 384.
9. cap.de haereticis.
10. Decretal. l. 5. t. 40. c. 27.
11. Cod. l.1. tit.5.
12. c. de haereticis.
13. Cod. l. 5. 4.
14. Baldus in Cod. l. 5. 4.
15. P.N.B. 269.
16. Hal. P.C. 395.
17. So called not from lolium, or tares, (which was afterwards devised, in order to justify the burning of them from Matth. 13:30.) but from one Walter Lolhard, a German reformer. Mod.Un.Has.xxvi.13.Spelm. Gloss.371.
18. Hen. IV. c. 15.
19. 5 Rep. 23. 12 Rep. 56 92.
20. 1 Hal. P.C. 405.
21. Vol. 1. pag. 98.
22. 31 Eliz. c.1. 17 Car. II. c.2. 22 Car. II. c.1.
23. Sir Humphrey Edwin, a lord mayor of London, had the imprudence soon after the toleration act to go to a presbyterian

meeting-house in his formalities: which is alluded to by dean Swift, in his tale of a tub, under the allegory of Jack getting on a great horse, and eating custard.

24. See Hawkins's pleas of the crown, and Burn's justice.

25. Sp. L.b. 19. c. 27.

26. Star. 13 Car.II. st.2. c. 1.

27. Stat. 25 Car. II. c.2.

28. 1 Hawk. P.C. 7.

29. 1 Ventr. 293. 2 Strange, 834.

30. Cod. 1.9. t.18.

31. Exod. 22:18.

32. 3 Inst. 44.

33. Sp.L. b. 12. c. 5.

34. Mr. Addison, Spect. No. 117.

35. Voltaire Siecl. Louis xiv. Mod. univ. Hist.xxv.215. Yet Vouglans, (*de droit criminel*, 353.459.) still reckons up sorcery and witchcraft among the crimes punishable in France.

36. 1Hawk. P.C. 7.

37. 3 Inst. 156.

38. See Vol. II. pag. 279.

39. c. 24.

40. Poph. 208.

41. 1 Siderf. 168.

42. Scobell. 121.

43. See Vol. III. pag. 139.

44. See Vol. pag. 458.

45. Dalt. just. ch. 11.



## CHAPTER 5 Of Offenses Against the Law of Nations

ACCORDING to the method marked out in the preceding chapter, we are next to consider the offenses more immediately repugnant to that universal law of society, which regulates the mutual intercourse between one state and another; those, I mean, which are particularly animadverted on, as such, by the English law.

THE law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world;<sup>1</sup> in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance frequently occur between two or more independent states, and the individuals belonging to each.<sup>2</sup> This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests.<sup>3</sup> And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree: or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.

IN arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world. Thus in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the lawmerchant,<sup>4</sup> which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law, collected from history and usage and such writers of all nations and languages as are generally approved and allowed of.

BUT, though in civil transactions and questions of property between the subjects of different states, the law of nations has much scope and extent, as adopted by the law of England; yet the present branch of our inquiries will fall within a narrow compass, as offenses against the law of nations can rarely be the object of the criminal law of any particular state. For offenses against this law are principally incident to whole states or nations: in which case recourse can only be had to war; which is an appeal to the god of hosts, to punish such infractions of public faith, as are committed by one independent people against another: neither state having any superior jurisdiction to resort to upon earth for justice. But where the individuals of any state violate this general law, it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective

capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two states in a war. It is therefore incumbent upon the nation injured, first to satisfaction and justice to be done on the offender, by the state to which he belongs; and, if that be refused or neglected, the sovereign then avows himself an accomplice or abettor of his subject's crime, and draws upon his community the calamities of foreign war.

THE principal offense against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.

1. AS to the first, violation of safe-conducts or passports, expressly granted by the king or his ambassadors<sup>5</sup> to the subjects of a foreign power in time of mutual war; or, committing acts of hostility against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct; are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another: and such offenses may, according to the writers upon the law of nations, be a just ground of a national war; since it is not in the power of the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community. And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law; and, more especially, as it is one of the articles of Magna Carta,<sup>6</sup> that foreign merchants shall be entitled to safe-conduct and security throughout the kingdom; there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honor is more particularly engaged in supporting his own safe-conduct. And, when this malicious rapacity was not confined to private individuals, but broke out into general hostilities, by the statute 2 Hen. V. st. 1. c. 6. breaking of truce and safe-conduct, or abetting and receiving the truce breakers, was (in affirmance and support of the law of nations) declared to be high treason against the crown and dignity of the king; and conservators of truce and safe-conducts were appointed in every port, and empowered to hear and determine such treasons (when committed at sea) according to the ancient marine law then practiced in the admiral's court: and, together with two men learned in the law of the land, to hear and determine according to that law the same treasons, when committed within the body of any county. Which statute, so far as it made these offenses amount to treason, was suspended by 14 Hen. VI. c. 8. and repealed by 20 Hen. VI. c. 11. but revived by 29 Hen. VI. c. 2. which gave the same powers to the lord chancellor, associated with either of the chief justices, as belonged to the conservators of truce and their assessors; and enacted that, notwithstanding the party be convicted of treason, the injured stranger should have restitution out of his effects, prior to any claim of the crown. And it is farther enacted by the statute 31 Hen. VI. c. 4. that if any of the king's subjects attempt or offend, upon the sea, or in port within the king's obedience, against any stranger in amity, league, or under safe-conduct; and especially by attaching his person, or spoiling him, or robbing him of his goods; the lord chancellor, with any of the justices of either the king's bench or common pleas, may cause full restitution and amends to be made to the injured.

IT is to be observed, that the suspending and repealing acts of 14 & 20 Hen. VI, and also the reviving act of 29 Hen. VI, were only temporary; so that it should seem that, after the expiration of them all, the statute 2 Hen. V continued in full force: but yet it is considered as extinct by the statute 14 Edw. IV. c. 4. which revives and confirms all statutes and ordinances made before the accession

of the house of York against breakers of amities, truces, leagues, and safe-conducts, with an express exception to the statutes of 2 Hen. V. But (however that may be) I apprehend it was finally repealed by the general statutes of Edward VI and queen Mary, for abolishing new-created treasons; though Sir Matthew Hale seems to question it as to treasons committed on the sea.<sup>7</sup> But certainly the statute of 31 Hen. VI remains in full force to this day.

II. AS to the rights of ambassadors, which are also established by the law of nations, and are therefore matter of universal concern, they have formerly been treated of at large.<sup>8</sup> It may here be sufficient to remark, that the common law of England recognizes them in their full extent, by immediately stopping all legal process, sued out through the ignorance or rashness of individuals, which may entrench upon the immunities of a foreign minister or any of his train. And, the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, it is declared by the statute 7 Ann. c. 12. that all process whereby the person of any ambassador, or of his domestic or domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void; and that all persons prosecuting, soliciting, or executing such process, being convicted by confession or the oath of one witness, before the lord chancellor and the chief justices, or any two of them, shall be deemed violators of the laws of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the said judges, of any two of them, shall think fit.<sup>9</sup> Thus, in cases of extraordinary outrage, for which the law has provided no special penalty, the legislature has entrusted to the three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime.

III. LASTLY, the crime of piracy, or robbery and depredation upon the high seas, is an offense against the universal law of society; a pirate being, according to Sir Edward Coke,<sup>10</sup> *hostis humani generis* [enemy to mankind]. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community has a right, by the rule of self-defense, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, any invasion of his person or personal property.

BY the ancient common law, piracy, if committed by a subject, was held to be a species of treason, being contrary to his natural allegiance; and by an alien to be felony only: but now, since the statute of treasons, 25 Edw. III. c. 2. it is held to be only felony in a subject.<sup>11</sup> Formerly it was only cognizable by the admiralty courts, which proceed by the rule of the civil law.<sup>12</sup> But, it being inconsistent with the liberties of the nation, that any man's life should be taken away, unless by the judgment of his peers, or the common law of the land, the statute 28 Hen. VIII. c. 15. established a new jurisdiction for this purpose; which proceeds according to the course of the common law, and of which we shall say more hereafter.

THE offense of piracy, by common law, consists in committing those act of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there.<sup>13</sup> As, by statute 11 & 12 W. III. c. 7. if any natural born subject commits any act of hostility upon the high seas, against others of his majesty's subjects, under color of a commission from any foreign power; this, though it would only be an act of war in an alien, shall be construed piracy in a subject. And farther, any commander, or other seafaring person, betraying his trust, and running away with any ship, boat, ordnance, ammunition, or goods; or yielding them up voluntarily to a pirate; or conspiring

to do these acts; or any person confusing the commander of a vessel, to hinder him from fighting in defense of his ship, or to cause a revolt on board; shall, for each of these offenses, be adjudged a pirate, felon, and robber, and shall suffer death, whether he be principal or accessory. By the statute 8 Geo. I. c. 24. the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in any wise consulting, combining, confederating, or corresponding with them; or the forcibly boarding any merchant vessel, though without seizing or carrying her off, and destroying or throwing any of the goods overboard; shall be deemed piracy: and all accessories to piracy, are declared to be principal pirates, and felons without benefit of clergy. By the same statutes also, (to encourage the defense of merchant vessels against pirates) the commanders or seamen wounded, and the widows of such seamen as are slain, in any piratical engagement, shall be entitled to a bounty, to be divided among them, not exceeding one fiftieth part of the value of the cargo on board: and such wounded seamen shall entitled to the pension of Greenwich hospital; which no other seamen are, except only such as have served in a ship of war. And if the commander shall behave cowardly, by not defending the ship, if she carries guns or arms, or shall discharge the mariners from fighting, so that the ship falls into the hands of pirates, such commander shall forfeit all his wages, and suffer six months imprisonment.

THESE are the principal cases, in which the statute law of England interposes, to aid and enforce the law of nations, as a part of the common law; inflicting an adequate punishment upon offenses against that universal law, committed by private persons. We shall proceed in the next chapter to consider offenses, which more immediately affect the sovereign executive power of our own particular state, or the king and government; which species of crimes branches itself into a much larger extent, than either of those of which we have already treated.

## NOTES

1. Ff. 1. 1. 9.
2. See Vol. I. pag.43.
3. Sp. L. .b. 1. c. 3.
4. See Vol. I. pag. 273.
5. See Vol. I. pag. 260.
6. 9 Hen. III. c. 30. See Vol. I. pag. 259, etc.
7. 1 Hal. P.C. 262.
8. See Vol. I. pag. 253.
9. See the occasion of making this statute; Vol. I. pag. 255.
10. 3 Inst. 113.
11. Ibid.
12. 1 Hawk. P.C. 98.
13. 1 Hawk. P.C. 100.

## CHAPTER 6 Of High Treason

THE third general division of crimes consists of such, as more especially affect the supreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the least to a criminal neglect of that duty, which is due from every subject to his sovereign. In a former part of these commentaries<sup>1</sup> we had occasion to mention the nature of allegiance, as the tie or ligament which binds every subject to be true and faithful to his sovereign liege lord the king, in return for that protection which is afforded him; and truth and faith to bear of life and limb, and earthly honor; and not to know or hear of any ill intended him, without defending him therefrom. And this allegiance, we may remember, was distinguished into two sorts or species: the one natural and perpetual, which is inherent only in natives of the king's dominions; the other local and temporary, which is incident to aliens also. Every offense therefore more immediately affecting the royal person, his crown, or dignity, is in some degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by residence: and these may be distinguished into four kinds; 1. Treason. 2. Felonies injurious to the king's prerogative. 3. *Praemunire*. 4. Other misprisions and contempts. Of which crimes the first and principal is that of treason.

TREASON, *proditio*, in its very name (which is borrowed from the French) imports a betraying, treachery, or breach of faith. It therefore happens only between allies, says the mirror:<sup>2</sup> for treason is indeed a general appellation, made use of by the law, to denote not only offenses against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation; and inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such his superior or lord. This is looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbors it to have conspired in public against his liege lord and sovereign: and therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary; these being breaches of the lower allegiance, of private and domestic faith, are denominated petit treasons. But when disloyalty so rears its crest, as to attack even majesty itself, it is called by way of eminent distinction high treason, *alta proditio*; being equivalent to the *crimen laesae majestatis* [crime of high treason] of the Romans, as Glanvil<sup>3</sup> denominates it also in our English law.

As this is the highest civil crime, which (considered as a member of the community) any man can possibly commit, it ought therefore to be the most precisely ascertained. For if the crime of high treason be indeterminate, this alone (says the president Montesquieu) is sufficient to make any government degenerate into arbitrary power.<sup>4</sup> And yet, by the ancient common law, there was a great latitude left in the breast of the judges, to determine what was treason, or not so: whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, to raise, by forced and arbitrary constructions, offenses into the crime and punishment of treason, which never were suspected to be such. Thus the accroaching, or attempting to exercise, royal power (a very uncertain charge) was in the 21 Edw. III. held to be treason in a knight of Hertfordshire who forcibly assaulted and detained one of the king's subjects till he paid him 90 £:<sup>5</sup> a crime, it must be owned, well deserving of punishment; but which seems to be of a complexion very different from

that of treason. Killing the king's father, or brother, or even his messenger, has also fallen under the same denomination.<sup>6</sup> The latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius, which determines that any attempts or designs against the ministers of the prince shall be treason.<sup>7</sup> But however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. c. 2. was made; which defines what offenses only for the future should be held to be treason: in like manner as the *lex Julia majestatis* [Julian law of treason] among the Romans, promulgated by Augustus Caesar, comprehended all the ancient laws, that had before been enacted to punish transgressors against the state.<sup>8</sup> This statute must therefore be our text and guide, in order to examine into the several species of high treason. And we shall find that it comprehends all kinds of high treason under seven distinct branches.

1. "WHEN a man does compass or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir." Under this description it is held that a queen regnant (such as queen Elizabeth and queen Anne) is within the words of the act, being invested with royal power and entitled to the allegiance of her subjects:<sup>9</sup> but the husband of such a queen is not comprised within these words, and therefore no treason can be committed against him.<sup>10</sup> The king here intended is the king in possession, without any respect to his title: for it is held, that a king *de facto* [in fact] and not *de jure* [by right], or in other words an usurper that has got possession of the throne, is a king within the meaning of the statute; as there is a temporary allegiance due to him, for his administration of the government, and temporary protection of the public: and therefore treasons committed against Henry VI were punished under Edward IV, though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or king *de jure* and not *de facto*, who has never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within this statute, against whom treasons may be committed.<sup>11</sup> And a very sensible writer on the crown-law carries the point of possession so far, that he holds,<sup>12</sup> that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him. A doctrine which he grounds upon the statute 11 Hen. VII. c. 1. which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture, which do assist and obey a king *de facto*. But, in truth, this seems to be confounding all notions of right and wrong; and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power (though not the name) of king, the people were bound in duty to hinder the son's restoration: and were the king of Poland or Morocco to invade this kingdom, and by any means to get possession of the crown (a term, by the way, of very loose and indistinct signification) the subject would be bound the his allegiance to fight for his natural prince today, and by the same duty of allegiance to fight against him tomorrow. The true distinction seems to be, that the statute of Henry the seventh does by no means command any opposition to a king *de jure*; but excuses the obedience paid to a king *de facto*. When therefore a usurper is in possession, the subject is excused and justified in obeying and giving him assistance: otherwise, under a usurpation, no man could be safe; if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay farther, as the mass of people are imperfect judges of title, of which in all cases possession is *prima facie* evidence, the law compels no man to yield obedience to that prince, whose right is by want of possession rendered uncertain and disputable, till providence shall think fit to interpose in his favor, and decide the ambiguous claim:

and therefore, till he is entitled to such allegiance by possession, no treason can be committed against him. Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is according to Sir Matthew Hale no longer the object of treason.<sup>13</sup> And the same reason holds, in case a king abdicates the government; or, by actions subversive of the constitution, virtually renounces the authority which he claims by that very constitution: since, as was formerly observed,<sup>14</sup> when the fact of abdication is once established, and determined by the proper judges, the consequence necessarily follows, that the throne is thereby vacant, and he is no longer king.

LET us next see, what is a compassing or imagining the death of the king, etc. These are synonymous terms; the word compass signifying the purpose or design of the mind or will,<sup>15</sup> and not, as in common speech, the carrying such design to effect.<sup>16</sup> And therefore an accidental stroke, which may mortally wound the sovereign, *per infortunium* [by accident], without any traitorous intent, is no treason: as was the case of Sir Walter Tyrrel, who, by the command of king William Rufus, shooting at a hart, the arrow glanced against a tree, and killed the king upon the spot.<sup>17</sup> But, as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open, or overt, act. And yet the tyrant Dionysius is recorded<sup>18</sup> to have executed a subject, barely for dreaming that he had killed him; which was held for a sufficient proof, that he had thought thereof in his waking hours. But such is not the temper of the English law; and therefore in this, and the three next species of treason, it is necessary that there appear an open or overt act of a more full and explicit nature, to convict the traitor upon. The statute expressly requires, that the accused “be thereof upon sufficient proof attainted of some open act by men of his own condition.” Thus, to provide weapons or ammunition for the purpose of killing the king, is held to be a palpable overt act of treason in imagining his death.<sup>19</sup> To conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compassing the king's death;<sup>20</sup> for all force, used to the person of the king, in its consequence may tend to his death, and is a strong presumption of something worse intended than the present force, by such as have so far thrown off their bounden duty to their sovereign: it being an old observation, that there is generally but a short interval between the prisons and the graves of princes. There is no question also, but that taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the king, is a sufficient overt act of high treason.<sup>21</sup>

HOW far mere words, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. We have two instances, in the reign of Edward the fourth, of persons executed for treasonable words: the one a citizen of London, who said he would make his son heir of the crown, being the sign of the house in which he lived; the other a gentleman, whose favorite buck the king killed in hunting, whereupon he wished it, horns and all, in the king's belly. These were esteemed hard cases: and the chief justice Markham rather chose to leave his place than assent to the latter judgment.<sup>22</sup> But now it seems clearly to be agreed, that, by the common law and the statute of Edward III, words spoken amount only to a high misdemeanor, and no treason. For they may be spoken in heat, without any intention, or be mistaken, perverted, or mis-remembered by the hearers; their meaning depends always on their connection with other words, and things; they may signify differently even according to the tone of voice, with which they are delivered; and sometimes silence itself is more expressive than any discourse. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreasonable to make them amount to high treason. And accordingly in 4 Car. I. on a reference to

all the judges, concerning some very atrocious words spoken by one Pyne, they certified to the king, “that though the words were as wicked as might be, yet they were no treason: for, unless it be by some particular statute, no words will be treason.”<sup>23</sup> If the words be set down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treason; for *scribere est agere* [writing is action]. But even in this case the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason: particularly in the cases of one Peacham a clergyman, for treasonable passages in a sermon never preached;<sup>24</sup> and of Algernon Sidney, for some papers found in his closet: which, had they been plainly relative to any previous formed design of dethroning or murdering the king, might doubtless have been properly read in evidence as overt acts of that treason, which was specially laid in the indictment.<sup>25</sup> But, being merely speculative, without any intention (so far as appeared) of making any public use of them, the convicting the authors of treason upon such an insufficient foundation has been universally disapproved. Peacham was therefore pardoned: and, though Sidney indeed was executed, yet it was to the general discontent of the nation; and his attainder was afterwards reversed by parliament. There was then no manner of doubt, but that the publication of such a treasonable writing was a sufficient overt act of treason at the common law;<sup>26</sup> though of late even that has been questioned.

2. THE second species of treason is, “if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir.” By the king's companion is meant his wife; and by violation is understood carnal knowledge, as well without force, as with it: and this is high treason in both parties, if both be consenting; as some of the wives of Henry the eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any suspicion of bastardy, whereby the succession to the crown might be rendered dubious: and therefore, when this reason ceases, the law ceases with it; for to violate a queen or princess dowager is held to be no treason:<sup>27</sup> in like manner as, by the feudal law, it was a felony and attended with a forfeiture of the fief, if the vassal vitiated the wife or daughter of his lord;<sup>28</sup> but no so if he only vitiated his widow.<sup>29</sup>

3. THE third species of treason is, “if a man do levy war against our lord the king in his realm.” And this may be done by taking arms, not only to dethrone the king, but under pretense to reform religion, or the laws or to remove evil counselors, or other grievances whether real or pretended.<sup>30</sup> For the law does not, neither can it, permit any private man, or set of men, to interfere forcibly in matters of such high importance; especially as it has established a sufficient power, for these purposes, in the high court of parliament: neither does the constitution justify any private or particular resistance for private or particular grievances; though in cases of national oppression the nation has very justifiably risen as one man, to vindicate the original contract subsisting between the king and his people. To resist the king's forces by defending a castle against them, is a levying of war: and so is an insurrection with an avowed design to pull down all enclosures, all brothels, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolent invasion of the king's authority.<sup>31</sup> But a tumult with a view to pull down a particular house, or lay open a particular enclosure, amounts at most to a riot; this being no general defiance of public government. So, if two subjects quarrel and levy war against each other, it is only a great riot and contempt, and no treason. Thus it happened between the earls of Hereford and Gloucester in 20 Edw. I. who raised each a little army, and committed outrages



upon each others lands, burning houses, attended with the loss of many lives: yet this was held to be no high treason, but only a great misdemeanor.<sup>32</sup> A bare conspiracy to levy war does not amount to this species of treason; but (if particularly pointed at the person of the king or his government) it falls within the first, of compassing or imagining the king's death.<sup>33</sup>

4. "IF a man be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere," he is also declared guilty of high treason. This must likewise be proved by some overt act, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like.<sup>34</sup> By enemies are here understood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coasts, without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the giving the many assistance is also clearly treason; either in the light of adhering to the public enemies of the king and kingdom,<sup>35</sup> or else in that of levying war against his majesty. And, most indisputably, the same acts of adherence or aid, which (when applied to foreign enemies) will constitute treason under this branch of the statute, will (when afforded to our own fellow-subjects in actual rebellion at home) amount to high treason under the description of levying war against the king.<sup>36</sup> But to relieve a rebel, fled out of the kingdom, is no treason: for the statute is taken strictly, and a rebel is not an enemy; an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England.<sup>37</sup> And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies in the kingdom, provided he leaves them whenever he has a safe opportunity.<sup>38</sup>

5. "IF a man counterfeit the king's great or privy seal," this is also high treason. But if a man takes wax bearing the impression of the great seal off from one patent, and fixes it to another, this is held to be only an abuse of the seal, and not a counterfeiting of it; as was the case of a certain chaplain, who in such manner framed a dispensation for non-residence. But the knavish artifice of a lawyer much exceeded this of the divine. One of the clerks in chancery glued together two pieces of parchment; on the uppermost of which he wrote a patent, to which he regularly obtained the great seal, the label going through both the skins. He then dissolved the cement; and taking off the written patent, on the blank skin wrote a fresh patent, of a different import from the former, and published it as true. This was held no counterfeiting of the great seal, but only a great misprision; and Sir Edward Coke<sup>39</sup> mentions it with some indignation, that the party was living at that day.

6. THE sixth species of treason under this statute, is "if a man counterfeit the king's money; and if a man bring false money into the realm counterfeit to the money of England, knowing the money to be false." As to the first branch, counterfeiting the king's money; this is treason, whether the false money be uttered in payment or not. Also if the king's own ministers alter the standard or alloy established by law, it is treason. But gold and silver money only are held to be within this statute.<sup>40</sup> With regard likewise to the second branch, importing foreign counterfeit money, in order to utter it here; it is held that uttering it, without importing it, is not within the treason.<sup>41</sup> But of this we shall presently say more.

7. THE last species of treason, ascertained by this statute, is "if a man slay the chancellor, treasurer,

or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places doing their offices.” These high magistrates, as they represent the king's majesty during the execution of their officers, are therefore for the time equally regarded by the law. But this statute extends only to the actual killing of them, and not to wounding, or a bare attempt to kill them. It extends also only to the officers therein specified; and therefore the barons of the exchequer, as such, are not within the protection of this act.<sup>42</sup>

THUS careful was the legislature, in the reign of Edward the third, to specify and reduce to a certainty the vague notions of treason, that had formerly prevailed in our courts. But the act does not stop here, but goes on. “Because other like cases of treason may happen in time to come, which cannot be thought of nor declared at present, it is accorded, that if any other case supposed to be treason, which is not above specified, does happen before any judge; the judge shall tarry without going to judgment of the treason, till the cause be showed and declared before the king and his parliament, whether it ought to be judged treason, or other felony.” Sir Matthew Hale<sup>43</sup> is very high in his encomiums on the great wisdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this act, by not suffering them to run out (upon their own opinions) into constructive treasons, though in cases that seem to them to have a like parity of reason; but reserving them to the decision of parliament. This is a great security to the public, the judges, and even this sacred act itself; and leaves a weighty memento to judges to be careful, and not overhasty in letting in treasons by construction or interpretation, especially in new cases that have not been resolved and settled. 2. He observes, that as the authoritative decision of these *casus omissi* [omitted cases] is reserved to the king and parliament, the most regular way to do it is by a new declarative act: and therefore the opinion of any one or of both houses, though of very respectable weight, is not that solemn declaration referred to by this act, as the only criterion for judging of future treasons.

IN consequence of this power, not indeed originally granted by the statute of Edward III, but constitutionally inherent in every subsequent parliament, (which cannot be abridged of any rights by the act of a precedent one) the legislature was extremely liberal in declaring new treasons in the unfortunate reign of king Richard the second: as, particularly, the killing of an ambassador was made so; which seems to be founded upon better reason than the multitude of other points, that were then strained up to this high offense: the most arbitrary and absurd of all which was by the statute 21 Ric. II. c. 3. which made the bare purpose and intent of killing or deposing the king, without any overt act to demonstrate it, high treason. And yet so little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both deposed and murdered. And, in the first year of his successor's reign, an act was passed,<sup>44</sup> reciting “that no man knew how he ought to behave himself, to do, speak, or say, for doubt of such pains of treason: and therefore it was accorded that in no time to come any treason be judged, otherwise than was ordained by the statute of king Edward the third.” This at once swept away the whole load of extravagant treasons introduced in the time of Richard the second.

BUT afterwards, between the reign of Henry the fourth and queen Mary, and particularly in the bloody reign of Henry the eighth, the spirit of inventing new and strange treasons was revived; among which we may reckon the offenses of clipping money; breaking prison or rescue, when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welchmen;

counterfeiting foreign coin; willful poisoning; execrations against the king; calling him opprobrious names by public writing; counterfeiting the sign manual or signet; refusing to adjure the pope; deflowering, or marrying without the royal license, any of the king's children, sisters, aunts, nephews, or nieces; bare solicitation of the chastity of the queen or princess, or advances made by themselves; marrying with the king, by a woman not a virgin, without previously discovering to him such her unchaste life; judging or believing (manifested by any overt act) the king to have been lawfully married to Anne of Cleve; derogating from the king's royal style and title; impugning his supremacy; and assembling riotously to the number of twelve, and not dispersing upon proclamation: all which new-fangled treasons were totally abrogated by the statute 1 Mar. c. 1. which once more reduced all treasons to the standard of the statute 25 Edw. III. Since which time, though the legislature has been more cautious in creating new offenses of this kind, yet the number is very considerably increased, as we shall find upon a short review.

THESE new treasons, created since the statute 1 Mar. c. 1. and not comprehended under the description statute 25 Edw. III, I shall comprise under three heads. 1. Such as relate to papists. 2. Such as relate to falsifying the coin or other royal signatures. 3. Such as are created for the security of the protestant succession in the house of Hanover.

1. THE first species, relating to papists, was considered in the preceding chapter, among the penalties incurred by that branch of non-conformists to the national church; wherein we have only to remember that by statute 5 Eliz. c. 1. to defend the pope's jurisdiction in this realm is, for the first time, a heavy misdemeanor; and, if the offense be repeated, it is high treason. Also by statute 27 Eliz. c. 2. if any popish priest, born in the dominions of the crown of England, shall come over hither from beyond the seas; or shall tarry her three days without conforming to the church; he is guilty of high treason. And by statute 3 Jac. I. c. 4. if any natural born subject be withdrawn from his allegiance, and reconciled to the pope or see of Rome, or any other prince or state, both he and all such as procure such reconciliation shall incur the guilt of high treason. These were mentioned under the division before referred to, as spiritual offenses, and I now repeat them as temporal ones also: the reason of distinguishing these overt acts of popery from all others, by setting the mark of high treason upon them, being certainly on a civil, and not on a religious, account. For every popish priest of course renounces his allegiance to his temporal sovereign upon taking orders; that being inconsistent with his new engagements of canonical obedience to the pope: and the same may be said of an obstinate defense of his authority here, or a formal reconciliation to the see of Rome, which the statute construes to be a withdrawing from one's natural allegiance; and therefore, besides being reconciled "to the pope," it also adds "or any other prince or state."

2. WITH regard to treasons relative to the coin or other royal signatures, we may recollect that the only two offenses respecting the coinage, which are made treason by the statute 25 Edw. III. are the actual counterfeiting the gold and silver coin of this kingdom; or the importing such counterfeit money with intent to utter it, knowing it to be false. But these not being found sufficient to restrain the evil practices of coiners and false moneyers, other statutes have been since made for that purpose. The crime itself is made a species of high treason; as being a breach of allegiance, by infringing the king's prerogative, and assuming one of the attributes of the sovereign, to whom alone it belongs to set the value and determinations of coin made at home, or to fix the currency of foreign money: and besides, as all money which bears the stamp of the kingdom is sent into the world upon

the public faith, as containing metal of a particular weight and standard, whoever falsifies, this is an offender against the state, by contributing to render that public faith suspected. And upon the same reasons, by a law of the emperor Constantine,<sup>45</sup> false coiners were declared guilty of high treason, and were condemned to be burned alive: as, by the laws of Athens,<sup>46</sup> all counterfeiters, debasers, and diminishers of the current coin were subjected to capital punishment. However, it must be owned, that this method of reasoning is a little overstrained: counterfeiting or debasing the coin being usually practiced, rather for the sake of private and unlawful lucre, than out of any disaffection to the sovereign. And therefore both this and its kindred species of treason, that of counterfeiting the seals of the crown or other royal signatures, seem better denominated by the later civilians a branch of the *crimen falsi* or forgery (in which they are followed by Glanvil,<sup>47</sup> Bracton,<sup>48</sup> and Fleta<sup>49</sup>) than by Constantine and our Edward the third, a species of the *crimen laesae majestatis* or high treason. For this confounds the distinction and proportion of offenses; and, by affixing the same ideas of guilt upon the man who coins a leaden groat and him who assassinates his sovereign, takes off from that horror which ought to attend the very mention of the crime of high treason, and makes it more familiar to the subject. Before the statute 25 Edw. III. the offense of counterfeiting the coin was held to be only a species of petit treason:<sup>50</sup> but subsequent acts in their new extensions of the offense have followed the example of that, and have made it equally high treason as an endeavor to subvert the government, though not quite equal in its punishment.

IN consequence of the principle thus adopted, the statute 1 Mar. c. 1. having at one blow repealed all intermediate treasons created since the 25 Edw. III. it was thought expedient by statute 1 Mar. St. 2. c. 6. to revive two species thereof; *viz.* 1. That if any person falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, but shall be current within this realm by consent of the crown; or, 2. shall falsely forge or counterfeit the sign manual, privy signet, or privy seal; such offenses shall be deemed high treason. And by statute 1 & 2 P. & M. c. 11. if any persons do bring into this realm such false or counterfeit foreign money, being current here, knowing the same to be false, and shall utter the same in payment, they shall be deemed offenders in high treason. The money referred to in these statutes must be such as is absolutely current here, in all payments, by the king's proclamation; of which there is none at present, Portugal money being only taken by consent, as approaching the nearest to our standard, and falling in well enough with our divisions of money into pounds and shillings: therefore to counterfeit it is no high treason, but another inferior offense. Clipping or defacing the genuine coin was not hitherto included in these statutes: though an offense equally pernicious to trade, and an equal insult upon the prerogative, as well as personal affront to the sovereign; whose very image ought to be had in reverence by all loyal subject. And therefore, among the Romans,<sup>51</sup> defacing or even melting down the emperor's statues was made treason by the Julian law; together with other offenses of the like sort, according to that vague appendix, "*aliudve quid simile si admiserint*" ["if they committed anything similar"]. And now, in England, by statute 5 Eliz. c. 11. clipping, washing, rounding, or filing, for wicked gain's sake, any of the money of this realm, or other money suffered to be current here, shall be adjudged high treason; and by statute 18 Eliz. c. 1. the same offense is described in other more general words; *viz.* impairing, diminishing, falsifying, scaling, and lightening; and made liable to the same penalties. By statute 8 & 9 W. III. c. 26. made perpetual by 7 Ann. c. 25. whoever shall knowingly make or mend, or assist in so doing, or shall buy or sell, or have in his possession, any instruments proper only for the coinage of money; or shall convey such instruments out of the king's mint; shall be guilty of high treason: which is by much the severest branch of the coinage law.

The statute goes on farther, and enacts, that to mark any coin on the edges with letters, or otherwise, in imitation of those used in the mint; or to color, gild, or case over any coin resembling the current coin, or even round blanks of base metal; shall be construed high treason. And, lastly, by statute 15 & 16 Geo. II. c. 28. if any person colors or alters any silver current coin of this kingdom, to make it resemble a silver one; this is also high treason: but the offender shall be pardoned, in case he discovers and convicts two other offenders of the same kind.

3. THE other new species of high treason is such as is created for the security of the protestant succession, over and above such treasons against the king and government as were comprised under the statute 25 Edw. III. For this purpose, after the act of settlement was made, for transferring the crown to the illustrious house of Hanover, it was enacted by statute 13 & 14 W. III. c. 3. that the pretended prince of Wales, who was then thirteen years of age, and had assumed the title of king James III, should be attainted of high treason; and it was made high treason for any of the king's subjects by letters, messages, or otherwise, to hold correspondence with him, or any person employed by him, or to remit any money for his use, knowing the same to be for his service. And by statute 17 Geo. II. c. 39. it is enacted, that if any of the sons of the pretender shall land or attempt to land in this kingdom, or be found in Great Britain, or Ireland, or any of the dominions belonging to the same, he shall be judged attainted of high treason, and suffer the pains thereof. And to correspond with them, or remit money for their use, is made high treason in the same manner as it was to correspond with the father. By the statute 1 Ann. St. 2.c. 17. if any person shall endeavor to deprive or hinder any person, being the next in succession to the crown according to the limitations of the act of settlement, from succeeding to the crown, and shall maliciously and directly attempt the same by any overt act, such offense shall be high treason. And by statute 6 Ann. c. 7. if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that any other person has any right or title to the crown of this realm, otherwise than according to the act of settlement; or that the kings of this realm with the authority of parliament are not able to make laws and statutes, to bind the crown and the descent thereof; such person shall be guilty of high treason. This offense (or indeed maintaining this doctrine in any wise, that the king and parliament cannot limit the crown) was once before made high treason, by statute 13 Eliz. c. 1. during the life of that princess. And after her decease it continued a high misdemeanor, punishable with forfeiture of goods and chattels, even in the most flourishing era of indefeasible hereditary right and *jure divino* [divine right] succession. But it was again raised into high treason, by the statute of Anne before-mentioned, at the time of a projected invasion in favor of the then pretender; and upon this statute one Matthews, a printer, was convicted and executed in 1719, for printing a treasonable pamphlet entitled *vox populi vox Dei* [the voice of the people is the voice of God].<sup>52</sup>

THUS much for the crime of treason, or *laesae majestatis*, in all its branches; which consists, we may observe, originally, in grossly counteracting that allegiance, which is due from the subject by either birth or residence: though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them a little to depart from this its primitive idea. But of this enough has been hinted already: it is now time to pass on from defining the crime to describing its punishment.

THE punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually a fledge or hurdle is allowed, to

preserve the offender from the extreme torment of being dragged on the ground or pavement.<sup>53</sup> 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal.<sup>54</sup>

THE king may, and often does, discharge all the punishment, except beheading, especially where any of noble blood are attainted. For, beheading being part of the judgment, that may be executed, though all the rest be omitted by the king's command.<sup>55</sup> But where beheading is no part of the judgment, as in murder or other felonies, it has been said that the king cannot change the judgment, although at the request of the party, from one species of death to another.<sup>56</sup> But of this we shall say more hereafter.

IN the case of coining, which is a treason of a different complection from the rest, the punishment is milder for male offenders; being only to be drawn, and hanged by the neck till dead.<sup>57</sup> But in treasons of every kind the punishment of women is the same, and different form that of men. For, as the natural modesty of the sex forbids the exposing and publicly mangling their bodies, their sentence (which is to the full as terrible to sense as the other) is to be drawn to the gallows, and there to be burned alive.<sup>58</sup>

THE consequence of this judgment, (attainder, forfeiture, and corruption of blood) must be referred to the latter end of this book, when we shall treat of them all together, as well in treason as in other offenses.

## NOTES

1. Book. I ch. 10.

2. c. 1. § 7.

3. l. 1. c. 2.

4. Sp. L. b. 12. c. 7.

5. 1 Hal. P. C. 80.

6. Britt. c. 22. 1 Hawk. P. C. 34.

7. *Qui de nece virorum illustrium, qui consilii et consistorio nostro intersunt, senatorum etiam (nam et ipsi pars corporis nostri sunt) vel cujuslibet postremo, qui militat nobiscum, cogitaverit: (eadem enim severitate voluntatem sceleris, qua effectum, puniri jura voluerint) ipse quidem, utpote majestatis reus, gladio feriat, bonis ejus omnibus fisco nostro addictis.* [He who shall meditate the death of any of those illustrious men who assist at our councils; likewise of the senators (for they are a part of ourself) or lastly of any of our companions in arms; shall, forasmuch as he is guilty of treason, perish by the sword, and all his goods be confiscated: for the law will punish the intention, and the perpetration of the crime with equal severity.] (Cod. 9. 8. 5.)

8. Gravin. Orig. 1. § 34.

9. 1 Hal. P. C. 101.

10. 3 Inst. 7. 1 Hal. P. C. 106.

11. 3 Inst. 7. 1 Hal. P. C. 104.

12. 1 Hawk. P. C. 36.

13. 1 Hal. P. C. 104.
14. Vol. 1. pag. 212.
15. By the ancient law compassing or intending the death of any man, demonstrated by some evident fact, was equally penal as homicide itself. (3 Inst. 5.)
16. 1 Hal. P. C. 107.
17. 3 Inst. 6.
18. Plutarch. in vit.
19. 3 Inst. 12.
20. 1 Hal. P. C. 109.
21. 1 Hawk. P. C. 38. 1 Hal. P. C. 119.
22. 1 Hal. P. C. 115.
23. Cro. Car. 125.
24. Ibid.
25. Foster. 198.
26. 1 Hal. P. C. 118. 1 Hawk. P. C. 38.
27. 3 Inst. 9.
28. Feud. l. 1. t. 5.
29. Ibid. t. 21.
30. 1 Hawk. P. C. 37.
31. 1 Hal. P. C. 132.
32. Ibid. 136.
33. 3 Inst. 9. Foster. 211. 213.
34. 3 Inst. 10.
35. Foster. 219.
36. Ibid. 216.
37. 1 Hawk. P. C. 38.
38. Foster. 216.
39. 3 Inst. 16.
40. 1 Hawk. P. C. 42.
41. Ibid. 43.
42. 1 Hal. P. C. 231.
43. 1 Hal. P. C. 259.
44. Stat. 1 Hen. IV. c. 10.
45. C. 9. 24. 2. Cod. Theod. *de falsa moneta* [of false money], l. 9.

46. Pott. Ant. l. 1. c. 26.

47. l. 14. c. 7.

48. l. 3. c. 3. § 1 & 2.

49. l. 1. c. 22.

50. 1 Hal. P. C. 224.

51. Ff. 48. 4. 6.

52. State Tr. IX. 680.

53. 1 Hal. P. C. 382.

54. This punishment for treason Sir Edward Coke tells us, is warranted by diverse examples in scripture; for Joab was drawn, Bithan was hanged, Judas was embowelled, and so of the rest. (3 Inst. 211.)

55. 1 Hal. P. C. 351.

56. 3 Inst. 52.

57. 1 Hal. P. C. 351.

58. 1 Hal. P. C. 399.



## CHAPTER 7 Of Felonies, Injurious to the King's Prerogative

AS, according to the method I have adopted, we are next to consider such felonies as are more immediately injurious to the king's prerogative, it will not be amiss here, at our first entrance upon this crime, to inquire briefly into the nature and meaning of felony; before we proceed upon any of the particular branches, into which it is divided.

FELONY, in the general acceptance of our English law, comprises every species of crime, which occasioned at common law the forfeiture of lands or goods. This most frequently happens in those crimes, for which a capital punishment either is or was liable to be inflicted: for those felonies, which are called clergyable, or to which the benefit of clergy extends, were anciently punished with death in all lay, or unlearned, offenders; though now by the statute-law that punishment is for the first offense universally remitted. Treason itself, says Sir Edward Coke,<sup>1</sup> was anciently comprised under the name of felony: and in confirmation of this we may observe, that the statute of treasons, 25 Edw. III. c. 2. speaking of some dubious crimes, directs a reference to parliament; that it may be there adjudged, “whether they be treason, or other felony.” All treasons therefore, strictly speaking, are felonies; though all felonies are not treason. And to this also we may add, that all offenses, now capital, are in some degree or other felony: and this is likewise the case with some other offenses, which are not punished with death; as suicide, where the party is already dead; homicide by chance-medley, or in self-defense; and petit larceny, or pilfering; all which are (strictly speaking) felonies, as they subject the committers of them to forfeitures. So that upon the whole the only adequate definition of felony seems to be that which is before laid down; *viz.* an offense which occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt.

To explain this matter a little farther: the word felony, or feloniam, is of undoubted feudal original, being frequently to be met with in the books of feuds, etc; but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the rest: some deriving it from the Greek, an impostor or deceiver; others from the Latin, *fallo, fefelli* [deception], to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a still stranger etymology;<sup>2</sup> that it is *crimen animo felleo perpetratum* [crime perpetrated with a bitter inclination], with a bitter or gallish inclination. But all of them agree in the description, that it is such a crime as works a forfeiture of all the offender's lands, or goods. And this gives great probability to Sir Henry Spelman's Teutonic or German derivation of it:<sup>3</sup> in which language indeed, as the word is clearly of feudal original, we ought rather to look for its signification, than among the Greeks and Romans. *Fe-lon* then, according to him, is derived from two northern words; *fief*, which signifies (we well know) the fief, feud, or beneficiary estate; and *lun*, which signifies price or value. Felony is therefore the same as *pretium feudi*, the consideration for which a man gives up his fief; as we say in common speech, such an act is as much as your life, or estate, is worth. In this sense it will clearly signify the feudal forfeiture, or act by which an estate is forfeited, or escheats, to the lord.

To confirm this we may observe, that it is in this sense, of forfeiture to the lord, that the feudal writers constantly use it. For all those acts, whether of a criminal nature or not, which at this day are generally forfeitures of copyhold estates,<sup>4</sup> are styled *feloniae* in the feudal law: “*scilicet, per quas*

*feudum amittitur*” [“that is, by which the fee is lost”].<sup>5</sup> As, “*si domino deservire noluerit* [by subtraction of suit and service];<sup>6</sup> *si per annum et diem cessaverit in petenda investitura* [by neglect to be admitted tenant within a year and a day];<sup>7</sup> *si dominum ejuravit, i.e. negavit se a domino feudum habere* [by disclaiming to hold of the lord, or swearing himself not his copyholder];<sup>8</sup> *si a domino, in jus eum vocante, ter citatus non comparuerit* [by contumacy in not appearing in court after three proclamations];<sup>9</sup> all these, with many others, are still causes of forfeiture in our copyhold estates, and were denominated felonies by the feudal constitutions. So likewise injuries of a more substantial or criminal nature were denominated felonies, that is, forfeitures: as assaulting or beating the lord;<sup>10</sup> vitiating his wife or daughter, “*si dominum cucurbitaverit, i.e. cum uxore ejus concubuerit*” [“if he dishonor his lord, that is, lie with his wife”];<sup>11</sup> all these are esteemed felonies, and the latter is expressly so denominated, “*si fecerit feloniam, dominum forte cucurbitando*” [“if he commit felony, as by dishonoring his lord”].<sup>12</sup> And as these contempts, or smaller offense, were felonies or acts of forfeiture, of course greater crimes, as murder and robbery, fell under the same denomination. On the other hand the lord might be guilty of felony, or forfeit his seignory to the vassal, by the same acts as the vassal would have forfeited his feud to the lord. “*Si dominus commisit feloniam, per quam vassallus amitteret feudum si eam commiserit in dominum, feudi proprietatem etiam dominus perdere debet.*”<sup>13</sup> One instance given of this sort of felony in the lord is beating the servant of his vassal, so as that he loses his service; which seems merely in the nature of a civil injury, so far as it respects the vassal. And all these felonies were to be determined “*per laudamentum sive judicium parium suorum*” [“by the verdict or judgment of his peers”] in the lord's court; as with us forfeitures of copyhold lands are presentable by the homage in the court-baron.

FELONY, and the act of forfeiture to the lord, being thus synonymous terms in the feudal law, we may easily trace the reason why, upon the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands (and, by a small deflection from the original sense, such as induced the forfeiture of goods also) were denominated felonies. Thus it was said, that suicide, robbery, and rape, were felonies; that is, the consequence of such crimes was forfeiture; till by long use we began to signify by the term of felony the actual crime committed, and not the penal consequence. And upon this system only can we account for the cause, why treason in ancient times was held to be a species of felony: *viz.* because it induced a forfeiture.

HENCE it follows, that capital punishment does by no means enter into the true idea and definition of felony. Felony may be without inflicting capital punishment, as in the cases instanced of self-murder, excusable homicide, and petit larceny: and it is possible that capital punishments may be inflicted, and yet the offense be no felony; as in the case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods,<sup>14</sup> an inseparable incident to felony. And of the same nature is the punishment of standing mute, without pleading to an indictment; which is capital, but without any forfeiture, and therefore such standing mute is no felony. In short the true criterion of felony is forfeiture; for, as Sir Edward Coke justly observes,<sup>15</sup> in all felonies which are punishable with death, the offender loses all his lands in fee-simple, and also his goods and chattels; in such as are not so punishable, his goods and chattels only.

THE idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offense felony, the law<sup>16</sup> implies that it shall be punished with

death, *viz.* by hanging, as well as with forfeiture: unless the offender prays the benefit of clergy; which all felons are entitled once to have unless the same is expressly taken away by statute. And, in compliance herewith, I shall for the future consider it also in the same light, as generical term, including all capital crimes below treason; having premised thus much concerning the true nature and original meaning of felony, in order to account for the reason of those instances I have mentioned, of felonies that are not capital, and capital offenses that are not felonies: which seem at first view repugnant to the general idea which we now entertain of felony, as a crime to be punished by death; whereas properly it is a crime to be punished by forfeiture, and to which death may, or may not be, though it generally is, superadded.

I PROCEED now to consider such felonies, as are more immediately injurious to the king's prerogative. These are, 1. Offenses relating to the coin, not amounting to treason. 2. Offenses against the king's council. 3. The offense of serving a foreign prince. 4. The offense of embezzling the king's armor or stores of war. To which may be added a fifth, 5. Desertion from the king's armies in time of war.

1. Offenses relating to the coin, under which may be ranked some inferior misdemeanors not amounting to felony, are thus declared by a series of statutes, which I shall recite in the order of time. And, first, by statute 27 Edw. I. c. 3. none shall bring pollards and crockards, which were foreign coins of base metal, into the realm, on pain of forfeiture of life and goods. By statute 9 Edw. III. St. 2. no sterling money shall be melted down, upon pain of forfeiture thereof. By statute 14 Eliz. c. 3. such as forge any foreign coin, although it be not made current here by proclamation, shall (with their aiders and abettors) be guilty of misprision of treason: a crime which we shall hereafter consider. By statute 13 & 14 Car. II. c. 31. the offense of melting down any current silver money shall be punished with forfeiture of the same, and also the double value: and the offender, if a freeman of any town, shall be disfranchised; if not, shall suffer six months imprisonment. By statute 6 & 7 W. III. c. 17. if any person buys or sells, or knowingly has in his custody, any clippings or filings of the coin, he shall forfeit the same and 500 £; one moiety to the king, and the other to the informer; and be branded in the cheek with the letter R. By statute 8 & 9 W. III. c. 26. if any person shall blanch, or whiten, copper for sale; (which makes it resemble silver) or buy or sell or offer to sale any malleable composition, which shall be heavier than silver, and look, touch, and wear like gold, but be beneath the standard: or if any person shall receive or pay any counterfeit or diminished money of this kingdom, not being cut in pieces, (an operation which every man is thereby empowered to perform) at a less rate than it shall import to be of: (which demonstrates a consciousness of its baseness, and a fraudulent design) all such persons shall be guilty of felony. But these precautions not being found sufficient to prevent the uttering of false or diminished money, which was only a misdemeanor at common law, it is enacted by statute 15 & 16 Geo. II. c. 28. that if any person shall tender in payment any counterfeit coin, knowing it so to be, he shall for the first offense by imprisoned six months; and find sureties for his good behavior for six months more: for the second offense, shall be imprisoned and find sureties for two years: and, for the third offense, shall be guilty of felony without benefit of clergy. Also if a person knowingly tenders in payment any counterfeit money, and at the same time has more in his custody; or shall, within ten days after, knowingly tender other false money; he shall for the first offense be imprisoned one year, and find sureties for his good behavior for two years longer; and for the second, be guilty of felony without benefit of clergy. By the same statute it is also enacted, that, if any person counterfeits the copper

coin, he shall suffer two years imprisonment, and find sureties for two years more. Thus much for offenses relating to the coin, as well misdemeanors as felonies, which I thought it most convenient to consider in one and the same view.

2. FELONIES, against the king's council,<sup>17</sup> are; first, by statute 3 Hen. VII. c. 14. if any sworn servant of the king's household conspires or confederates to kill any lord of this realm, or other person, sworn of the king's council, he shall be guilty of felony. Secondly, by statute 9 Ann. c. 16. to assault, strike, wound, or attempt to kill, any privy counselor in the execution of his office, is made felony without benefit of clergy.

3. FELONIES in serving foreign states, which service is generally inconsistent with allegiance to one's natural prince, are restrained and punished by statute 3 Jac. I. c. 4. which makes it felony for any person whatever to go out of the realm, to serve any foreign prince, without having first taken the oath of allegiance before his departure. And it is felony also for any gentleman, or person of higher degree, or who has borne any office in the army, to go out of the realm to serve such foreign prince or state, without previously entering into a bond with two sureties, not to be reconciled to the see of Rome, or enter into any conspiracy against his natural sovereign. And farther, by statute 9 Geo. II. c. 30. enforced by statute 29 Geo. II. c. 17. if any subject of Great Britain shall enlist himself, or if any person shall procure him to be enlisted, in any foreign service, or detain or embark him for that purpose, without license under the king's sign manual, he shall be guilty of felony without benefit of clergy: but if the person, so enlisted or enticed, shall discover his seducer within fifteen days, so as he may be apprehended and convicted of the same, he shall himself be indemnified. By statute 29 Geo. II. c. 27. it is moreover enacted, that to serve under the French king, as a military officer, shall be felony without benefit of clergy; and to enter into the Scotch brigade, in the Dutch service, without previously taking the oaths of allegiance and abjuration, shall be a forfeiture of 500 £.

4. FELONY, by embezzling the king's armor or warlike stores, is so declared to be by statute 31 Eliz. c. 4. which enacts, that if any person having the charge or custody of the king's armor, ordnance, ammunition, or habiliments of war; or of any victual provided for victualing the king's soldiers or mariners; shall, either for gain, or to impede his majesty's service, embezzle the same to the value of twenty shillings, such offense shall be felony. And the statute 22 Car. II. c. 5. takes away the benefit of clergy from this offense, so far as it relates to naval stores. Other inferior embezzlements and misdemeanors, that fall under this denomination, are punished by statute 1 Geo. I. c. 25. with fine and imprisonment.

5. DESERTION from the king's armies in time of war, whether by land or sea, in England or in parts beyond the seas, is by the standing laws of the land (exclusive of the annual acts of parliament to punish mutiny and desertion) and particularly by statute 18 Hen. VI. c. 19. and 5 Eliz. c. 5. made felony, but not without benefit of clergy. But by the statute 2 & 3 Edw. VI. c. 2. clergy is taken away from such deserters, and the offense is made triable by the justices of every shire. The same statutes punish other inferior military offenses fines, imprisonment, and other penalties.

## NOTES

1. 3 Inst. 15.
2. 1 Inst. 391.
3. Glossar. tit. Felon.
4. See Vol. II. pag. 284.
5. Feud. l. 2. t. 26. in calc.
6. Feud. l. 1. t. 21.
7. Feud. l. 2. t. 24.
8. Feud. l. 2. t. 34. l. 2. t. 26. § 3.
9. Feud. l. 2. t. 22.
10. Feud. l. 2. t. 24. § 2.
11. Feud. l. 1. t. 5.
12. Feud. l. 2. t. 38. Britton. l. 1. c. 22.
13. Feud. l. 2. t. 26 & 47.
14. 3 Inst. 43.
15. 1 Inst. 391.
16. 1 Hawk. P. C. 107. 2. Hawk. P. C. 444.
17. See Vol. I. pag. 332.

## CHAPTER 8 Of Praemunire

A THIRD species of offense more immediately affecting the king and his government, though not subject to capital punishment, is that of *praemunire* [forewarning]: so called from the words of the writ preparatory to the prosecution thereof; “*praemunire*<sup>1</sup> *facias* A. B.” forewarn A. B. that he appear before us to answer the contempt wherewith he stands charged; which contempt is particularly recited in the preamble to the writ.<sup>2</sup> It took its original from the exorbitant power claimed and exercised in England by the pope, which even in the days of blind zeal was too heavy for our ancestors to bear.

IT may justly be observed, that religious principles, which (when genuine and pure) have an evident tendency to make their professors better citizens as well as better men, have (when perverted and erroneous) been usually subversive of civil government, and been made both the cloak and the instrument of every pernicious design that can be harbored in the heart of man. The unbounded authority that was exercised by the Druids in the west, under the influence of pagan superstition, and the terrible ravages committed by the Saracens in the east, to propagate the religion of Mahomet, both witness to the truth of that ancient universal observation; that, in all ages and in all countries, civil and ecclesiastical tyranny are mutually productive of each other. And it is the glory of the church of England, as well as a strong presumptive argument in favor of the purity of her faith, that she has been (as her prelates on a trying occasion once expressed it<sup>3</sup>) in her principles and practice ever most unquestionably loyal. The clergy of her persuasion, holy in their also moderate in their ambition, and entertain just notions of the ties of society and the rights of civil government. As in matters of faith and morality they acknowledge no guide but the scriptures, so, in matters of external polity and of private right, they derive all their title from the civil magistrate; they look up to the king as their head, to the parliament as their lawgiver, and pride themselves in nothing so justly, as in being true members of the church, emphatically by law established. Whereas the principles of those who differ from them, as well in one extreme as the other, are equally and totally destructive of those ties and obligations by which all society is kept together; equally encroaching on those rights, which reason and the original contract of every free state in the universe have vested in the sovereign power; and equally aiming at a distinct independent supremacy of their own, where spiritual men and spiritual causes are concerned. The dreadful effects of such a religious bigotry, when actuated by erroneous principles, even of the protestant kind, are sufficiently evident from the history of the Anabaptists in Germany, the covenanters in Scotland, and that deluge of sectaries in England, who murdered their sovereign, overturned the church and monarchy, shook every pillar of law, justice, and private property, and most devoutly established a kingdom of the saints in their stead. But these horrid devastations, the effects of mere madness or of zeal that was nearly allied to it, though violent and tumultuous, were but of a short duration. Whereas the progress of the papal policy, long actuated by the steady counsels of successive pontiffs, took deeper root, and was at length in some places with difficulty, in others never yet, extirpated. For this we might call to witness the black intrigues of the Jesuits, so lately triumphant over Christendom, but now universally abandoned by even the Roman catholic powers: but the subject of our present chapter rather leads us to consider the vast strides, which were formerly made in this kingdom by the popish clergy; how nearly they arrived to effecting their grand design; some few of the means they made use of for establishing their plan; and how almost all of them have been defeated or converted to

better purposes, by the vigor of our free constitution, and the wisdom of successive parliaments.

THE ancient British church, by whomsoever planted, was a stranger to the bishop of Rome, and all his pretended authority. But, the pagan Saxon invaders having driven the professors of Christianity to the remotest corners of our island, their own conversion was afterwards effected by Augustin the monk, and other missionaries from the court of Rome. This naturally introduced some few of the papal corruptions in point of faith and doctrine; but we read of no civil authority claimed by the pope in these kingdoms, till the era of the Norman conquest: when the then reigning pontiff having favored duke William in his projected invasion, by bluffing his host and consecrating his banners, he took that opportunity also of establishing his spiritual encroachments; and was even permitted so to do by the policy of the conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates: prelates, who, being bred abroad in the doctrine and practice of slavery, had contracted a reverence and regard for it, and took a pleasure in riveting the chains of a free-born people.

THE most stable foundation of legal and rational government is a due subordination of rank, and a gradual scale of authority; and tyranny also itself is most surely supported by a regular increase of despotism, rising from the slave to the sultan: with this difference however, that the measure of obedience in the one is grounded on the principles of society, and is extended no farther than reason and necessity will warrant; in the other it is limited only by absolute will and pleasure, without permitting the inferior to examine the title upon which it is founded. More effectually therefore to enslave the consciences and minds of the people, the Romish clergy themselves paid the most implicit obedience to their own superiors or prelates; and they, in their turns, ere as blindly devoted to the will of the sovereign pontiff, whose decisions they held to be infallible, and his authority co-extensive with the Christian world. Hence his legates *a latere* [attendants] were introduced into every kingdom of Europe, his bulls and decretal epistles became the rule both of faith and discipline, his judgment was the final resort in all cases of doubt or difficulty, his decrees were enforced by anathemas and spiritual censures, he dethroned even kings that were refractory, and denied to whole kingdoms (when undutiful) the exercise of Christian ordinances, and the benefits of the gospel of God.

BUT, though the being spiritual head of the church was a thing of great found, and of greater authority, among men of conscience and piety, yet the court of Rome was fully apprized that (among the bulk of mankind) power cannot be maintained without property; and therefore its attention began very early to be riveted upon every method that promised pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchase of masses to redeem the souls of the deceased. New-fangled offenses were created, and indulgences were sold to the wealthy, for liberty to sin without danger. The canon law took cognizance of crimes, enjoined penance *pro salute animae* [for the good of the soul], and commuted that penance for money. Non-residence and pluralities among the clergy, and marriages among the laity related within the seventh degree, were strictly prohibited by canon; but dispensations were seldom denied to those who could afford to buy them. In short, all the wealth of Christendom was gradually drained, by a thousand channels, into the coffers of the holy see.

THE establishment also of the feudal system in most of the governments of Europe, whereby the

lands of all private proprietors were declared to be held of the prince, gave a hint to the court of Rome for usurping a similar authority over all the preferments of the church; which began first in Italy, and gradually spread itself to England. The pope became a feudal lord; and all ordinary patrons were to hold their right of patronage under this universal superior. Estates held by feudal tenure, being originally gratuitous donations, were at that time denominated *beneficia* [benefices]: their very name as well as constitution was borrowed, and the care of the souls of a parish thence came to be denominated a benefice. Lay fees were conferred by investiture or delivery of corporal possession; and spiritual benefices, which at first were universally donatives, now received in like manner a spiritual investiture, by institution from the bishop, and induction under his authority. As lands escheated to the lord, in defect of a legal tenant, so benefices lapsed to the bishop upon non-presentation by the patron, in the nature of a spiritual escheat. The annual tenths collected from the clergy were equivalent to the feudal render, or rent reserved upon a grant; the oath of canonical obedience was copied from the oath of fealty required from the vassal by his superior; and the *primer seizins* of our military tenures, whereby the first profits of an heir's estate were cruelly extorted by his lord, gave birth to as cruel an exaction of first-fruits from the beneficed clergy. And the occasional aids and talliages, levied by the prince on his vassals, gave a handle to the pope to levy, by the means of his legates *a latere*, peter-pence and other taxations.

AT length the holy father went a step beyond any example of either emperor or feudal lord. He reserved to himself, by his own apostolical authority,<sup>4</sup> the presentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occasion, or on his journey thither, or back again; and moreover such also as became vacant by his promotion to a bishopric or abbey: "*etiamsi ad illa personae consueverint et debuerint per electionem aut quemvis alium modum assumi*" ["although parsons were accustomed, and ought, to be admitted to them by election, or some other manner"]. And this last, the canonists declared, was no detriment at all to by the lord. Dispensations to avoid these vacancies begat the doctrine of *commendams*: and papal provisions were the previous nomination to such benefices, by a kind of anticipation, before they became actually void; though afterwards indiscriminately applied to any right of patronage exerted or usurped by the pope, in consequence of which the best livings were filled by Italian and other foreign clergy, equally unskilled in and averse to the laws and constitution of England. The very nomination to bishoprics, that ancient prerogative of the crown, was wrested from king Henry the first, and afterwards from his successor king John; and seemingly indeed conferred on the chapters belonging to each see: but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually vested in the pope. and, to sum up this head with a transaction most unparalleled and astonishing in its kind, pope Innocent III had at length the effrontery to demand, and king John had the meanness to consent to, a resignation of his crown to the pope, whereby England was to become forever St. Peter's patrimony; and the dastardly monarch re-accepted his scepter from the hands of the papal legate, to hold as the vassal of the holy see, at the annual rent of a thousand marks.

ANOTHER engine set on foot, or at least greatly improved, by the court of Rome, was a masterpiece of papal policy. Not content with the ample provision of tithes, which the law of the land had given to the parochial clergy, they endeavored to grasp at the lands and inheritances of the kingdom, and (had not the legislature withstood them) would by this time have probably been masters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine and other



rules, men of four and austere religion, separated from the world and its concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretenses to extraordinary sanctity, while all their aim was to aggrandize the power and extend the influence of their grand superior the pope. and as, in those times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe, that founding a monastery a little before their deaths would atone for a life of incontinence, disorder, and bloodshed. Hence innumerable abbeys and religious houses were built within a century after the conquest, and endowed, not only with the tithes of parishes which were ravished from the secular clergy, but also with lands, manors, lordships, and extensive baronies. And the doctrine inculcated was, that whatever was so given to, or purchased by, the monks and friars, was consecrated to God himself; and that to alienate or take it away was no less than the sin of sacrilege.

I MIGHT here have enlarged upon other contrivances, which will occur to the recollection of the reader, set on foot by the court of Rome, for effecting an entire exemption of its clergy from any intercourse with the civil magistrate: such as the separation of the ecclesiastical court from the temporal; the appointment of its judges by merely spiritual authority, without any interposition from the crown; the exclusive jurisdiction it claimed over all ecclesiastical persons and causes; and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or punishment except before their own tribunal. But the history and progress of ecclesiastical courts,<sup>5</sup> as well as of purchases in mortmain,<sup>6</sup> have already been fully discussed in the preceding volumes: and we shall have an opportunity of examining at large the nature of the *privilegium clericale* in the progress of the present book. And therefore I shall only observe at present, that notwithstanding this plan of pontifical power was deeply laid, and so indefatigably pursued by the unwearied politics of the court of Rome through a long succession of ages; notwithstanding it was polished and improved by the united endeavors of a body of men, who engrossed all the learning of Europe for centuries together; notwithstanding it was firmly and resolutely executed by persons the best calculated for establishing tyranny and despotism, being fired with a bigoted enthusiasm, (which prevailed not only among the weak and simple, but even among those of the best natural and acquired endowments) unconnected with their fellow-subjects, and totally indifferent what might befall that posterity to which they bore no endearing relation; ) yet it vanished into nothing, when the eyes of the people were a little enlightened, and they set themselves with vigor to oppose it. So vain and ridiculous is the attempt to live in society, without acknowledging the obligations which it lays us under; and to affect an entire independence of that civil state, which protects us in all our rights, and gives us every other liberty, that only excepted of despising the laws of the community.

HAVING thus in some degree endeavored to trace out the original and subsequent progress of the papal usurpations in England, let us now return to the statutes of *praemunire*, which were framed to encounter this overgrown yet increasing evil. King Edward I, a wise and magnanimous prince, set himself in earnest to shake off this servile yoke.<sup>7</sup> He would not suffer his bishops to attend a general council, till they had sworn not to receive the papal benediction. He made light of all papal bulls and processes: attacking Scotland in defiance of one; and seizing the temporalities of his clergy, who under pretense of another refused to pay a tax imposed by parliament. He strengthened the statutes of mortmain; thereby closing the great gulf, in which all the lands of the kingdom were in danger of being swallowed. And, one of his subjects having obtained a bull of excommunication against another, he ordered him to be executed as a traitor, according to the ancient law.<sup>8</sup> And in the

thirty fifth year of his reign was made the first statute against papal provisions, which, according to Sir Edward Coke,<sup>9</sup> is the foundation of all the subsequent statutes of *praemunire*; which we rank as an offense immediately against the king, because every encouragement of the papal power is a diminution of the authority of the crown.

IN the weak reign of Edward the second the pope again endeavored to encroach, but the parliament manfully withstood him; and it was one of the principal articles charged against that unhappy prince, that he had given allowance to the bulls of the see of Rome. But Edward the third was of a temper extremely different; and, to remedy these inconveniences first by gentle means, he and his nobility wrote an expostulation to the pope: but receiving a menacing and contemptuous answer, withal acquainting him, that the emperor, (who a few years before at the diet of Nuremberg, A. D. 1323, had established a law against provisions<sup>10</sup>) and also the king of France, had lately submitted to the holy see; the king replied, that if both the emperor and the French king should take the pope's part, he was ready to give battle to them both, in defense of the liberties of his crown. Hereupon more sharp and penal laws were enacted against provisors,<sup>11</sup> which enact severally, that the court of Rome shall present or collate to no bishopric or living in England; and that whoever disturbs any patron in the presentation to a living by virtue of a papal provision, such provisor shall pay fine and ransom to the king at his will; and be imprisoned till he renounces such provision: and the same punishment is inflicted on such as cite the king, or any of his subjects, to answer in the court of Rome. And when the holy see resented these proceedings, and pope Urban V attempted to revive the vassalage and annual rent to which king John had subjected his kingdom, it was unanimously agreed by all the estates of the realm in parliament assembled, 40 Edw. III. that king John's donation was null and void, being without the concurrence of parliament, and contrary to his coronation oath: and all the temporal nobility and commons engaged, that if the pope should endeavor by process or otherwise to maintain these usurpations, they would resist and withstand him with all their power.<sup>12</sup>

IN the reign of Richard the second, it was found necessary to sharpen and strengthen these laws, and therefore it was enacted by statutes 3 Ric. II. c. 3. and 7 Ric. II. c. 12. first, that no alien should be capable of letting his benefice to farm; in order to compel such, as had crept in, at least to reside on their preferments: and, afterwards, that no alien should be capable to be presented to any ecclesiastical preferment, under the penalty of the statutes of provisors. By the statute 12 Ric. II. c. 15. all liegemen of the king, accepting of a living by any foreign provision, are put out of the king's protection, and the benefice made void. To which the statute 13 Ric. II. St. 2. c. 2. adds banishment and forfeiture of lands and goods: and by c. 3. of the same statute, any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of provisors, shall be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member.

IN the writ for the execution of all these statutes the words *praemunire facias*, being (as was said) used to command a citation of the party, have denominated in common speech, not only the writ, but the offense itself of maintaining the papal power, by the name of *praemunire*. And accordingly the next statute I shall mention, which is generally too by all subsequent statutes, is usually called the statute of *praemunire*. It is the statute 16 Ric. II. c. 5. which enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulls, instruments, or other things which touch the king, against him, his crown, and realm, and all persons aiding and assisting

therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council; or process of *praemunire facias* shall be made out against them, as in other cases of provisors.

BY the statute 2 Hen. IV. c. 3. all persons who accept any provision from the pope, to be exempt from canonical obedience to their proper ordinary, are also subjected to the penalties of *praemunire*. And this is the last of our ancient statutes touching this offense; the usurped civil power of the bishop of Rome being pretty well broken down by these statutes, as his usurped religious power was in about a century afterwards: the spirit of the nation being so much raised against foreigners, that about this time, in the reign of Henry the fifth, the alien priories, or abbeys for foreign monks, were suppressed, and their lands given to the crown. And no farther attempts were afterwards made in support of these foreign jurisdictions.

A LEARNED writer, before referred to, is therefore greatly mistaken, when he says,<sup>13</sup> that in Henry the sixth's time the archbishop of Canterbury and other bishops offered to the king a large supply, if he would consent that all laws against provisors, and especially the statute 16 Ric. II. might be repealed; but that this motion was rejected. This account is incorrect in all its branches. For, first, the application, which he probably means was made not by the bishops only, but by the unanimous consent of a provincial synod, assembled in 1439, 18 Hen. VI. that very synod which at the same time refused to confirm and allow a papal bull, which then was laid before them. Next, the purport of it was not to procure a repeal of the statutes against provisors, or that of Richard II in particular; but to request that the penalties thereof, which by a forced construction were applied to all that sued in the spiritual, and even in many temporal, courts of this realm, might be turned against the proper objects only; those who appealed to Rome or to any foreign jurisdictions: the tenor of the petition being, "that those penalties should be taken to extend only to those that commenced any suits or procured any writs or public instruments at Rome, or elsewhere out of England; and that no one should be prosecuted upon that statute for any suit in the spiritual courts or lay jurisdictions of this kingdom." Lastly, the motion was so far from being rejected, that the king promised to recommend it to the next parliament, and in the mean time that no one should be molested upon this account. And the clergy were so satisfied with their success, that they granted to the king a whole tenth upon this occasion.<sup>14</sup>

AND indeed so far was the archbishop, who presided in this synod, from countenancing the usurped power of the pope in this realm, that he was ever a firm opposer of it. And, particularly, in the reign of Henry the fifth, he prevented the king's brother from being then made a cardinal, and legate *a latere* from the pope; upon the mere principle of its being within the mischief of papal provisions, and derogatory from the liberties of the English church and nation. For, as he expressed himself to the king in his letter upon that subject, "he was bound to oppose it by his ligeance, and also to quit himself to God, and the church of this land, of which God and the king had made him governor." This was not the language of a prelate addicted to the slavery of the see of Rome; but of one, who was indeed of principles so very opposite to the papal usurpations, that in the year preceding this synod, 17 Hen. VI. he refused to consecrate a bishop of Ely, that was nominated by pope Eugenius IV. A conduct quite consonant to his former behavior, in 6 Hen. VI, when he refused to obey the commands of pope Martin V, who had required him to exert his endeavors to repeal the statute of *praemunire*; ("*execrabile illud statutum*" ["that detestable statute"] as the holy father phrases it)

which refusal so far exasperated the court of Rome against him, that at length the pope issued a bull to suspend him from his office and authority, which the archbishop disregarded, and appealed to a general council. And so sensible were the nation of their primate's merit, that the lords spiritual, and temporal, and also the university of Oxford, wrote letters to the pope in his defense; and the house of commons addressed the king, to send an ambassador forthwith to his holiness, on behalf of the archbishop, who had incurred the displeasure of the pope for opposing the excessive power of the court of Rome.<sup>15</sup>

THIS then is the original meaning of the offense, which we call *praemunire*; viz. introducing a foreign power into this land, and creating *imperium in imperio* [a government within a government], by paying that obedience to papal process, which constitutionally belonged to the king alone, long before the reformation in the reign of Henry the eighth: at which time the penalties of *praemunire* were indeed extended to more papal abuses than before; as the kingdom then entirely renounced the authority of the see of Rome, though not all the corrupted doctrines of the Roman church. and therefore by the several statutes of 24 Hen. VIII. c. 12. and 25 Hen. VIII. c. 19 & 21. to appeal to Rome from any of the king's courts, which (though illegal before) had at times been connived at; to sue to Rome for any license or dispensation; or to obey any process from thence; are made liable to the pains of *praemunire*. And, in order to restore to the king in effect the nomination of vacant bishoprics, and yet keep up the established forms, it is enacted by treason 25 Hen. VIII. c. 20. that if the dean and chapter refuse to elect the person named by the king, or any archbishop or bishop to confirm or consecrate him, they shall fall within the penalties of the statutes of *praemunire*. Also by statute 5 Eliz. c. 1. to refuse the oath of supremacy will incur the pains of *praemunire*; and to defend the pope's jurisdiction in this realm, is a *praemunire* for the first offense, and high treason for the second. So too, by statute 13 Eliz. c. 2. to import any *agnus Dei* [a wax "lamb of God"], crosses, beads, or other superstitious things pretended to be hallowed by the bishop of Rome, and tender the same to be used; or to receive the same with such intent, and not discover the offender; or if a justice of the peace, knowing thereof, shall not within fourteen days declare it to a privy counselor; they all incur a *praemunire*. But importing, or selling mass books or other popish books, is by statute 3 Jac. I. c. 5. §. 25. only a penalty of forty shillings. Lastly, to contribute to the maintenance of a Jesuit's college, or any popish seminary whatever, beyond sea; or any person in the same; or to contribute to the maintenance of any Jesuit or popish priest in England, is by statute 27 Eliz. c. 2. made liable to the penalties of *praemunire*.

THUS far the penalties of *praemunire* seem to have kept within the proper bounds of their original institution, the depressing the power of the pope: but, hey being pains of no inconsiderable consequence, it has been thought fit to apply the same to other heinous offenses; some of which bear more, and some less relation to this original offense, and some no relation at all.

THUS, 1. By the statute 1 & 2 Ph. & Mar. c. 8. to molest the possessions of abbey lands granted by parliament to Henry the eighth, and Edward the sixth, is a *praemunire*. 2. So likewise is the offense of acting as a broker or agent in any usurious contract, where above ten percent interest is taken, by statute 13 Eliz. c. 10. 3. To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *praemunire*, by statute 21 Jac. I. c. 3. 4. To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a *praemunire* by two statutes; the one 16 Car. I. c. 21. the other 1 Jac.

II. c. 8. 5. On the abolition, by statute 12 Car. II. c. 24. of purveyance,<sup>16</sup> and the prerogative of preemption, or taking any victual, beasts, or goods for the king's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *praemunire*. 6. To assert, maliciously and advisedly, by speaking or writing, that both or either house of pee have a legislative authority without the king, is declared a *praemunire* by statute 13 Car. II. c. 1. 7. By the *habeas corpus* act also, 31 Car. II. c. 2. it is a *praemunire*, and incapable of the kings' pardon, besides other heavy penalties,<sup>17</sup> to send any subject of this realm a prisoner into parts beyond the seas. 8. By the statute 1 W. & M. St. 1. c. 8. persons of eighteen years of age, refusing to take the new oaths of allegiance, as well as supremacy, upon tender by the proper magistrate, are subject to the penalties of a *praemunire*; and by statute 7 & 8 W. III. c. 24. sergeants, counselors, proctors, attorneys, and all officers of courts, practicing without having taken the oaths of allegiance and supremacy, and subscribing the declaration against popery, are guilty of a *praemunire*, whether the oaths be tendered or no. 9. By the statute 6 Ann. c. 7. to assert maliciously and directly, by preaching, teaching, or advised speaking, that the then pretended prince of Wales, or any person other than according to the acts of settlement and union, has any right to the throne of these kingdoms; or that the king and parliament cannot make laws to limit the descent of the crown; such preaching, teaching, or advised speaking is a *praemunire*: as writing, printing, or publishing the same doctrines amounted, we may remember, to high treason. 10. By statute 6 Ann. c. 23. if the assembly of peers of Scotland, convened to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *praemunire*. 11. The last offense that has been made a *praemunire*, was by statute 6 Geo. I. c. 18. the year after the infamous south sea project had beggared half the nation. This therefore makes all unwarrantable undertakings by unlawful subscriptions, then commonly known by the name of bubbles, subject to the penalties of a *praemunire*.

HAVING thus inquired into the nature and several species of *praemunire*, its punishment may be gathered from the foregoing statutes, which are thus shortly fumed up by Sir Edward Coke:<sup>18</sup> “that, from the conviction, the defendant shall be out of the king's protection, and his lands and tenements, goods and chattels forfeited to the king: and that his body shall remain in prison at the king's pleasure; or (as other authorities have it) during life:”<sup>19</sup> both which amount to the same thing; as the king by his prerogative may any time remit the whole, or any part of the punishment, except in the case of transgressing the statute of *habeas corpus* [have the body]. These forfeitures, here inflicted, do not (by the way) bring this offense within our former definition of felony; being inflicted by particular statutes, and not by the common law. But so odious, Sir Edward Coke adds, was this offense of *praemunire*, that a man that was attainted of the same might have been slain by any other man without danger of law: because it was provided by law,<sup>20</sup> that any man might do to him as to the king's enemy; and any man may lawfully kill an enemy. However, the position itself, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battle, or for necessary self-defense. And, to obviate such savage and mistaken notions, the statute 5 Eliz. c. 1. provides, that it shall not be lawful to kill any person attainted in a *praemunire*, any law, statute, opinion, or exposition of law to the contrary notwithstanding. But still such delinquent, though protected as a part of the public from public wrongs, can bring no action for any private injury, how atrocious soever; being so far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may suffer. And no man, knowing him to be guilty, can with safety give him comfort,

aid, or relief.<sup>21</sup>

## NOTES

1. A barbarous word for *praemonere*.
2. Old Nat. Brev. 101. edit. 1534.
3. Address to James II. 1687.
4. Extrav. l. 3. t. 2. c. 13.
5. See Vol. III. pag. 61.
6. See Vol. II. pag. 268.
7. Dav. 83, etc.
8. Bro. Abr. tit. Coron. 115. Treason. 14. 5 Rep. part. 1. fol. 12. 3 Aff. 19.
9. 2 Inst. 583.
10. Mod. Univ. Hist. xxix. 293.
11. Stat. 25 Edw. III. St. 6. 27 Edw. III. St. 1. c. 1. 38 Edw. III. St. 1. c. 4. & St. 2. c. 1, 2, 3, 4.
12. Seld. in Flet. 10. 4.
13. Dav. 96.
14. Wilk. Concil. Mag. III. 533.
15. See Wilk. Concil. Mag. Br. Vol. III. *passim*. And Dr. Duck's life of archbishop Chichele, who was the prelate here spoken of, and the munificent founder of All Souls college in Oxford: in vindication of whose memory the author hopes to be excused this digression; if indeed it be a digression, to show how contrary to the sentiments of so learned and pious a prelate, even in the days of popery, those usurpations were, which the statutes of *praemunire* and provisors were made to restrain.
16. See Vol. I. pag. 287.
17. See Vol. I. pag. 138. Vol. III. pag. 137.
18. 1 Inst. 129.
19. 1 Bulstr. 199.
20. Stat. 25 Edw. III. St. 5. c. 22.
21. 1 Hawk. P. C. 55.

## CHAPTER 9

**Of Misprisions and Contempts, Affecting the King and Government**

THE fourth species of offenses, more immediately against the king and government, are entitled misprisions and contempts.

MISPRISIONS (a term derived from the old French, *mespris*, a neglect or contempt) are, in the acceptance of our law, generally understood to be all such high offenses as are under the degree of capital, but nearly bordering thereon: and it is said, that a misprision is contained in every treason and felony whatsoever; and that, if the king so please, the offender may be proceeded against for the misprision only.<sup>1</sup> And upon the same principle, while the jurisdiction of the star-chamber subsisted, it was held that the king might remit a prosecution for treason, and cause the delinquent to be censured in that court, merely for a high misdemeanor: as happened in the case of Roger earl of Rutland, in 43 Eliz. who was concerned in the earl of Essex's rebellion.<sup>2</sup> Misprisions are generally divided into two sorts; negative, which consist in the concealment of something which ought to be revealed; and positive, which consist in the commission of something which ought to be done.

I. OF the first, or negative kind, is what is called misprision of treason; consisting in the bare knowledge and concealment of treason, without any degree of assent thereto: for any assent makes the party a principal traitor; as indeed the concealment, which was construed aiding and abetting, did at the common law: in like manner as the knowledge of a plot against the state, and not revealing it, was a capital crime at Florence, and other states of Italy.<sup>3</sup> But it is now enacted by the statute 1 & 2 Ph. & Mar. c. 10. that a bare concealment of treason shall be only held a misprision. This concealment becomes criminal, if the party apprized of the treason does not, as soon as conveniently may be, reveal it to some judge of assize or justice of the peace.<sup>4</sup> But if there be any probable circumstances of assent, as if one goes to a treasonable meeting, knowing beforehand that a conspiracy is intended against the king; or, being in such company once by accident, and having heard such treasonable conspiracy, meets the same company again, and hears more of it, but conceals it; this is an implied assent in law, and makes the concealer guilty of principal high treason.<sup>5</sup>

THERE is also one positive misprision of treason, created so by act of parliament. The statute 13 Eliz. c. 2. enacts, that those who forge foreign coin, not current in this kingdom, their aiders, abettors, and procurers, shall all be guilty of misprision of treason. For, though the law would not put foreign coin upon quite the same footing as our own; yet, if the circumstances of trade concur, the falsifying it may be attended with consequence almost equally pernicious to the public; as the counterfeiting of Portugal money would be at present: and therefore the law has made it an offense just below capital, and that is all. For the punishment of misprision of treason is loss of the profits of lands during life, forfeiture of goods, and imprisonment during life.<sup>6</sup> Which total forfeiture of the goods was originally inflicted while the offense amounted to principal treason, and of course included in it a felony, by the common law; and therefore is no exception to the general rule laid down in a former chapter,<sup>7</sup> that wherever an offense is punished by such total forfeiture it is felony at the common law.

MISPRISION of felony is also the concealment of a felony which a man knows, but never assented to; for, if he assented, this makes him either principal, or accessory. And the punishment of this, in

a public officer, by the statute Westm. 1. 3. Edw. I. c. 9. is imprisonment for a less discretionary time; and, in both, fine and ransom at the king's pleasure: which pleasure of the king must be observed, once for all, not to signify any extrajudicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice; "*voluntas regis in curia, non in camera*" ["the will of the king in his court, not in his chamber"].<sup>8</sup>

THERE is also another species of negative misprisions; namely, the concealing of treasure-trove, which belongs to the king or him grantees, by prerogative royal: the concealment of which was formerly punishable by death;<sup>9</sup> but now only by fine and imprisonment.<sup>10</sup>

II. MISPRISIONS, which are merely positive, are generally denominated contempts or high misdemeanors; of which

1. THE first and principal is the mal-administration of such high officers, as are in public trust and employment. This is usually punished by the method of parliamentary impeachment: wherein such penalties, short of death, are inflicted, as to the wisdom of the house of peers shall seem proper; consisting usually of banishment, imprisonment, fines, or perpetual disability. Hitherto also may be referred the offense of embezzling the public money, called among the Romans *peculatus*, which the Julian law punished with death in a magistrate, and with deportation, or banishment, in a private person.<sup>11</sup> With us it is not a capital crime, but subjects the committer of it to a discretionary fine and imprisonment. Other misprisions are, in general, such contempts of the executive magistrate, as demonstrate themselves by some arrogant and undutiful behavior towards the king and government. These are

2. CONTEMPTS against the king's prerogative. As, by refusing to assist him for the good of the public; either in his councils, by advice, if called upon; or in his wars, by personal service for defense of the realm, against a rebellion or invasion.<sup>12</sup> Under which class may be ranked the neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Hen. V. c. 8. which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel.<sup>13</sup> Contempts against the prerogative may also be, by preferring the interests of a foreign potentate to those of our own, or doing or receiving anything that may create an undue influence in favor of such extrinsic power; as, by taking a pension from any foreign prince without the consent of the king.<sup>14</sup> Or, by disobeying the king's lawful commands; whether by writs issuing out of his courts of justice, or by a summons to attend his privy council, or by letters from the king to a subject commanding him to return from beyond the seas, (for disobedience to which his lands shall be seized till he does return, and himself afterwards punished) or by his writ of *ne exeat regnum* [not to leave the realm], or proclamation, commanding the subject to stay at home.<sup>15</sup> Disobedience to any of these commands is a high misprision and contempt: and so, lastly, is disobedience to any act of parliament, where no particular penalty is assigned; for then it is punishable, like the rest of these contempts, by fine and imprisonment, at the discretion of the king's courts of justice.<sup>16</sup>

3. CONTEMPTS and misprisions against the king's person and government, may be by speaking or writing against them, cursing or wishing him ill, giving our scandalous stories concerning him, or doing anything that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people. It has been also held an offense



of this species to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die: these being acts which impliedly encourage rebellion. And for this species of contempt a man may not only be fined and imprisoned, but suffer the pillory or other infamous corporal punishment:<sup>17</sup> in like manner as, in the ancient German empire, such persons as endeavored to sow sedition, and disturb the public tranquility, were condemned to become the objects of public notoriety and derision, by carrying a dog upon their shoulders from one great town to another. The emperors Otho I. and Frederic Barbarossa inflicted this punishment on noblemen of the highest rank.<sup>18</sup>

4. CONTEMPTS against the king's title, not amounting to treason or *praemunire* [forewarning], are the denial of his right to the crown in common and unadvised discourse; for, if it be by advisedly speaking, we have seen<sup>19</sup> that it amounts to a *praemunire*. This heedless species of contempt is however punished by our law with fine and imprisonment. Likewise if any person shall in any wise hold, affirm, or maintain, that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; this is a misdemeanor, by statute 13 Eliz. c. 1. and punishable with forfeiture of goods and chattels. A contempt may also arise from refusing or neglecting to take the oaths, appointed by statute for the better securing the government; and yet acting in a public office, place of trust, or other capacity, for which the said oaths are required to be taken; *viz.* those of allegiance, supremacy, and abjuration: which must be taken within six calendar months after admission. The penalties for this contempt, inflicted by statute 1 Geo. I. St. 2. c. 13. are very little, if anything, short of those of a *praemunire*: being an incapacity to hold the said offices, or any other; to prosecute any suit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of parliament: and after conviction the offender shall also forfeit 500 *l.* to him or them that will sue for the same. Members on the foundation of any college in the two universities, who by this statute are bound to take the oaths, must also register a certificate thereof in the college register, within one month after; otherwise, if the electors do not remove him, and elect another within twelve months, or after, the king may nominate a person to succeed him by his great seal or sign manual. Besides thus taking the oaths for offices, any two justices of the peace may by the same statute summon, and tender the oaths to, any person whom they shall suspect to be disaffected; and every person refusing the same, who is properly called a non-juror, shall be adjudged a popish recusant convict, and subjected to the same penalties that were mentioned in a former chapter;<sup>20</sup> which in the end may amount to the alternative of abjuring the realm, or suffering death as a felon.

5. CONTEMPTS against the king's palaces or courts of justice have always been looked upon as high misprisions: and by the a law, before the conquest, fighting in the king's palace, or before the king's judges, was punished with death.<sup>21</sup> So too, in the old Gothic constitution, there were many places privileged by law, *quibus major reverentia et securitas debetur, ut templa et judicia, quae sancta habebantur, ) arces et aula regis, ) denique locus quilibet praesente aut adventante rege.*<sup>22</sup> [“To which a greater reverence and inviolability is due; as churches and courts of justice, which were held sacred - the king's courts and castles - lastly, the place where the king resides or is approaching.”] And at present, with us, by the statute 33 Hen. VIII. c. 12. malicious striking in the king's palace, wherein his royal person resides, whereby blood is drawn, is punishable by perpetual imprisonment, and fine at the king's pleasure; and also with loss of the offender's right hand, the solemn execution of which sentence is prescribed in the statute at length.

BUT striking in the king's superior courts of justice, in Westminster-hall, or at the assizes, is made still more penal than even in the king's palace. The reason seems to be, that those courts being anciently held in the king's palace, and before the king himself, striking there included the former contempt against the king's palace, and something more; *viz.* the disturbance of public justice. For this reason, by the ancient common law before the conquest,<sup>23</sup> striking in the king's courts of justice, or drawing a sword therein, was a capital felony: and our modern law retains so much of the ancient severity, as only to exchange the loss of life for the loss of the offending limb. Therefore a stroke or a blow in such court of justice, whether blood be drawn or not, or even assaulting a judge, sitting in the court, by drawing a weapon, without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life.<sup>24</sup> A rescue also of a prisoner from any of the said courts, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life:<sup>25</sup> being looked upon as an offense of the same nature with the last; but only, as no blow is actually given, the amputation of the hand is excused. For the like reason an affray, or riot, near the said courts, but out of their actual view, is punished only with fine and imprisonment.<sup>26</sup>

NOT only such as are guilty of an actual violence, but of threatening or reproachful words to any judge sitting in the courts, are guilty of a high misprision, and have been punished with large fines, imprisonment, and corporal punishment.<sup>27</sup> And, even in the inferior courts of the king, an affray, or contemptuous behavior, is punishable with a fine by the judges there sitting; as by the steward in a court-leet, or the like.<sup>28</sup>

LIKEWISE all such, as are guilty of any injurious treatment to those who are immediately under the protection of a court of justice, are punishable by fine and imprisonment: as if a man assaults or threatens his adversary for suing him, a counselor or attorney for being employed against him, a juror for his verdict, or a jailer or other ministerial officer for keeping him in custody, and properly executing his duty:<sup>29</sup> which offenses, when they proceeded farther than bare threats, were punished in the Gothic constitutions with exile and forfeiture of goods.<sup>30</sup>

LASTLY, to endeavor to dissuade a witness from giving evidence; to disclose an examination before the privy council; or, to advise a prisoner to stand mute; (all of which are impediments of justice) are high misprisions, and contempts of the king's courts, and punishable by fine and imprisonment. And anciently it was held, that if one of the grand jury disclosed to any person indicted the evidence that appeared against him, he was thereby made accessory to the offense, if felony; and in treason a principal. And at this day it is agreed, that he is guilty of a high misprision,<sup>31</sup> and liable to be fined and imprisoned.<sup>32</sup>

## NOTES

1. Yearb. 2 Ric. III. 10. Staundf. P. C. 37. 1 Hawk. P. C. 55, 56.
2. Hudson of the court of star-chamber. MS. In Mus. Brit.
3. Guicciard. Hist. b. 3. & 13.
4. 1 Hal. P. C. 372.
5. 1 Hawk. P. C. 56.

6. 1 Hal. P. C. 374.
7. See pag. 94.
8. 1 Hal. P. C. 375.
9. Glanv. l. 1. c. 2.
10. 3 Inst. 133.
11. Inst. 4. 18. 9.
12. 1 Hawk. P. C. 59.
13. Lamb. Eir. 315.
14. 3 Inst. 144.
15. See Vol. I. pag. 266.
16. 1 Hawk. P. C. 60.
17. Ibid.
18. Mod. Un. Hist. xxix. 28. 119.
19. See pag. 91.
20. See pag. 55.
21. 3 Inst. 140. LL. Alured. cap. 7. & 34.
22. Stiernh. *de jure Goth.* l. 3. c. 3.
23. LL. Inae. c. 6. LL. Canut. c. 56. LL. Alured. c. 7.
24. Staundf. P. C. 38. 3 Inst. 140, 141.
25. 1 Hawk. P. C. 57.
26. Cro. Car. 373.
27. Cro. Car. 503.
28. 1 Hawk. P. C. 58.
29. 3 Inst. 141, 142.
30. Stiernh. *de jure Goth.* l. 3. t. 3.
31. See Barr. 212. 27. Afterwards. pl. 44. § 5. fol. 138.
32. 1 Hawk. P. C. 59.

## CHAPTER 10

### Of Offenses Against Public Justice

THE order of our distribution will next lead us to take into consideration such crimes and misdemeanors as more especially affect the commonwealth, or public polity of the kingdom: which however, as well as those which are peculiarly pointed against the lives and security of private subjects, are also offenses against the king, as the *pater-familias* [family father] of the nation; to whom it appertains by his regal office to protect the community, and each individual therein, from every degree of injurious violence, by executing those laws, which the people themselves in conjunction with him have enacted; or at least have consented to, by an agreement either expressly made in the persons of their representatives, or by a tacit and implied consent perfumed and proved by immemorial usage.

THE species of crimes, which we have now before us, is subdivided into such a number of inferior and subordinate classes, that it would much exceed the bounds of an elementary treatise, and be insupportably tedious to the reader, were I to examine them all minutely, or with any degree of critical accuracy. I shall therefore confine myself principally to general definitions or descriptions of this great variety of offenses, and to the punishments inflicted by law for each particular offense; with now and then a few incidental observations: referring the student for more particulars to other voluminous authors; who have treated of these subjects with greater precision and more in detail, than is consistent with the plan of these commentaries.

THE crimes and misdemeanors, that more especially affect the common-wealth, may be divided into five species; *viz.* offenses against public justice, against the public peace, against public trade, against the public health, and against the public police or economy: of each of which we will take a cursory view in their order.

FIRST then, of offenses against public justice: some of which are felonious, whose punishment may extend to death; others only misdemeanors. I shall begin with those that are most penal, and descend gradually to such as are of less malignity.

1. EMBEZZLING or vacating records, or falsifying certain other proceedings in a court of judicature, is a felonious offense against public justice. It is enacted by statute 8 Hen. VI. c. 12. that if any clerk, or other person, shall willfully take away, withdraw, or avoid any record, or process in the superior courts of justice in Westminster-hall, by reason whereof the judgment shall be reversed or not take effect; it is felony not only in the principal actors, but also in their procurers, and abettors. Likewise by statute 21 Jac. I. c. 26. to acknowledge any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment, in the name of another person not privy to the same, is felony without benefit of clergy. Which law extends only to proceedings in the courts themselves: but by statute 4 W. & M. c. 4. to personate any other person before any commissioner authorized to take bail in the country is also felony. For no man's property would be safe, if records might be suppressed or falsified, or persons' names be falsely usurped in courts, or before their public officers.

2. TO prevent abuses by the extensive power, which the law is obliged to repose in jailers, it is enacted by statute 14 Edw. III. c. 10. that if any jailer by too great duress of imprisonment makes

any prisoner that he has in ward, become an approver or an appellor against his will; that is, as we shall see hereafter, to accuse and turn evidence against some other person; it is felony in the jailer. For, as Sir Edward Coke<sup>1</sup> observes, it is not lawful to induce or excite any man even to a just accusation of another; much less to do it by duress of imprisonment; and least of all by a jailer, to whom the prisoner is committed for safe custody.

3. A THIRD offense against public justice is obstructing the execution of lawful process. This is at all times an offense of a very high and presumptuous nature; but more particularly so, when it is an obstruction of an arrest upon criminal process. And it has been held, that the party opposing such arrest becomes thereby *particeps criminis* [criminal participant]; that is, an accessory in felony, and a principal in high treason.<sup>2</sup> Formerly one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent persons assembled together to shelter themselves from justice, (especially in London and Southwark) under the pretext of their having been ancient palaces of the crown, or the like:<sup>3</sup> all of which sanctuaries for iniquity are now demolished, and the opposing of any process therein is made highly penal, by the statutes 8 & 9 W. III. c. 27. 9 Geo. I. c. 28. and 11 Geo. I. c.22. which enact, that persons opposing the execution of any process in such pretended privileged places within the bills of mortality, or abusing any officer in his endeavors to execute his duty therein, so that he receives bodily hurt, shall be guilty of felony, and transported for seven years.

4. AN escape of a person arrested upon criminal process, by eluding the vigilance of his keepers before he is put in hold, is also an offense against public justice, and the party himself is punishable by fine or imprisonment.<sup>4</sup> But the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner; the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody, till cleared by the due course of justice. Officers therefore who, after arrest, negligently permit a felon to escape, are also punishable by fine;<sup>5</sup> but voluntary escapes, by consent and connivance of the officer, are a much more serious offense: for it is generally agreed that such escapes amount to the same kind of offense, and are punishable in the same degree, as the offense of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. And this, whether he were actually committed to jail, or only under a bare arrest.<sup>6</sup> But the officer cannot be thus punished, till the original delinquent is actually found guilty or convicted, by verdict, confession, or outlawry, of the crime for which he was so committed or arrested: otherwise it might happen, that the officer might be punished for treason or felony, and the person arrested and escaping might turn out to be an innocent man. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor.<sup>7</sup>

5. BREACH of prison by the offender himself, when committed for any cause, was felony at the common law:<sup>8</sup> or even conspiring to break it.<sup>9</sup> But this severity is mitigated by the statute *de frangentibus prisonam* [concerning those breaking prison], 1 Edw. II. which enacts, that no person shall have judgment of life or member, for breaking prison, unless committed for some capital offense. So that to break prison, when lawfully committed for any treason or felony, remains still felony as at the common law; and to break prison, when lawfully confined upon any other inferior charge, is still punishable as a high misdemeanor by fine and imprisonment. For the statute, which ordains that such offense shall be no longer capital, never meant to exempt it entirely from every

degree of punishment.<sup>10</sup>

6. RESCUE is the forcibly freeing another from an arrest or imprisonment; and is always the same offense in the stranger so rescuing, as it would have been in the party himself to have broken prison.<sup>11</sup> A rescue therefore of one apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor also. But here, as upon voluntary escapes, the principal must first be attainted before the rescuer can be punished: and for the same reason; because perhaps in fact it may turn out that there has been no offense committed.<sup>12</sup> By the statute, 16 Geo. II. c. 31. to assist a prisoner in custody for treason or felony with any arms, instruments of escape, or disguise, without the knowledge of the jailer; or any way to assist such prisoner to attempt an escape, though no escape be actually made, is felony, and subjects the offender to transportation for seven years. And by the statutes 25 Geo. II. c. 37. and 27 Geo. II. c. 15. to rescue, or attempt to rescue, any person committed for murder, or for any of the offenses enumerated in that act, or in the black act 9 Geo. I. c. 22. is felony without benefit of clergy.

7. ANOTHER capital offense against public justice is the returning from transportation, or being seen at large in Great Britain before the expiration of the term for which the offender was sentenced to be transported. This is made felony without benefit of clergy by statutes 4. Geo. I. c. 11. 6 Geo. I. c. 23. and 8 Geo. III. c. 15.

8. AN eighth is that of taking a reward, under pretense of helping the owner to his stolen goods. This was a contrivance carried to a great length of villainy in the beginning of the reign of George the first: the confederates of the felons thus disposing of stolen goods, at a cheap rate, to the owners themselves, and thereby stifling all farther inquiry. The famous Jonathan Wild had under him a well disciplined corps of thieves, who brought in all their spoils to him; and he kept a sort of public office for restoring them to the owners at half price. To prevent which audacious practice, to the ruin and in defiance of public justice, it was enacted by statute 4 Geo. I. c. 11. that whoever shall take a reward under the pretense of helping anyone to stolen goods, shall suffer as the felon who stole them; unless he cause such principal felon to be apprehended and brought to trial, and shall also give evidence against him. Wild, upon this statute, (still continuing in his old practice) was at last convicted and executed.

9. RECEIVING of stolen goods, knowing them to be stolen, is also a high misdemeanor and affront to public justice. We have seen in a former chapter,<sup>13</sup> that this offense, which is only a misdemeanor at common law, by the statutes 3 & 4 W. & M. c. 9. and 5 Ann. c. 31. makes the offender accessory to the these and felony. But because the accessory cannot in general be tried, unless with the principal, or after the principal is convicted, the receivers by that means frequently eluded justice. To remedy which, it is enacted by statute 1 Ann. c. 9. and 5 Ann. c. 31. that such receivers may still be prosecuted for a misdemeanor, and punished by fine and imprisonment, though the principal felon be not before taken, so as to be prosecuted and convicted. And, in case of receiving stolen lead, iron, and certain other metals, such offense is by statute 29 Geo. II. c. 30. punishable by transportation for fourteen years.<sup>14</sup> So that now the prosecutor has two methods in his choice: either to punish the receivers for the misdemeanor immediately, before the thief is taken;<sup>15</sup> or to wait till the felon is convicted, and then punish them as accessories to the felony. But it is provided by the same statutes, that he shall only make use of one, and not both o these methods of punishment. By the same statute

also 29 Geo. II. c. 30. persons having lead, iron, and other metals in their custody, and not giving a satisfactory account how they came by the same, are guilty of a misdemeanor and punishable by fine or imprisonment.

10. OF a nature somewhat similar to the two last is the offense of *theft-bote*, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. This is frequently called compounding of felony, and formerly was held to make a man an accessory; but is now punished only with fine and imprisonment.<sup>16</sup> This perversion of justice, in the old Gothic constitutions, was liable to the most severe and infamous punishment. And the Salic law "*latroni eum similem habuit, qui furtum celare vellet, et occulte sine iudice compositionem ejus admittere.*"<sup>17</sup> ["Considers him, who conceals a theft, and secretly receives a settlement for it without the knowledge of the judge, in the same light as the thief."] By statute 25 Geo. II. c. 36. even to advertise a reward for the return of things stolen, with no questions asked, or words to the same purport, subjects the advertiser and the printer to a forfeiture of 50 £ each.

11. COMMON barretry is the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise.<sup>18</sup> The punishment for this offense, in a common person, is by fine and imprisonment: but if the offender (as is too frequently the case) belongs to the profession of the law, a barretor, who is thus able as well as willing to do mischief, ought also to be disabled from practicing for the future.<sup>19</sup> Hereunto maybe referred an offense of equal malignity and audaciousness; that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offense, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges no equally extensive, it is directed by statute 8 Eliz. c. 2. to be punished by six months imprisonment, and treble damages to the party injured.

12. MAINTENANCE is an offense, that bears a near relation to the former; being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it.<sup>20</sup> a practice, that was greatly encouraged by the first introduction of uses.<sup>21</sup> This is an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. And therefore, by the Roman law, it was a species of the *crimen falsi* [forgery] to enter into any confederacy, or do any act to support another's lawsuit, by money, witnesses, or patronage.<sup>22</sup> A man may however maintain the suit of his near kinsman, servant, or poor neighbor, out of charity and compassion, with impunity. Otherwise the punishment by common law is fine and imprisonment;<sup>23</sup> and, by the statute 32 Hen. VIII. c. 9. a. forfeiture of ten pounds.

13. CHAMPERTY, *campi-partitio*, is a species of maintenance, and punished in the same manner:<sup>24</sup> being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense.<sup>25</sup> Thus *champart*, in the French law, signifies a similar division of profits, being a part of the crop annually due to the landlord by bargain or custom. In our sense of the word, it signifies the purchasing of a suit, or right of suing: a practice so much abhorred by our law, that it is one main reason why a chose in action, or thing of which one has the right but not the possession,

is not assignable at common law; because no man should purchase any pretense to sue in another's right. These pests of civil society, that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman law: "*qui improbe coeunt in alienam litem, ut quicquid ex communicatione in rem ipsius redactum fuerit, inter eos communicaretur, lege Julia de vi privata tenentur*" ["those who fraudulently interfere in other men's lawsuits to share whatever may be awarded by the verdict, are liable to the Julian law of secret influence"];<sup>26</sup> and they were punished by the forfeiture of a third part of their goods, and perpetual infamy. Hitherto also must be referred the provision of the statute 32 Hen. VIII. c. 9. that no one shall sell or purchase any pretended right or title to land, unless the vendor has received the profits thereof for one whole year before such grant, or has been in actual possession purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor. These offenses relate chiefly to the commencement of civil suits: but

14. THE compounding of informations upon penal statutes are an offense of an equivalent nature in criminal causes; and are, besides, an additional misdemeanor against public justice, by contributing to make the laws odious to the people. At once therefore to discourage malicious informers, and to provide that offenses, when once discovered, shall be duly prosecuted, it is enacted by statute 18 Eliz. c. 5. that if any person, informing under pretense of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him (which demonstrates him intent in commencing the prosecution to be merely to serve his own ends, and not for the public good) he shall forfeit 10£, shall stand two hours on the pillory, and shall be forever disabled to sue on any popular or penal statute.

15. A CONSPIRACY also to indict an innocent man of felony falsely and maliciously, who is accordingly indicted and acquitted, is a farther abuse and perversion of public justice; for which the party injured may either have a civil action by writ of conspiracy, (of which we spoke in the preceding book<sup>27</sup>) or the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the king, and were by the ancient common law<sup>28</sup> to receive what is called the villainous judgment; *viz.* to lose their *liberam legem* [legal liberty], whereby they are discredited and disabled to be jurors or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their own bodies committed to prison.<sup>29</sup> But it now is the better opinion, that the villainous judgment is by long disuse become obsolete; it not having been pronounced for some ages: but instead thereof the delinquents are usually sentenced to imprisonment, fine, and pillory. To this head may be referred the offense of sending letters, threatening to accuse any person of a crime punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels. This is punishable by statute 30 Geo. II. c. 24. at the discretion of the court, with fine, imprisonment, pillory, whipping, or transportation for seven years.

16. THE next offense against public justice is when the suit is past its commencement, and come to trial. And that is the crime of willful and corrupt perjury; which is defined by Sir Edward Coke,<sup>30</sup> to be a crime committed when a lawful oath is administered, in some judicial proceeding, to a person who swears willfully, absolutely and falsely, in a matter material to the issue or point in question. The law takes no notice of any perjury but such as is committed in some court of justice, having



power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason it is much to be questioned how far any magistrate is justifiable in taking a voluntary affidavit in any extrajudicial matter, as is now too frequent upon every petty occasion: since it is more than possible, that by such idle oaths a man may frequently *in foro conscientiae* [in the court of conscience] incur the guilt, and at the same time evade the temporal penalties, of perjury. The perjury must also be willful, positive, and absolute; not upon surprise, or the like: it also must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstances, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before-mentioned. Subornation of perjury is the offense of procuring another to take such a false oath, as constitutes perjury in the principal. The punishment of perjury and subornation, at common law, has been various. It was anciently death; afterwards banishment, or cutting out the tongue, then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony.<sup>31</sup> But the statute 5 Eliz. c. 9. (if the offender be prosecuted thereon) inflicts the penalty of perpetual infamy, and a fine of 40£ on the suborner; and, in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months imprisonment, perpetual infamy, and a fine of 20£ or to have both ears nailed to the pillory. But the prosecution is usually carried on for the offense at common law; especially as, to the penalties before inflicted, the statute 2 Geo. II. c. 25. super-adds a power, for the court to order the offender to be sent to the house of correction for seven years, or to be transported for the same period; and makes it felony without benefit of clergy to return or escape within the time. It has sometimes been wished, that perjury, at least upon capital accusations, whereby another's life has been or might have been destroyed, was also rendered capital, upon a principle of retaliation; as it is universally by the laws of France.<sup>32</sup> And certainly the odiousness of the crime pleads strongly in behalf of the French law. But it is to be considered, that there they admit witnesses to be heard only on the side of the prosecution, and use the rack to extort a confession from the accused. In such a constitution therefore it is necessary to throw the dread of capital punishment into the other scale, in order to keep in awe the witnesses for the crown; on whom alone the prisoner's fate depends: so naturally does one cruel law beget another. But corporal and pecuniary punishments, exile and perpetual infamy, are more suited to the genius of the English law, where the fact is openly discussed between witnesses on both sides, and the evidence for the crown may be contradicted and disproved by those of the prisoner. Where indeed the death of an innocent person has actually been the consequence of such willful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment: which our ancient law in fact inflicted.<sup>33</sup> But the mere attempt to destroy life by other means not being capital, there is no reason than an attempt by perjury should: much less that this crime should in all judicial cases be punished with death. For to multiply capital punishments lessens their effect, when applied to crimes of the deepest dye; and, detestable as perjury is, it is not by any means to be compared with some other offenses, for which only death can be inflicted: and therefore it seems already (except perhaps in the instance of deliberate murder by perjury) very properly punished by our present law; which has adopted the opinion of Cicero,<sup>34</sup> derived from the law of the twelve tables, "*perjurii poena divina, exitium; humana, dedecus.*" ["The divine punishment of perjury is death; the human punishment, disgrace."]

17. BRIBERY is the next species of offense against public justice; which is when a judge, or other

person concerned in the administration of justice, takes any undue reward to influence his behavior in his office.<sup>35</sup> In the east it is the custom never to petition any superior for justice, not excepting their kings, without a present. This is calculated for the genius of despotic countries; where the true principles of government are never understood, and it is imagined that there is no obligation from the superior to the inferior, no relative duty owing from the governor to the governed. The Roman law, though it contained many severe injunctions against bribery, as well for selling a man's vote in the senate or other public assembly, as for the bartering of common justice, yet by a strange indulgence in one instance, it tacitly encouraged this practice; allowing the magistrate to receive small presents, provided they did not in the whole exceed a hundred crowns in the year.<sup>36</sup> not considering the insinuating nature and gigantic progress of this vice, when once admitted. Plato therefore more wisely, in his ideal republic,<sup>37</sup> orders those who take presents for doing their duty to be punished in the severest manner: and by the laws of Athens he that offered was also prosecuted, as well as he that received a bribe.<sup>38</sup> In England this offense of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same.<sup>39</sup> But in judges, especially the superior ones, it has been always looked upon as so heinous an offense, that the chief justice Thorpe was hanged for it in the reign of Edward III. By a statute<sup>40</sup> 11 Hen. IV, all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service forever. And some notable examples have been made in parliament, of persons in the highest stations, and otherwise very eminent and able, but contaminated with this sordid vice.

18. EMBRACERY is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like.<sup>41</sup> The punishment for the person embracing is by fine and imprisonment; and, for the juror so embraced, if it be by taking money, the punishment is (by diverse statutes of the reign of Edward III) perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.

19. THE false verdict of jurors, whether occasioned by embracery or not, was anciently considered as criminal, and therefore exemplarily punished by attain in the manner formerly mentioned.<sup>42</sup>

20. ANOTHER offense of the same species is the negligence of public officers, entrusted with the administration of justice, as sheriffs, coroners, constables, and the like: which makes the offender liable to be fined; and in very notorious cases will amount to a forfeiture of his office, if it be a beneficial one.<sup>43</sup> Also the omitting to apprehend persons, offering stolen iron, lead, and other metals to sale, is a misdemeanor and punishable by a stated fine, or imprisonment, in pursuance of the statute 29 Geo. II. c. 30.

21. THERE is yet another offense against public justice, which is a crime of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the oppression and tyrannical partiality of judges, justices, and other magistrates, in the administration and under the color of their office. However, when prosecuted, either by impeachment in parliament, or by information in the court of king's bench, (according to the rank of the offenders) it is sure to be severely punished with forfeiture of their offices, fines, imprisonment, or other discretionary censures, regulated by the nature and aggravations of the offense committed.

22. LASTLY, extortion is an abuse of public justice, which consists in any officer's unlawfully taking, by color of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due.<sup>44</sup> The punishment is fine and imprisonment, and sometimes a forfeiture of the office.

### NOTES

1. 3 Inst. 91.
2. 1 Hawk. P. C. 121.
3. Such as White-Friers, and its environs; the Savoy; and the Mint in Southwark.
4. 2 Hawk. P. C. 122.
5. 1 Hal. P. C. 600.
6. 1 Hal. P. C. 590. 2 Hawk. P. C. 134.
7. 1 Hal. P. C. 588, 9. 2 Hawk. P. C. 134, 5.
8. 1 Hal. P. C. 607.
9. Bract. l. 3. c. 9.
10. 2 Hawk. P. C. 128.
11. Ibid. 139.
12. 1 Hal. P. C. 607.
13. See pag. 38.
14. See also statute 2 Geo. II. c. 28. § 12. for the punishment of receivers of goods stolen by bum-boats, etc. in the Thames.
15. Foster. 373.
16. 1 Hawk. P. C. 125.
17. Stiernh. *de jure Goth.* L. 3. t. 5.
18. 1 Hawk. P. C. 243.
19. 1 Hawk. P. C. 244.
20. Ibid. 249.
21. Dr. & St. 203.
22. Ff. 48. 10. 20.
23. 1 Hawk. P. C. 255.
24. Ibid. 257.
25. Stat. of conspirat. 33 Edw. I.
26. Ff. 48. 7. 6.
27. See Vol. III. pag. 126.
28. Bro. Abr. t. conspiracy. 28.

29. 1 Hawk. P. C. 193.
30. 3 Inst. 164.
31. 3 Inst. 163.
32. Montesq. Sp. L. b. 29. ch. 11.
33. Britton. c. 5.
34. de Leg. 2. 9.
35. 1 Hawk. P. C. 168.
36. Ff. 48. 11. 6.
37. de Lig. 1. 12.
38. Port. Antiqu. b. 1. c. 23.
39. 3 Inst. 147.
40. Ibid. 146.
41. 1 Hawk. P. C. 259.
42. See Vol. III. pag. 402.
43. 1 Hawk. P. C. 168.
44. 1 Hawk. P. C. 170.

## CHAPTER 11 Of Offenses Against the Public Peace

WE are next to consider offenses against the public peace; the conservation of which is entrusted to the king and his officers, in the manner and for the reasons which were formerly mentioned at large.<sup>1</sup> These offenses are either such as are an actual breach of the peace; or constructively so, by tending to make others break it. Both of these species are also either felonious, or not felonious. The felonious breaches of the peace are strained up to that degree of malignity by virtue of several modern statutes: and, particularly,

1. THE riotous assembling of twelve persons, or more, and not dispersing upon proclamation. This was first made high treason by statute 3 & 4 Edw. VI. c. 5. when the king was a minor, and a change in religion to be effected: but that statute was repealed by statute 1 Mar. c. 1. among the other treasons created since the 25 Edw. III; though the prohibition was in substance re-enacted, with an inferior degree of punishment, by statute 1 Mar. St. 2. c. 12. which made the same offense a single felony. These statutes specified and particularized the nature of the riots they were meant to suppress; as, for example, such as were set on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other specific purposes: in which cases, if the persons were commanded by proclamation to disperse, and they did not, it was by the statute of Mary made felony, but within the benefit of clergy; and also the act indemnified the peace officers and their assistants, if they killed any of the mob in endeavoring to suppress such riot. This was thought a necessary security in that sanguinary reign, when popery was intended to be re-established, which was likely to produce great discontents: but at first it was made only for a year, and was afterwards continued for that queen's life. And, by statute 1 Eliz. c. 16. when a reformation in religion was to be once more attempted, it was revived and continued during her life also; and then expired. From the accession of James the first to the death of queen Anne, it was never once thought expedient to revive it: but, in the first year of George the first, it was judged necessary, in order to support the execution of the act of settlement, to renew it, and at one stroke to make it perpetual, with large additions. For, whereas the former acts expressly defined and specified what should be accounted a riot, the statute 1 Geo. I. c. 5. enacts, generally, that if any twelve persons are unlawfully assembled to the disturbance of the peace, and any one justice of the peace, sheriff, under-sheriff, or mayor of a town, shall think proper to command them by proclamation to disperse, if they contemn his orders and continue together for one hour afterwards, such contempt shall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force opposed, or the reader be in any manner willfully hindered from the reading of it, such opposers and hinderers are felons, without benefit of clergy: and all persons to whom such proclamation ought to have been made, and knowing of such hindrance, and not dispersing, are felons, without benefit of clergy. There is the like indemnifying clause, in case any of the mob be unfortunately killed in the endeavor to disperse them; being copied from the act of queen Mary. And, by a subsequent clause of the new act, if any persons, so riotously assembled, begin even before proclamation to pull down any church, chapel, meeting-house, dwelling-house, or out-houses, they shall be felons without benefit of clergy.

2. BY statute 1 Hen. VII. c. 7. unlawful hunting in any legal forest, park, or warren, not being the king's property, by night, or with painted faces, was declared to be single felony. But now by the statute 9 Geo. I. c. 22. to appear armed in any inclosed forest or place, where deer are usually kept,

or in any warren or hares or conies, or in any high road, open heath, common, or down, by day or night, with faces blacked, or otherwise disguised, or (being so disguised) to hunt, wound, kill, or steal any deer, to rob a warren or to steal fish, or to procure, by gift or promise of reward, any person to join them in such unlawful act, is felony without benefit of clergy. I mention these offences in this place, not on account of the damage thereby done to private property, but of the manner in which that damage is committed: namely, with the face blacked or with other disguise, and being armed with offensive weapons, to the breach of the public peace and the terror of his majesty's subjects.

3. ALSO by the same statute 9 Geo. I. c. 22. amended by statute 27 Geo. II. c. 15. knowingly to send any letter without a name, or with a fictitious name, demanding money, venison, or any other valuable thing, or threatening (without any demand) to kill, or fire the house of, any person, is made felony without benefit of clergy. This offense was formerly high treason by the statute 8 Hen. V. c. 6.

4. To pull down or destroy any turnpike-gate, or fence thereunto belonging, by the statute 1 Geo. II. c. 19. is punished with public whipping, and three months imprisonment; and to destroy the toll-houses, or any sluice or lock on a navigable river, is made felony to be punished with transportation for seven years. By the statute 5 Geo II. c. 33 the offense of destroying turnpike-gates or fences, is made felony also, with transportation for seven years. And, lastly, by the statute 8 Geo. II. c. 20, the offenses of destroying both turnpikes upon roads, and sluices upon rivers, are made felony without benefit of clergy; and may be tried as well in an adjacent county, as that wherein the fact is committed. The remaining offenses against the public peace are merely misdemeanors and no felonies; as,

5. AFFRAYS (from *affraier*, to terrify) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects: for, if the fighting be in private, it is no affray but an assault.<sup>2</sup> Affrays may be suppressed by any private person present, who is justifiable in endeavoring to part the combatants, whatever consequence may ensue.<sup>3</sup> But more especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace.<sup>4</sup> The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case: for, where there is any material aggravation, the punishment proportionably increases. As where two persons coolly and deliberately engage in a duel: this being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray, though no mischief has actually ensued.<sup>5</sup> Another aggravation is, when thereby the officers of justice are disturbed in the due execution of their office: or where a respect to the particular place ought to restrain and regulate men's behavior, more than in common ones; as in the king's court, and the like. And upon the same account also all affrays in a church or church-yard are esteemed very heinous offenses, as being indignities to him to whose service those places are consecrated. Therefore mere quarrelsome words, which are neither an affray nor an offense in any other place, are penal here. For it is enacted by statute 5 & 6 Edw. VI. c. 4. that if any person shall, by words only, quarrel, chide, or brawl, in a church or church-yard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiae* [from entering the church]; and, if a clerk in orders, from the

ministration of his office during pleasure. And, if any person in such church or church-yard proceeds to smite or lay violent hands upon another, he shall be excommunicated *ipso facto* [by that fact]; or if he strikes him with a weapon, or draws any weapon with intent to strike, he shall besides excommunication (being convicted by a jury) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek. Two persons may be guilty of an affray: but,

6. RIOTS, routs, and unlawful assemblies must have three persons at least to constitute them. An unlawful assembly is when three, or more, do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it.<sup>6</sup> A rout is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common, or of way; and make some advances towards it.<sup>7</sup> A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel:<sup>8</sup> as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner. The punishment of unlawful assemblies, if to the number of twelve, we have just now seen may be capital, according to the circumstances that attend it; but, from the number of three to eleven, is by fine and imprisonment only. The same is the case in riots and routs by the common law; to which the pillory in very enormous cases has been sometimes superadded.<sup>9</sup> And by the statute 13 Hen. IV. c. 7. any two justices, together with the sheriff our under-sheriff of the county, may come with the *posse comitatus* [power of the county], if need be, and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction; which record alone shall be a sufficient conviction of the offenders. In the interpretation of which statute it has been held, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable.<sup>10</sup> So that our ancient law, previous to the modern riot act, seems pretty well to have guarded against any violent breach of the public peace; especially as any riotous assembly on a public or general account, as to redress grievances or pull down all enclosures, and also resisting the king's forces if sent to keep the peace, may amount to overt acts of high treason, by levying war against the king.

7. NEARLY related to this head of riots is the offense of tumultuous petitioning; which was carried to an enormous height in the times preceding the grand rebellion. Wherefore by statute 13 Car. II. St. 1. c. 5. it is enacted, that not more than twenty names shall be signed to any petition to the king or either house of parliament, for any alteration of matters established by law in church or state; unless the contents thereof be previously approved, in the country, by three justices, or the majority of the grand jury at the assizes or quarter sessions; and in London, by the lord mayor, aldermen, and common council:<sup>11</sup> and that no petition shall be delivered by a company of more than ten persons: on pain in either case of incurring a penalty not exceeding 100£, and three months imprisonment.

8. AN eighth offense against the public peace is that of a forcible entry or detainer; which is committed by violently taking or keeping possession, with menaces, force, and arms, of lands and tenements, without the authority of law. This was formerly allowable to every person disseized, or turned out of possession, unless his entry was taken away or barred by his own neglect, or other

circumstances; which were explained more at large in a former volume.<sup>12</sup> But this being found very prejudicial to the public peace, it was thought necessary by several statutes to restrain all persons from the use of such violent methods, even of doing themselves justice; and much more if they have no justice in their claim.<sup>13</sup> So that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained with force, with violence, and unusual weapons. By the statute 5 Ric. II. St. 1. c. 8. all forcible entries are punished with imprisonment and ransom at the king's will. And by the several statutes of 15 Ric. II. c. 2. 8 Hen. VI. c. 9. 31 Eliz. c. 11. and 21 Jac. I. c. 15. upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon him own view, as in case of riots; and upon such conviction may commit the offender to jail, till he makes fine and ransom to the king. And moreover the justice or justices have power to summon a jury, to try the forcible entry or detainer complained of: and, if the same be found by that jury, then besides the fine on the offender, the justices shall make restitution by the sheriff of the possession, without inquiring into the merits of the title; for the force is the only thing to be tried, punished, and remedied by them: and the same may be done by indictment at the general sessions. But this provision does not extend to such as endeavor to maintain possession by force, where they themselves, or their ancestors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding.

9. THE offense of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton, 2 Edw. III. c. 3. upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armor.<sup>14</sup>

10. SPREADING false news, to make discord between the king and nobility, or concerning any great man of the realm, is punished by common law<sup>15</sup> with fine and imprisonment; which is confirmed by statutes Westm. 1. 3 Edw. I. c. 34. 2 Ric. II. St. 1. c. 5. and 12 Ric. II. c. 11.

11. FALSE and pretended prophecies, with intent to disturb the peace, are equally unlawful, and more penal; as they raise enthusiastic jealousies in the people, and terrify them with imaginary fears. They are therefore punished by our law, upon the same principle that spreading of public news of any kind, without communicating it first to the magistrate, was prohibited by the ancient Gauls.<sup>16</sup> Such false and pretended prophecies were punished capitally by statute 1 Edw. VI. c. 12. which was repealed in the reign of queen Mary. And now by the statute 5 Eliz. c. 15. the penalty for the first offense is a fine of 100£, and one year's imprisonment; for the second, forfeiture of all goods and chattels, and imprisonment during life.

12. BESIDES actual breaches of the peace, anything that tends to provoke or excite others to break it, is an offense of the same denomination. Therefore challenges to fight, either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment, according to the circumstances of the offense.<sup>17</sup> If this challenge arises on account of any money won at gaming, or if any assault or affray happen upon such account, the offender, by statute 9 Ann. c. 14. shall forfeit all his goods to the crown, and suffer two years imprisonment.



13. OF a nature very similar to challenges are libels, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule.<sup>18</sup> The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law:<sup>19</sup> and therefore the sending an abusive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace.<sup>20</sup> For the same reason it is immaterial with respect to the essence of a libel, whether the matter of it be true or false;<sup>21</sup> since the provocation, and not the falsity, is the thing to be punished criminally: though, doubtless, the falsehood of it may aggravate its guilt, and enhance its punishment. In a civil action, we may remember, a libel must appear to be false, as well as scandalous;<sup>22</sup> for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offense it may be against the public peace: and therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the sole consideration of the law. And therefore, in such prosecutions, the only facts to be considered are, first, the making or publishing of the book or writing; and secondly, whether the matter be criminal: and, if both these points are against the defendant, the offense against the public is complete. The punishment of such libelers, for either making, repeating, printing, or publishing the libel, is fine, and such corporal punishment as the court in their discretion shall inflict; regarding the quantity of the offense, and the quality of the offender.<sup>23</sup> By the law of the twelve tables at Rome, libels, which affected the reputation of another, were made a capital offense: but, before the reign of Augustus, the punishment became corporal only.<sup>24</sup> Under the emperor Valentinian<sup>25</sup> it was again made capital, not only to write, but to publish, or even to omit destroying them. Our law, in this and many other respects, corresponds rather with the middle age of Roman jurisprudence, when liberty, learning, and humanity, were in their full vigor, than with the cruel edicts that were established in the dark and tyrannical ages of the ancient *decemviri*, or the later emperors.

IN this, and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, some with a greater, others with a less degree of severity; the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution,<sup>26</sup> is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will hereby

laid upon freedom, of thought or inquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument heretofore used for restraining the just freedom of the press, “that it was necessary to prevent the daily abuse of it,” will entirely lose its force, when it is shown (by a seasonable exertion of the law) that the press cannot be abused to any bad purpose, without incurring a suitable punishment: whereas it never can be used to any good one, when under the control of an inspector. So true will it be found, that to censure the licentiousness, is to maintain the liberty, of the press.

## NOTES

1. Vol. I. pag. 117. 268. 350.
2. 1 Hawk. P. C. 134.
3. Ibid. 136.
4. Ibid. 137.
5. Ibid. 138.
6. 3 Inst. 176.
7. Bro. Abr. Riot. 4. 5.
8. 3 Inst. 176.
9. 1 Hawk. P. C. 159.
10. 1 Hal. P. C. 161.
11. This may be one reason (among others) why the corporation of London has, since the restoration, usually taken the lead in petitions to parliament for the alteration of any established law.
12. See Vol. III. pag. 174, etc.
13. 1 Hawk. P. C. 141.
14. Pott. Antiqu. b. 1. c. 26.
15. 2 Inst. 226. 3 Inst. 198.
16. “*Habent legibus sanctum, si quis de republica a finitimis rumore aut fama acceperit, uti ad magistratum deferat, ne cum alio communicet: quod saepe homines temerarios atque imperitos falsis rumoribus terreri, et ad facinus impelli, et de summis rebus consilium capere, cognitum est.*” [“They make it an inviolable rule, that if any one shall have received any intelligence in the neighborhood concerning the republic by rumour or report, he shall make it known to a magistrate, and not communicate it to any one else: for rash and ignorant men, it is well known, alarmed by false reports, are often driven to violent measures, and interfere in affairs of the highest consequence.”] Caes. de bell. Gall. lib. 6. cap. 19.
17. 1 Hawk. P. C. 135. 138.
18. 1 Hawk. P. C. 193.
19. Moor. 813.
20. 2 Brownl. 151. 12 Rep. 35. Hob. 215. Poph. 139. 1 Hawk. P. C. 195.
21. Moor. 627. 5 Rep. 125. 11 Mod. 99.

22. See Vol. III. pag. 125.

23. 1 Hawk. P. C. 196.

24. — *Quinetiam lex, Poenaque lata, malo quae nollet carmine quenquam, Describi: ) vertere modum formidine fustis.* [Moreover the law and punishment are decreed, which forbids any one to write scurrilous verses: — they changed their mode of writing through fear of corporal chastisement.] Hor. ad Aug. 152.

25. Cod. 9. 36.

26. The art of printing, soon after its introduction, was looked upon (as well in England as in other countries) as merely a matter of state, and subject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of license, and finally by the decrees of the court of star chamber; which limited the number of printers, and of presses which each should employ, and prohibited new publications unless previously approved by proper licensers. On the demolition of this odious jurisdiction in 1641, the long parliament of Charles I, after their rupture with that prince, assumed the same powers as the star chamber exercised with respect to the licensing of books; and in 1643, 1647, 1649, and 1652, (Scobell. i. 44, 134. ii 88, 230.) issued their ordinances for that purpose, founded principally on the star chamber decree of 1637. In 1662 was passed the statute 13 & 14 Car. II. c. 33. which (with some few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by statute 1 Jac. II. c. 17. and continued till 1692. It was then continued for two years longer by statute 4 W. & M. c. 24. but, though frequent attempts were made by the government to revive it, in the subsequent part of that reign, (Com. Journ. 11 Feb. 1694. 26 Nov. 1695. 22 Oct. 1696. 9 Feb. 1697. 31 Jan. 1698.) yet the parliament resisted it so strongly, that it finally expired, and the press became properly free, in 1694; and has ever since so continued.

## CHAPTER 12

### Of Offenses Against Public Trade

Offenses against public trade, like those of the preceding classes, are either felonious, or not felonious. Of the first sort are,

1. OWLING, so called from its being usually carried on in the night, which is the offense of transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture. This was forbidden at common law,<sup>1</sup> and more particularly by statute 11 Edw. III. c. 1. when the importance of our woollen manufacture was first attended to; and there are now many later statutes relating to this offense, the most useful and principal of which are those enacted in the reign of queen Elizabeth, and since. The statute 8 Eliz. c. 3. makes the transportation of live sheep, or embarking them on board any ship, for the first offense forfeiture of goods, and imprisonment for a year, and that at the end of the year the left hand shall be cut off in some public market, and shall be there nailed up in the openest place; and the second offense is felony. The statutes 12 Car. II. c. 32. and 7 & 8 W. III. c. 28. make the exportation of wool, sheep, or fuller's earth, liable to pecuniary penalties, and the forfeiture of the interest of the ship and cargo by one owners, if privy; and confiscation of goods, and three years imprisonment to the master and all the mariners. And the statute 4 Geo. I. c. 11. (amended and farther enforced by 12 Geo. II. c. 21. and 19 Geo. II. c. 34.) makes it transportation for seven years, if the penalties be not paid.

2. SMUGGLING, or the offense if importing goods without paying the duties imposed thereon by the laws of the customs and excise, is an offense generally connected and carried on hand in hand with the former. This is restrained by a great variety of statutes, which inflict pecuniary penalties and seizure of the goods for clandestine smuggling; and affix the guilt of felony, with transportation for seven years, upon more open, daring, and avowed practices: but the last of them, 19 Geo. II. c. 34. is for this purpose *instar omnium* [equal to all]; for it makes all forcible acts of smuggling, carried on in defiance of the laws, or even in disguise to evade them, felony without benefit of clergy: enacting, that if three or more persons shall assemble, with fire arms or other offensive weapons, to assist in the illegal exportation or importation of goods, or in rescuing the same after seizure, or in rescuing offenders in custody for such offenses; or shall pass with such goods in disguise; or shall would, shoot at, or assault any officers of the revenue when in the execution of their duty; such persons shall be felons, without the benefit of clergy. As to that branch of the statute, which required any person, charged upon oath as a smuggler, under pain of death, to surrender himself upon himself upon proclamation, it seems to be expired; as the subsequent statutes,<sup>2</sup> which continue the original act to the present time, do in terms continue only so much of the said act, as relates to the punishment of the offenders, and not to the extraordinary method of apprehending or causing them to surrender: and for offenses of this positive species, where punishment (though necessary) is rendered so by the laws themselves, which by imposing high duties on commodities increase the temptation to evade them, we cannot surely be too cautious in inflicting the penalty of death.<sup>3</sup>

3. ANOTHER offense against public trade is fraudulent bankruptcy, which was sufficiently spoken of in a former volume;<sup>4</sup> when we thoroughly examined the nature of these unfortunate traders. I shall therefore here barely mention over again some abuses incident to bankruptcy, *viz.* the bankrupt's neglect of surrendering himself to his creditors; his non-conformity to the directions of the several

statutes; his concealing or embezzling his effects to the value of 20£; and his withholding any books or writings with intent to defraud his creditors: all which the policy of our commercial country has made capital in the offender; or, felony without benefit of clergy. And indeed it is allowed in general, by such as are the most averse to the infliction of capital punishment, that the offense of fraudulent bankruptcy, being an atrocious species of the *crimen falsi* [forgery], ought to be put upon a level with those of forgery and falsifying the coin.<sup>5</sup> To this head we may also subjoin, that by statute 32 Geo. II. c. 28. it is felony punishable by transportation for seven years, if a prisoner, charged in execution for any debt under 100£, neglects or refuses on demand to discover and deliver up his effects for the benefit of his creditors. And these are the only felonious offenses against public trade; the residue being mere misdemeanors: as,

4. USURY, which is an unlawful contract upon the loan of money, to receive the same again with exorbitant increase. Of this also we had occasion to discourse at large in a former volume.<sup>6</sup> We there observed that by statute 37 Hen. VIII. c. 9. the rate of interest was fixed at 10£ percent per annum: which the statute 13 Eliz. c. 8. confirms; and ordains, that all brokers shall be guilty of a *praemunire* [forewarning] that transact any contracts for more, and the securities themselves shall be void. The statute 21 Jac. I. c. 17. reduced interest to eight percent; and, it having been lowered in 1650, during the usurpation, to six percent, the same reduction was re-enacted after the restoration by statute 12 Car. II. c. 13. and, lastly, the statute 12 Ann. St. 2. c. 16. has reduced it to five percent. Wherefore not only all contracts for taking more are in themselves totally void, but also the lender shall forfeit treble the money borrowed. Also if any scrivener or broker takes more than five shillings percent procuration-money, or more than twelve-pence for making a bond, he shall forfeit 20£ with costs, and shall suffer imprisonment for half a year.

5. CHEATING is another offense, more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither therefore may be referred that prodigious multitude of statutes, which are made to prevent deceits in particular trades, and which are chiefly of use among the traders themselves. For so cautious has the legislature been, and so thoroughly abhors all indirect practices, that there is hardly a considerable fraud incident to any branch of trade, but what is restrained and punished by some particular statute. The offense also of breaking the assize of bread, or the rules laid down by law, and particularly by statute 31 Geo. II. c. 29. and 3 Geo. III. c. 11. for ascertaining its price in every given quantity, is reducible to this head of cheating: as is likewise in a peculiar manner the offense of selling by false weights and measures; the standard of which fell under our consideration in a former volume.<sup>7</sup> The punishment of bakers breaking the assize, was anciently to stand in the pillory, by statute 51 Hen. III. St. 6. and for brewers (by the same act) to stand in the tumbrel or dungcart:<sup>8</sup> which, as we learn from domesday book, was the punishment for knavish brewers in the city of Chester so early as the reign of Edward the confessor. “*Malam cervisiam faciens, in cathedra ponebatur stercoris.*”<sup>9</sup> [“He who made bad beer, was placed in a dung-cart.”] But now the general punishment for all frauds of this kind, if indicted (as they may be) at common law, is by fine and imprisonment: though the easier and more usual way is by levying on a summary conviction, by distress and sale, the forfeitures imposed by the several acts of parliament. Lastly, any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory.<sup>10</sup> And by the statutes 33 Hen. VIII. c. 1. and 30 Geo. II. c. 24. if any man defrauds another of any valuable chattels by color of any false token, counterfeit letter, or false pretense, or pawns or disposes of another's goods

without the consent to the owner, he shall suffer such punishment by imprisonment, fine pillory, transportation, whipping, or other corporal pain, as the court shall direct.

6. THE offense of forestalling the market is also an offense against public trade. This, which (as well as the two following) is also an offense at common law,<sup>11</sup> is described by statute 5 & 6 Edw. VI. c. 14. to be the buying or contracting for any merchandise or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there: any of which practices make the market dearer to the fair trader.

7. REGRATING is described by the same statute to be the buying of corn, or other dead victual, in any market, and selling them again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as very successive seller must have a successive profit.

8. ENGROSSING, by the same statute, is the getting into one's possession, or buying up, of corn or other dead victuals, with intent to sell them again. This must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And the penalty for these three offenses by this statute (which is the last that has been made concerning them) is the forfeiture of the goods or their value, and two months imprisonment for the first offense; double value and six months imprisonment for the second; and, for the third, the offender shall forfeit all his goods, be set in the pillory, and imprisoned at the king's pleasure. Among the Romans these offenses, and other male-practices to raise the price of provisions, were punished by a pecuniary mulct. "*Poena viginti aureorum statuitur adversus eum, qui contra annonam fecerit, societatemve coierit, quo annona carior fiat.*"<sup>12</sup> ["Those who entered into any association, or employed any other means, by which the price of provisions was enhanced, were fined twenty guineas."]

9. MONOPOLIES are much the same offense in other branches of trade, that engrossing is in provisions: being a license or privilege allowed by the king for the sole buying and selling, making, working, or using, of anything whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before.<sup>13</sup> These had been carried to an enormous height during the reign of queen Elizabeth; and were heavily complained of by Sir Edward Coke,<sup>14</sup> in the beginning of the reign of king James the first: but were in great measure remedied by ft 21 Jac. I. c. 3. which declares such monopolies to be contrary to law and void; (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions;) and monopolists are punished with the forfeiture of treble damages and double costs, to those whom they attempt to disturb; and if they procure any action, brought against them for these damages, to be stayed by any extrajudicial order, other than of the court wherein it is brought, they incur the penalties of *praemunire*. Combinations also among victualers or artificers, to raise the price of provisions, or any commodities, or the rate of labor, are in many cases severely punished by particular statutes; and, in general, by statute 2 & 3 Edw. VI. c. 15. with the forfeiture of 10£, or twenty days imprisonment, with an allowance of only bread and water, for the first offense; 20£, or the pillory, for the second; and 40£, for the third, or else the pillory, loss of one ear, and perpetual infamy. In the same manner, by a constitution of the emperor Zeno,<sup>15</sup> all monopolies and combinations to keep up the price of merchandise, provisions, or workmanship, were prohibited upon pain of forfeiture of goods and perpetual banishment.

10. To exercise a trade in any town, without having previously served as an apprentice for seven years,<sup>16</sup> is looked upon to be detrimental to public trade, upon the supposed want of sufficient skill in the trader; and therefore is punished by statute 5 Eliz. c. 4. with the forfeiture of forty shillings by the month.

11. LASTLY, to prevent the destruction of our home manufactures, by transporting and seducing our artists to settle abroad, it is provided by statute 5 Geo. I. c. 27 that such as so entice or seduce them shall be fined 100£, and be imprisoned three months; and for the second offense shall be fined at discretion, and be imprisoned a year: and the artificers, so going into foreign countries, and not returning within six months after warning given them by the British ambassador where they reside, shall be deemed aliens, and forfeit all their lands and goods, and shall be incapable of any legacy or gift. By statute 23 Geo. II. c. 13. the seducers incur, for the first offense, a forfeiture of 500£, for each artificer contracted with to be sent abroad, and imprisonment for twelve months; and for the second 1000£, and are liable to two years imprisonment: and if any person exports any tools or utensils used in the silk or woollen manufactures, he forfeits the same and 200£, and the captain of the ship (having knowledge thereof) 100£: and if any captain of a king's ship, or officer of the customs, knowingly suffers such exportation, he forfeits 100£, and his employment; and is forever made incapable of bearing any public office.

## NOTES

1. *Mirr.* c. 1. § 3.
2. *Stat.* 26 Geo. II. c. 32. 32 Geo. II. c. 18. 4. Geo. III. c. 12.
3. See Vol. I. pag. 317. *Beccar.* ch. 33.
4. See Vol. II. pag. 481, 482.
5. *Beccar.* ch. 34.
6. See Vol. II. pag. 455, etc.
7. See Vol. I. pag. 274.
8. 3 *Inst.* 219.
9. *Seld.* tit. of hon. b. 2. c. 5. § 3.
10. 1 *Hawk. P. C.* 188.
11. 2 *Hawk. P. C.* 235.
12. *Ff.* 48. 12. 2.
13. 1 *Hawk. P. C.* 231.
14. 3 *Inst.* 181.
15. *Cod.* 4. 59. 1.
16. See Vol. I. pag. 427.

## CHAPTER 13

**Of Offenses Against the Public Health, and the Public Police or Economy**

THE fourth species of offenses, more especially affecting the commonwealth, are such as are against the public health of the nation; a concern of the highest importance, and for the preservation of which there are in many countries special magistrates or curators appointed.

1. THE first of these offenses is a felony; but, by the blessing of providence for more than a century past, incapable of being committed in this nation. For by statute 1 Jac. I. c. 31. it is enacted, that if any person infected with the plague, or dwelling in any infected house, he commanded by the mayor or constable, or other head officer of his town or vill, to keep his house, and shall venture to disobey it; he may be enforced, by the watchmen appointed on such melancholy occasions, to obey such necessary command: and, if any hurt ensue by such enforcement, the watchmen are thereby indemnified. And farther, if such person so commanded to confine himself goes abroad, and converses in company, if he has no plague sore upon him, he shall be punished as a vagabond by whipping, and be bound to his good behavior: but, if he has any infectious sore upon him uncured, he then shall be guilty of felony. By the statute 26 Geo. II. c. 6. (explained and amended by 29 Geo. II. c. 8.) the method of performing quarantine, or forty days probation, by ships coming from infected countries, is put in a much more regular and effectual order than formerly; and masters of ships, coming from infected places and disobeying the directions there given, or having the plague on board and concealing it, are guilty of felony without benefit of clergy. The same penalty also attends persons escaping from the lazarets, or places wherein quarantine is to be performed; and officers and watchmen neglecting their duty; and persons conveying goods or letters from ships performing quarantine.

2. A SECOND, but much inferior, species of offense against public health is the selling of unwholesome provisions. To prevent which the statute 51 Hen. III. St. 6. and the ordinance for bakers, c. 7. prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement for the first offense, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by the statute 12 Car. II. c. 25. §. 11. any brewing or adulteration of wine is punished with the forfeiture of 100£, if done by the wholesale merchant; and 40£, if done by the vintner or retail trader. These are all the offenses which may properly be said to respect the public health.

V. THE last species of offenses which especially affect the commonwealth are those against the public police and economy. By the public police and economy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations. This head of offenses must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society, and are not comprehended under any of the four preceding species. These amount, some of them to felony, and others to misdemeanors only. Among the former are,

1. THE offense of clandestine marriages: for by the statute 26 Geo. II. c. 33. 1. To solemnize



marriage in any other place besides a church, or public chapel wherein banns have been usually published, except by license from the archbishop; ) and, 2. To solemnize marriage in such church or chapel without due publication of banns, or license obtained from a proper authority; ) do both of them not only render the marriage void, but subject the person solemnizing it to felony, punished by transportation for fourteen years: as, by three former statutes,<sup>1</sup> he and his assistants were subject to a pecuniary forfeiture of 100£ 3. To make a false entry in a marriage register; to alter it when made; to forge, or counterfeit, such entry, or a marriage license, or aid and abet such forgery; to utter the same as true, knowing it to be counterfeit; or to destroy or procure the destruction of any register, in order to vacate any marriage, or subject any person to the penalties of this act; all these offenses, knowingly and willfully committed, subject the party to the guilt of felony, without benefit of clergy.

2. ANOTHER felonious offense, with regard to this holy estate of matrimony, is what our law corruptly calls bigamy; which properly signifies being twice married, but with us is used as synonymous to polygamy, or having a plurality of wives at once.<sup>2</sup> Such second marriage, living the former husband or wife, is simply void, and a mere nullity, by the ecclesiastical law of England: and yet the legislature has thought it just to make it felony, by reason of its being so great a violation of the public economy and decency of a well ordered state. For polygamy can never be endured under any rational civil establishment, whatever specious reasons may be urged for it by the eastern nations, the fallaciousness of which has been fully proved by many sensible writers: but in northern countries the very nature of the climate seems to reclaim against it; it never having obtained in this part of the world, even from the time of our German ancestors; who, as Tacitus informs us,<sup>3</sup> “*prope soli barbarorum singulis uxoribus contenti sunt*” [“almost the only barbarians who are contented with one wife”]. It is therefore punished by the laws both of ancient and modern Sweden with death.<sup>4</sup> And with us in England it is enacted by statute 1 Jac. I. c. 11. that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony; but within the benefit of clergy. The first wife in this case shall not be admitted as an evidence against her husband, because she is the true wife; but the second may, for she is indeed no wife at all;<sup>5</sup> and so, *vice versa*, of a second husband. This act makes an exception to five cases, in which such second marriage, though in the three first it is void, is yet no felony. 1. Where either party bath been continually abroad for seven years, whether the party in England has notice of the other's being living or no. 2. Where either of the parties has been absent from the other seven years, within this kingdom, and the remaining party has had no notice of the other's being alive within that time. 3. Where there is a divorce or separation *a mensa et thoro* [from bed and board] by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed *a vinculo* [from (marital) bonds]. Or, 5. Where either of the parties was under the age of consent at the time of the first marriage: for in such case the first marriage was voidable by the disagreement of either party, which this second marriage very clearly amounts too. But, if at the age of consent the parties had agreed to the marriage; and afterwards one of them should marry again; I should apprehend that such second marriage would be within the reason and penalties of the act.

3. A THIRD species of felony against the good order and economy of the kingdom, is by idle soldiers and mariners wandering about the realm, or persons pretending so to be, and abusing the name of that honorable profession.<sup>6</sup> Such a one, not having a testimonial or pass from a justice of the peace, limiting the time of his passage; or exceeding the time limited for fourteen days, unless

he falls sick; or forging such testimonial; is by statute 39 Eliz. c. 17. made guilty of felony, without benefit of clergy. This sanguinary law, though in practice deservedly antiquated, still remains a disgrace to our statute-book: yet attended with this mitigation, that the offender may be delivered, if any honest freeholder or other person of substance will take him into his service, and he abides in the same for one year; unless licensed to depart by his employer, who in such case shall forfeit ten pounds.

4. OUTLANDISH persons calling themselves Egyptians, or gypsies, are another object of the severity of some of our unrepealed statutes. These are a strange kind of commonwealth among themselves of wandering impostors and jugglers, who made their first appearance in Germany about the beginning of the sixteenth century, and have since spread themselves all over Europe. Munster, it is true,<sup>7</sup> who is followed and relied upon by Spelman,<sup>8</sup> fixes the time of their first appearance to the year 1417; but, as he owns, that the first whom he ever saw were in 1524, it is probably an error of the press for 1517: especially as other historians<sup>9</sup> inform us, that when sultan Selim conquered Egypt, in the year 1517, several of the natives refused to submit to the Turkish yoke; but, being at length subdued and banished, they agreed to disperse in small parties all over the world, where their supposed skill in the black art gave them an universal reception, in that age of superstition and credulity. In the compass of a very few years they gained such a number of idle proselytes, (who imitated their language and complection, and betook themselves to the same arts of chiromancy, begging, and pilfering) that they became troublesome and even formidable to most of the states of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591.<sup>10</sup> And the government in England took the alarm much earlier: for in 1530, they are described by statute 22 Hen. VIII. c. 10. as “outlandish people, calling themselves Egyptians, using no craft nor feat of merchandise, who have come into this realm and gone from shire to shire and place to place in great company, and used great, subtle, and crafty means to deceive the people; bearing them in hand, that they by palmistry could tell men's and women's fortunes; and so many times by craft and subtlety have deceived the people of their money, and also have committed many heinous felonies and robberies.” Wherefore they are directed to avoid the realm, and not to return under pain of imprisonment, and forfeiture of their goods and chattels; and, upon their trials for any felony which they may have committed, they shall not be entitled to a jury *de medietate linguae* [half foreign and half native]. And afterwards, it is enacted by statutes 1 & 2 Ph. & M. c. 4. and 5 Eliz. c. 20. that if any such persons shall be imported into the kingdom, the importer shall forfeit 40£. And if the Egyptians themselves remain one month in this kingdom; or if any person, being fourteen years old, (whether natural born subject or stranger) which has been seen or found in the fellowship of such Egyptians, or which has disguised him or herself like them, shall remain in the same one month, at one or several times; it is felony without benefit of clergy: and Sir Matthew Hale informs us,<sup>11</sup> that at one Suffolk assizes no less than thirteen gypsies were executed upon these statutes, a few years before the restoration. But, to the honor of our national humanity, there are no instances more modern than this, of carrying these laws into practice.

5. To descend next to offenses, whose punishment is short of death. Common nuisances are a species of offenses against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires.<sup>12</sup> The nature of common nuisances, and their distinction from private nuisances, were explained in the preceding volume;<sup>13</sup> when we considered more particularly the nature of the private

sort, as a civil injury to individuals. I shall here only remind the student, that common nuisances are such inconvenient or troublesome offenses, as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow subjects. Of this nature are, 1. Annoyances in highways, bridges, and public rivers, by rendering the same inconvenient or dangerous to pass: either positively, by actual obstructions; or negatively, by want of reparations. For both of these, the persons so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large, may be indicted, distrained to repair and amend them, and in some cases fined. Where there is an house erected, or an enclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a *purpresture*.<sup>14</sup> 2. All those kinds of nuisances, (such as offensive trades and manufactures) which when injurious to a private man are actionable, are, when detrimental to the public, punishable by public prosecution, and subject to fine according to the quantity of the misdemeanor: and particularly the keeping of hogs in any city or market town is indictable as a public nuisance.<sup>15</sup> 3. All disorderly inns or ale-houses, bawdy-houses, gaming-houses, stage-plays unlicensed, booths and stages for rope-dancers, mountebanks, and the like, are public nuisances, and may upon indictment be suppressed and fined.<sup>16</sup> Inns, in particular, being intended for the lodging and receipt of travelers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveler without a very sufficient cause: for thus to frustrate the end of their institution is held to be disorderly behavior.<sup>17</sup> Thus too the hospitable laws of Norway punish, in the severest degree, such inn-keepers as refuse to furnish accommodations at a just and reasonable price.<sup>18</sup> 4. By statute 10 & 11 W. III. c. 17. all lotteries are declared to be public nuisances, and all grants, patents, or licenses for the same to be contrary to law. 5. Cottages are held to be common nuisances, if erected singly on the waste, being harbors for thieves and other idle and dissolute persons. Therefore it is enacted by statute 31 Eliz. c. 7. that no person shall erect a cottage, unless he lays to it four acres of freehold land of inheritance to be occupied therewith, on pain to forfeit to the king 10£ for its erection, and 40 s. per month for its continuance: and no owner or occupier of a cottage shall suffer any inmates therein, or more families than one to inhabit there, on pain to forfeit 10 s. per month to the lord of the leet. This seems, upon our present more enlarged notions, a hard and impolitic law; depriving the people of houses to dwell in, and consequently preventing the populousness of towns and parishes: which, though it is generally endeavored to be guarded against, though a fatal rural policy, (being sometimes, when the poor are ill-managed, an intolerable hardship) yet, taken in a national view, and on a supposition of proper industry and good parochial government, is a very great advantage to any kingdom. But indeed this, like most other rigid or inconvenient laws, is rarely put in execution. 6. The making and selling of fireworks and squibs, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common nuisance, by statute 9 & 10 W. III. c. 7. and therefore is punishable by fine. 7. Eaves-droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet:<sup>19</sup> or are indictable at the sessions, and punishable by fine and finding sureties for the good behavior.<sup>20</sup> 8. Lastly, a common scold, *communis rixatrix*, (for our law-latin confines it to the feminine gender) is a public nuisance to her neighborhood. For which offense she may be indicted;<sup>21</sup> and, if convicted, shall<sup>22</sup> be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or cucking stool, which in the Saxon language signifies

the scolding stool; though now it is frequently corrupted into ducking stool, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment.<sup>23</sup>

6. IDLENESS in any person whatsoever is also a high offense against the public economy. In China it is a maxim, that if there be a man who does not work, or a woman that is idle, in the empire, somebody must suffer cold or hunger: the produce of the lands not being more than sufficient, with culture, to maintain the inhabitants; and therefore, though the idle person may shift off the want from himself, yet it must in the end fall somewhere. The court also of Areopagus at Athens punished idleness, and exerted a right of examining every citizen in what manner he spent his time; the intention of which was,<sup>24</sup> that the Athenians, knowing they were to give an account of their occupations, should follow only such as were laudable, and that there might be no room left for such as lived by unlawful arts. The civil law expelled all sturdy vagrants from the city:<sup>25</sup> and, in our own law, all idle persons or vagabonds, whom our ancient statutes describe to be “such as wake on the night, and sleep on the day, and haunt customable taverns, and ale-houses, and routs about; and no man wot from whence they come, ne whither they go;” or such as are most particularly described by statute 17 Geo. II. c. 5. and divided into three classes, idle and disorderly persons, rogues and vagabonds, and incorrigible rogues: ) all these are offenders against the good order, and blemishes in the government, of any kingdom. They are therefore all punished, by the statute last-mentioned; that is to say, idle and disorderly persons with one month's imprisonment in the house of correction; rogues and vagabonds with whipping and imprisonment not exceeding six months; and incorrigible rogues with the like discipline and confinement, not exceeding two years: the breach and escape from which confinement in one of an inferior class, ranks him among incorrigible rogues; and in a rouge (before incorrigible) makes him a felon, and liable to be transported for seven years. Persons harboring vagrants are liable to a fine of forty shillings, and to pay all expenses brought upon the parish thereby; in the same manner .as by our ancient laws, whoever harbored any stranger for more than two nights, was answerable to the public for any offense that such his inmate might commit.<sup>26</sup>

7. UNDER the head of public economy may also be properly ranked all sumptuary laws against luxury, and extravagant expenses in dress, diet, and the like; concerning the general utility of which to a state, there is much controversy among the political writers. Baron Montesquieu laws it down,<sup>27</sup> that luxury is necessary in monarchies, as in France; but ruinous to democracies, as in Holland. With regard therefore to England, whose government is compounded of both species, it may still be a dubious question, how far private luxury is a public evil; and, as such, cognizable by public laws. and indeed our legislators have several times changed their sentiments as to this point: for formerly there were a multitude of penal laws existing, to restrain excess in apparel;<sup>28</sup> chiefly made in the reigns of Edward the third, Edward the fourth, and Henry the eighth, against piked shoes, short doublets, and long coats; all of which were repealed by statute 1 Jac. I. c. 25. But, as to excess in diet, there still remains one ancient statute unrepealed, 10 Edw. III. st. 3. which ordains that no man shall be served at dinner or supper, with more than two courses; except upon some great holy days there specified, in which he may be served with three.

8. NEXT to that of luxury, naturally follows the offense of gaming, which is generally introduced to supply or retrieve the expenses occasioned by the former: it being a kind of tacit confession, that the company engaged therein do, in general, exceed the bounds of their respective fortunes; and

therefore they cast lots to determine upon whom the ruin shall at present fall, that the rest may be saved a little longer. But, taken in any light, it is an offense of the most alarming nature; tending by necessary consequence to promote public idleness, theft, and debauchery among those of a lower class: and, among persons of a superior rank, it has frequently been attended with the sudden ruin and desolation of ancient and opulent families, an abandoned prostitution of every principle of honor and virtue, and too often has ended in self-murder. To restrain this pernicious vice, among the inferior sort of people, the statute 33 Hen. VIII. c. 9. was made; which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diversions there specified,<sup>29</sup> unless in the time of Christmas, under pecuniary pains and imprisonment. And the same law, and also the statute 30 Geo. III. c. 24. inflict pecuniary penalties, as well upon the master of any public house wherein servants are permitted to game, as upon the servants themselves who are found to be gaming there. But this is not the principal ground of modern complaint: it is the gaming in high life, that demands the attention of the magistrate; a passion to which every valuable consideration is made a sacrifice, and which we seem to have inherited from our ancestors the ancient Germans; whom Tacitus<sup>30</sup> describes to have been bewitched with the spirit of play to a most exorbitant degree. “They addict themselves, says he, to dice, (which is wonderful) when sober, and a serious employment; with such a mad desire of winning or losing, that, when stripped of everything else, they will stake at last their liberty, and their very selves. The loser goes into a voluntary slavery, and, though younger and stronger than his antagonist, suffers himself to be bound and sold. And this perseverance in so bad a cause they call the point of honor: *ea est in re prava pervicacia, ipsi fidem vocant.*” One would almost be tempted to think Tacitus was describing a modern Englishman. When men are thus intoxicated with so frantic a spirit, laws will be of little avail: because the same false sense of honor, that prompts a man to sacrifice himself, will deter him from appealing to the magistrate. Yet it is proper that laws should be, and be known publicly, that gentlemen may learn what penalties they willfully incur, and what a confidence they repose in sharpers; who, if successful in play, are certain to be paid with honor, or, if unsuccessful, have it in their power to be still greater gainers by informing: For by statute 16 Car. II. c. 7. if any person by playing or betting shall lose more than 100£, at one time, he shall not be compellable to pay the same; and the winner shall forfeit treble the value, one moiety to the king, the other to the informer. The statute 9 Ann. c. 14. enacts, that all bonds and other securities, given for money won at play, or money lent at the time to play withal, shall be utterly void: that all mortgages and encumbrances of lands, made upon the same consideration, shall be and inure to the use of the heir of the mortgagor: that, if any person at one time loses 10£, at play, he may sue the winner, and recover it back by action of debt at law; and, in case the loser does not, any other person may sue the winner for treble the sum so lost; and the plaintiff in either case may examine the defendant himself upon oath: and that in any of these suits no privilege of parliament shall be allowed. The statute farther enacts, that if any person cheats at play, and at one time wins more than 10£, or any valuable thing, he may be indicted thereupon, and shall forfeit five times the value, shall be deemed infamous, and suffer such corporal punishment as in case of willful perjury. By several statutes of the reign of king George II,<sup>31</sup> all private lotteries by tickets, cards, or dice, (and particularly the games of faro, basset, ace of hearts, hazard, passage, roly polly, and all other games with dice, except backgammon) are prohibited under a penalty of 200£, for him that shall erect such lotteries, and 50£, a time for the players. Public lotteries, unless by authority of parliament, and all manner of ingenious devices, under the denomination of sales or otherwise, which in the end are equivalent to lotteries, were before prohibited by a great variety of statutes<sup>32</sup> under heavy pecuniary penalties. But particular descriptions will ever be lame and

deficient, unless all games of mere chance are at once prohibited; the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another. The statute 13 Geo. II. c. 19. to prevent the multiplicity of horse races, another fund of gaming, directs that no plates or matches under 50£, value shall be run, upon penalty of 200£, to be paid by the owner of each horse running, and 100£, by such as advertise the plate. By statute 188 Geo. II. c. 34. the statute 9 Ann. is farther enforced, and some deficiencies supplied: the forfeitures of that act may now be recovered in a court of equity; and moreover, if any man be convicted upon information or indictment of winning or losing at any sitting 10£ or 20£, within twenty four hours, he shall forfeit five times the sum. Thus careful has the legislature been to prevent this destructive vice: which may show that our laws against gaming are not so deficient, as ourselves and our magistrates in putting those laws in execution.

9. LASTLY, there is another offense, so constituted by a variety of acts of parliament, which are so numerous and so confused, and the crime itself of so questionable a nature, that I shall not detain the reader with many observations thereupon. And yet it is an offense which the sportsmen of England seem to think of the highest importance; and a matter, perhaps the only one, of general and national concern: associations having been formed all over the kingdom to prevent its destructive progress. I mean the offense of destroying such beasts and fowls, as are ranked under the denomination of game: which, we may remember, was formerly observed,<sup>33</sup> (upon the old principles of the forest law) to be a trespass and offense in all persons alike, who have not authority from the crown to kill game (which is royal property) by the grant of either a free warren, or at least a manor of their own. But the laws, called the game laws, have also inflicted additional punishments (chiefly pecuniary) on persons guilty of this general offense, unless they be people of such rank or fortune as is therein particularly specified. All persons therefore, of what property or distinction soever, that kill game out of their own territories, or even upon their own estates, without the king's license expressed by the grant of a franchise, are guilty of the first original offense, of encroaching on the royal prerogative. And those indigent persons who do so, without having such rank or fortune as is generally called a qualification, are guilty not only of the original offense, but of the aggravations also, created by the statutes for preserving the game: which aggravations are so severely punished, and those punishments so implacably inflicted, that the offense against the king is seldom thought of, provided the miserable delinquent can make his peace with the lord of the manor. This offense, thus aggravated, I have ranked under the present head, because the only rational footing, upon which we can consider it as a crime, is that in low and indigent persons it promotes idleness, and takes them away from their proper employments and callings; which is an offense against the public police and economy of the commonwealth.

THE statutes for preserving the game are many and various, and not a little obscure and intricate; it being remarked,<sup>34</sup> that in one statute only, 5 Ann. c. 14. there is false grammar in no fewer than six places, besides other mistakes: the occasion of which, or what denomination of persons were probably the penners of these statutes, I shall not at present inquire. It is in general sufficient to observe, that the qualifications for killing game as they are usually called, or more properly the exemptions from the penalties inflicted by the statute law, are, 1. The having a freehold estate of 100£, per annum; there being fifty times the property required to enable a man to kill a partridge, as to vote for a knight of the shire: 2. A leasehold for ninety nine years of 150£, per annum: 3. Being the son and heir apparent of an esquire (a very loose and vague description) or person of superior

degree: 4. Being the owner, or keeper, of a forest, park, chase, or warren. For unqualified persons transgressing these laws, by killing game, keeping engines for that purpose, or even having game in their custody, or for persons (however qualified) that kill game, or have it in possession, at unseasonable times of the year, there are various penalties assigned, corporal and pecuniary, by different statutes;<sup>35</sup> on any of which, but only on one at a time, the justices may convict in a summary way, or prosecutions may be carried on at the assizes. And, lastly, by statute 28 Geo. II. c. 12. no person, however qualified to kill, may make merchandise of this valuable privilege, by selling or exposing to sale any game, on pain of like forfeiture as if he had no qualification.

### NOTES

1. 6 & 7 W. III. c. 6. 7. & 8 W. III. c. 35. 10 Ann. c. 19. § 176.
2. 3 Inst. 88.
3. de mor. Germ. 18.
4. Stiernh. *de jure Sueon.* l. 3. c. 2.
5. 1 Hal. P. C. 693.
6. 3 Inst. 85.
7. Cosmogr. l. 3.
8. Gloss. 193.
9. Mod. Univ. Hist. xliii. 271.
10. Dufresne. Gloss. I. 200.
11. 1 Hal. P. C. 671.
12. 1 Hawk. P. C. 197.
13. Vol. III. pag. 216.
14. Co. Litt. 277. from the French *pourpris*, an enclosure.
15. Salk. 460.
16. 1 Hawk. P. C. 198. 225.
17. 1 Hal. P. C. 225.
18. Stiernh. *de jure Sueon.* l. 2. c. 9.
19. Kitch. of courts. 20.
20. Ibid. 1 Hawk. P. C. 132.
21. 6 Mod. 213.
22. 1 Hawk. P. C. 198. 200.
23. 3 Inst. 219.
24. Valcr. Maxim. l. 2. c. 6.
25. Nov. 80. c. 5.

26. LL. Edw. c. 27. Bracton. l. 3. tr. 2.c. 10. § 2.
27. Sp. L. b. 7. c. 2 & 4.
28. 3 Inst. 199.
29. Logetting in the fields, slide-thrift or shove-groat, cloysh-cayls, half-bowl, and coyting.
30. de mor. Germ c. 24.
31. 12 Geo. II. c. 28. 13 Geo. II. c. 19. 18 Geo. II. c. 34.
32. 10 & 11 W. III. c. 17. 9 Ann. c. 6. § 56. 10 Ann. c. 26. § 109. 8 Geo. I. c. 2. § 36, 37. 9 Geo. I. c. 19. § 4, 5. 6 Geo. II. c. 35. § 29, 30.
33. See Vol. II. pag. 417, etc.
34. Burn's Justice, tit. Game. § 3.
35. Burn's Justice, tit. Game.



## CHAPTER 14 Of Homicide

IN the ten preceding chapters we have considered, first, such crimes and misdemeanors as are more immediately injurious to God and his holy religion; secondly, such as violate or transgress the law of nations; thirdly, such as more especially affect the king, the father and representative of his people; fourthly, such as more directly infringe the rights of the public or commonwealth, taken in its collective capacity; and are now, lastly, to take into consideration those which in a more peculiar manner affect and injure individuals or private subjects.

WERE these injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall absolutely under the notion of private wrongs; for which a satisfaction would be due only to the party injured: the manner of obtaining which was the subject of our inquiries in the preceding volume. But the wrongs, which we are now to treat of, are of a much more extensive consequence; 1. Because it is impossible they can be committed without a violation of the laws of nature; of the moral as well as political rules of right: 2. Because they include in them almost always a breach of the public peace: 3. Because by their example and evil tendency they threaten and endanger the subversion of all civil society. Upon these accounts it is, that, besides the private satisfaction due and given in many cases to the individual, by action for the private wrong, the government also calls upon the offender to submit to public punishment for the public crime. And the prosecution of these offenses is always at the suit and in the name of the king, in whom by the texture of our constitution the *jus gladii*, or executory power of the law, entirely resides. Thus too, in the old Gothic constitution, there was a threefold punishment inflicted on all delinquents: first, for the private wrong to the party injured; secondly, for the offense against the king by disobedience to the laws; and thirdly, for the crime against the public by their evil example.<sup>1</sup> Of which we may trace the groundwork, in what Tacitus tells us of his Germans;<sup>2</sup> that, whenever offenders were fined, "*pars mulctae regi, vel civitati, pars ipsi qui vindicatur vel propinquis ejus, exsolvitur.*" ["Part of the fine is paid to the king or the state, and part to the plaintiff, or to his relations."]

THESE crimes and misdemeanors against private subjects are principally of three kinds; against their persons, their habitations, and their property.

OF crimes injurious to the persons of private subjects, the most principal and important is the offense of taking away that life, which is the immediate gift of the great creator; and which therefore no man can be entitled to deprive himself or another of, but in some manner either expressly commanded in, or evidently deducible from, those laws which the creator has given us; the divine laws, I mean, of either nature or revelation. The subject therefore of the present chapter will be, the offense of homicide or destroying the life of man, in its several stages of guilt, arising from the particular circumstances of mitigation or aggravation which attend it.

NOW homicide, or the killing of any human creature, is of three kinds; justifiable, excusable, and felonious. The first has no share of guilt at all; the second very little; but the third is the highest crime against the law of nature, that man is capable of committing.

## I. JUSTIFIABLE homicide is of diverse kinds.

1. SUCH as is owing to some unavoidable necessity, without any will, intention, or desire, and without any inadvertence or negligence, in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who has forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must require it, otherwise it is not justifiable: therefore wantonly to kill the greatest of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder.<sup>3</sup> For as Bracton<sup>4</sup> very justly observes, “*istud homicidium si sit ex livore, vel delectatione essundendi humanum sanguinem, licet juste occidatur iste, tamen occisor peccat mortaliter, propter intentionem corruptam.*” [“If the homicide be committed through malice, or a thirst of human blood, the perpetrator is guilty of murder on account of his evil intention, although the sufferer deserved death.”] And farther, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder.<sup>5</sup> and upon this account Sir Matthew Hale himself, though he accepted the place of a judge of the common pleas under Cromwell's government (since it is necessary to decide the disputes of civil property in the worst of times) yet declined to sit on the crown side at the assizes, and try prisoners; having very strong objections to the legality of the usurper's commission:<sup>6</sup> a distinction perhaps rather too refined; since the punishment of crimes is at least as necessary to society, as maintaining the boundaries of property. Also such judgment, when legal, must be executed by the proper officer, or his appointed deputy; for no one else is required by law to do it, which requisition it is, that justifies the homicide. If another person does it of his own head, it is held to be murder:<sup>7</sup> even though it be the judge himself.<sup>8</sup> It must farther be executed, *servato juris ordine* [per order of the court]; it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versa*, it is murder:<sup>9</sup> for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law; but, if a sheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commission of homicide: and, besides, this license might occasion a very gross abuse of his power. The king indeed may remit part of a sentence; as, in the case of treason, all but the beheading: but this is no change, no introduction of a new punishment; and in the case of felony, where the judgment is to be hanged, the king (it has been said) cannot legally order even a peer to be beheaded.<sup>10</sup> But this doctrine will be more fully considered in a subsequent chapter.

AGAIN: in some cases homicide is justifiable, rather by the permission, than by the absolute command of the law: either for the advancement of public justice, which without such indemnification would never be carried on with proper vigor; or, in such instances where it is committed for the prevention of some atrocious crime, which cannot otherwise avoided.

2. HOMICIDES, committed for the advancement of public justice, are; 1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him.<sup>11</sup> 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavor to take him, kills him.<sup>12</sup> This is of a piece with the old Gothic constitutions, which (Stiernhook informs us<sup>13</sup>) “*surem, si aliter capi non posset, occidere permittunt*” [“a thief may be killed if he cannot otherwise be taken”]. 3. In case of a riot, or rebellious assembly, the officers

endeavoring to disperse the mob are justifiable in killing them, both at common law,<sup>14</sup> and by the riot act, 1 Geo. I. c. 5. 4. Where the prisoners in a jail, or going to jail, assault the jailer or officer, and he in his defense kills any of them, it is justifiable, for the sake of preventing an escape.<sup>15</sup> 5. If trespassers in forests, parks, chases, or warrens, will not surrender themselves to the keepers, they may be slain; by virtue of the statute 21 Edw. I. St. 2. *de malefactoribus in parcis* [of trespassers in parks], and 3 & 4 W. & M. c. 10. But, in all these cases, there must be an apparent necessity on the officer's side; *viz.* that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, the deer-stealers could not but escape, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable. 6. If the champions in a trial by battle killed either of them the other, such homicide was justifiable, and was imputed to the just judgment of God, who was thereby presumed to have decided in favor of the truth.<sup>16</sup>

3. IN the next place, such homicide, as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature;<sup>17</sup> and also by the law of England, as it stood so early as the time of Bracton,<sup>18</sup> and as it is since declared by statute 24 Hen. VIII. c. 5. If any person attempt to burn it,<sup>19</sup>) and shall be killed in such attempt, the slayer shall be acquitted and discharged. This reaches not to any crime unaccompanied with force, as picking of pockets, or to the breaking open of any house in the day time, unless it carries with it an attempt of robbery also. So the Jewish law, which punished no theft with death, makes homicide only justifiable, in case of nocturnal house-breaking: "if a thief be found breaking up, and he be smitten that he die, no blood shall be shed for him: but if the sun be risen upon him, there shall blood be shed for him; for he should have made full restitution."<sup>20</sup> At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact:<sup>21</sup> and, by the Roman law of the twelve tables, a thief might be slain by night with impunity; or even by day, if he armed himself with any dangerous weapon:<sup>22</sup> which amounts very nearly to the same as is permitted by our own constitutions.

THE Roman law also justifies homicide, when committed in defense of the chastity either of oneself or relations:<sup>23</sup> and so also, according to Selden,<sup>24</sup> stood the law in the Jewish republic. The English law likewise justifies a woman, killing one who attempts to ravish her:<sup>25</sup> and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other.<sup>26</sup> And I make no doubt but the forcibly attempting a crime, of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this: that where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does; who holds,<sup>27</sup> "that all manner of force without right upon a man's person, puts him in a state of war with the aggressor; and, of consequence, that, being in such a state of war, he may lawfully kill him that puts him under this unnatural restraint." However just this conclusion may be in a state of uncivilized nature, yet the law of England, like that of every other well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system; nor will suffer with impunity any crime to be prevented by death, unless the same, if committed, would also be punished by death.

IN these instances of justifiable homicide, you will observe that the slayer is in no kind of fault whatsoever, not even in the minutest degree; and is therefore to be totally acquitted and discharged, with commendation rather than blame. But that is not quite the case in excusable homicide, the very name whereof imports some fault, some error, or omission; so trivial however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment.

II. EXCUSABLE homicide is of two sorts; either *per infortunium*, by misadventure; or *se defendendo*, upon a principle of self-preservation. We will first see wherein these two species of homicide are distinct, and then wherein they agree.

1. HOMICIDE *per infortunium*, or misadventure, is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a bystander; or, where a person, qualified to keep a gun, is shooting at a mark, and undesignedly kills a man:<sup>28</sup> for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his servant or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder;<sup>29</sup> for the act of immoderate correction is unlawful. Thus by an edict of the emperor Constantine,<sup>30</sup> when the rigor of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment, and, if death accidentally ensued, he was guilty of no crime: but if he struck him with a club or a stone, and thereby occasioned his death; or if in any other yet grosser manner “*immoderate suo jure utatur, tunc reus homicidii sit.*” [“If he uses his right immoderately, then he is guilty of homicide.”]

BUT to proceed. A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and swordplaying, the succeeding amusement of their posterity: and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony of manslaughter. But, if the king command or permit such diversion, it is said to be only misadventure, for then the act is lawful.<sup>31</sup> In like manner as, by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games, authorized or permitted by the state, was not held to be guilty of homicide.<sup>32</sup> Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful; but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence.<sup>33</sup> And in general, if death ensues in consequence of any idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts.<sup>34</sup>

2. HOMICIDE in self-defense, or *se defendendo*, upon a sudden affray, is also excusable rather than justifiable, by the English law. This species of self-defense must be distinguished from that just now mentioned, as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuse, but of justification. But the self-defense, which we are now speaking of, is that whereby a

man may protect himself from an assault, or the like, in the course of a sudden brawl or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or (as some rather choose to write it) *chaud-medley*; the former of which in its etymology signifies a casual affray, the latter an affray in the heat of blood or passion: both of them of pretty much the same import; but the former is in common speech too often erroneously applied to any manner of homicide by misadventure; whereas it appears by the statute 24 Hen. VIII. c. 5. and our ancient books,<sup>35</sup> that it is properly applied to such killing, as happens in self-defense upon a sudden rencounter.<sup>36</sup> This right of natural defense does not imply a right of attacking: for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice. They cannot therefore legally exercise this right of preventive defense, but in sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defense, it must appear that the slayer had no other possible means of escaping from his assailant.

IN some cases this species of homicide (upon *chance-medley* in self-defense) differs but little from manslaughter, which also happens frequently upon *chance-medley* in the proper legal sense of the word.<sup>37</sup> But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun to fight, or (having begun) endeavors to decline any farther struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense.<sup>38</sup> For which reason the law requires, that the person, who kills another in his own defense, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, no fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honor: because the king and his courts are the *vindices injuriarum* [avengers of injuries], and will give too the party wronged all the satisfaction he deserves.<sup>39</sup> In this the civil law also agrees with ours, or perhaps goes rather farther; "*qui cum aliter tueri se non possunt, damni culpam dederint, innoxii sunt.*"<sup>40</sup> ["Those who kill their adversary when they cannot otherwise defend, are innocent."] The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him:<sup>41</sup> for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defense he may kill his assailant instantly. And this is the doctrine of universal justice,<sup>42</sup> as well as of the municipal law.

AND, as the manner of the defense, so is also the time to be considered: for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge and not defense. Neither, under the color of self defense, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, this is murder; because of the previous malice and concerted design.<sup>43</sup> But if A upon a sudden quarrel assaults B first, and upon B's returning the assault, A really and *bona fide* flees; and, being driven to the wall, turns again upon B and kills him; this may be *se defendendo* according to some of our writers:<sup>44</sup> though others<sup>45</sup> have thought this opinion too favorable; inasmuch as the necessity, to which he is at last reduced,

originally arose from his own fault. Under this excuse of self-defense, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defense of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself.<sup>46</sup>

THERE is one species of homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by lord Bacon,<sup>47</sup> where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's, is excusable though unavoidable necessity, and the principle of self-defense; since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life.

LET us next take a view of those circumstances wherein these two species of homicide, by misadventure and self-defense, agree; and those are in their blame and punishment. For the law sets so high a value upon the life of a man, that it always intends some misbehavior, it perfumes negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it; who therefore is not altogether faultless.<sup>48</sup> And as to the necessity which excuses a man who kills another *se defendendo*, lord Bacon<sup>49</sup> entitles it *necessitas culpabilis* [culpable necessity], and thereby distinguishes it from the former necessity of killing a thief or a malefactor. For the law intends that the quarrel or assault arose from some unknown wrong, or some provocation, either in word or deed: and since in quarrels both parties may be, and usually are, in some fault; and it scarce can be tried who was originally in the wrong; the law will not hold the survivor entirely guiltless. But it is clear, in the other case, that where I kill a thief that breaks into my house, the original default can never be upon my side. The law besides may have a farther view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining, that he who slays his neighbor, without an express warrant from the law so to do, shall in no case be absolutely free from guilt.

NOR is the law of England singular in this respect. Even the slaughter of enemies required a solemn purgation among the Jews; which implies that the death of a man, however it happens, will leave some stain behind it. And the Mosaic law<sup>50</sup> appointed certain cities of refuge for him “who killed his neighbor unawares; as if a man goes into the wood with his neighbor to hew wood, and his hand fetches a stroke with the ax to cut down a tree, and the head slips from the helve, and lights upon his neighbor that he die, he shall flee unto one of these cities and live.” But it seems he was not held wholly blameless, any more than in the English law; since the avenger of blood might slay him before he reached his asylum, or if he afterwards stirred out of it till the death of the high priest. In the imperial law likewise<sup>51</sup> casual homicide was excused, by the indulgence of the emperor signed with his own sign manual, “*adnotatione principis*” [“the signature of the prince”]: otherwise the death of a man, however committed, was in some degree punishable. Among the Greeks<sup>52</sup> homicide by misfortune was expiated by voluntary banishment for a year.<sup>53</sup> In Saxony a fine is paid to the kindred of the slain; which also among the western Goths, was little inferior to that of voluntary homicide:<sup>54</sup> and in France<sup>55</sup> no person is ever absolved in cases of this nature, without a largess to

the poor, and the charge of certain masses for the soul of the party killed.

THE penalty inflicted by our laws is said by Sir Edward Coke to have been anciently no less than death;<sup>56</sup> which however is with reason denied by later and more accurate writers.<sup>57</sup> It seems rather to have consisted in a forfeiture, some say of all the goods and chattels, others of only part of them, by way of fine or *weregild*:<sup>58</sup> which was probably disposed of, as in France, *in pios usus* [to pious uses], according to the humane superstition of the times, for the benefit of his soul, who was thus suddenly sent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty (especially if a total forfeiture) growing more severe than was intended, in proportion as personal property has become more considerable, the delinquent has now, and has had as early as our records will reach,<sup>59</sup> a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same.<sup>60</sup> And indeed, to prevent this expense, in cases where the death has notoriously happened by misadventure or in self-defense, the judges will usually permit (if not direct) a general verdict of acquittal.<sup>61</sup>

III. FELONIOUS homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done, either by killing one's self, or another man.

SELF-MURDER, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law,<sup>62</sup> yet was punished by the Athenian law with cutting off the hand, which committed the desperate deed.<sup>63</sup> And also the law of England wisely and religiously considers, that no man has a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offense; one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who has an interest in the preservation of all his subjects; the law has therefore ranked this among the highest, crimes, making it a peculiar species of felony, a felony committed on oneself. A *felo de se* therefore is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if, attempting to kill another, he runs upon his antagonist's sword; or, shooting at another, the gun bursts and kills himself.<sup>64</sup> The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroners' juries are apt to carry it, *viz.* that the very act of suicide is an evidence of insanity; as if every man who acts contrary to reason, had no reason at all: for the same argument would prove every other criminal *non compos* [of unsound mind], as well as the self-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong; which is necessary, as was observed in a former chapter,<sup>65</sup> to form a legal excuse. And therefore, if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man.<sup>66</sup>

BUT now the question follows, what punishment can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial in the highway, with a stake driven through his body; on the latter, by a forfeiture of all his goods and chattels to the king: hoping that his care for either his own reputation, or the welfare of his family, would be some motive to restrain him from

so desperate and wicked an act. And it is observable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cause of his death. As if husband and wife be possessed jointly of a term of years in land, and the husband drowns himself; the land shall be forfeited to the king, and the wife shall not have it by survivorship. For by the act of casting himself into the water he forfeits the term; which gives a title to the king, prior to the wife's title by survivorship, which could not accrue till the instant of her husband's death.<sup>67</sup> And, though it must be owned that the letter of the law herein borders a little upon severity, yet it is some alleviation that the power of mitigation is left in the breast of the sovereign, who upon this (as on all other occasions) is reminded by the oath of his office to execute judgment in mercy.

THE other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt, which divide the offense into manslaughter, and murder. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles, and principally consists in this, that manslaughter arises from the sudden heat of the passions, murder from the wickedness of the heart.

I. MANSLAUGHTER is therefore thus defined,<sup>68</sup> the unlawful killing of another, without malice either express or implied: which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act. These were called in the Gothic constitutions "*homicidia vulgaria; quae aut casu, aut etiam sponte committuntur, sed in subitaneo quodam iracundiae calore et impetu.*"<sup>69</sup> ["Common homicides, which are committed by accident, or even willingly, but in the sudden heat and violence of passion."] And hence it follows, that in manslaughter there can be no accessories before the fact; because it must be done without premeditation.

AS to the first, or voluntary branch: if upon a sudden quarrel two persons fight, and one of them kills the other, this is manslaughter: and so it is, if they upon such an occasion go out and fight in a field; for this is one continued act of passion:<sup>70</sup> and the law pays that regard to human frailty, as not to put a hasty and a deliberate act upon the same footing with regard to guilt. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor, though this is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself; yet neither is it murder, for there is no previous malice; but it is manslaughter.<sup>71</sup> But in this, and in every other case of homicide upon provocation, if there be a sufficient cooling-time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder.<sup>72</sup> So, if a man takes another in the act of adultery with his wife, and kills him directly upon the spot; though this was allowed by the laws of Solon,<sup>73</sup> as likewise by the Roman civil law, (if the adulterer was found in the husband's own house<sup>74</sup>) and also among the ancient Goths;<sup>75</sup> yet in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, but it is manslaughter.<sup>76</sup> It is however the lowest degree of it: and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation.<sup>77</sup> Manslaughter therefore on a sudden provocation differs from excusable homicide *se defendendo* in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other no necessity at all, being only a sudden act of revenge.

THE second branch, or involuntary manslaughter, differs also from homicide excusable by



misadventure, in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the king's command, and one of them kills the other: this is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief.<sup>78</sup> So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only: but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning;<sup>79</sup> and murder, if he knows of their passing and gives no warning at all, for then it is malice against all mankind.<sup>80</sup> And, in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, it will be murder; but if no more was intended than a mere trespass, it will only amount to manslaughter.<sup>81</sup>

NEXT, as to the punishment of this degree of homicide: the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels.

BUT there is one species of manslaughter, which is punished as murder, the benefit of clergy being taken away from it by statute; namely, the offense of mortally stabbing another, though done upon sudden provocation. For by statute 1 Jac. I. c. 8. when one thrusts or stabs another, not then having a weapon drawn, or who has not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. This statute was made on account of the frequent quarrels and stabbings with short daggers, between the Scotch and the English, at the accession of James the first;<sup>82</sup> and, being therefore of a temporary nature, ought to have expired with the mischief, which it meant to remedy. For, in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling or shooting, can either extenuate or enhance the guilt: unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law has construed the statute so favorably in behalf of the subject, and so strictly when against him, that the offense of stabbing stands almost upon the same footing, as it did at the common law.<sup>83</sup> thus, (not to repeat the cases before-mentioned, of stabbing an adulteress, etc. which are barely manslaughter, as at common law) in the construction of this statute it has been doubted, whether, if the deceased had struck at all before the mortal blow given, this takes it out of the statute, though in the preceding quarrel the stabber had given the first blow; and it seems to be the better opinion, that this is not within the statute<sup>84</sup> Also it has been resolved, that the killing a man by throwing a hammer or other weapon is not within the statute; and whether a shot with a pistol be so or not, is doubted<sup>85</sup> But if the party slain had a cudgel in his hand, or had thrown a pot or a bottle or discharged a pistol at the party stabbing, this is a sufficient having a weapon drawn on his side within the words of the statute.<sup>86</sup>

2. WE are next to consider the crime of deliberate and wilful murder; a crime at which human nature starts, and which is I believe punished almost universally throughout the world with death. The

words of the Mosaic law (over and above the general precept to Noah,<sup>87</sup> that “whoso sheds man's blood, by man shall his blood be shed”) are very emphatic in prohibiting the pardon of murderers.<sup>88</sup> “Moreover ye shall take no satisfaction for the life of a murderer, who is guilty of death, but he shall surely be put to death; for the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it.” And therefore our law has provided one course of prosecution, (that by appeal, of which hereafter) wherein the king himself is excluded the power of pardoning murder: so that, were the king of England so inclined, he could not imitate that Polish monarch mentioned by Pufendorf;<sup>89</sup> who thought proper to remit the penalties of murder to all the nobility, in an edict with this arrogant preamble, “*nos, divini juris rigorem moderantes, etc.*” [“we, mitigating the rigor of divine law, etc.”]. But let us now consider the definition of this great offense.

THE name of murder was anciently applied only to the secret killing of another;<sup>90</sup> (which the word, *moërda*, signifies in the Teutonic language<sup>91</sup>) and it was defined “*homicidium quod nullo vidente, nullo sciente, clam perpetratur*”<sup>92</sup> [“homicide, committed privately, no one witnessing, no one knowing it”]: for which the vill wherein it was committed, or (if that were too poor) the whole hundred, was liable to a heavy amercement; which amercement itself was also denominated *murdrum*.<sup>93</sup> This was an ancient usage among the Goths in Sweden and Denmark; who supposed the neighborhood, unless they produced the murderer, to have perpetrated or at least connived at the murder:<sup>94</sup> and, according to Bracton,<sup>95</sup> was introduced into this kingdom by king Canute, to prevent his countrymen the Danes from being privily murdered by the English; and was afterwards continued by William the conqueror, for the like security to his own Normans.<sup>96</sup> And therefore if, upon inquisition had, it appeared that the person found slain was an Englishman, (the presentment whereof was denominated *englescherie*<sup>97</sup>) the country seems to have been excused from this burden. But, this difference being totally abolished by statute 14 Edw. III. c. 4. we must now (as is observed by Staundforde<sup>98</sup>) define murder in quite another manner, without regarding whether the party slain was killed openly or secretly, or whether he was of English or foreign extraction.

MURDER is therefore now thus defined, or rather described, by Sir Edward Coke;<sup>99</sup> “when a person, of sound memory and discretion, unlawfully kills any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied.” The best way of examining the nature of this crime will be by considering the several branches of this definition.

FIRST, it must be committed by a person of sound memory and discretion: for a lunatic or infant, as was formerly observed, are incapable of committing any crime; unless in such cases where they show a consciousness of doing wrong, and of course a discretion, or discernment, between good and evil.

NEXT, it happens when a person of such sound discretion unlawfully kills. The unlawfulness arises from the killing without warrant or excuse: and there must also be an actual killing to constitute murder; for a bare assault, with intent to kill, is only a great misdemeanor, though formerly it was held to be murder.<sup>100</sup> The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. Of these the most detestable of all is poison; because it can of all others be the least prevented either by manhood or forethought.<sup>101</sup> And therefore by the statute 22 Hen. VIII. c. 9. it was made treason, and a more grievous and lingering kind of death was inflicted on it than the common law allowed; namely, boiling to death;

but this act did not live long, being repealed by 1 Edw. VI. c. 12. There was also, by the ancient common law, one species of killing held to be murder, which is hardly so at this day, nor has there been an instance wherein it has been held to be murder for many ages past:<sup>102</sup> I mean by bearing false witness against another, with an express premeditated design to take away his life, so as the innocent person be condemned and executed.<sup>103</sup> The Gothic laws punished in this case, both the judge, the witnesses, and the prosecutor; “*peculiari poena judicem puniunt; peculiari testes, quorum fides judicem seduxit; peculiari denique et maxima auctorem, ut homicidam.*”<sup>104</sup> [“One particular punishment is inflicted on the judge, another on the witnesses whose testimony misled; and lastly, one of the greatest severity on the prosecutor, who is treated as a murderer.”] And, among the Romans, the *lex Cornelia, de sicariis* [Cornelian law of assassins], punished the false witness with death, as being guilty of a species of assassination<sup>105</sup> And there is no doubt but this is equally murder *in foro conscientiae* [in the court of conscience] as killing with a sword; though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such. If a man however does such an act, of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself: as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died;<sup>106</sup> and, of the harlot, who laid her child in an orchard, where a kite struck it and killed it.<sup>107</sup> So too, if a man has a beast that is used to do mischief; and he, knowing it, suffers it to go abroad, and it kills a man; even this is manslaughter in the owner: but if he had purposely turned it loose, though barely to frighten people and make what is called sport, it is with us (as in the Jewish law) as much murder, as if he had incited a bear or a dog to worry them.<sup>108</sup> If a physician or surgeon gives his patient a potion or plaster to cure him, which contrary to expectation kills him, this is neither murder, nor manslaughter, but misadventure; and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance:<sup>109</sup> but it has been held, that if it be not a regular physician or surgeon, who administers the medicine or performs the operation, it is manslaughter at the least.<sup>110</sup> Yet Sir Matthew Hale very justly questions the law of this determination; since physic [medicine] and salves were in use before licensed physicians and surgeons: wherefore he treats this doctrine as apocryphal, and fitted only to gratify and flatter licentiates and doctors in physic; though it may be of use to make people cautious and wary, how they meddle too much in so dangerous an employment.<sup>111</sup> In order also to make the killing murder, it is requisite that the party die within a year and a day after the stroke received, or cause of death administered; in the computation of which, the whole day upon which the hurt was done shall be reckoned the first.<sup>112</sup>

FARTHER; the person killed must be “a reasonable creature “in being, and under the king's peace,” at the time of the killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace or protection, is as much murder as to kill the most regular born Englishman; except he be an alien-enemy, in time of war.<sup>113</sup> To kill a child in its mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dies by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them.<sup>114</sup> But, as there is one case where it is difficult to prove the child's being born alive, namely, in the case of the murder of bastard children by the unnatural mother, it is enacted by statute 21 Jac. I. c. 27. that if any woman be delivered of a child, which if born alive should by law be a bastard; and endeavors privately to conceal its death, by burying the child or the like; the mother so offending shall suffer death as in the case of murder, unless she can prove by one witness at least that the child was actually born dead. This law, which

favors pretty strongly of severity, in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother, is nevertheless to be also met with in the criminal codes of many other nations of Europe; as the Danes, the Swedes, and the French:<sup>115</sup> but I apprehend it has of late years been usual with us in England, upon trials for this offense to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption (that the child, whose death is concealed, was therefore killed by its parent) is admitted to convict the prisoner.

LASTLY, the killing must be committed with malice aforethought, to make it the crime of murder. This is the grand criterion, which now distinguishes murder from other killing: and this malice prepense, *malitia praecogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general; the dictate of a wicked, depraved, and malignant heart,<sup>116</sup> *un disposition a faire un male chose* [a disposition to do wrong].<sup>117</sup> and it may be either express, or implied in law. Express malice is when one, with a sedate deliberate mind and formed design, does kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm.<sup>118</sup> This takes in the case of deliberate dueling, where both parties meet avowedly with an intent to murder: thinking it their duty, as gentlemen, and claiming it as their right, to wanton with their won lives and those of their fellow creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man: and therefore the law has justly fixed the crime and punishment of murder, on them, and on their seconds also.<sup>119</sup> Yet it requires such a degree of passive valor, to combat the dread of even undeserved contempt, arising from the false notions of honor too generally received in Europe, that the strongest prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy custom; till a method be found out of compelling the original aggressor to make some other satisfaction to the affronted party, which the world shall esteem equally reputable, as that which is now given at the hazard of the life and fortune, as well of the person insulted, as of him who has given the insult. Also, if even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia* [malice]. As when a park-keeper tied a boy, that was stealing wood, to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar, and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died; these were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter.<sup>120</sup> Neither shall he be guilty of a less crime, who kills another in consequence of such a wilful act, as shows him to be an enemy to all mankind in general; as going deliberately with a horse used to strike, or discharging a gun, among a multitude of people.<sup>121</sup> so if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And, if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed; as to beat a man, to commit a riot, or to rob a park; and one of them kills a man; it is murder in them all, because of the unlawful act, the *malitia praecogitata*, or evil intended beforehand.<sup>122</sup>

ALSO in many cases where no malice is expressed, the law will imply it: as, where a man wilfully poisons another, in such a deliberate act the law presumes malice, though no particular enmity can

be proved.<sup>123</sup> And if a man kills another suddenly, without any; or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act, upon a slight or no apparent cause. No affront, by words, or gestures only, is a sufficient provocation, so as to excuse or extenuate such acts of violence as manifestly endanger the life of another.<sup>124</sup> But if the person so provoked had unfortunately killed the other, by beating him in such a manner as showed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behavior, as adjudge it only manslaughter, and not murder.<sup>125</sup> In like manner if one kills an officer of justice, either civil or criminal, in the execution of his duty, or any of his assistants endeavoring to conserve the peace, or any private person endeavoring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall be guilty of murder.<sup>126</sup> And if one intends to do another felony, and undesignedly kills a man, this is also murder.<sup>127</sup> Thus if one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other. The same is the case, where one lays poison for A; and B, against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder.<sup>128</sup> It were endless to go through all the cases of homicide, which have been adjudged either expressly, or impliedly, malicious: these therefore may suffice as a specimen; and we may take it for a general rule, that all homicide is malicious, and of course amounts to murder, unless where justified by the command or permission of the law; excused on a principle of accident or self-preservation; or alleviated into manslaughter, by being either the involuntary consequence of some act, not strictly lawful or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury: the latter of whom are to decide whether the circumstances alleged be proved to have actually existed; the former, how far they extend to take away or mitigate the guilt. For all homicide is presumed to be malicious, until the contrary appears upon evidence.<sup>129</sup>

THE punishment of murder, and that of manslaughter, were formerly one and the same; both having the benefit of clergy: so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime.<sup>130</sup> But now, by statute 23 Hen. VIII. c. 1. and 1 Edw. VI. c. 12. the benefit of clergy is taken away from murder though malice prepense. In atrocious cases it was frequently usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains, near the place where the fact was committed: but this was no part of the legal judgment; and the like is still sometimes practiced in the case of notorious thieves. This, being quite contrary to the express command of the Mosaic law,<sup>131</sup> seems to have been borrowed from the civil law; which, besides the terror of the example, gives also another reason for this practice, *viz.* that it is a comfortable sight to the relations and friends of the deceased.<sup>132</sup> But now in England, it is enacted by statute 25 Geo II. c. 37. that the judge, before whom a murderer is convicted, shall in passing sentence direct him to be executed on the next day but one, (unless the same shall be Sunday, and then on the Monday following) and that his body be delivered to the surgeons to be dissected and anatomized;<sup>133</sup> and that the judge may direct his body to be afterwards hung in chains, but in no wise to be buried without dissection. And, during the short but awful interval between sentence and execution, he prisoner shall be kept alone, and sustained with only bread and water. But a power is allowed to the judge, upon good and sufficient cause, to respite the execution, and relax the other restraints of this act.

BY the Roman law, *parricide*, or the murder of one's parents or children, was punished in a much severer manner than any other kind of homicide. After being scourged, the delinquents were sewed up in a leather sack, with a live dog, a cock, a viper, and an ape, and so cast into the sea.<sup>134</sup> Solon, it is true, in his laws, made none against parricide; apprehending it impossible that any one should be guilty of so unnatural a barbarity.<sup>135</sup> And the Persians, according to Herodotus, entertained the same notion, when they adjudged all persons who killed their reputed parents to be bastards. And, upon some such reason as this, must we account for the omission of an exemplary punishment for this crime in our English laws; which treat it no otherwise than as simple murder, unless the child was also the servant of his parent.<sup>136</sup>

FOR, though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical connections, when coupled with murder, denominates it a new offense; no less than a species of treason, called *parva prodition*, or petit treason: which however is nothing else but an aggravated degree of murder;<sup>137</sup> although, on account of the violation of private allegiance, it is stigmatized as an inferior species of treason.<sup>138</sup> And thus, in the ancient Gothic constitution, we find the breach both of natural and civil relations ranked in the same class with crimes against the state and the sovereign.<sup>139</sup>

PETIT treason, according to the statute 25 Edw. III. c. 2. may happen three ways: by a servant killing his master, a wife her husband, or an ecclesiastical person (either secular, or regular) his superior, to whom he owes faith and obedience. A servant who kills his master whom he has left, upon a grudge conceived against him during his service, is guilty of petit treason: for the traitorous intention was hatched while the relation subsisted between them; and this is only an execution of that intention.<sup>140</sup> So if a wife be divorced *a mensa et thoro* [from bed and board], still the *vinculum matrimonii* [bonds of matrimony] subsists; and if she kills such divorced husband, she is a traitress.<sup>141</sup> And a clergyman is understood to owe canonical obedience, to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop: and therefore to kill any of these is petit treason.<sup>142</sup> As to the rest, whatever has been said, or remains to be observed hereafter, with respect to wilful murder, is also applicable to the crime of petit treason, which is no other than murder in its most odious degree: except that the trial shall be as in cases of high treason, before the improvements therein made by the statutes of William III;<sup>143</sup> and also except in its punishment.

THE punishment of petit treason, in a man, is to be drawn and hanged, and, in a woman, to be drawn and burned:<sup>144</sup> the idea of which latter punishment seems to have been handed down to us from the laws of the ancient Druids, which condemned a woman to be burned for murdering her husband;<sup>145</sup> and it is now the usual punishment for all sorts of treasons committed by those of the female sex.<sup>146</sup> Persons guilty of petit treason were first debarred the benefit of clergy by statute 12 Hen. VII. C. 7.

## NOTES

1. Stiernhook. l. 1. c. 5.
2. de mor. Germ. c. 12.
3. 1 Hal. P. C. 497.

4. fol. 120.
5. 1 Hawk. P. C. 70. 1 Hal. P. C. 497.
6. Burnet in his life.
7. 1 Hal. P. C. 501. 1 Hawk. P. C. 70.
8. Dalt. Just. c. 150.
9. Finch. L. 31. 3 Inst. 52. 1 Hal. P. C. 501.
10. 3 Inst. 52. 212.
11. 1 Hal. P. C. 494. 1 Hawk. P. C. 71.
12. 1 Hal. P. C. 494.
13. *de jure Goth.* l. 3. c. 5.
14. 1 Hal. P. C. 495. 1 Hawk. P. C. 161.
15. 1 Hal. P. C. 496.
16. 1 Hawk. P. C. 71.
17. Puff. L. of N. l. 2. c. 5.
18. fol. 155.
19. 1 Hal. P. C. 488.
20. Exod. Xxii. 2.
21. Potter. Antiqu. b. 1. c. 24.
22. Cic. pro Milone. 3. Ff. 9. 2. 4.
23. “Divus Hadrianus rescripsit, eum qui stuprum sibi vel suis inferentem occidit, dimittendum.” [“Homicide is justified when committed in defense of the chastity either of oneself or relations.”] (Ff. 48. 8. 1.)
24. de legib. Hebraeor. l. 4. c. 3.
25. Bac. Elem. 34. 1 Hawk. P. C. 71.
26. 1 Hal. P. C. 485, 486.
27. Ess. on gov. p. 2. c. 3.
28. 1 Hawk. P. C. 73, 74.
29. 1 Hal. P. C. 473, 474.
30. Cod. L. 9. t. 14.
31. 1 Hal. P. C. 473. 1 Hawk. P. C. 74.
32. Plato de LL. lib. 7. Ff. 9. 2. 7.
33. Hawk. P. C. 73.
34. Ibid. 74. 1 Hal. P. C. 472. Fost. 261.
35. Staundf. P. C. 16.
36. 3 Inst. 55. 57. Fost. 275. 276.

37. 3 Inst. 55.
38. Fost. 277.
39. 1 Hal. P. C. 481. 483.
40. Ff. 9. 2. 45.
41. 1 Hal. P. C. 483.
42. Puff. b. 2. c. 5. § 13.
43. 1 Hal. P. C. 479.
44. 1 Hal. P. C. 482.
45. 1 Hawk. P. C. 75.
46. 1 Hal. P. C. 484.
47. Elem. c. 5. See also 1 Hawk. P. C. 73.
48. 1 Hawk. P. C. 72.
49. Elem. c. 5.
50. Numb. c. 35. and Deut. c. 19.
51. Cod. 9. 16. 5.
52. Plato de Leg. lib. 9.
53. To this expiation by banishment the spirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty third Iliad, that, when a child, he was obliged to flee his country for casually killing his playfellow; “νηπιος, ουχ εθελων” [“careless but unintentional”].
54. Stiernh. *de jure Goth.* l. 3. c. 4.
55. De Mornay on the digest.
56. 2 Inst. 148. 315.
57. 1 Hal. P. C. 425. 1. Hawk. P. C. 75. Fost. 282, etc.
58. Fost. 287.
59. Fost. 283.
60. 2 Hawk. P. C. 381.
61. Fost. 288.
62. “*Si quis impatientia doloris, aut taedio vitae, aut morbo, aut furore, aut pudore, mori maluit, non animadvertatur in eum.*” [“If any one, under the pressure of grief, weariness of life, disease, madness, or shame, prefers death, his conduct shall not be considered to the prejudice of his character.”] Ff. 49. 16. 6.
63. Pott. Antiqu. b. 1. c. 26.
64. 1 Hawk. P. c. 68. 1 Hal. P. C. 413.
65. See pag. 24.
66. Hal. P. C. 412.
67. Finch. L. 216.



68. 1 Hal. P. C. 466.
69. Stiernh. *de jure Goth.* l. 3. c. 4.
70. 1 Hawk. P. C. 82.
71. Kelyng. 135.
72. Fost. 296.
73. Plutarch. in vit. Solon.
74. Ff. 48. 5. 24.
75. Stiernh. *de jure Goth.* l. 3. c. 2.
76. 1 Hal. P. C. 486.
77. Sir. T. Raym. 212.
78. 3 Inst. 56.
79. Kel. 40.
80. 3 Inst. 57.
81. Foster. 258.
82. 1 Lord Raym. 140.
83. Fost. 299, 300.
84. Fost. 301. 1 Hawk. P. C. 77.
85. 1 Hal. P. C. 470.
86. 1 Hawk. P. C. 77.
87. Gen. 9:6.
88. Numb. 35:31.
89. L. of N. b. 8. c. 3.
90. Dialog. de Scacch. l. 1. c. 10.
91. Stiernh. *de jure Sueon.* l. 3. c. 3.
92. Glanv. l. 14. c. 3.
93. Bract. l. 3. tr. 2. c. 15. § 7. Stat. Marlbr. c. 26 Fost. 281.
94. Stiernh. l. 3. c. 4.
95. l. 3. tr. 2. c. 15.
96. 1 Hal. P. C. 447.
97. Bract. ubi supr.
98. P. C. l. 1. c. 10.
99. 3 Inst. 47.
100. 1 Hal. P. C. 425.

101. 3 Inst. 48.

102. Fost. 132. In the case of Macdaniel and Berry, reported by Sir Michael Foster, though the attorney general declined to argue this point of law, I have grounds to believe it was not from any apprehension that the point was not maintainable, but from other prudential reasons. Nothing therefore should be concluded from the waiving of that prosecution.

103. Mirror. c. 1. § 9. Britt. c. 5. Bracton. l. 3. c. 4.

104. Stiernh. *de jure Goth.* l. 3. c. 3.

105. Ff. 48. 8. 1.

106. 1 Hawk. P. C. 78.

107. 1 Hal. P. C. 432.

108. Ibid., 431.

109. Mirr. c. 4. § 16. See Vol. III. pag. 122.

110. Britt. c. 5. 4. Inst. 251.

111. 1 Hal. P. C. 430.

112. 1 Hawk. P. C. 79.

113. 3 Inst. 50. 1 Hal. P. C. 433.

114. 3 Inst. 50. 1 Hawk. P. C. 80.

115. See Barrington on the statutes. 425.

116. Foster. 256.

117. 2 Roll. Rep. 461.

118. 1 Hal. P. C. 451.

119. 1 Hawk. P. C. 82.

120. 1 Hal. P. C. 454. 47. 4.

121. 1 Hawk. P. C. 74.

122. Ibid. 84.

123. Hal. P. C. 455.

124. 1 Hawk. P. C. 82. 1 Hal. P. C. 455, 456.

125. Fost. 291.

126. 1 Hal. P. C. 457. Foster. 308, etc.

127. 1 Hal. P. C. 465.

128. 1 Hal. P. C. 466.

129. Fost. 255.

130. 1 Hal. P. C. 450.

131. "The body of a malefactor shall not remain all night upon the tree; but thou shalt in any wise bury him in that day, that the land be not defiled." Deut. 21:23.

132. "*Famosos latrones, in his locis, ubi grassati sunt, furca figendos placuit; ut, et conspectu deterreantur alii, et solatio*

*sit cognatis interemptorum, eodem loco poena reddita, in quo latrones homicidia fecissent.*” [“Notorious robbers were hanged where they had committed the act: that others might be deterred by the sight, and also that the deceased’s relations might be comforted knowing that punishment was inflicted on the very spot of the murder.”] Ff. 48. 19 28. § 15.

133. Fost. 107.

134. Ff. 48. 9. 9.

135. Cic. Pro. S. Roscio. § 25.

136. 1 Hal. P. C. 380.

137. Foster. 107. 324. 336.

138. See pag. 75.

139. “*Omnium gravissima censetur vis facta ab incolis in patriam, subditis in regem, liberis in parentes, maritis in uxores, (et vice versa) servis in dominos, aut etiam ab homine in semetipsum.*” [“Violence exerted by inhabitants against their country, by subjects against their king, by children against their parents, by husbands against their wives (and vice versa), by servants against their masters, or even by man against himself, is the worst of all crimes.”] Stierhn. *de jure Goth.* l. 3. c. 3.

140. 1 Hawk. P. C. 89. 1 Hal. P. C. 380.

141. 1 Hal. P. C. 381.

142. Ibid.

143. Fost. 337.

144. 1 Hal. P. C. 382. 3. Inst. 311.

145. Caesar de bell. Gall. l. 6. c. 18.

146. See pag. 93.

## CHAPTER 15 Of Offenses Against the Persons of Individuals

HAVING in the preceding chapter considered the principal crime or public wrong, that can be committed against a private subject, namely, by destroying his life; I proceed now to inquire into such other crimes and misdemeanors, as more peculiarly affect the security of his person, which living.

OF these some are felonious, and in their nature capital; others are simple misdemeanors, and punishable with a lighter animadversion. Of the felonies the first is that of mayhem.

I. MAYHEM, *mahemium*, was in part considered in the preceding volume,<sup>1</sup> as a civil injury: but it is also looked upon in a criminal light by the law; being an atrocious breach of the king's peace, and an offense tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members, as may render him the less able in fighting, either to defend himself, or to annoy his adversary.<sup>2</sup> And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abate their courage, are held to be mayhems. But the cutting off his ear, or nose, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him.

BY the ancient law of England he that maimed any man, whereby he lost any part of his body, was sentenced to lose the like part; *membrum pro membro* [limb for limb]:<sup>3</sup> which is still the law in Sweden.<sup>4</sup> But this went afterwards out of use: partly because the law of retaliation, as was formerly shown,<sup>5</sup> is at best an inadequate rule of punishment; and partly because upon a repetition of the offense the punishment could not be repeated. So that, by the common law, as it for a long time stood, mayhem was only punishable with fine and imprisonment;<sup>6</sup> unless perhaps the offense of mayhem by castration, which all our old writers held to be felony; "*et sequitur aliquando poena capitalis, aliquando perpetuum exilium, cum omnium bonorum ademptione.*"<sup>7</sup> ["And sometimes capital punishment follows, sometimes perpetual exile with the loss of all his goods."] And this, although the mayhem was committed upon the highest provocation.<sup>8</sup>

BUT subsequent statutes have put the crime and punishment of mayhem more out of doubt. For, first, by statute 5 Hen. IV. c. 5. to remedy a mischief that then prevailed, of beating, wounding, or robbing a man, and then cutting out his tongue or putting out his eyes, to prevent him from being an evidence against them, this offense is declared to be felony, if done of malice prepense; that is, as Sir Edward Coke<sup>9</sup> explains it, voluntarily and of set purpose, though done upon a sudden occasion. Next, in order of time, is the statute 37 Hen. VIII. c. 6. which directs, that if a man shall maliciously and unlawfully cut off the ear of any of the king's subjects, he shall not only forfeit treble damages to the party grieved, to be recovered by action of trespass at common law, as a civil satisfaction; but also 10£ by way of fine to the king, which was his criminal amercement. The last statute, but by far the most severe and effectual of all, is that of 22 & 23 Car. II. c. 1. called the Coventry act; being occasioned by an assault on Sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in parliament. By this statute it is enacted, that if any person shall of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb

or member of any other person, with intent to maim or to disfigure him; such person, his counselors, aiders, and abettors, shall be guilty of felony without benefit of clergy.<sup>10</sup>

THUS much for the felony of mayhem: to which may be added the offense of wilfully and maliciously shooting at any person, which may endanger either killing or maiming him. This, though no such evil consequence ensues, is made felony without benefit of clergy by statute 9 Geo. I. c. 22. and thereupon one Arnold was convicted in 1723, for shooting at lord Onslow; but, being half a madman, was never executed, but confined in prison, where he died about thirty years after.

II. THE second offense, more immediately affecting the personal security of individuals, relates to the female part of his majesty's subjects; being that of their forcible abduction and marriage; which is vulgarly called stealing an heiress. For by statute 3 Hen. VII. c. 2. it is enacted, that if any person shall for lucre take any woman, maid, widow, or wife, having substance either in goods or lands, or being heir apparent to her ancestors, contrary to her will; and afterwards she be married to such misdoer, or by his consent to others, or defiled; such person, and all his accessories, shall be deemed principal felons: and by statute 39 Eliz. c. 9. the benefit of clergy is taken away from all such felons, except accessories after the offense.

IN the construction of this statute it has been determined, 1. That the indictment must allege that the taking was for lucre, for such are the words of the statute.<sup>11</sup> 2. In order to show this, it must appear that the woman has substance either real or personal, or is an heir apparent.<sup>12</sup> 3. It must appear that she was taken away against her will. 4. It must also appear, that she was afterwards married, or defiled. And though possibly the marriage or defilement might be by her subsequent consent, being won thereunto by flatteries after the taking, yet this is felony, if the first taking were against her will:<sup>13</sup> and so *vice versa*, if the woman be originally taken away with her own consent, yet if she afterwards refuse to continue with the offender, and be forced against her will, she may, from that time, as properly be said to be taken against her will, as if she never had given any consent at all; for, till the force was put upon her, she was in her own power.<sup>14</sup> 5. It is held that a woman, thus taken away and married, may be sworn and give evidence against the offender, though he is her husband *de facto* [in fact]; contrary to the general rule of law: because he is no husband *de jure* [in law], in case the actual marriage was also against her will.<sup>15</sup> In cases indeed where the actual marriage is good, by the consent of the inveigled woman obtained after her forcible abduction, Sir Matthew Hale seems to question how far her evidence should be allowed: but other authorities<sup>16</sup> seem to agree, that it should even then be admitted; esteeming it absurd, that the offender should thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, should (by a forced construction of law) be made use of to stop the mouth of the most material witness against him.

AN inferior degree of the same kind of offense, but not attended with force, is punished by the statute 4 & 5 Ph. & Mar. c. 8. which enacts, that if any person, above the age of fourteen, unlawfully shall convey or take away any woman child unmarried, (which is held<sup>17</sup> to extend to bastards as well as to legitimate children) within the age of sixteen years, from the possession and against the will of the father, mother, guardians, or governors, he shall be imprisoned two years, or fined at the discretion of the justices: and if he deflowers such maid or woman child, or, without the consent of parents, contracts matrimony with her, he shall be imprisoned five years, or fined at the discretion of the justices, and she shall forfeit all her lands to her next of kin, during the life of her said

husband. So that as these stolen marriages, under the age of sixteen, were usually upon mercenary views, this act, besides punishing the seducer, wisely removed the temptation. But this latter part of the act is now rendered almost useless, by provisions of a very different kind, which make the marriage totally void,<sup>18</sup> in the statute 26 Geo. II. c. 33.

III. A THIRD offense, against the female part also of his majesty's subjects, but attended with greater aggravations than that of forcible marriage, is the crime of rape, *raptus mulierum*, or the carnal knowledge of a woman forcibly and against her will. This, by the Jewish law,<sup>19</sup> was punished with death, in case the damsel was betrothed to another man; and, in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsels's father, and she was to be the wife of the ravisher all the days of his life; without that power of divorce, which was in general permitted by the Mosaic law.

THE civil law<sup>20</sup> punishes the crime of ravishment with death and confiscation of goods: under which it includes both the offense of forcible abduction, or taking away a woman from her friends, of which we last spoke; and also the present offense of forcibly dishonoring them; either of which, without the other, is in that law, sufficient to constitute a capital crime. Also the stealing away a woman from her parents or guardians, and debauching her, is equally penal by the emperor's edict, whether she consent or is forced: "*sive volentibus, sive nolentibus mulieribus, tale facinus fuerit perpetratum.*" ["The crime will be the same whether the woman consent or not."] And this, in order to take away from women every opportunity of offending in this way; whom the Roman laws suppose never to go astray, without the seduction and arts of the other sex: and therefore, by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honor of the women. "*Si enim ipsi raptores metu, vel atrocitate poenae, ab hujusmodi facinore fe temperaverint, nulli mulieri, sive volenti, sive nolenti, peccandi locus relinquetur; quia hoc ipsum velle mulierum, ab insidiis nequissimi hominis, qui meditatur rapinam, inducitur. Nisi etenim eam sollicitaverit, nisi odiosis artibus circumvenerit, non faciet eam velle in tantum dedecus sese prodere.*" ["For if the ravisher be restrained from a crime of this nature, either by fear or severity of punishment, no opportunity is left for a woman to offend either willingly or unwillingly, because the desire is always raised in her by the wicked seductions of the man who meditates the violence. For unless he solicit her, unless he compass his design by odious arts, he could never make her wish to betray herself to such dishonor."] But our English law does not entertain quite such sublime ideas of the honor of either sex, as to lay the blame of a mutual fault upon one of the transgressors only: and therefore makes it a necessary ingredient in the crime of rape, that it must be against the woman's will.

RAPE was punished by the Saxon laws, particularly those of king Athelstan,<sup>21</sup> with death: which was also agreeable to the old Gothic or Scandinavian constitutions.<sup>22</sup> But this was afterwards thought too hard: and in its stead another severe, but not capital, punishment was inflicted by William the conqueror; *viz.* castration and loss of eyes;<sup>23</sup> which continued till after Bracton wrote, in the reign of Henry the third. But in order to prevent malicious accusations, it was then the law, (and, it seems, still continues to be so in appeals of rape<sup>24</sup>) that the woman should immediately after, "*dum recens fuerit maleficium*" ["while the injury is recent"], go to the next town, and there make discovery to some credible persons of the injury she has suffered; and afterwards should acquaint the high constable of the hundred, the coroners, and the sheriff with the outrage.<sup>25</sup> This seems to correspond in some degree with the laws of Scotland and Arragon,<sup>26</sup> which require that complaint must be made

within twenty four hours: though afterwards by statute Westm. 1 c. 13. the time of limitation in England was extended to forty days. At present there is no time of limitation fixed: for, as it is usually now punished by indictment at the suit of the king, the maxim of law takes place that *nullum tempus occurrit regi* [no time runs against the king]: but the jury will rarely give credit to a stale complaint. During the former period also it was held for law,<sup>27</sup> that the woman (by consent of the judge and her parents) might redeem the offender from the execution of his sentence, by accepting him for her husband; if he also was willing to agree to the exchange, but not otherwise.

IN the 3 Edw. I. by the statute Westm. 1. c. 13. the punishment of rape was much mitigated: the offense itself being reduced to a trespass, if not prosecuted by the woman within forty days, and subjecting the offender only to two years imprisonment, and a fine at the king's will. But, this lenity being productive of the most terrible consequences, it was in ten years afterwards, 13 Edw I. found necessary to make the offense of rape felony, by statute Westm. 2. c. 34. And by statute 18 Eliz. c. 7. it is made felony without benefit of clergy: as is also the abominable wickedness of carnally knowing or abusing any woman child under the age of ten years; in which case the consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion. Sir Matthew Hale is indeed of opinion, that such profligate actions committed on an infant under the age of twelve years, the age of female discretion by the common law, either with or without consent, amount to rape and felony; as well since as before the statute of queen Elizabeth:<sup>28</sup> but the law has in general been held only to extend to infants under ten.

A MALE infant, under the age of fourteen years, is presumed by law incapable to commit a rape, and therefore it seems cannot be found guilty of it. For though in other felonies *malitia supplet aetatem* [malice is equivalent to age], as has in some cases been shown; yet, as to this particular species of felony, the law supposes an imbecility of body as well as mind.<sup>29</sup>

THE civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind:<sup>30</sup> not allowing any punishment for violating the chastity of her, who has indeed no chastity at all, or at least has no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life:<sup>31</sup> for, as Bracton well observes,<sup>32</sup> "*licet meretrix fuerit antea, certe tunc temporis non suit, cum reclamando nequitiae ejus consentire noluit.*" ["Although a harlot formerly, she surely was not then, when by crying out she showed herself unwilling to consent to his wickedness."]

AS to the material facts requisite to be given in evidence and proved upon an indictment of rape, they are of such a nature, that though necessary to be known and settled, for the conviction of the guilty and preservation of the innocent, and therefore are to be found in such criminal treatises as discourse of these matters in detail, yet they are highly improper to be publicly discussed, except only in a court of justice. I shall therefore merely add upon this head a few remarks from Sir Matthew Hale, with regard to the competency and credibility of witnesses; which may, *salvo pudore* [observing decency], be considered.

AND, first, the party ravished may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon

the circumstances of fact that concur in that testimony. For instance: if the witness be of good fame; if she presently discovered the offense, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances, which give greater probability to her evidence. But, on the other side, if she be of evil fame, and stands unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned.

MOREOVER, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she has sense and understanding to know the nature and obligations of an oath; and, even if she has not, it is thought by Sir Matthew Hale<sup>33</sup> that she ought to be heard without oath, to give the court information; though that alone will not be sufficient to convict the offender. And he is of this opinion, first, because the nature of the offense being secret, there may be no other possible proof of the actual fact; though afterwards there may be concurrent circumstances to corroborate it, proved by other witnesses: and, secondly, because the law allows what the child told her mother, or other relations, to be given in evidence, since the nature of the case admits frequently of no better proof; and there is much more reason for the court to hear the narration of the child herself, than to receive it at second hand from those who swear they heard her say so. And indeed it is now settled, that infants of any age are to be heard; and, if they have any idea of an oath, to be also sworn: it being found by experience that infants of very tender years often give the clearest and truest testimony. But in any of these cases, whether the child be sworn or not, it is to be wished, in order to render her evidence credible, that there should be some concurrent testimony, of time, place and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or such as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses, as well as of the truth of the fact.

“IT is true,” says this learned judge<sup>34</sup> “that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent.” He then relates two very extraordinary cases of malicious prosecutions for this crime, that had happened within his own observation; and concludes thus: “I mention these instances, that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon, without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are overhastily carried to the conviction of the person accused thereof, by the confident testimony of sometimes false and malicious witnesses.”

IV. WHAT has been here observed, especially with regard to the manner of proof, which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offense, of a still deeper malignity; the infamous crime against nature, committed either with man or beast. A crime, which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offense of so dark a nature, so easily charged, and the negative so



difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.

I WILL not act so disagreeable part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter christianos non nominandum*" ["that horrible crime not to be named among Christians"]. A taciturnity observed likewise by the edict of Constantius and Constans:<sup>35</sup> "*ubi scelus est id, quod non proficit scire, jubemus insurgere leges, armari jura gladio ultore, ut exquisitis poenis subdantur infames, qui sunt, vel qui futuri sunt, rei.*" ["Where that crime is found, which it is unfit even to know, we command the law to arise armed with an avenging sword, that the infamous men who are, or shall in future be guilty of it, may undergo the most severe punishments."] Which leads me to add a word concerning its punishment.

THIS the voice of nature and of reason, and the express law of God,<sup>36</sup> determine to be capital. Of which we have a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is an universal, not merely a provincial, precept. And our ancient law in some degree imitated this punishment, by commanding such miscreants to be burnt to death;<sup>37</sup> though Fleta<sup>38</sup> says they should be buried alive: either of which punishments was indifferently used for this crime among the ancient Goths.<sup>39</sup> But now the general punishment of all felonies is the same, namely, by hanging: and this offense (being in the times of popery only subject to ecclesiastical censures) was made single felony by the statute 25 Hen. VIII. c. 6. and felony without benefit of clergy by statute 5 Eliz. c. 17. And the rule of law herein is, that, if both are arrived at years of discretion, *agentes et consentientes pari poena plectantur* [the perpetrator and consenting party are punished the same].<sup>40</sup>

THESE are all the felonious offenses, more immediately against the personal security of the subject. The inferior offenses, or misdemeanors, that fall under this head, are assaults, batteries, wounding, false imprisonment, and kidnapping.

V, VI, VII. WITH regard to the nature of the three first of these offenses in general, I have nothing farther to add to what has already been observed in the preceding book of these commentaries;<sup>41</sup> when we considered them as private wrongs, or civil injuries, for which a satisfaction or remedy is given to the party aggrieved. But, taken in a public light, as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fine and imprisonment; or with other ignominious corporal penalties, where they are committed with any very atrocious design.<sup>42</sup> As in case of an assault with an intent to murder, or with an intent to commit either of the crimes last spoken of; for which intentional assaults, in the two last cases, indictments are much more usual, than for the absolute perpetration of the facts themselves, on account of the difficulty of proof: and herein, besides heavy fine and imprisonment, it is usual to award judgment of the pillory.

THERE is also one species of battery, more atrocious and penal than the rest, which is the beating of a clerk in orders, or clergyman; on account of the respect and reverence due to his sacred character, as the minister and ambassador of peace. Accordingly it is enacted by the statute called *articuli cleri* [articles of the clergy], 9 Edw. II. c. 3. that if any person lay violent hands upon a clerk,

the amends for the peace broken shall be before the king; that is by indictment in the king's courts: and the assailant may also be sued before the bishop, that excommunication or bodily penance may be imposed: which if the offender will redeem by money, to be given to the bishop, or the party grieved, it may be sued for before the bishop; whereas otherwise to sue in any spiritual court, for civil damages for the battery, falls within the danger of *praemunire* [forewarning].<sup>43</sup> But suits are, and always were, allowable in the spiritual court, for money agreed to be given as a commutation for penance.<sup>44</sup> So that upon the whole it appears, that a person guilty of such brutal behavior to a clergyman, is subject to three kinds of prosecution, all of which may be pursued for one and the same offense: an indictment, for the breach of the king's peace by such assault and battery; a civil action, for the special damage sustained by the party injured; and a suit in the ecclesiastical court, first, *pro correctione et salute animae* [for the correction and health of the soul] by enjoining penance, and then again for such sum of money as shall be agreed on for taking off the penance enjoined: it being usual in those courts to exchange their spiritual censures for a round compensation in money<sup>45</sup> perhaps because poverty is generally esteemed by the moralists the best medicine *pro salute animae* [for the good of the soul].

VIII. THE two remaining crimes and offenses, against the persons of his majesty's subjects, are infringements of their natural liberty: concerning the first of which false imprisonment, its nature and incidents, I must content myself with referring the student to what was observed in the preceding volume,<sup>46</sup> when we considered it as a mere civil injury. But, besides the private satisfaction given to the individual by action, the law also demands public vengeance for the breach of the king's peace, for the loss which the state sustains by the confinement of one of its members, and for the infringement of the good order of society. We have before seen,<sup>47</sup> that the most atrocious degree of this offense, that of sending any subject of this realm a prisoner into parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is punished with the pains of *praemunire*, and incapacity to hold any office, without any possibility of pardon.<sup>48</sup> Inferior degrees of the same offense of false imprisonment are also punishable by indictment (like assaults and batteries) and the delinquent may be fined and imprisoned.<sup>49</sup> And indeed<sup>50</sup> there can be no doubt, but that all kinds of crimes of a public nature all disturbances of the peace, all oppressions, and other misdemeanors whatsoever, of a notoriously evil example, may be indicted at the suit of the king.

IX. THE other remaining offense, that of kidnapping, being the forcible abduction or stealing away of man, woman, or child from their own country, and selling them into another, was capital by the Jewish law, "He that steals a man, and sells him, or if he be found in his hand, he shall surely be put to death."<sup>51</sup> So likewise in the civil law, the offense of spiriting away and stealing men and children, which was called *plagium*, and the offenders *plagiarii*, was punished with death.<sup>52</sup> This is unquestionably a very heinous crime, as it robs the king of his subjects, banishes a man from his country, and may in its consequences be productive of the most cruel and disagreeable hardships; and therefore the common law of England has punished it with fine, imprisonment, and pillory.<sup>53</sup> And also the statute 11 & 12 W. III. c. 7. though principally intended against pirates, has a clause that extends to prevent the leaving of such persons abroad, as are thus kidnapped or spirited away; by enacting, that if any captain of a merchant vessel shall (during his being abroad) force any person on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out, if able and desirous to return, he shall suffer three months imprisonment. And thus much for offenses that more immediately affect the persons of individuals.

## NOTES

1. See Vol. III. pag. 121.
2. Brit. l. 1. c. 25. 1 Hawk. P. C. 111.
3. 3 Inst. 118. – *Mes, si la pleynte soit faite de femme qu'avera tolle a home ses membres, en tiel case perdra la feme la une meyn par jugement, come le membre dount ele avera trespasse.* [But if the complaint be preferred against a woman that she had mutilated a man, she shall be adjudged to lose her hand, as the member with which she had offended.] (Brit. c. 25.)
4. Stiernhook *de jure Sueon.* l. 3. c. 3.
5. See pag. 12.
6. 1 Hawk. P. C. 112.
7. Bract. Fol. 144.
8. Sir Edward Coke (3 Inst. 62.) has transcribed a record of Henry the third's time, (Claus. 13 Hen. III. m. 9.) by which a gentleman of Somersetshire and his wife appear to have been apprehended and committed to prison, being indicted for dealing thus with John the monk, who was caught in adultery with the wife.
9. 3 Inst. 62.
10. On this statute Mr. Coke, a gentleman of Suffolk, and one Woodburn, a laborer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact, of slitting the nose of Mr. Crispe, Coke's brother in law. The case was somewhat-singular. The murder of Crispe was intended, and he was left for dead, being terribly hacked and disfigured with a hedgebill; but he recovered. Now the bare intent to murder is no felony: but to disfigure, with an intent to disfigure, is made so by this statute; on which they were therefore indicted. And Coke, who was a disgrace to the profession of the law, had the effrontery to rest his defense upon this point, that the assault was not committed with an intent to disfigure, but with an intent to murder; and therefore not within the statute. But the court held, that if a man attacks another to murder him with such an instrument as a hedge bill, which cannot but endanger the disfiguring him; and in such attack happens not to kill, but only to disfigure him; he may be indicted on this statute: and it shall be left to the jury whether it were not a design to murder by disfiguring, and consequently a malicious intent to disfigure as well as to murder. Accordingly the jury found them guilty of such previous intent to disfigure, in order to effect their principal intent to murder, and they were both condemned and executed (State Trials. VI. 212.)
11. 1 Hawk. P. C. 110.
12. 1 Hal. P. C. 660. 1. Hawk. P. C. 109.
13. 1 Hal. P. C. 660.
14. 1 Hawk. P. C. 110.
15. 1 Hal. P. C. 661.
16. Cro. Car. 488. 6 keb. 193. Seate. Trials. V. 455.
17. Stra. 1162.
18. See vol. I. pag. 437. etc.
19. Deut. 22:25.
20. Cod. 9. tit. 13.
21. Bracton. l. 3. c. 28.
22. Stiernh. *de jure Sueon.* l. 3. c. 2.
23. LL. Guil. Cunku. P. C. 19.

24. 1 Hal. P. C. 632.
25. Glanv. l. 14. c. 6. Bract. L. 3. c. 28.
26. Barrington. 107.
27. Glanv. l. 14. c. 6. Bract. L. 3. c. 28.
28. 1 Hal. P. C. 631.
29. Ibid.
30. Cod. 9. 9. 22. Ff. 47. 2. 39.
31. 1 Hal. P. C. 629. 1. Hawk. P. C. 108.
32. fol. 147.
33. 1 Hal. P. C. 634.
34. 1 Hal. P. C. 635.
35. Cod. 9. 9. 31.
36. Levit. xx. 13. 15.
37. Brit. c. 9.
38. l. 1. c. 37.
39. Stiernh. *de jure Goth.* l. 3. c. 2.
40. 3 Inst. 59.
41. See Vol. III. 120.
42. 1 Hawk. P. C. 65.
43. 2 Inst. 492. 620.
44. Arti. Cler. 9 Edw. IL. 4. F. N. B. 55.
45. 2 Rol. Rep. 384.
46. See Vol. III. pag. 127.
47. See pag. 116.
48. Stat. 31 Car. II. c. 2.
49. West. Symbol. part. 2. pag. 92.
50. 1 Hawk. P. C. 210.
51. Exod. 21:16.
52. Ff. 48. 15. 1.
53. Raym. 474. 3 Show, 221. Skinn 47. Comb. 10.

## CHAPTER 16

### Of Offenses Against the Habitations of Individuals

THE only two offenses, that more immediately affect the habitations of individuals or private subjects, are those of arson and burglary.

I. ARSON, *ab ardendo* [of burning], is the malicious and wilful burning of the house or outhouses of another man. This is an offense of very great malignity, and much more pernicious to the public than simple theft: because, first, it is an offense against that right, of habitation, which is acquired by the law of nature as well as by the laws of society; next, because of the terror and confusion that necessarily attends it; and, lastly, because in simple theft the thing stolen only changes its master, but still remains *in esse* [in being] for the benefit of the public, whereas by burning the very substance is absolutely destroyed. It is also frequently more destructive than murder itself, of which too it is often the cause: since murder, atrocious as it is, seldom extends beyond the felonious act designed; whereas fire too frequently involves in the common calamity persons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies. For which reason the civil law<sup>1</sup> punishes with death such as maliciously set fire to houses in towns, and contiguous to others; but is more merciful to such as only fire a cottage, or house, standing by itself.

OUR English law also distinguishes with much accuracy upon this crime. And therefore we will inquire, first, what is such a house as may be the subject of this offense; next, wherein the offense itself consists, or what amounts to a burning of such house; and, lastly how the offense is punished.

1. NOT only the bare dwelling house, but all outhouses that are parcel thereof, though not contiguous thereto, nor under the same roof, as barns and stables, may be the subject of arson.<sup>2</sup> And this by the common law: which also accounted it felony to burn a single barn in the field, if filled with hay or corn, though not parcel of the dwelling house.<sup>3</sup> The burning of a stack of corn was anciently likewise accounted arson.<sup>4</sup> And indeed all the niceties and distinctions which we meet with in our books, concerning what shall, or shall not, amount to arson, seem now to be taken away by a variety of statutes; which will be mentioned in the next chapter, and have made the punishment of wilful burning equally extensive as the mischief. The offense of arson (strictly so called) may be committed by wilfully setting fire to one's own house, provided one's neighbor's house is thereby also burnt; but if no mischief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's.<sup>5</sup> For by the common law no intention to commit a felony amounts to the same crime; though it does, in some cases, by particular statutes. However such wilful firing one's own house, in a town, is a high misdemeanor, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behavior.<sup>6</sup> And if a landlord or reversioner sets fire to his house, of which another is in possession under a lease from himself or from those whose estate he has, it shall be accounted arson; for, during the lease, the house is the property of the tenant.<sup>7</sup>

2. AS to what shall be said a burning, so as to amount to arson: a bare intent, or attempt to do it, by actually setting fire to an house, unless it absolutely burns, does not fall within the description of *incendit et combussit* [burned and consumed]; which were words necessary, in the days of law-latin, to all indictments of this sort. But the burning and consuming of any part is sufficient; though the

fire be afterwards extinguished.<sup>8</sup> Also it must be a malicious burning; otherwise it is only a trespass: and therefore no negligence or mischance amounts to it. For which reason, though an unqualified person, by shooting with a gun, happens to set fire to the thatch of a house, this Sir Matthew Hale determines not to be felony, contrary to the opinion of former writers.<sup>9</sup> But by statute 6 Ann c. 31. any servant, negligently setting fire to a house or outhouses, shall forfeit 100£, or be sent to the house of correction for eighteen months: in the same manner as the Roman law directed “*eos, qui negligenter ignes apud se habuerint, fustibus vel flagellis caedi*” [“those who have fire carelessly about them shall be beaten with whips or sticks”].<sup>10</sup>

3. THE punishment of arson was death by our ancient Saxon laws.<sup>11</sup> And, in the reign of Edward the first, this sentence was executed by a king of *lex talionis* [law of retaliation]; for the incendiaries were burnt to death:<sup>12</sup> as they were also by the gothic constitutions.<sup>13</sup> The statute 8 Hen. VI. c. 6. made the wilful burning of houses, under some special circumstances therein mentioned, amount to the crime of high treason. But it was again reduced to felony by the general acts of Edward VI and queen Mary: and now the punishment of all capital felonies is uniform, namely, by suspension. The offense of arson was denied the benefit of clergy by statute 21 Hen. VIII. c. 1. but that statute was repealed by 1 Edw. VI. c. 12. and arson was afterwards held to be ousted of clergy, with respect to the principal offender, only by inference and deduction from the statute 4 & 5 P. & M. c. 4. which expressly denied it to the accessory;<sup>14</sup> though now it is expressly denied to the principal also, by statute 9 Geo. I. c. 22.

II. BURGLARY, or nocturnal housebreaking, *burgi latrocinium*, which by our ancient law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offense: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion and disturbance of that right of habitation, which every individual might acquire even in a state of nature; an invasion, which in such a state, would be sure to be punished with death, unless the assailant were the stronger. But in civil society, the laws also come in to the assistance of the weaker party: and, besides that they leave him this natural right of killing the aggressor, if he can, (as was shown in a former chapter<sup>15</sup>) they also protect and avenge him, in case the might of the assailant is too powerful. And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity: agreeing herein with the sentiments of ancient Rome, as expressed in the words of Tully;<sup>16</sup> “*quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium?*” [“For what is more sacred, what more inviolable, than the house of every citizen?”] For this reason no doors can in general be broken open to execute any civil process; though, in criminal causes, the public safety supersedes the private. Hence also in part arises the animadversion of the law upon eavesdroppers, nuisancers, and incendiaries: and to this principle it must be assigned, that a man may assemble people together lawfully (at least if they do not exceed eleven) without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case.<sup>17</sup>

THE definition of a burglar, as given us by Sir Edward Coke,<sup>18</sup> is, “he that by night breaks and enters into a mansion house, with intent to commit a felony.” In this definition there are four things to be considered; the time, the place, the manner, and the intent.

1. THE time must be by night, and not by day; for in the day time there is no burglary. We have seen,<sup>19</sup> in the case of justifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night, and what day, for this purpose: anciently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion seems to be, that if there be daylight or *crepusculum* [twilight] enough, begun or left, to discern a man's face withal, it is no burglary.<sup>20</sup> But this does not extend to moonlight; for then many midnight burglaries would go unpunished: and besides, the malignity of the offense does not so properly arise 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 defenseless.

2. AS to the place. It must be, according to Sir Edward Coke's definition, in a mansion house; and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei* [the mansion house of God].<sup>21</sup> But it does not seem absolutely necessary, that it should in all cases be a mansion-house; for it may also be committed by breaking the gates or walls of a town in the night;<sup>22</sup> though that perhaps Sir Edward Coke would have called the mansion-house of the garrison or corporation. Selman defines burglary to be, "*nocturna disruptio alicujus habitaculi, vel ecclesiae, etiam murorum portarumve burgi, ad feloniam perpetranda.*" ["The nocturnal breaking open of any habitation or church, or even the walls or gates of a town, for the purpose of committing a felony"] And therefore we may safely conclude, that the requisite of its being *domus mansionalis* is only in the burglary of a private house; which is the most frequent, and in which it is indispensably necessary to form its guilt, that it must be in a mansion or dwelling house. For no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defense: nor is a breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house however, wherein a man sometimes resides, and which the owner has only left for a short season, *animo revertendi* [intending to return], is the object of burglary; though no one be in it, at the time of the fact committed.<sup>23</sup> And if the barn, stable, or warehouse be parcel of the mansion-house, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenances, if within the curtilage or homestall.<sup>24</sup> A chamber in a college or an inn of court, where each inhabitant has a distinct property, is, to all other purposes as well as this, the mansion-house of the owner.<sup>25</sup> So also is a room or lodging, in any private house, the mansion for the time being of the lodger. The house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation. And not of the respective officers.<sup>26</sup> But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there; it is no dwellinghouse, nor can burglary be committed therein: for by the lease it is severed from the rest of the house, and therefore is not the dwellinghouse of him who occupies the other part; neither can I be said to dwell therein, when I never lie there.<sup>27</sup> Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein:<sup>28</sup> for the law regards thus highly nothing but permanent edifices; a house or church, the wall, or gate of a town; and it is the folly of the owner to lodge in so fragile a tenement: but his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances.

3. AS to the manner of committing burglary: there must be both a breaking and an entry to complete it. But they need not be both done at once: for, if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars.<sup>29</sup> there must be an actual breaking; not a mere legal *clausum fregit* [breaking the close], (by leaping over invisible ideal boundaries, which may constitute a civil trespass) but a substantial and forcible irruption. As at least by breaking; not a mere legal *clausum fregit*, (by leaping over invisible ideal boundaries, which may constitute a civil trespass) but a substantial and forcible irruption. As at least by breaking, or taking out the glass of, or otherwise opening, a window; picking lock, or opening it with a key; nay, by lifting up the latch of a door, or unloosing any other fastening which the owner has provided. But if a person leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein, it is no burglary: yet, if he afterwards unlocks an inner or chamber door, it is so.<sup>30</sup> But to come down a chimney is held a burglarious entry; for that is as much closed, as the nature of things will permit.<sup>31</sup> So also to knock at a door, and upon opening it to rush in, with a felonious intent; or, under pretense of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house; all these entries have been adjudged burglarious, though there was no actual breaking: for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process.<sup>32</sup> And so, if a servant opens and enters his master's chamber door with a felonious design; or if any other person lodging in the same house, or in a public inn, opens and enters another's door, with such evil intent; it is burglary. Nay, if the servant conspires with a robber, and lets him into the house by night, this is burglary in both:<sup>33</sup> for the servant is doing an unlawful act, and the opportunity afforded him, of doing it with greater ease, rather aggravates than extenuates the guilt. As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient: as, to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries.<sup>34</sup> The entry may be before the breaking, as well as after: for by statute 12 Ann. c. 7. if a person enters into or is within, the dwelling house of another, without breaking in, either by day or by night, with intent to commit felony, and shall in the night break out of the same, this is declared to be burglary; there having before been different opinions concerning it: lord Bacon<sup>35</sup> holding the affirmative, and Sir Matthew Hale<sup>36</sup> the negative. But it is universally agreed, that there must be both a breaking, either in fact or by implication, and also an entry, in order to complete the burglary.

4. AS to the intent; it is clear, that such breaking and entry must be with a felonious intent, otherwise it is only a trespass. And it is the same, whether such intention be actually carried into execution, or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary; whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offense were felony at common law, or only created so by statute; since that statute, which makes an offense felony, gives it incidentally all the properties of a felony at common law.<sup>37</sup>

THUS much for the nature of burglary; which is, as has been said, a felony at common law, but within the benefit of clergy. The statute however of 18 Eliz. c. 7. takes away clergy from the principals, and that of 3 & 4 W. & M. c. 9. from all accessories before the fact. And, in like manner, the laws of Athens, which punished no simple theft with death, made burglary a capital crime.<sup>38</sup>



## NOTES

1. Ff. 48. 19. 28. § 12.
2. 1 Hal. P. C. 567.
3. 3 Inst. 69.
4. 1 Hawk. P. C. 105.
5. Cro. Car. 377.
6. 1 Hal. P. C. 568. 1 Hawk. P. C. 106.
7. Fost. 115.
8. 1 Hawk. P. C. 106.
9. 1 Hal. P. C. 569.
10. Ff. 1. 15. 4.
11. LL. Inne. c. 7.
12. Britt. c. 9.
13. Stierh. *de jure Goth.* l. 3. c. 6.
14. 11 Rep. 35. 2 Hal. 346, 347. Foster. 336.
15. See pag. 180.
16. Pro. domo, 41.
17. 1 Hal. P. C. 547.
18. 3 Inst. 63.
19. See pag. 180, 181.
20. 3 Inst. 63. 1 Hal. P. C. 1 Hawk.
21. 3 Inst. 64.
22. Spelm. Gloss. t. Burglary. 1. Hawk. P. C. 103.
23. 1 Hal. P. C. Fost. 77.
24. 1 Hal. P. C. 558. 1 Hawk. P. C. 104.
25. 1 Hal. P. C. 556.
26. Foster. 38, 39.
27. 1 Hal. P. C. 558.
28. 1 Hawk. P. C. 104.
29. 1 Hal. P. C. 551.
30. Ibid. 553.
31. 1 Hawk. P. C. 102. 1 Hal. P. C. 552.
32. Hawk. P. C. 102.

33. 1 Hal. P. C. 553. 1 Hal. P. C. 103.

34. 1 Hal. P. C. 1 Hawk. P. C. 103.

35. Elem. 65.

36. 1 Hal. P. C. 554.

37. 1 Hawk. P. C. 105.

38. Pott. Antiq. b. 1. c. 26.

## CHAPTER 17 Of Offenses Against Private Property

THE next, and last, species of offenses against private subjects, are such as more immediately affect their property. Of which there are two, which are attended with a breach of the peace; larceny, and malicious mischief: and one, that is equally injurious to the rights of property, but attended with no act of violence; which is the crime of forgery. Of these three in their order.

1. LARCENY, or theft, by contraction for latrocinium, *latrocinium*, is distinguished by the law into two sorts; the one called simple larceny, or plain theft unaccompanied with any other atrocious circumstance; and mixed or compound larceny, which also includes in it the aggravation of a taking from one's house or person.

AND, first, of simple larceny: which, when it is the stealing of goods above the value of twelvepence, is called grand larceny; when of goods to that value, or under, is petit larceny: offenses, which are considerably distinguished in their punishment, but not otherwise. I shall therefore first consider the nature of simple larceny in general; and then shall observe the different degrees of punishment, inflicted on its two several branches.

SIMPLE larceny then is “the felonious taking, and carrying “away, of the personal goods of another.” This offense certainly commenced then, whenever it was, that the bounds of property, or laws of *meum* and *tuum* [mine and yours], were established. How far such an offense can exist in a state of nature, where all things are held to be common, is a question that may be solved with very little difficulty. The disturbance of any individual, in the occupation of what he has seized to his present use, seems to be the only offense of this kind incident to such a state. But, unquestionably, in social communities, when property is established, the necessity whereof we have formerly seen,<sup>1</sup> any violation of that property is subject to be punished by the laws of society: though how far that punishment should extend, is matter of considerable doubt. At present we will examine the nature of theft, or larceny, as laid down in the foregoing definition.

1. IT must be a taking. This implies the consent of the owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon trust, can ground a larceny. As if A lends B a horse, and he rides away with him; or, if I send goods by a carrier, and he carries them away; these are no larcenies.<sup>2</sup> But if wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, these are larcenies:<sup>3</sup> for here the *animus furandi* [intent to steal] is manifest; since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. But bare non-delivery shall not of course be intended to arise from a felonious design; since that may happen from a variety of other accidents. Neither by the common law was it larceny in any servant to run away with the goods committed to him to keep, but only a breach of civil trust. But by statute 33 Hen. VI. c. 1. the servants of persons deceased, accused of embezzling their master's goods, may by writ out of chancery (issued by the advice of the chief justices and chief baron, or any two of them) and proclamation made thereupon, be summoned to appear personally in the court of king's bench, to answer their master's executors in any civil suit for such goods; and shall, on default of appearance, be attainted of felony. And by statute 21 Hen. VIII. c. 7. if any servant embezzles his master's goods

to the value of forty shillings, it is made felony; except in apprentices, and servants under eighteen years old. But if he had not the possession, but only the care and oversight of the goods, as the butler of plate, the shepherd of sheep, and the like, the embezzling of them is felony at common law.<sup>4</sup> So if a guest robs his inn or tavern of a piece of plate, it is larceny; for he has not the possession delivered to him, but merely the use:<sup>5</sup> and so it is declared to be by statute 3 & 4 W. & M. c. 9. if a lodger runs away with the goods from his ready furnished lodging. Under some circumstances also a man maybe guilty of felony in taking his own goods: as if he steals them from a pawnbroker, or any one to whom he has delivered and entrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on the road, with intent of charge the hundred with the loss according to the statute of Winchester.<sup>6</sup>

2. THERE must not only be a taking, but a carrying away: *cepit et asportavit* [taking and carrying away] was the old law-latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away. As if a man be leading another's horse out of a close, and be inn, has removed them from his chamber down stairs; these have been adjudged sufficient carryings away, to constitute a larceny.<sup>7</sup> Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprised before he can make his escape with it; this is larceny.<sup>8</sup>

3. THIS taking, and carrying away, must also be felonious; that is, done *animo furandi*: or, as the civil law expresses it, *lucri causa* [for gain's sake].<sup>9</sup> This requisite, besides excusing those who labor under incapacities of mind or will, (of whom we spoke sufficiently at the entrance of this book<sup>10</sup>) indemnifies also mere trespassers, and other petty offenders. As if a servant takes his master's horse, without his knowledge, and brings him home again: if a neighbor takes another's plow, that is left in the field, and uses it upon his own land, and then returns it: if, under color of arrear of rent, where none is due, I distrain another's cattle, or seize them: all these are misdemeanors and trespasses, but no felonies.<sup>11</sup> The ordinary discovery of a felonious intent is where the party does it clandestinely, or being charged with the facts, denies it. But this is by no means the only criterion of criminality: for in cases that may amount to larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those, which may evidence a felonious intent, of *animum furandi*: wherefore they must be left to the due and attentive consideration of the court and jury.

4. THIS felonious taking and carrying away must be of the personal goods of another: for if they are things real, or favor of the realty, larceny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules or the common law; but the severance of them was, and in many things is still, merely a trespass: which depended on a subtlety in the legal notions of our ancestors. These things were parcel of the real estate; and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable.<sup>12</sup> And if they were severed by violence, so as to be changed into moveables; and at the same time, by one and the same continued act, carried off by the person who severed them; they could never be said to be taken from the proprietor, in this their newly acquired state of mobility (which is essential to the nature of larceny) being never, as such, in the actual or constructive

possession of any one, but of him who committed the trespass. He could not in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief fevers them at one time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid; and comes again at another time, when they are so turned into personalty, and takes them away; it is larceny: and so it is, if the owner, or any one else, has severed them.<sup>13</sup> And now, by the statute 4 Geo II. c. 32. to steal, or fever with intent to steal, any lead or iron fixed to a house, or in any court or garden thereunto belonging, is made felony, liable to transportation for seven years: and to steal underwood or hedges, and the like, to rob orchards or gardens of fruit growing therein, to steal or otherwise destroy any turnips or the roots of madder when growing, are by the statutes 43 Eliz. c. 7. 15 Car. II. c. 2. 23. Geo. II. c. 26. and 31 Geo. II. c. 35. punishable criminally, by whipping, small fines, imprisonment, and satisfaction to the party wronged, according to the nature of the offense. Moreover, the stealing by night of any trees, or of any roots, shrubs, or plants to the value of 5s, is by statute 6 Geo. III. c. 36. made felony in the principals, aiders, and abettors, and in the purchasers thereof knowing the same to be stolen: and by statute 6 Geo. III. c. 48. the stealing of any timber trees therein specified,<sup>14</sup> and of any root, shrub, or plant, by day or night, is liable to pecuniary penalties for the two first offenses, and for the third is constituted a felony liable to transportation for seven years. Stealing are out of mines is also no larceny, upon the same principle of adherence to the freehold; with an exception only to mines of black lead, the stealing of are out of which is felony without benefit of clergy by statute 25 Geo. II. c. 10. Upon nearly the same principle the stealing of writings relating to a real estate is no felony, but a trespass:<sup>15</sup> because they concern the land, or (according to our technical language) savor of the realty, and are considered as part of it by the law; so that they descend to the heir together with the land which they concern.<sup>16</sup>

BONDS, bills, and notes, which concern mere choses in action, were also at the common law held not to be such goods whereof larceny might be committed; being of no intrinsic value,<sup>17</sup> and not importing any property in the possession of the person from whom they are taken. But by the statute 2 Geo. II. c. 25. they are now put upon the same footing, with respect to larcenies, as the money they were meant to secure. And, by statute 7 Geo. III. c. 50. if any officer or servant of the post-office shall secrete, embezzle, or destroy any letter or packet, containing any bank note or other valuable paper particularly specified in the act, or shall steal the same out of any letter or packet, he shall be guilty of felony without benefit of clergy. Or, if he shall destroy any letter or packet with which he has received money for the postage, or shall advance the rate of postage on any letter or packet sent by the post, and shall secrete the money received by such advancement, he shall be guilty of single felony. larceny also could not at common law be committed of treasure-trove, or wreck, till seized by the king or him who has the franchise; for till such seizure no one has a determinate property therein. But by statute 26 Geo. II. c. 19. plundering, or stealing from, any ship in distress (whether wreck or no wreck) is felony without benefit of clergy: in like manner as, by the civil law,<sup>18</sup> this inhumanity is also punished in the same degree as the most atrocious theft.

LARCENY also cannot be committed of such animals, in which there is no property either absolute or qualified; as of beasts that are *ferae naturae* [of wild nature], and unreclaimed such as deer, hares, and conies, in a forest, chase, or warren; fish in an open river or pond; or wild fowls at their natural liberty.<sup>19</sup> But if they are reclaimed or confined, and may serve for food, it is otherwise, even at

common law: for of deer so enclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larceny may be committed.<sup>20</sup> And now, by statute 9 Geo. I. c. 22. to kill or steal any deer in a forest, or other place, enclosed; to rob a warren; or to steal fish from a river or pond, being in this last case armed and disguised; these are felonies without benefit of clergy. And by statute 13 Car. II. c. 10. to steal deer in any forest, though unenclosed, is a forfeiture of 20l. for the first offense, and by statute 10 Geo. II. c. 32. seven years transportation for the second offense: which punishment is also inflicted for the first offense upon such as come to hunt there armed with offensive weapons. Also by statute 5 Geo. III. c. 14. the penalty of transportation for seven years is inflicted on persons stealing or taking fish in any water within a park, paddock, orchard, or yard; and on the receivers, aiders, and abettors: and the like punishment, or whipping, fine, or imprisonment, is provided for the taking or killing of conies<sup>21</sup> in open warrens. And a forfeiture of five pounds to the owner of the fishery is made payable by persons taking or destroying (or attempting so to do) any fish in any river or other water within any enclosed ground being private property. Stealing hawks, in disobedience to the rules prescribed by the statute 37 Edw. III. c. 19. is also felony.<sup>22</sup> It is also said,<sup>23</sup> that, if swans be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond: otherwise it is only a trespass. But, of all valuable domestic animals, as horses, and of all animals *domitae naturae* [of tame nature], which serve for food, as swine, sheep, poultry, and the like larceny may be committed; and also of the flesh of such as are *ferae naturae*, when killed.<sup>24</sup> As to those animals, which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them,<sup>25</sup> yet they are not of such estimation, as that the crime of stealing them amounts to larceny.<sup>26</sup>

NOTWITHSTANDING however that no larceny can be committed, unless there be some property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larceny to steal it; and an indictment will lie, for the goods of a person unknown.<sup>27</sup> In like manner as, among the Romans,<sup>28</sup> the *lex Hostilia de furtis* [Hostilian law of theft] provided, that a prosecution for theft might be carried on without the intervention of a grave; which is the property of those, whoever they were, that buried the deceased: but stealing the corpse itself, which has no owner, (though a matter of great indecency) is no felony, unless some of the gravecloths be stolen with it.<sup>29</sup> Very different from the law of the Franks, which seems to have respected both as equal offenses; when it directed that a person, who had dug a corpse out of the ground in order to strip it, should be banished from society, and no one suffered to relieve his wants, till the relations of the deceased consented to his readmission.<sup>30</sup>

HAVING thus considered the general nature of simple larceny, I come next to treat of its punishment. Theft, by the Jewish law, was only punished with a pecuniary fine, and satisfaction to the party injured.<sup>31</sup> And in the civil law, till some very late constitutions, we never find the punishment capital. The late of Draco at Athens punished it with death: but his laws were said to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulct, And so the Attic laws in general continued;<sup>32</sup> except that once, in a time of dearth, it was made capital to break into a garden, and steal figs: but this law, and the informers against the offense, grew so odious, that from them all malicious informers were styled sycophants; a name, which we have much perverted from its original meaning. From these examples, as well as the reason of the thing, many learned and

scrupulous men have questioned the propriety, if not lawfulness, of inflicting capital punishment for simple theft.<sup>33</sup> And certainly the natural punishment for injuries to property seems to be the loss of the offender's own property: which ought to be universally the case, were all men's fortunes equal. But as those, who have no property themselves, are generally the most ready to attack the property of others, it has been found necessary instead of a pecuniary to substitute a corporal punishment: yet how far this corporal punishment ought to extend, is what has occasioned the doubt. Sir Thomas More,<sup>34</sup> and the marquis Beccaria,<sup>35</sup> at the distance of more than two centuries, have very sensibly proposed that kind of corporal punishment, which approaches the nearest to a pecuniary satisfaction; *viz.* a temporary imprisonment, with an obligation to labor, first for the party robbed, and afterwards for the public, in works of the most slavish kind: in order to oblige the offender to repair, by his industry and diligence, the depredations he has committed upon private property and public order. But, notwithstanding all the remonstrances of speculative politicians and moralists, the punishment of theft still continues, throughout the greatest part of Europe, to be capital: and Pufendorf,<sup>36</sup> together with Sir Matthew Hale<sup>37</sup> are of opinion that this must always be referred to the prudence of the legislature; who are to judge, say they, when crimes are become so enormous as to require such sanguinary restrictions.<sup>38</sup> Yet both these writers agree, that such punishment should be cautiously inflicted, and never without the utmost necessity.

OUR ancient Saxon laws nominally punished theft with death, if above the value of tweldepence: but the criminal was permitted to redeem his life by a pecuniary ransom; as, among their ancestors the Germans, by a stated number of cattle.<sup>39</sup> But in the ninth year of Henry the first, this power of redemption was taken away, and all persons guilty of larceny above the value of tweldepence were directed to be hanged; which law continues in force to this day.<sup>40</sup> For though the inferior species of theft, or petit larceny, is only punished by whipping at common law,<sup>41</sup> or by statute 4 Geo. I. c. 11. may be extended to transportation for seven years, yet the punishment of grand larceny, or the stealing above the value of tweldepence, (which sum was the standard in the time of king Athelstan, eight hundred years ago) is at common law regularly death. Which, considering the great intermediate alteration in the price or denomination of money, is undoubtedly a very rigorous constitution; and made Sir Henry Spelman (above a century since, when money was at twice its present rate) complain, that while everything else was risen in its nominal value, and become dearer, the life of man had continually grown cheaper.<sup>42</sup> It is true, that the mercy of juries will often make them strain a point, and bring in larceny to be under the value of tweldepence, when it is really of much greater value: but this is a kind of pious perjury, and does not at all excuse our common law in this respect from the imputation of severity, but rather strongly confesses, the charge. It is likewise true, that by the merciful extensions of the benefit of clergy by our modern statute law, a person who commits a simple larceny to the value of thirteen pence or thirteen hundred pounds, though guilty of a capital offense, shall be excused the pains of death: but this is only for the first offense. And in many cases of simple larceny the benefit of clergy is taken away by statute: as from horsestealing;<sup>43</sup> taking woollen cloth from off the tenters,<sup>44</sup> or linen from the place of manufacture;<sup>45</sup> stealing sheep or other cattle specified in the acts<sup>46</sup> thefts on navigable rivers above the value of forty shillings;<sup>47</sup> plundering vessels in distress, or that have suffered shipwreck;<sup>48</sup> stealing letters sent by the post;<sup>49</sup> and also stealing deer, hares, and conies under the peculiar circumstances mentioned in the Waltham black act.<sup>50</sup> Which additional severity is owing to the great malice and mischief of the theft in some of these instances; and, in others, to the difficulties men would otherwise lie under to preserve those goods, which are so easily carried off. Upon which last principle the Roman law

punished more severely than other thieves the *abigei*, or stealers of cattle;<sup>51</sup> and the *balnearii*, or such as stole the clothes of persons who were washing in the public baths:<sup>52</sup> both which constitutions seem to be borrowed from the laws of Athens.<sup>53</sup> And so too the ancient Goths punished with unrelenting severity thefts of cattle, or of corn that was reaped and left in the field: such kind of property (which no human industry can sufficiently guard) being esteemed under the peculiar custody of heaven.<sup>54</sup> And thus much for the offense of simple larceny.

MIXED, or compound larceny is such as has all the properties of the former, but is accompanied with one of, or both, the aggravations of a taking from one's house or person. First therefore of larceny from the house, and then of larceny from the person.

1. LARCENY from the house, though it seems (from the considerations mentioned in the preceding chapter<sup>55</sup>) to have a higher degree of guilt than simple larceny, yet is not at all distinguished from the other at common law:<sup>56</sup> unless where it is accompanied with the circumstance of breaking the house by night; and then we have seen that it falls under another description, *viz.* that of burglary. But now by several acts of parliament (the history of which is very ingeniously deduced by a learned modern wrier,<sup>57</sup> who has shown them to have gradually arisen from our improvements in trade and opulence) the benefit of clergy is taken from larcenies committed in an house in almost every instance.<sup>58</sup> The multiplicity of which acts are apt to create some confusion; but upon comparing them diligently we may collect, that the benefit of clergy is denied upon the following domestic aggravations of larceny; *viz.* 1. In all larcenies above the value of tweldepence, from a church, or from a dwelling-house, or booth, any person being therein. 2. In all larcenies to the value of 5 s. committed by breaking the dwelling-house, though no person be therein. 3. In all larcenies to the value of 40 s. from a dwelling-house, or its outhouses, without breaking in, and whether any person be therein or no. 4. In all larcenies to the value of 5 s. from any shop, warehouse,<sup>59</sup> coachhouse, or stable; whether the same be broken open or not, and whether any person be therein or no. In all these cases, whether happening by day or by night, the benefit of clergy is taken away from the offenders.

2. LARCENY from the person is either by privately stealing; or by open and violent assault, which is usually called robbery.

THE offense of privately stealing from a man's person, as by picking his pocket or the like, without his knowledge, was debarred of the benefit of clergy, so early as by the statute 8 Eliz. c. 14. But then it must be such a larceny, as stands in need of the benefit of clergy, *viz.* of above the value of tweldepence; else the offender shall not have judgment of death. For the statute creates no new offense; but only takes away the benefit of clergy, which was a matter of grace, and leaves the thief to the regular judgment of the ancient law.<sup>60</sup> This severity (for a most severe law it certainly is) seems to be owing to the ease with which such offenses are committed, and the difficulty of property, in the manual occupation or corporal possession of the owner, which was an offense even in a state of nature. And therefore the *saccularii*, or cutpurses [purse snatchers], were more severely punished than common thieves by the Roman and Athenian laws.<sup>61</sup>

OPEN and violent larceny from the person, or robbery, the *rapina* of the civilians, is the felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear.<sup>62</sup> 1. There must be a taking, otherwise it is no robbery. A mere attempt to rob was indeed held



to be felony, so late as Henry the fourth's time:<sup>63</sup> but afterwards it was taken to be only a misdemeanor, and punishable with fine and imprisonment; till the statute 7 Geo. II. c. 21. which makes it a felony transportable for seven years. If the thief, having once taken a purse, returns it, still it is a robbery: and so it is whether the taking be strictly from the person of another, or in his presence only; as where a robber by menaces and violence puts a man in fear, and drives away his sheep of his cattle before his face.<sup>64</sup> 2. It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery.<sup>65</sup> 3. Lastly, the taking must be by force, or a previous putting in fear; which makes the violation of the person more atrocious than privately stealing. For, according to the maxim of the civil law,<sup>66</sup> “*qui vi rapuit, fur improbius esse videtur*” [“he who takes by force is the more iniquitous thief”]. This previous putting in fear is the criterion that distinguishes robbery from other larcenies. For if one privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent:<sup>67</sup> neither is it capital, as privately stealing, being under the value of tweldepence. Yet this putting in fear does not imply, that any great degree of terror or affright in the party robbed is necessary to constitute a robbery: it is sufficient that so much force, or threatening by work or gesture, be used, as might create an apprehension of danger, or oblige a man to part with his property without or against his consent.<sup>68</sup> Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be put in fear, yet this is undoubtedly a robbery. Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence, this is a felonious robbery.<sup>69</sup> So if, under a pretense of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted,<sup>70</sup> whether the forcing a higgler, or other chapman, to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery.

THIS species of larceny is debarred of the benefit of clergy by statute 23 Hen. VIII. c. 1. and other subsequent statutes; not indeed in general, but only when committed in or near the king's highway. A robbery therefore in a distant field, or footpath, was not punished with death;<sup>71</sup> but was open to the benefit of clergy, till the statute 3 & 4 W. & M. c. 9. which takes away clergy from robbery wheresoever committed.

II. MALICIOUS mischief, or damage, is the next species of injury to private property, which the law considers as a public crime. This is such as is done, not *animo furandi*, or with an intent of gaining by another's loss; which is some, though a weak, excuse: but either out of a spirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arson; for as that affects the habitation, so this does the other property, of individuals. And therefore any damage arising from this mischievous disposition, though only a trespass at common law, is now by a multitude of statutes made penal in the highest degree. Of these I shall extract the contents in order of time.

AND, first, by statute 22 Hen. VIII. c. 11. perversely and maliciously to cut down or destroy the powdike [marsh], in the fens of Norfolk and Ely, is felony. By statute 43 Eliz. c. 13. (for preventing rapine on the northern borders) to burn any barn or stack of corn or grain; or to prey, or make spoil, of the persons or goods of the subject upon deadly feud, in the four northern counties of Northumberland, Westmorland, Cumberland, and Durham; or to give or take any money or contribution, there called blackmail, to secure such goods from rapine; is felony without benefit of

clergy. By statute 22 & 23 Car. II. c. 7. to burn any ricks or stacks of corn, hay, or grain, barns, houses, buildings, or kilns; or maliciously, unlawfully, and willingly to kill any horses, sheep, or other cattle, in the night time, is felony; but the offender may make his election to be transported for seven years: and to maim or hurt such cattle is a trespass, for which treble damages shall be recovered. By statute 1 Ann. St. 2. c. 9. captains and mariners belonging to ships, and destroying the same, to the prejudice of the owners, (and by 4 Geo. I. c. 48. maliciously to set on fire any underwood, wood, or coppice, is made single felony. By statute 6 Geo. I. c. 23. the wilful and malicious tearing, cutting, spoiling, burning, or defacing of the garments or clothes of any person passing in the streets or highways, is felony. This was occasioned by the insolence of certain weavers and others; who, upon the introduction of some Indian fashions prejudicial to their own manufactures, made it their practice to cast aqua fortis in the streets upon such as wore them. By statute 9 Geo. I. c. 22. commonly called the Waltham black act, occasioned by the devastations committed in Epping forest, near Waltham in Essex, by persons in disguise or with their faces blacked; (who seem to have resembled the Roberdsmen, or followers of Robert Hood, that in the reign of Richard the first committed great outrages on the borders of England and Scotland<sup>72</sup>); by this black act, I say, which has in part been mentioned under the several heads of riots, mayhem, and larceny, it is farther enacted, that unlawfully and maliciously to set fire to any house, barn, or outhouse, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood; or to break down the head of any fishpond, whereby the fish shall be lost; or to kill, maim, or wound any cattle; or to cut down, or destroy, any trees planted in an avenue, or growing in a garden, orchard, or plantation, for ornament, shelter, or profit; all these malicious acts are felonies without benefit of clergy: and the hundred shall be chargeable for the damages, unless the offender be convicted. In like manner by the Roman law to cut down trees, and especially vines, was punished in the same degree as robbery.<sup>73</sup> By statutes 6 Geo. II. c. 37. and 10 Geo. II. c. 32. it is also made felony without the benefit of clergy, maliciously to cut down any river or sea bank, whereby lands may be overflowed; or to cut any hop-binds growing in a plantation of hops, or wilfully and maliciously to let fire to any mine or delph [mine] of coal. By statute 28 Geo. II. c. 19 to set fire to any goss, furze, or fern, growing in any forest or chase, is subject to a fine of five pounds. And by statute 6 Geo. III. c. 36 & 48. wilfully to spoil or destroy any timber or other trees, roots, shrubs, or plants, is for the two first offenses liable to pecuniary penalties; and for the third if in the day time, and even for the first if at night, the offender shall be guilty of felony, and liable to transportation for seven years. And these are the punishments of malicious mischief.

III. FORGERY, or the *crimen falsi*, is an offense, which was punished by the civil law with deportation or banishment, and sometimes with death.<sup>74</sup> It may with us be defined (at common law) to be, “the fraudulent making or alteration of a writing to the prejudice of another man's right:” for which the offender may suffer fine, imprisonment, and pillory. And also by a variety of statutes, a more severe punishment is inflicted on the offender in many particular cases, which are so multiplied of late as almost to become general. I shall mention the principal instances.

BY statute 5 Eliz. c. 14. 50 forge or make, or knowingly to publish or give in evidence, any forged deed, court roll, or will, with intent to affect the right of real property, either freehold or copyhold, is punished by a forfeiture to the party grieved of double costs and damages; by standing in the pillory, and having both his ears cut off, and his nostrils slit, and seared; by forfeiture to the crown of the profits of his lands, and by perpetual imprisonment. For any forgery relating to a term of

years, or annuity, bond, obligation, acquittance, release, or discharge of any debt or demand of any personal chattels, the same forfeiture is given to the party grieved; and on the offender is inflicted the pillory, loss of one of his ears, and half a year's imprisonment: the second offense in both cases being felony without benefit of clergy.

BESIDES this general act, a multitude of others, since the revolution, (when paper credit was first established) have inflicted capital punishment on the forging or altering of bank bills or notes, or other securities;<sup>75</sup> of bills of credit issued from the exchequer;<sup>76</sup> of south sea bonds, etc;<sup>77</sup> of lottery orders;<sup>78</sup> of army or navy debentures;<sup>79</sup> of East India bonds;<sup>80</sup> of writings under seal of the London, or royal exchange, assurance;<sup>81</sup> of a letter of attorney or other power to receive or transfer stock or annuities, or for the personating a proprietor thereof, to receive or transfer such annuities, stock, or dividends:<sup>82</sup> to which may be added, though not strictly reducible to this head, the counterfeiting of mediterranean passes, under the hands of the lords of the admiralty, to protect one from the piratical states of Barbary;<sup>83</sup> the forging or imitating any stamps to defraud the stamp office;<sup>84</sup> and the forging any marriage register or license:<sup>85</sup> all which are by distinct acts of parliament made felonies without benefit of clergy. And by statute 31 Geo. II. c. 32. forging or counterfeiting any stamp or mark to denote the standard of gold and silver plate, and certain other offenses of the like tendency, are made felony, but not without benefit of clergy.

THERE are also two other general laws, with regard to forgery; the one 2 Geo. II. c. 35. whereby the first offense in forging or publishing any forged deed, will, writing obligatory, bill of exchange, promissory note, endorsement or assignment thereof, or any acquittance or receipt for money or goods, with intention to defraud any person, is made felony without benefit of clergy. And by statute 7 Geo. II. c. 22. it is equally penal to forge or utter a counterfeit acceptance of a bill of exchange, or the number of any accountable receipt for any note, bill, or any other security for money; or any warrant or order for the payment of money, or delivery of goods. So that, I believe, through the number of these general and special provisions, there is now hardly a case possible to be conceived, wherein forgery, that tends to defraud, whether in the name of a real or fictitious person,<sup>86</sup> is not made a capital crime.

THESE are the principal infringements of the rights of property; which were the last species of offenses against individuals or private subjects, which the method of our distribution has led us to consider. We have before examined the nature of all offenses against the public, or commonwealth; against the king or supreme magistrate, the father and protector of that community; against the universal law of all civilized nations; together with some of the more atrocious offenses, of publicly pernicious consequence, against God and his holy religion. And these several heads comprehend the whole circle of crimes and misdemeanors, with the punishment annexed to each, that are cognizable by the laws of England.

## NOTES

1. See Vol. II. pag. 8, etc.
2. 1 Hal. P. C. 504.
3. 3 Inst. 107.

4. 1 Hal. P. C. 506.
5. 1 Hawk. P. C. 90.
6. Foster. 123, 124.
7. 3 Inst. 108, 109.
8. 1 Hawk. P. C. 93.
9. Inst. 4. 1. 1.
10. See pag. 20.
11. 1 Hal. P. C. 509.
12. See Vol. II. pag. 16.
13. 5 Inst. 109. 1 Hal. P. C. 510.
14. Oak, beech, chestnut, walnut, ash, elm, cedar, fir, asp, lime, sycamore, and birch.
15. 1 Hal. P. C. 510. Stra. 1137.
16. See Vol. II. pag. 438.
17. 8 Rep. 33.
18. Cab. 6. 2. 18.
19. 1 Hal. P. C. Fost. 336.
20. 1 Hawk. P. C. 94. 1. Hal. P. C. 511.
21. See stat. 22 & 23 Car. II. c. 25.
22. 3 Inst. 98.
23. Dalt. Just. C. 156.
24. 1 Hal. P. C. 511.
25. See Vol. II. pag. 393.
26. 1 Hal. P. C. 512.
27. Ibid.
28. Gravin. L. 3. § 106.
29. See Vol. II. pag. 429.
30. Montesq. Sp. L. b. 30. ch. 19.
31. Exod. c. xxii.
32. Petit. LL. Attic. l. 7. tit. 5.

33. *Est enim ad vindicanda furta nimis atrox, nec tamen ad refrænanda sufficiens: quippe neque furtum simplex tam ingens facinus est, ut capite debeat plecti; neque ulla poena est tanta, ut ab latrociniis cohibeat eos, qui nullam aliam artem quaerendi victus habent.* [Death is too severe a punishment for theft, nor yet sufficient to restrain it; for neither is simple theft such a heinous offense, that it should be made capital, nor can there be any punishment so severe as to restrain those from robbing who have no other means of obtaining a livelihood.] (Mori Utopia. Edit. Glasg. 1750. pag. 21.) – *Denique, cum lex Mosaica, quanquam inclemens et aspera, tamen pecunia furtum, haud morte, mulctavit; ne putemus Deum, in nova lege clementiae qua pater imperat filiis, majorem indusisse nobis invicem saeviendi licentiam. Haec sunt cur non licere putem:*

*quam vero sit absurdum, atque etiam perniciosum reipublicae, furem atque homicidam ex aequo puniri, nemo est (opinor) qui nesciat.* [In short, since the Mosaic law, although rigorous and severe, only punished theft by a fine, not by death, we cannot think that God, in that new law of mercy by which as a father he governs his children, has granted us a greater liberty of harshness or severity towards each other. These are the reasons why I deem it unlawful. And there is no one, I think, but must be sensible how absurd it is, and even pernicious to the commonwealth, that a thief and a murderer should receive the same punishment.] (Ibid. 39.)

34. Utop. pag. 42.

35. ch. 22.

36. L. of N. b. 8. c. 3.

37. 1 Hal. P. C. 13.

38. See pag. 9.

39. Tac. *de mor. Germ.* c. 12.

40. 1 Hal. P. C. 12. 3 Inst. 53.

41. 3 Inst. 218.

42. Gloss. 350.

43. Stat. 1 Edw. VI. c. 12. 2. & 3. Edw. VI.

44. Stat. 22 Car. II. c. 5.

45. Stat. 18 Geo. II. c. 27.

46. Stat. 14 Geo. II. c. 6. 15 Geo. II. c. 34.

47. Stat. 24 Geo. II. c. 45.

48. Stat. 12. Ann. St. 2. c. 18. 26 Geo. II. c. 19.

49. Stat. 7. Geo. III. c. 50.

50. Stat. 9 Geo. I. c. 22.

51. Ff. 47. t. 14.

52. Ibid. t. 17.

53. Pott. *Antiqu.* b. 1. c. 26.

54. Stiernh. *de jure Goth.* l. 3. c. 5.

55. See pag. 223.

56. 1 Hawk. P. C. 98.

57. Barr. 375. etc.

58. Stat. 23 Hen. VIII. c. 1. 25. Hen. VIII. c. 3. 1 Edw. VI. c. 12. 5. & Edw. VI. c. 9. 10 & 11 W. III. c. 23. 12. Ann. c. 7.

59. See Foster. 78, 79. Barr. 379.

60. 1 Hawk. P. C. 98.

61. Ff. 47. 11. 7. Pott. *Antiqu.* l. 1. c. 26.

62. 1 Hawk. P. C. 95.

63. 1 Hal. P. C. 532.
64. 1 Hal. P. C. 533.
65. 1 Hawk. P. C. 97.
66. Ff. 4. 2. 14. § 12.
67. 1 Hal. P. C. 534.
68. Fost. 128.
69. 1 Hawk. P. C. 96.
70. Ibid. 97.
71. 1 Hal. P. C. 535.
72. 3 Inst. 197.
73. Ff. 47. 7. 2.
74. Inst. 4. 18. 7.
75. Stat. 7 & 8 W. III. c. 31. 8 & 9. III. c. 20. 11 Geo. I. c. 9. 12 Geo. I. c. 32. 15 Geo. II. c. 13.
76. See the several acts for issuing them.
77. Stat. 9 Ann. c. 21. 6 Geo. I. c. 4. & 11. 12 Geo. I. c. 32.
78. See the several acts for the lotteries.
79. Stat. 5. Geo. 1. c. 14. 9 Geo. I. c. 5.
80. Stat. 12 Geo. 1. c. 32.
81. Stat. 6. Geo. 1. c. 18.
82. Stat. 8 Geo. I. c. 22. 9 Geo. 1. c. 12.
83. Stat. 4. Geo. II. c. 18.
84. See the several stamp acts.
85. Stat. 26 Geo. 11 c. 33.
86. Fost. 116, etc.

## CHAPTER 18

### Of the Means of Preventing Offenses

WE are now arrived at the fifth general branch or head, under which I proposed to consider the subject of this book of our commentaries; *viz.* the means of preventing the commission of crimes and misdemeanors. And really it is an honor, and almost a singular one, to our English laws, that they furnish a title of this sort: since preventive justice is upon every principle, of reason, of humanity, and of sound policy, preferable in all respects to punishing justice;<sup>1</sup> the execution of which, though necessary, and in its consequences a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.

THIS preventive justice consists in obliging those persons, whom there is probable ground to suspect of future misbehavior, to stipulate with and to give full assurance to the public, that such offense as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behavior. This requisition of sureties has been several times mentioned before, as part of the penalty inflicted upon such as have been guilty of certain gross misdemeanors: but there also it must be understood rather as a caution against the repetition of the offense, than any immediate pain or punishment. And indeed, if we consider all human punishments in a large and extended view, we shall find them all rather calculated to prevent future crimes, than to expiate the past: since, as was observed in a former chapter,<sup>2</sup> all punishments inflicted by temporal laws may be classed under three heads; such as tend to the amendment of the offender himself, or to deprive him of any power to do future mischief, or to deter others by his example: all of which conduce to one and the same end, of preventing future crimes, whether that be effected by amendment, disability, or example. But the caution, which we speak of at present, is such as is intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground of apprehension.

By the Saxon constitution these sureties were always at hand, by means of king Alfred's wise institution of decennaries or frankpledges; wherein, as has more than once been observed,<sup>3</sup> the whole neighborhood or tithing of freemen were mutually pledges for each others good behavior. But, this great and general security being now fallen into disuse and neglected, there has succeeded to it the method of making suspected persons find particular and special securities for their future conduct: of which we find mention in the laws of king Edward the confessor;<sup>4</sup> “*tradat fidejussores de pace et legalitate tuenda*” [“deliver sureties for peace and good behavior”]. Let us therefore consider, first, what this security is; next, who may take or demand it; and, lastly, how it may be discharged.

1. THIS security consists in being bound, with one or more sureties, in a recognizance or obligation to the king, entered on record, and taken in some court or by some judicial officer; whereby the parties acknowledge themselves to be indebted to the crown in the sum required; (for instance 100£) with condition to be void and of none effect, if the party shall appear in court on such a day, and in the mean time shall keep the peace: either generally, towards the king, and all his liege people; or particularly also, with regard to the person who craves the security. Or, if it be for the good behavior, then on condition that he shall demean and behave himself well, (or be of good behavior) either generally or specially, for the time therein limited, as for one or more years, or for life. This

recognizance, if taken by a justice of the peace, must be certified to the next sessions, in pursuance of the statute 3 Hen. VII. c. 1. and if the condition of such recognizance be broken, by any breach of the peace in the one case, or any misbehavior in the other, the recognizance becomes forfeited or absolute; and, being *estreated* or extracted (taken out from among the other records) and sent up to the exchequer, the party and his sureties, having now become the king's absolute debtors, are sued for the several sums in which they are respectively bound.

2. ANY justices of the peace, by virtue of their commission, or those who are *ex officio* [officially] conservators of the peace, as was mentioned in a former volume<sup>5</sup> may demand such security according to their own discretion: or it may be granted at the request of any subject, upon due cause shown, provided such demandant be under the king's protection; for which reason it has been formerly doubted, whether Jews, Pagans, or persons convicted of a *praemunire* [forewarning], were entitled thereto.<sup>6</sup> Or, if the justice is averse to act, it may be granted by a mandatory writ, called a *supplicavit* [entreaty], issuing out of the court of king's bench or chancery; which will compel the justice to act, as a ministerial and not as a judicial officer: and he must make a return to such writ, specifying his compliance, under his hand and seal.<sup>7</sup> But this writ is seldom used: for, when application is made to the superior courts, they usually take the recognizances there, under the directions of the statute 21 Jac. I. c. 8. And indeed a peer or peeress cannot be bound over in any other place, than the courts of king's bench or chancery: though a justice of the peace has a power to require sureties of any other person, being compos mentis and under the degree of nobility, whether he be a fellow justice or other magistrate, or whether he be merely a private man.<sup>8</sup> Wives may demand it against their husbands; or husbands, if necessary, against their wives.<sup>9</sup> But feme-coverts, and infants under age, ought to find security by their friends only, and not to be bound themselves: for they are incapable of engaging themselves to answer any debt; which, as we observed, is the nature of these recognizances or acknowledgments.

3. A RECOGNIZANCE may be discharged, either by the demise of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such recognizance is certified by the justices (as the quarter sessions, assizes, or king's bench) if they see sufficient cause: or if he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued.<sup>10</sup>

THUS far what has been said is applicable to both species of recognizances, for the peace, and for the good behavior; *de pace, et legalitate, tuenda*, as expressed in the laws of king Edward. But as these two species of securities are in some respects different, especially as to the cause of granting, or the means of forfeiting them; I shall now consider them separately: and first, shall show for what cause such a recognizance, with sureties for the peace, is grantable; and then, how it may be forfeited.

1. ANY justice of the peace may, *ex officio* [officially], bind all those to keep the peace, who in his presence make any affray; or threaten to kill or beat another; or contend together with hot and angry words; or go about with unusual weapons or attendance, to the terror of the people; and all such as he knows to be common barretors; and such as are brought before him by the constable for a breach of the peace in his presence; and all such persons, as, having been before



bound to the peace, have broken it and forfeited their recognizances.<sup>11</sup> Also, wherever any private man has just cause to fear, that another will burn his house, or do him a corporal injury, by killing, imprisoning, or beating him; or that he will procure others so to do; he may demand surety of the peace against such person: and every justice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm; and will show that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him; and will also farther swear, that he does not require such surety out of malice or for mere vexation.<sup>12</sup> This is called swearing the peace against another: and, if the party does not find such sureties, as the justice in his discretion shall require, he may immediately be committed till he does.<sup>13</sup>

2. SUCH recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault, or *meance*, to the person of him who demanded it, if it be a special recognizance: or, if the recognizance be general, by any unlawful action whatsoever, that either is or tends to a breach of the peace; or, more particularly, by any one of the many species of offenses which were mentioned as crimes against the public peace in the eleventh chapter of this book; or, by any private violence committed against any of his majesty's subjects. But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance.<sup>14</sup> Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, so as to forfeit one's recognizance (being looked upon to be merely the effect of heat and passion) unless they amount to a challenge to fight.<sup>15</sup>

THE other species of recognizance, with sureties, is for the *good abearance*, or good behavior. This includes security for the peace, and somewhat more: we will therefore examine it in the same manner as the other.

1. FIRST then, the justices are empowered by the statute 34 Edw III. c. 1. to bind over to the good behavior towards the king and his people, all them that be not of good fame, wherever they be found, to the intent that the people be not troubled nor endamaged, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, that be not of good fame, it is held that a man may be bound to his good behavior for causes of scandal, *contra bonos mores* [against good manners], as well as *contra pacem* [against the peace]; as, for haunting bawdy houses with women of bad fame; or for keeping such women in his own house; or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers; eaves-droppers; such as keep suspicious company, or are reported to be pilferers or robbers; such as sleep in the day, and wade on the night; common drunkards; whoremasters; the putative fathers of bastards; cheats; idle vagabonds; and other persons, whose misbehavior may reasonably bring them within the general words of the statute, of so great a latitude, as leaves much to be determined by the discretion of the magistrate himself. But, if he commits a man for want of sureties, he must express the cause thereof with convenient certainty; and take care that such cause be a good one.<sup>16</sup>

2. A RECOGNIZANCE for the good behavior may be forfeited by all the same means, as one for the security of the peace may be; and also by some others. As, by going armed with unusual attendance, to the terror of the people; by speaking words tending to sedition; or, by committing any

of those acts of misbehavior, which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen:<sup>17</sup> for, though it is just to compel suspected persons to give security to the public against misbehavior that is apprehended; yet it would be hard, upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.

### NOTES

1. Beccar. ch. 41.
2. See pag. 11.
3. See Vol. I, pag. 113.
4. Cap. 18.
5. See Vol. I, pag. 350.
6. 1 Hawk. P. C. 126.
7. F. N. B. 80. 2 P. Wms. 202.
8. 1 Hawk. P. C. 127.
9. 2 Stra. 1207.
10. 1 Hawk. P. C. 127.
11. 1 Hawk. P. C. 126.
12. Ibid. 127.
13. Ibid. 128.
14. Ibid. 131.
15. 1 Hawk. P. C. 130.
16. Ibid. 132.
17. 1 Hawk. P. C. 133.

## CHAPTER 19 Of Courts of a Criminal Jurisdiction

THE sixth, and last, object of our inquiries will be the method of inflicting those punishments, which the law has annexed to particular offenses; and which I have constantly subjoined to the description of the crime itself. In the discussion of which I shall pursue much the same general method, that I followed in the preceding book, with regard to the redress of civil injuries: by, first, pointing out the several courts of criminal jurisdiction, wherein offenders may be prosecuted to punishment; and by, secondly, deducing down in their natural order, and explaining, the several proceedings therein.

FIRST then, in reckoning up the several courts of criminal jurisdiction, I shall, as in the former case, begin with an account of such, as are of a public and general jurisdiction throughout the whole realm; and, afterwards, proceed to such, as are only of a private and special jurisdiction, and confined to some particular parts of the kingdom.

I. IN our inquiries into the criminal courts of public and general jurisdiction, I must in one respect pursue a different order from that in which I considered the civil tribunals. For there, as the several courts had a gradual subordination to each other, the superior correcting and reforming the errors of the inferior, I thought it best to begin with the lowest, and so ascend gradually to the courts of appeal, or those of the most extensive powers. But as it is contrary to the genius and spirit of the law of England, to suffer any man to be tried twice for the same offense in a criminal way, especially if acquitted upon the first trial; therefore these criminal courts may be said to be all independent of each other: at least so far, as that the sentence of the lowest of them can never be controlled or reversed by the highest jurisdiction in the kingdom, unless for error in matter of law, apparent upon the face of the record; though sometimes causes may be removed from one to the other before trial. And therefore as, in these courts of criminal cognizance, there is not the same chain and dependence as in the others, I shall rank them according to their dignity, and begin with the highest of all; *viz.*

I. THE high court of parliament; which is the supreme court in the kingdom, not only for the making, but also for the execution, of laws; by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attain particular persons of treason or felony, or to inflict pains and penalties, beyond or contrary to the common law, to serve a special purpose, I speak not of them; being to all intents and purposes new laws, made *pro re nata* [for the occasion], and by no means an execution of such as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a prosecution of the already known and established law, and has been frequently put in practice; being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom.<sup>1</sup> A commoner cannot however be impeached before the lords for any capital offense, but only for high misdemeanors:<sup>2</sup> a peer may be impeached for any crime. And they usually (in case of an impeachment of a peer for treason) address the crown to appoint a lord high steward, for the greater dignity and regularity of their proceedings; which high steward was formerly elected by the peers themselves, though he was generally commissioned by the king;<sup>3</sup> but it has of late years been strenuously maintained,<sup>4</sup> that the appointment of a high steward in such cases is not indispensably necessary, but that the house may proceed without one. The articles of impeachment are a kind of bills of indictment, found by the house of commons, and afterwards tried

by the lords; who are in cases of misdemeanors considered not only as their own peers, but as the peers of the whole nation. This is a custom derived to us from the constitution of the ancient Germans; who in their great councils sometimes tried capital accusations relating to the public: "*licet apud concilium accusare quoque, et discrimen capitis intendere.*"<sup>5</sup> ["One may bring accusations before the council, and commence capital prosecutions."] And it has a peculiar propriety in the English constitution; which has much improved upon the ancient model imported hither from the continent.

For, though in general the union of the legislative and judicial powers ought to be most carefully avoided,<sup>6</sup> yet it may happen that a subject, entrusted with the administration of public affairs, may infringe the rights of the people, and be guilty of such crimes, as the ordinary magistrate either dares not or cannot punish. Of these the representatives of the people, or house of commons, cannot properly judge; because their constituents are the parties injured: and can therefore only impeach. But before what court shall this impeachment be tried? Not before the ordinary tribunals, which would naturally be swayed by the authority of so powerful an accuser. Reason therefore will suggest, that this branch of the legislature, which represents the people, must bring its charge before the other branch, which consists of the nobility, who have neither the same interests, nor the same passions as popular assemblies.<sup>7</sup> This is a vast superiority, which the constitution of this island enjoys, over those of the Grecian or Roman republics; where the people were at the same time both judges and accusers. It is proper that the nobility should judge, to insure justice to the accused; as it is proper that the people should accuse, to insure justice to the commonwealth. And therefore, among other extraordinary circumstances attending the authority of this court, there is one of a very singular nature, which was insisted on by the house of commons in the case of the earl of Danby in the reign of Charles II;<sup>8</sup> and is now enacted by statute 12 & 13 W. III. c. 2. that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in parliament.<sup>9</sup>

2. THE court of the lord high steward of Great Britain.<sup>10</sup> is a court instituted for the trial of peers, indicted for treason or felony, or for misprision of either<sup>11</sup> The office of this great magistrate is very ancient; and was formerly hereditary, or at least held for life, or *dum bene se gesserit* [during good behavior]: but now it is usually, and has been for many centuries part, <sup>12</sup> granted *pro hac vice* [for this time] only; and it has been the constant practice (and therefore seems now to have become necessary) to grant it to a lord of parliament, else he is incapable to try such delinquent peer.<sup>13</sup> When such an indictment is therefore found by a grand jury of freeholders in the king's bench, or at the assizes before the justices of *oyer* and *terminer* [hear and determine], it is to be removed by a writ of *certiorari* [notice given] into the court of the lord high steward, which only has power to determine it. A peer may plead a pardon before the court of king's bench, and the judges have power to allow it; in order to prevent the trouble of appointing an high steward, merely for the purpose of receiving such plea. But he may not plead, in that inferior court, any other plea; as guilty, or not guilty, of the indictment; but only in this court: because, in consequence of such plea, it is possible that judgment of death might be awarded against him. The king therefore, in case a peer be indicted of treason, felony, or misprision, creates a lord high steward *pro hac vice* by commission under the great seal; which recites the indictment so found, and gives his grace power to receive and try it *secundum legem et consuetudinem Angliae* [according to the law and custom of England]. Then, when the indictment is regularly removed, by writ of *certiorari*, commanding the inferior court to certify it up to him, the lord high steward directs a precept to a serjeant at arms, to summon the lords

to attend and try the indicted peer. This precept was formerly issued to summon only eighteen or twenty, selected from the body of the peers: then the number came to be indefinite; and the custom was, for the lord high steward to summon as many as he thought proper, (but of late years not less than twenty three<sup>14</sup>) and that those lords only should sit upon the trial: which threw a monstrous weight of power into the hands of the crown, and this its great officer, of selecting only such peers as the then predominant party should most approve of. And accordingly, when the earl of Clarendon fell into disgrace with Charles II, there was a design formed to prorogue the parliament, in order to try him by a select number of peers; it being doubted whether the whole house could be induced to fall in with the views of the court.<sup>15</sup> But now, by statute 7 W. III. c. 3. upon all trials of peers for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned, at least twenty days before such trial, to appear and vote therein; and every lord appearing shall vote in the trial of such peer, first taking the oaths of allegiance and supremacy, and subscribing the declaration against popery.

DURING the session of parliament the trial of an indicted peer is not properly in the court of the lord high steward, but before the court last-mentioned, of our lord the king in parliament.<sup>16</sup> It is true, a lord high steward is always appointed in that case, to regulate and add weight to the proceedings; but he is rather in the nature of a speaker *pro tempore* [temporary], or chairman of the peers are therein the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high steward has a vote with the rest, in right of his peerage. But in the court of the lord high steward, which is held in the recess of parliament, he is the sole judge in matters of law, as the lords triers are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial.<sup>17</sup> Therefore, upon the conviction and attainder of a peer for murder in full parliament, it has been held by the judges,<sup>18</sup> that in case the day appointed in the judgment for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament, during its sitting, though no high steward be existing; or, in the recess of parliament, by the court of king's bench, the record being removed into that court.

IT has been a point of some controversy, whether the bishops have now a right to sit in the court of the lord high steward, to try indictments of treason and misprision. Some incline to imagine them included under the general words of the statute of king William, "all peers, who have a right to sit and vote in parliament:" but the expression had been much clearer, if it had been, "all lords," and not, "all peers;" for though bishops, on account of the baronies annexed to their bishoprics, are clearly lords of parliament, yet, their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility: and perhaps this word might be inserted purposely with a view to exclude them. However, there is no instance of their sitting on trials for capital offenses, even upon impeachments or indictments in full parliament, much less in the court we are now treating of; for indeed they usually voluntarily withdraw, but enter a protest declaring their right to stay. It is certain that, in the eleventh chapter of the constitutions of Clarendon, made in parliament 11 Hen. II. they are expressly excluded from sitting and voting in trials of life or limb: "*episcopi, sicut caeteri barones, debent interesse judiciis cum baronibus, quousque perveniatur ad diminutionem membrorum, vel ad mortem*" ["the bishops ought to be present at trials, as well as the other barons, unless they involve the loss of life or limb"]; and Becket's quarrel with the king hereupon was not on account of the exception, (which was agreeable to the canon law) but of the general rule, that

compelled the bishops to attend at all. And the determination of the house of lords in the earl of Danby's case,<sup>19</sup> which has ever since been adhered to, is consonant to these constitutions; "that the lords spiritual have a right to stay and sit in court in capital cases, till the court proceeds to the vote of guilty, or not guilty." It must be noted, that this resolution extends only to trials in full parliament: for to the court of the lord high steward (in which no vote can be given, but merely that of guilty or not guilty) no bishop, as such, ever was or could be summoned; and though the statute of king William regulates the proceedings in that court, as well as in the court of parliament, yet it never intended to new-model or alter its constitution; and consequently does not give the lords spiritual any right in cases of blood which they had not before.<sup>20</sup> And what makes their exclusion more reasonable, is, that they have no right to be tried themselves in the court of the lord high steward,<sup>21</sup> and therefore surely ought not to be judges there. For the privilege of being thus tried depends upon nobility of blood, rather than a seat in the house; as appears from the trials of popish lords, of lords under age, and (since the union) of the Scots nobility, though not in the number of the sixteen; and from the trials of females, such as the queen consort or dowager, and of all peeresses by birth; and peeresses by marriage also, unless they have, when dowagers, disparaged themselves by taking a commoner to their second husband.

3. THE court of king's bench,<sup>22</sup> concerning the nature of which we partly inquired in the preceding book,<sup>23</sup> was (we may remember) divided into a crown side, and a plea side. And on the crown side, or crown office, it takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace. Into this court also indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar, or at *nisi prius* [unless before], by a jury of the county out of which the indictment is brought. The judges of this court are the supreme coroners of the kingdom. And the court itself is the principal court of criminal jurisdiction (though the two former are of greater dignity) known to the laws of England. For which reason by the coming of the court of king's bench into any county, (as it was removed to Oxford on account of the sickness in 1665) all former commissions of *oyer and terminer*, and general jail delivery, are at once absorbed and determined *ipso facto*: in the same manner as by the old Gothic and Saxon constitutions, "*jure vetusto obtinuit, quievisse omnia inferiora judicia, dicente jus rege.*"<sup>24</sup> ["By long custom, all inferior courts of justice adjourn where the king administers justice."]

INTO this court of king's bench has reverted all that was good and salutary of the jurisdiction of the court of star-chamber, *camera stellata*:<sup>25</sup> which was a court of very ancient origin<sup>26</sup> but new-modeled by statutes 3 Hen. VII. c. 1. and 21 Hen. VIII. c. 20. consisting of diverse lords spiritual and temporal, being privy counselors, together with two judges of the courts of common law, without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehavior of sheriffs, and other notorious misdemeanors, contrary to the laws of the land. Yet this was afterwards (as lord Clarendon informs us<sup>27</sup>) stretched "to the asserting of all proclamations, and orders of state; to the vindicating of illegal commissions, and grants of monopolies; holding for honorable that which pleased, and for just that which profited, and becoming both a court of law to determine civil rights, and a court of revenue to enrich the treasury: the council table by proclamations enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited; and the star-chamber, which consisted of the same persons in different rooms, censuring the breach and disobedience to those proclamations by very great fines, imprisonments, and corporal severities: so that any disrespect to any acts of state, or to the persons of statesmen was in no time

more penal, and the foundations of right never more in danger to be destroyed." For which reasons, it was finally abolished by statute 16 Car. I. c. 10. to the general joy of the whole nation.<sup>28</sup>

4. THE court of chivalry,<sup>29</sup> of which we also formerly spoke<sup>30</sup> as a military court, or court of honor, when held before the earl marshal only, is also a criminal court, when held before the lord high constable of England jointly with the earl marshal. And then it has jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it. But the criminal, as well as civil part of its authority, is fallen into entire disuse: there having been no permanent high constable of England (but only *pro hac vice* at coronations and the like) since the attainder and execution of Stafford duke of Buckingham in the thirteenth year of Henry VIII; the authority and charge, both in war and peace, being deemed too ample for a subject: so ample, that when the chief justice Fineux was asked by king Henry the eighth, how far they extended, he declined answering; and said, the decision of that question belonged to the law of arms, and not to the law of England.<sup>31</sup>

5. THE high court of admiralty,<sup>32</sup> held before the lord high admiral of England, or his deputy, styled the judge of the admiralty, is not only a court of civil, but also of criminal, jurisdiction. This court has cognizance of all crimes and offenses committed either upon the sea, or on the coasts, out of the body or extent of any English county; and, by statute 15 Ric. II. c. 3. of death and mayhem happening in great ships being and hovering in the main stream of great rivers, below the bridges of the same rivers, which are then a sort of ports of havens; such as are the ports of London and Gloucester, though they lie at a great distance from the sea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exercise of a criminal jurisdiction therein was contrary to the genius of the law of England; inasmuch as a man might be there deprived of his life by the opinion of a single judge, without the judgment of his peers. And besides, as innocent persons might thus fall a sacrifice to the caprice of a single man, so very gross offenders might, and did frequently, escape punishment: for the rule of the civil law is, how reasonably I shall not at present inquire, that no judgment of death can be given against offenders, without proof by two witnesses, or a confession of the fact by themselves. This was always a great offense to the English nation: and therefore in the eighth year of Henry VI a remedy was endeavored to be applied in parliament; but it miscarried for want of the royal assent. However, by the statute 28 Hen. VIII. c. 15. it was enacted, that these offenses should be tried by commissioners, nominated by the lord chancellor; namely, the admiral, or his deputy, and three or four more; (among whom two common law judges are constantly appointed, who in effect try all the prisoners) the indictment being first found by a grand jury of twelve men, and afterwards tried by another jury, as at common law: and that the course of proceedings should be according to the law of the land. This is now the only method of trying marine felonies in the court of admiralty: the judge of the admiralty still presiding therein, just as the lord mayor presides at the sessions in London.

THESE five courts may be held in any part of the kingdom, and their jurisdiction extends over crimes that arise throughout the whole of it, from one end to the other. What fellow are also of a general nature, and universally diffused over the nation, but yet are of a local jurisdiction, and confined to particular districts. Of which species is,

6. THE court of *oyer and terminer*, and general jail delivery:<sup>33</sup> which is held before the king's

commissioners, among whom are usually two judges of the courts at Westminster, twice in every year in every county of the kingdom; except the four northern ones, where it is held only once, and London and Middlesex wherein it is held eight times. This was slightly mentioned in the preceding book.<sup>34</sup> We then observed, that, at what is usually called the assizes, the judges sit by virtue of five several authorities: two of which, the commission of assize and its attendant jurisdiction of *nisi prius*, being principally of a civil nature, were then explained at large; to which I shall only add, that these justices have, by virtue of several statutes, a criminal jurisdiction also, in certain special cases.<sup>35</sup> The third, which is the commission of the peace, was also treated of in a former volume,<sup>36</sup> when we inquired into the nature and office of a justice of the peace. I shall only add, that all the justices of the peace of any county, wherein the assizes are held, are bound by law to attend them, or else are liable to a fine; in order to return recognizances, etc, and to assist the judges in such matters as lie within their knowledge and jurisdiction, and in which some of them have probably been concerned, by way of previous examination. But the fourth authority is the commission of *oyer and terminer*,<sup>37</sup> to hear and determine all treasons, felonies, and misdemeanors. This is directed to the judges and several others; but the judges only are of the quorum, so that the rest cannot act without them. The words of the commission are, “to inquire, hear, and determine.” So that by virtue of this commission they can only proceed upon an indictment found at the same assizes; for they must first inquire, by means of the grand jury or inquest, before they are empowered to hear and determine by the help of the petit jury. Therefore they have besides, fifthly, a commission of general jail delivery;<sup>38</sup> which empowers them to try and deliver every prisoner, who shall be in the jail when the judges arrive at the circuit town, whenever indicted, or for whatever crime committed. It was anciently the course to issue special writs of jail delivery for each particular prisoner, which were called the writs *de bono et malo* [of good and evil]:<sup>39</sup> but, these being found inconvenient and oppressive, a general commission for all the prisoners has long been established in their stead. So that, one way or other, the jails are cleared, and all offenders tried, punished, or delivered, twice in every year: a constitution of singular use and excellence. Sometimes also, upon urgent occasions, the king issues a special or extraordinary commission of *oyer and terminer*, and jail delivery, confined to those offenses which stand in need of immediate inquiry and punishment: upon which the course of proceeding is the same, as upon general and ordinary commissions. Formerly it was held, in pursuance of the statutes 8 Ric. II. c. 2. and 33 Hen. VIII. c. 4. that no judge or other lawyer could act in the commission of *oyer and terminer*, or in that of jail delivery, within his own county, where he was born or inhabited; in like manner as they are prohibited from being judges of assize and determining civil causes. But that local partiality, which the jealousy of our ancestors was careful to prevent, being judged less likely to operate in the trial of crimes and misdemeanors, than in matters of property and disputes between party and party, it was thought proper by the statute 12 Geo. II. c. 27. to allow any man to be a justice of *oyer and terminer* and general jail delivery within any county of England.

7. THE court of general quarter sessions of the peace<sup>40</sup> is a court that must be held in every county once in every quarter of a year; which by statute 2 Hen. V. c. 4. is appointed to be in the first week after Michaelmas-day; the first week after the epiphany; the first week after the close of Easter; and in the week after the translation of saint Thomas a Becket, or the seventh of July. It is held before two or more justices of the peace, one of which must be of the quorum. The jurisdiction of this court by statute 34 Edw. III. c. 1. extends to the trying and determining all felonies and trespasses whatsoever: though they seldom, if ever, try any greater offense than small felonies within the



benefit of clergy; their commission providing, that, if any case of difficulty arises, they shall not proceed to judgment, but in the presence of one of the justices of the courts of king's bench or common pleas, or one of the judges of assize. And therefore murders, and other capital felonies, are usually remitted for a more solemn trial to the assizes. They cannot also try any new-created offense, without express power given them by the statute which creates it.<sup>41</sup> But there are many offenses, and particular matters, which by particular statutes belong properly to this jurisdiction, and ought to be prosecuted in this court: as, the smaller misdemeanors against the public or commonwealth, not amounting to felony; and especially offenses relating to the game, highways, alehouses, bastard children, the settlement and provision for the poor, vagrants, servants wages, apprentices, and popish recusants.<sup>42</sup> Some of these are proceeded upon by indictment; and others in a summary way by motion and order thereupon; which order may for the most part, unless guarded against by particular statutes, be removed into the court of king's bench, by writ of *certiorari facias*, and be there either quashed or confirmed. The records or rolls of the sessions are committed to the custody of a special officer denominated the *custos rotulorum* [keeper of the rolls], who is always a justice of the quorum; and among them of the quorum (says Lambard<sup>43</sup>) a man for the most part especially picked out, either for wisdom, countenance, or credit. The nomination of the *custos rotulorum* (who is the principal civil officer in the county, as the lord lieutenant is the chief in military command) is by the king's sign manual: and to him the nomination of the clerk of the peace belongs; which office he is expressly forbidden to sell for money.<sup>44</sup>

IN most corporation towns there are quarter sessions kept before justices of their own, within their respective limits: which have exactly the same authority as the general quarter sessions of the county, except in a very few instances; one of the most considerable of which is the matter of appeals from orders of removal of the poor, which, though they be from the orders of corporation justices, must be to the sessions of the county, by statute 8 & 9 W. III. c. 30. In both corporations and counties at large, there is sometimes kept a special or petty session, by a few justices, for dispatching smaller business in the neighborhood alehouses, passing the accounts of parish officers, and the like.

8. THE sheriff's *tourn*,<sup>45</sup> or rotation, is a court of record, held twice every year within a month after Easter and Michaelmas, before the sheriff, in different parts of the county; being indeed only the turn of the sheriff to keep a court-leet in each respective hundred.<sup>46</sup> this therefore is the great court-leet of the county, as the county court is the court-baron: for out of this, for the ease of the sheriff, was taken

9. THE court-leet, or view of frankpledge,<sup>47</sup> which is a court of record, held once in the year and not oftener,<sup>48</sup> within a particular hundred, lordship, or manor, before the steward of the leet; being the king's court granted by charter to the lords of those hundreds or manors. its original intent was to view the frank pledges, that is, the freemen within the liberty; who (we may remember<sup>49</sup>) according to the institution of the great Alfred, were all mutually pledges for the good behavior of each other. Besides this, the preservation of the peace, and the chastisement of diverse minute offenses against the public good, are the objects both of the court-leet and the sheriff's tourn: which have exactly the same jurisdiction, one being only a larger species of the other; extending over more territory, but not over more causes. All freeholders within the precinct are obliged to attend them, and all persons commorant [residing] therein; which commorancy consists in usually lying there: a regulation,

which owes its original to the laws of king Canute.<sup>50</sup> But persons under twelve and above sixty years old, peers, clergymen, women, and the king's tenants in ancient demesne, are excused from attendance there: all others being bound to appear upon the jury, if required, and make their due presentments. It was also anciently the custom to summon all the king's subjects, as they respectively grew to years of discretion and strength, to come to the court-leet, and there take the oath of allegiance to the king. The other general business of the leet and tourn, was to present by jury all crimes whatsoever that happened within their jurisdiction; and not only to present, but also to punish, all trivial misdemeanors, as all trivial debts were recoverable in the court-baron, and county court: justice, in these minuter matters of both kinds, being brought home to the doors of every man by our ancient constitution. Thus in the Gothic constitution, the *haereda* [heirs], which answered to our court-leet, “*de omnibus quidem cognoscit, non tamen de omnibus judicat*” [“takes cognizance of all offences, but does not give judgment in all”].<sup>51</sup> The objects of their jurisdiction are therefore unavoidably very numerous: being such as in some degree, either less or more, affect the public weal, or good governance of the district in which they arise; from common nuisances and other material offenses against the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the tourn and the leet have been for a long time in a declining way: a circumstance, owing in part to the discharge granted by the statute of Marlbridge, 52 Hen. III. c. 10. to all prelates, peers, and clergymen from their attendance upon these courts; which occasioned them to grow into disrepute. And hence it is that their business has for the most part gradually devolved upon the quarter sessions: which it is particularly directed to do in some cases by statute 1 Edw. IV. c. 2.

10. THE court of the coroner<sup>52</sup>; is also a court of record, to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. And this he is only entitled to do *super visum corporis* [on view of the body]. Of the coroner and his office we treated at large in a former volume,<sup>53</sup> among the public officers and ministers of the kingdom; and therefore shall not here repeat our inquiries: only mentioning his court, by way of regularity, among the criminal courts of the nation.

11. THE court of the clerk of the market<sup>54</sup>; is incident to every fair and market in the kingdom, to punish misdemeanors therein; as a court of *pie poudre* is, to determine all disputes relating to private or civil property. The object of this jurisdiction.<sup>55</sup> is principally the cognizance of weights and measures, to try whether they be according to the true standard thereof, or no: which standard was anciently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly; and hence this officer, though now usually a layman, is called the clerk of the market.<sup>56</sup> If they be not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves ought to be burnt. This is the most inferior court of criminal jurisdiction in the kingdom; though the objects of its coercion were esteemed among the Romans of such importance to the public, that they were committed to the care of some of their most dignified magistrates, the *curule aediles*.

II. THERE are a few other criminal courts of greater dignity than many of these, but of a more confined and partial jurisdiction; extending only to some particular places, which the royal favor, confirmed by act of parliament, has distinguished by the privilege of having peculiar courts of their own, for the punishment of crimes and misdemeanors arising within the bounds of their cognizance;

These, not being universally dispersed, or of general use, as the former, but confined to one spot, as well as to a determinate species of causes, may be denominated private or special courts of criminal jurisdiction.

I SPEAK not here of ecclesiastical courts; which punish spiritual fins, rather than temporal crimes, by penance, contrition, and excommunication, *pro salute animae* [for the good of the soul]: or, which is looked upon as equivalent to all the rest, by a sum of money to the officers of the court by way of commutation of penance. Of these we discoursed sufficiently in the preceding book.<sup>57</sup> I am now speaking of such courts as proceed according to the course of the common law; which is a stranger to such unaccountable barterings of public justice.

1. AND, first, the court of the lord steward, treasurer, or comptroller of the king's household<sup>58</sup> was instituted by statute 3 Hen. VII. c. 14. to inquire of felony by any of the king's sworn servants, in the check roll of the household, under the degree of a lord, in confederating, compassing, conspiring, and imagining the death or destruction of the king, or any lord or other of his majesty's privy council, or the lord steward, treasurer, or comptroller of the king's house. The inquiry, and trial thereupon, must be by a jury according to the course of the common law, consisting of twelve fad men (that is, sober and discreet persons) of the king's household.

2. THE court of the lord steward of the king's household, or (in his absence) of the treasurer, comptroller, and steward of the marshalsea,<sup>59</sup> was created by statute 33 Hen. VIII. c. 12. with a jurisdiction to inquire of, hear, and determine, all treasons, misprisions of treason, murders, manslaughters, bloodshed, and other malicious strikings; whereby blood shall be shed in any of the palaces and houses of the king, or in any other house where the royal person shall abide. The proceedings are also by jury, both a grant and a petit one, as at common law, taken out of the officers and sworn servants of the king's household. The form and solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand, which is part of the punishment for shedding blood in the king's court, is very minutely set forth in the said statute 33 Hen. VIII. and the several offices of the servants so the household in and about such execution are described; from the serjeant of the wood-yard, who furnishes the chopping-block, to the serjeant farrier, who brings hot irons to sear the stump.

3. As in the preceding book<sup>60</sup> we mentioned the courts of the two universities, or their chancellor's courts, for the redress of civil injuries; it will not be improper now to add a short work concerning the jurisdiction of their criminal courts, which is equally large and extensive. The chancellor's court of Oxford (with which university the author has been chiefly conversant, though probably that of Cambridge has also a similar jurisdiction) has authority to determine all causes of property, wherein a privileged person is one of the parties, except only causes of freehold; and also all criminal offenses or misdemeanors, under the degree of treason, felony, or mayhem. The prohibition of meddling with freehold still continues: but the trial of treason, felony, and mayhem, by a particular charter is committed to the university jurisdiction in another court, namely, the court of the lord high steward of the university.

FOR by the charter of 7 Jun. 2 Hen. IV. (confirmed, among the rest, by the statute 13 Eliz. c. 29.) cognizance is granted to the university of Oxford of all indictments of treasons, insurrections, felony,

and mayhem, which shall be found in any of the king's courts against a scholar or privileged person; and they are to be tried before the high steward of the university, or his deputy, who is to be nominated by the chancellor of the university for the time being. But, when his office is called forth into action, such high steward must be approved by the lord high chancellor of England; and a special commission under the great seal is given to him, and others, to try the indictment then depending, according to the law of the land and the privileges of the said university. When therefore an indictment is found at the assizes, or elsewhere, against any scholar of the university, or other privileged person, the vice-chancellor may claim the cognizance of it; and (when claimed in due time and manner) it ought to be allowed him by the judges of assize: and then it comes to be tried in the high steward's court. But the indictment must first be found by a grand jury, and then the cognizance claimed: for I take it that the high steward cannot proceed originally *ad inquirendum* [to inquire]; but only, after inquest in the common law courts, *ad audiendum et determinandum* [to hear and determine]. Much in the same manner, as, when a peer is to be tried in the court of the lord high steward of Great Britain, the indictment must first be found at the assizes, or in the court of king's bench, and then (in consequence of a writ of *certiorari*) transmitted to be finally heard and determined before his grace the lord high steward and the peers.

WHEN the cognizance is so allowed, if the offense be *inter minora crimina* [among lesser crimes], or a misdemeanor only, it is tried in the chancellor's court by the ordinary judge. But if it be for treason, felony, or mayhem, it is then, and then only, to be determined before the high steward, under the king's special commission to try the same. The process of the trial is this. The high steward issues one precept to the sheriff of the county, who thereupon returns a panel of eighteen freeholders; and another precept to the bedells [officers] of the university, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio universitatis gaudentes*" ["laymen enjoying university privilege"]: and by a jury formed *de medietate*, half of freeholders, and half of matriculated persons, is the indictment to be tried; that in the guildhall of the city of Oxford. And if execution be necessary to be awarded, in consequence of finding the party guilty, the sheriff of the county must execute the university process; to which he is annually bound by an oath.

I HAVE been the more minute in describing these proceedings, as there has happily been no occasion to reduce them into practice for more than a century past; though it is not a right that merely rests *in scriptis* [on paper] or theory, but has formerly often been carried into execution. There are many instances, one in the reign of queen Elizabeth, two in that of James the first, and two in that of Charles the first, where indictments for murder have been challenged by the vice-chancellor at the assizes, and afterwards tried before the high steward by jury. The commissions under the great seal, the sheriff's and bedell's panels, and all the other proceedings on the trial of the several indictments, are still extant in the archives of that university.

## NOTES

1. 1 Hal. P. C. 19, 150.

2. When, in 4 Edw. III. the king demanded the earls, barons, and peers, to give judgment against Simon de Bereford, who had been a notorious accomplice in the treasons of Roger earl of Mortimer, they came before the king in parliament, and said all with one voice, that the said Simon was not their peer; and therefore they were not bound to judge him as a peer of the land. And when afterwards, in the same parliament, they were prevailed upon, in respect of the notoriety and heinousness of his crimes, to receive the charge and to give judgment against him, the following protest and *proviso* was entered on the

parliament roll. "And it is assented and accorded by our lord the king, and all the great men, in full parliament, that albeit the peers as judges of the parliament, have taken upon them in the presence of our lord the king to make and render the said judgment; yet the peers who now are, or shall be in time to come, be not bound or charged to render judgment upon others than peers; nor that the peers of the land have power to do this, but thereof ought ever to be discharged and acquitted: and that the aforesaid judgment now rendered be not drawn to example or consequence in time to come, whereby the said peers may be charged hereafter to judge others than their peers, contrary to the laws of the land, if the like case happen, which God forbid." (Rot. Parl. 4 Edw. III. n 2 & 6. 2 Brad. Hist. 190. Selden. Judic. In parl. ch. 1.)

3. 1 Hal. P. C. 350.

4. Lords Journ. 12 May 1679, Com. Journ. 15 May 1679. Fost. 142, etc.

5. Tacit. de mar. Germ. 12.

6. See Vol. I, pag. 269.

7. Montesq. Sp. L. xi. 6.

8. Com. Journ. 5 May 1679.

9. 1 See chap. 31.

10. 4 Inst. 58. 2 Hawk. P. C. 5. 421.

11. 1 Bulstr. 198.

12. Pryn. on 4 Inst. 46.

13. *Quand un seigneur de parlement serra arreïn de treason ou felony, le roy par ses lettres patens fera un grand et sage seigneur d'estre le grand seneschal d'Angleterre: qui doit faire un precept pur faire venir xx seigneurs, ou xviii, etc.* [When a lord of parliament is arraigned on a charge of treason or felony, the king by his letters patent shall create some wise and noble peer Lord High Steward of England, who shall issue out a precept to summon eighteen or twenty lords, etc.] (Yearb. 13 Hen. VIII, 11.) See Staund P. C. 152. 3 Inst. 28. 4 Inst. 59. 2 Hawk. P. C. 5. Barr. 234.

14. Kelynge. 56.

15. Carte's life of Ormonde. Vol. 2.

16. Fost. 141.

17. State Trials, Vol. 214. 232. 3.

18. Fost. 139.

19. Lords Journ. 15 May 1679.

20. Fost. 248.

21. Bro. Abr. t. Trial. 142.

22. 4 Inst. 70. 2 Hal. P. C. 2. 2 Hawk. P. C. 6.

23. See Vol. III. pag. 41.

24. Stiernhook. l. 1. c. 2.

25. This is said (Lamb. Arch. 154.) to have been so called, either from the Saxon word *steoran*, to steer or govern; or from its punishing the *crimen stellionatus*, or cosenage; or because the room wherein it sat, the old council chamber of the palace of Westminster, (Lamb. 148.) was full of windows; or (to which Sir Edward Coke, 4 Inst. 66. accedes) because haply the roof thereof was at the first garnished with gilded stars. As all these are merely conjectures, (for no stars are said to have remained in the roof so late as the reign of queen Elizabeth) I shall venture to propose another conjectured etymology, as plausible perhaps as any of them. It is well known that, before the banishment of the Jews under Edward I, their contracts and obligations were denominated in our ancient records *starra* or *starrs*, from a corruption of the Hebrew word, *shetâr*, a

covenant. (Tovey's Angl. Judaic. 32. Selden. tit. of hon. ii. 34. Uxor Ebraic. i. 14.) These starrs, by an ordinance of Richard the first, preserved by Hoveden, were commanded to be enrolled and deposited in chests under three keys in certain places; one, and the most considerable, of which was in the king's exchequer at Westminster: and no starr was allowed to be valid, unless it were found in some of the said repositories. (Madox hist. exch. c. vii. § 4. 5. 6.) The room at the exchequer, where the chests containing these starrs were kept, was probably called the starr-chamber; and, when the Jews were expelled from the kingdom, was applied to the use of the king's council, when sitting in their judicial capacity. To confirm this; the first time the star-chamber is mentioned in any record, (Rot. claus. 41 Edw. III. m. 13.) it is said to have been situated near the receipt of the exchequer: that the king's council, his chancellor, treasurer, justices, and other sages, were assembled *en la chaumbre des esteilles pres la resceipt al Westminster*. For in process of time, when the meaning of the Jewish starrs was forgotten, the word star-chamber was naturally rendered in law-french, *la chaumbre des esteilles*, and in law-latin, *camera stellata*; which continued to be the style in latin till the dissolution of that court.

26. Lamb. Arch. 156.

27. Hist. of Reb. Book 1 & 3.

28. The just odium, into which this tribunal had fallen before its dissolution, has been the occasion that few memorials have reached us of its nature, jurisdiction, and practice; except such as, on account of their enormous oppression, are recorded in the histories of the times. There are however to be met with some reports of its proceedings in manuscript; of which the author has one, for the first three years of king Charles: and there is in the British Museum (Harl. MSS. Vol. I. No. 1226.) a very full, methodical, and accurate account of the constitution and course of this court, compiled by William Hudson of Gray's Inn, an eminent practitioner therein.

29. 4 Inst. 123. 2 Hawk. P. C. 9.

30. See Vol. III. pag. 68.

31. Duck *de authorit. jur. civ.*

32. 4 Inst. 134. 147.

33. 4 Inst. 162. 168. 2 Hal. P. C. 22. 32. 2 Hawk. P. C. 14. 23.

34. See Vol. III. pag. 58.

35. 2 Hal. P. C. 39. 2 Hawk. P. C. 28.

36. See Vol. I. pag. 351.

37. See appendix, § 1.

38. Ibid.

39. 2 Inst. 43.

40. 4 Inst. 170. 2 Hal. P. C. 42. 2 Hawk. P. C. 32.

41. 4 Mod. 379. Salk. Lord Raym. 1144.

42. See Lambard's cirenarcha, and Burn's justice.

43. b. 4. c. 3.

44. Stat. 37. Hen. VIII. c. 1. 1. W. & M. St. 1. c. 21.

45. 4 Inst. 259. 2 Hal. P. C. 69. 2 Hawk. P. C. 55.

46. Mirr. c. 1. § 13 & 16.

47. 4 Inst. 261. 2 Hawk. P. C. 72.

48. Mirror. C. 1. § 10.

49. See Vol. III. pag. 113.

50. part. 2. c. 19.
51. Stiernh. de jur. Goth. l. 1. c. 2.
52. 4 Inst. 271. 2. Hal. P. C. 53. 2 Hawk. P. C. 42.
53. See Vol. I. pag. 349.
54. 4 Inst. 273.
55. See stat. 17 Car. 11. c. 19. 22 Car. II. c. 8. 23. Car. II. c. 12.
56. Bacon of English Gov. b. 1. c. 8.
57. See V. 4. III. pag. C. 1.
58. 4 Inst. 132.
59. Ibid. 2 Hal. P. C. 7.
60. See Vol. III. pag. 83.

## CHAPTER 20 Of Summary Convictions

WE are next, according to the plan I have laid down, to take into consideration the proceedings in the courts of criminal jurisdiction, in order to the punishment of offenses. These are plain, easy, and regular; the law not admitting any fictions, as in civil causes, to take place where the life, the liberty, and the safety of the subject are more immediately brought into jeopardy. And these proceedings are divisible into two kinds; summary, and regular: of the former of which I shall briefly speak, before we enter upon the latter, which will require a more thorough and particular examination.

BY a summary proceeding I mean principally such as is directed by several acts of parliament (for the common law is a stranger to it, unless in the case of contempts) for the conviction of offenders, and the inflicting of certain penalties created by those acts of parliament. In these there is no intervention of a jury, but the party accused is acquitted or condemned by the suffrage of such person only, as the statute has appointed for his judge. An institution designed professedly for the greater ease of the subject, by doing him speedy justice, and by not harassing the freeholders with frequent and troublesome attendances to try every minute offense. But it has of late been so far extended, as, if a check be not timely given, to threaten the disuse of our admirable and truly English trial by jury, unless only in capital cases. For,

I. OF this summary nature are all trials of offenses and frauds contrary to the laws of the excise, and other branches of the revenue: which are to be inquired into and determined by the commissioners of the respective departments, or by justices of the peace in the country; officers, who are all of them appointed and removable at the discretion of the crown. And though such convictions are absolutely necessary for the due collection of the public money, and are a species of mercy to the delinquents, who would be ruined by the expense and delay of frequent prosecutions by indictment; and though such has usually been the conduct of the commissioners, as seldom (if ever) to afford just grounds to complain of oppression; yet when we again<sup>1</sup> consider the various and almost innumerable branches of this revenue, which may be in their turns the subjects of fraud, or at least complaints of fraud, and of course the objects of this summary and arbitrary jurisdiction; we shall find that the power of these officers of the crown over the property of the people is increased to a very formidable height.

II. ANOTHER branch of summary proceedings is that before justices of the peace, in order to inflict diverse petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many disorderly offenses; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice-books formerly cited,<sup>2</sup> and which used to be formerly punished by the verdict of a jury in the court-leet. This change in the administration of justice has however had some mischievous effects; as, 1. The almost entire disuse and contempt of the court-leet, and sheriff's tourn, the king's ancient courts of common law, formerly much revered and respected. 2. The burdensome increase of the business of a justice of the peace, which discourages so many gentlemen of rank and character from acting in the commission; from an apprehension that the duty of their office would take up too much of that time, which they are unwilling to spare from the necessary concerns of their families, the improvement of their understandings, and their engagements in other services of the public. Though if all gentlemen of



fortune had it both in their power, and inclinations, to act in this capacity, the business of a justice of the peace would be more divided, and fall the less heavy upon individuals: which would remove what in the present scarcity of magistrates is really an objection so formidable, that the country is greatly obliged to any gentleman of figure, who will undertake to perform that duty, which in consequence of his rank in life he owes more peculiarly to his country. However, this backwardness to act as magistrates, arising greatly from this increase of summary jurisdiction, is productive of, 3. A third mischief: which is, that this trust, when slighted by gentlemen, falls of course into the hands of those who are not so; but the mere tools of office. And then the extensive power of a justice of the peace, which even in the hands of men of honor is highly formidable, will be prostituted to mean and scandalous purposes, to the law ends of selfish ambition, avarice, or personal resentment. And from these ill consequences we may collect the prudent foresight of our ancient lawgivers, who suffered neither the property nor the punishment of the subject to be determined by the opinion of any one or two men; and we may also observe the necessity of not deviating any farther from our ancient constitution, by ordaining new penalties to be inflicted upon summary convictions.

THE process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon them, by making it necessary to summon the party accused before he is condemned. This is now held to be an indispensable requisite:<sup>3</sup> though the justices long struggled the point; forgetting that rule of natural reason expressed by Seneca,

*“Qui statuit aliquid, parte inaudita altera,  
Aequom licet statuerit, haud aequus suit.”*  
[He who accuses another, however just it is,  
is unjust unless the accused defends himself.]

A rule, to which all municipal laws, that are founded on the principles of justice, have strictly conformed: the Roman law requiring a citation at the least; and our own common law never suffering any fact (either civil or criminal) to be tried, till it has previously compelled an appearance by the party concerned. After this summons, the magistrate, in summary proceedings, may go on to examine one or more witnesses, as the statute may require, upon oath; and then make his conviction of the offender, in writing: upon which he usually issues his warrant, either to apprehend the offender, in case corporal punishment is to be inflicted on him; or else to levy the penalty incurred, by distress and sale of his goods. This is, in general, the method of summary proceedings before a justice or justices of the peace: but for particulars we must have recourse to the several statutes, which create the offense, or inflict the punishment; and which usually chalk out the method by which offenders are to be convicted. Otherwise they fall of course under the general rule, and can only be convicted by indictment or information at the common law.

III. To this head, of summary proceedings, may also be properly referred the method, immemorially used by the superior courts of justice, of punishing contempts by attachment, and the subsequent proceedings thereon.

THE contempts, that are thus punished, are either direct, which openly insult or resist the powers of the courts, or the persons of the judges who preside there; or else are consequential, which (without such gross insolence or direct opposition) plainly tend to create an universal disregard of

their authority. The principal instances, of either sort, that have been usually<sup>4</sup> punished by attachment, are chiefly of the following kinds. 1. Those committed by inferior judges and magistrates: by acting unjustly, oppressively, or irregularly, in administering those portions of justice which are entrusted to their distribution; or by disobeying the king's writs issuing out of the superior courts, by proceeding in a cause after it is put a stop to or removed by writ of prohibition, *certiorari* [notice given], error, *supersedeas* [that you forbear], and the like. For, as the king's superior courts (and especially the court of king's bench) have a general superintendence over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that super-intending authority, whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, jailers, and other officers of the court: by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behavior, or culpable neglect of duty. 3. Those committed by attorneys and solicitors, who are also officers of the respective courts: by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice. For the mal-practice of the officers reflects some dishonor on their employers: and, if frequent or unpunished, creates among the people a disgust against the courts themselves. 4. Those committed by jurymen, in collateral matters relating to the discharge of their office: such as making default, when summoned; refusing to be sworn, or to give any verdict; eating or drinking without the leave of the court, and especially at the cost of either party; and other misbehaviors or irregularities of a similar kind: but not in the mere exercise of their judicial capacities, as by giving a false or erroneous verdict. 5. Those committed by witnesses: by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. Those committed by parties to any suit or proceeding before the court: as by disobedience to any rule or order, made in the progress of a cause; by non-payment of costs awarded by the court upon a motion; or by non-observance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such determination.<sup>5</sup> 7. Those committed by any other persons, under the degree of a peer: and even by peers themselves, when enormous and accompanied with violence, such as forcible rescues and the like;<sup>6</sup> or when they import a disobedience to the king's great prerogative writs, of prohibition, *habeas corpus* [have the body],<sup>7</sup> and the rest. Some of these contempts may arise in the face of the court; as by rude and contumelious behavior; by obstinacy, perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever: others in the absence of the party; as by disobeying or treating with disrespect the king's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court, or judges, acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by anything in short that demonstrates a gross want of the regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.

THE process of attachment, for these and the like contempts, must necessarily be as ancient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly we find it actually exercised, as early as the annals of our law extend. And, though a very learned author<sup>8</sup> seems inclinable to derive this process from the statute of Westm. 2.

13 Edw. I. c. 39. (which ordains, that in case the process of the king's courts be resisted by the power of any great man, the sheriff shall chastise the resister by imprisonment, "*a qua non deliberentur sine speciali praecepto domini regis*" ["no release from which without special command of the king"]: and if the sheriff himself be resisted, he shall certify to the court the names of the principal offenders, their aiders, consenters, commanders and favorers, and by a special writ judicial they shall be attached by their bodies to appear before the court, and if they be convicted thereof they shall be punished at the king's pleasure, without any interfering by any other person whatsoever) yet he afterwards more justly concludes, that it is a part of the law of the land; and, as such, is confirmed by the statute of Magna Carta.

IF the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any farther proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either make a rule on the suspected party to show cause why an attachment should not issue against him;<sup>9</sup> or, in very flagrant instances of contempt, the attachment issues in the first instance;<sup>10</sup> as it also does, if no sufficient cause be shown to discharge, and thereupon the court confirms and makes absolute, the original rule. This process of attachment is merely intended to bring the party into court: and, when there, he must either stand committed. or put in bail, in order to answer upon oath to such interrogatories as shall be administered to him, for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days:<sup>11</sup> and, if any of the interrogatories is improper, the defendant may refuse to answer it, and move the court to have it struck out.<sup>12</sup> If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury.<sup>13</sup> If he confesses the contempt, the court will proceed to correct him by fine, or imprisonment, or both, and sometimes by a corporal or infamous punishment.<sup>14</sup> If he contempt be of such a nature, that, when the fact is once acknowledged, the court can receive no farther information by interrogatories than it is already possessed of, (as in the case of a *rescous*<sup>15</sup>) the defendant may be admitted to make such simple acknowledgment, and receive his judgment, without answering to any interrogatories: but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court.

IT cannot have escaped the attention of the reader, that this method, of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance;<sup>16</sup> and seems indeed to have been derived to the courts of king's bench and common pleas through the medium of the courts of equity. For the whole process of the courts of equity, in the several stages of a cause, and finally to enforce their decrees, was, till the introduction of sequestrations, in the nature of a process of contempt; acting only *in personam* [on the person] and not *in rem* [on property]. And there, after the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by affidavits of the adverse party: whereas in the courts of law, the admission of the party to purge himself by oath is more favorable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed. And, with regard to this singular mode of trial, thus admitted in this

one particular instance, I shall only for the present observe; that as the process by attachment in general appears to be extremely ancient,<sup>17</sup> and has since the restoration been confirmed by an express act of parliament,<sup>18</sup> so the method of examining the delinquent himself upon oath, with regard to the contempt alleged, is at least of as high antiquity,<sup>19</sup> and by long and immemorial usage is now become the law of the land.

## NOTES

1. See Vol. I. pag. 318, etc.
2. Lambard and Burn.
3. Salk. 181. 2 Lord Raym. 1405.
4. 2 Hawk. P. C. 142. etc.
5. See Vol. III. pag. 17.
6. Styl. 277. 2 Hawk. P. C. 152.
7. 4 Burr. 632. Lords Journ. 7 Febr. 8 Jun 1757.
8. Gilb. Hist. C. P. ch 3.
9. Styl. 277.
10. Salk. 84. Stra. 185.
11. 6 Mod. 73.
12. Stra. 444.
13. 6 Mod. 73.
14. Cro. Car. 146.
15. The king v. Elkins. M. 8 Geo. III. B. R.
16. See Vol. III. pag. 100, 101.
17. Yearb. 22 Edw. IV. 29.
18. Stat. 13 Car. II. St. 2. c. 2. § 4.
19. M. 5 Edw. IV. rot. 75. cited in Rast. Ent. 268. pl. 5.

## CHAPTER 21 Of Arrests

WE are now to consider the regular and ordinary method of proceeding in the courts of criminal jurisdiction; which may be distributed under twelve general heads, following each other in a progressive order: *viz.* 1. Arrest; 2. Commitment, and bail; 3. Prosecution; 4. Process; 5. Arraignment, and its incidents; 6. Plea, and issue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and its consequence; 10. Reversal of judgment; 11. Reprieve, or pardon; 12. Execution: all which will be discussed in the subsequent part of this book.

FIRST then, of an arrest: which is the apprehending or restraining of one's person, in order to be forthcoming to answer an alleged or suspected crime. To this arrest all persons whatsoever are, without distinction, equally liable to all criminal cases: but no man is to be arrested, unless charged with such a crime, as will at least justify holding him to bail, when taken. And, in general, an arrest may be made four ways: 1. By warrant: 2. By an officer without warrant: 3. By a private person also without warrant: 4. By an hue and cry.

1. A WARRANT may be granted in extraordinary cases by the privy council, or secretaries of state;<sup>1</sup> but ordinarily by justices of the peace. This they may do in any cases where they have a jurisdiction over the offense; in order to compel the person accused to appear before them:<sup>2</sup> for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend, and submit to such examination. And this extends undoubtedly to all treasons, felonies, and breaches of the peace; and also to all such offenses as they have power to punish by statute. Sir Edward Coke indeed<sup>3</sup> has laid it down, that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found: and the contrary practice is by others<sup>4</sup> held to be grounded rather upon connivance, than the express rule of law; though now by long custom established. A doctrine, which would in most cases give a loose to felons to escape without punishment; and therefore Sir Matthew Hale has combated it with invincible authority, and strength of reason: maintaining, 1. That a justice of peace has power to issue a warrant to apprehend a person accused of felony, though not yet indicted;<sup>5</sup> and 2. That he may also issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there is a felony or other crime actually committed, without which no warrant should be granted; as also to prove the cause and probability of suspecting the party, against whom the warrant is prayed.<sup>6</sup> This warrant ought to be under the hand and seal of the justice, should set forth the time and place of making, and the cause for which it is made, and should be directed to the constable, or other peace officer, requiring him to bring the party either generally before any justice of the peace for the county, or only before the justice who granted it; the warrant in the latter case being called a special warrant.<sup>7</sup> A general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty;<sup>8</sup> for it is the duty of the magistrate, and ought not be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons guilty of a crime therein specified, is no legal warrant: for the point, upon which its authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty

or not. It is therefore in fact no warrant at all: for it will not justify the officer who acts under it;<sup>9</sup> whereas a lawful warrant will at all events indemnify the officer, who executes the same ministerially. When a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief, or other, justice of the court of king's bench extends all over the kingdom: and is *teste'd*, or dated, England; not Oxfordshire, Berks, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county; but the practice of backing warrants had long prevailed without law, and was at last authorized by statutes 23 Geo. II. c. 26. and 24 Geo. II. c. 55.

2. ARRESTS by officers, without warrant, may be executed, 1. By a justice of the peace; who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence.<sup>10</sup> 2. The sheriff, and 3. The coroner, may apprehend any felon within the county without warrant. 4. The constable, of whose office we formerly spoke,<sup>11</sup> has great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace, and carry him before a justice of the peace. And, in case of felony actually committed, or a dangerous wounding whereby felony is like to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken; and, if he or his assistants be killed in attempting such arrest, it is murder in all concerned.<sup>12</sup> 5. Watchmen, either those appointed by the statute of Winchester, 13. Edw. I. c. 4. to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to the constable, may *virtute officii* [by virtue of office] arrest all offenders, and particularly nightwalkers, and commit them to custody till the morning.<sup>13</sup>

3. ANY private person (and *a fortiori* [consequently] a peace officer) that is present when any felony is committed, is bound by the law to arrest the felon; on pain of fine and imprisonment, if he escapes through the negligence of the bystanders.<sup>14</sup> And they may justify breaking open doors upon following such felon: and if they kill him, provided he cannot be otherwise taken, it is justifiable; though if they are killed in endeavoring to make such arrest, it is murder.<sup>15</sup> Upon probable suspicion also a private person may arrest the felon, or other person so suspected,<sup>16</sup> but the cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter, and no more.<sup>17</sup> It is no more, because there is no malicious design to kill: but it amounts to so much, because it would be of most pernicious consequence, if, under pretense of suspecting felony, any private person might break open a house, or kill another; and also because such arrest upon suspicion is barely permitted by the law, and not enjoined, as in the case of those who are present when a felony is committed.

4. THERE is yet another species of arrest, wherein both officers and private men are concerned, and that is upon an hue and cry raised upon a felony committed. An hue (from *huer*, to shout) and cry, *hutesium et clamor*, is the old common law process of pursuing, with horn and with voice, all felons, and such as have dangerously wounded another.<sup>18</sup> It is also mentioned by statute Westm. 1. 3 Edw. I. c. 9. and 4 Edw. I. *de officio coronatoris* [of the office of coroner]. But the principal statute, relative to this matter, is that of Winchester, 13 Edw. I. c. 1 & 4. which directs, that from thenceforth every country shall be so well kept, that, immediately upon robberies and felonies committed, fresh

suit shall be made from town to town, and from county to county; and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry, with all the town and the towns near; and so hue and cry shall be made from town to town, until they be taken and delivered to the sheriff. And, that such hue and cry may more effectually be made, the hundred is bound by the same statute, c. 3. to answer for all robberies therein committed, unless they take the felon; which is the foundation of an action against the hundred,<sup>19</sup> in case of any loss by robbery. By statute 27 Eliz. c. 13. no hue and cry is sufficient, unless made with both horsemen and footmen. And by statute 8 Geo. II. c. 16. the constable or like officer refusing or neglecting to make hue and cry, forfeits 5 £: and the whole vill or district is still in strictness liable to be amerced, according to the law of Alfred, if any felony be committed therein and the felon escapes. An institution, which has long prevailed in many of the eastern countries, and has in part been introduced even into the Mogul empire, about the beginning of the last century; which is said to have effectually delivered that vast territory from the plague of robbers, by making in some places the villages, in others the officers of justice, responsible for all the robberies committed within their respective districts.<sup>20</sup> Hue and cry<sup>21</sup> may be raised either by precept of a justice of the peace, or by a peace officer, or by any private man that knows of a felony. The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony, and the person of the felon; and thereupon the constable is to search his own town, and raise all the neighboring vills, and make pursuit with horse and foot: and in the prosecution of such hue and cry, the constable and his attendants have the same powers, protection, and indemnification, as if acting under the warrant of a justice of the peace. But if a man wantonly or maliciously raises a hue and cry, without cause, he shall be severely punished as a disturber of the public peace.<sup>22</sup>

IN order to encourage farther the apprehending of certain felons, rewards and immunities are bestowed on such as bring them to justice, by diverse acts of parliament. The statute 4 & 5 W. & M. c. 8. enacts, that such as apprehend a highwayman, and prosecute him to conviction, shall receive a reward of 40£ from the public; to be paid to them (or, if killed in the endeavor to take him, their executors) by the sheriff of the county: to which the statute 8 Geo. II. c. 16. superadds 10£ to be paid by the hundred indemnified by such taking. By statute 10 & 11 W. III. c. 23. any person apprehending and prosecuting to conviction a felon guilty of burglary or private larceny to the value of 5 s. from any shop, warehouse, coach-house, or stable, shall be excused from all parish offices. And by statute 5 Ann. c. 31 any person so apprehending and prosecuting a burglar, or felonious housebreaker, (or, if killed in the attempt, his executors) shall be entitled to a reward of 40£.

## NOTES

1. 1 Lord Raym. 65.
2. 2 Hawk. P. C. 84.
3. 4 Inst. 176.
4. 2 Hawk. P. C. 84.
5. 2 Hal. P. C. 108.
6. Ibid. 110.
7. 2 Hawk. P. C. 85.

8. 1 Hal. P. C. 580. 2 Hawk. P. C. 82.

9. A practice had obtained in the secretaries office ever since the restoration, grounded on some clauses in the acts for regulating the press, of issuing general warrants to take up (without naming any person in particular) the authors, printers and publishers of such obscene or seditious libels, as were particularly specified in the warrant. When those acts expired in 1694, the same practice was inadvertently continued, in every reign and under every administration, except the four last years of queen Anne, down to the year 1763: when such a warrant being issued to apprehend the authors, printers and publishers of a certain seditious libel, its validity was disputed; and the warrant was adjudged by the whole court of king's bench to be void, in the case of *Money v. Leach*. Trin. 5 Geo. III. B. R. After which the issuing of such general warrants was declared illegal by a vote of the house of commons. (Com. Journ. 22 Apr. 1766.)

10. 1 Hal. P. C. 86.

11. See Vol. I. pag. 355.

12. 2 Hal. P. C. 88 - 90.

13. Ibid. 98.

14. 2 Hawk. P. C. 74.

15. 2 Hal. P. C. 77.

16. Stat. 30 Geo. II. c. 24.

17. 2 Hal. P. C. 82, 83.

18. Bracton. l. 3. tr. 2. c. 1. § 1. Mirr. c. 2. § 6.

19. See Vol. III. pag. 160.

20. Mod. Un. Hist. vi. 383. vii. 156.

21. 2 Hal. P. C. 100–104.

22. 1 Hawk. P. c. 75.



## CHAPTER 22 Of Commitment and Bail

WHEN a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace. And how he is there to be treated, I shall next show, under the second head, of commitment and bail.

THE justice, before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged: and to this end by statute 2 & 3 Ph. & M. c. 10. he is to take in writing the examination of such prisoner, and the information of those who bring him: which, Mr. Lambard observes,<sup>1</sup> was the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum* [no one was obliged to betray himself]; and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men. If upon this inquiry it manifestly appears, either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail; that is, put in securities for his appearance, to answer the charge against him. This commitment therefore being only for safe custody, wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes: but in felonies, and other offenses of a capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit, to save his own life? and what satisfaction or indemnity is it to the public, to seize the effects of them who have bailed a murderer, if the murderer himself be suffered to escape with impunity? Upon a principle similar to which, the Athenian magistrates, when they took a solemn oath, never to keep a citizen in bonds that could give three sureties of the same quality with himself, did it with an exception to such as had embezzled the public money, or been guilty of treasonable practices.<sup>2</sup> What the nature of bail is, has been shown in the preceding book;<sup>3</sup> viz. a delivery, or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance: he being supposed to continue in their friendly custody, instead of going to jail. In civil cases we have seen that every defendant is bailable; but in criminal matters it is otherwise. Let us therefore inquire, in what cases the party accused ought, or ought not, to be admitted to bail.

AND, first, to refuse or delay to bail any person bailable, is an offense against the liberty of the subject, in any magistrate, by the common law;<sup>4</sup> as well as by the statute Westm. 1. 3 Edw. I. c. 15. and the *habeas corpus* act, 31 Car. II. c. 2. And lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute 1 W. & M. St. 2. c. 1. that excessive bail ought not to be required: though what bail shall be called excessive, must be left to the courts, on considering the circumstances of the case, to determine. And on the other hand, if the magistrate takes insufficient bail, he is liable to be fined, if the criminal does not appear.<sup>5</sup> Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate; but most usually by the justices of the peace. Regularly, in all offenses either against the common law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special act of parliament.<sup>6</sup> In order therefore more precisely to ascertain what offenses are bailable.

LET us next see, who may not be admitted to bail, or, what offenses are not bailable. And here I

shall not consider any one of those cases in which bail is ousted by statute, from prisoners convicted of particular offenses; for then such imprisonment without bail is part of their sentence and punishment. But, where the imprisonment is only for safe custody before the conviction, and not for punishment afterwards, in such cases bail is ousted or taken away, wherever the offense is of a very enormous nature: for then the public is entitled to demand nothing less than the highest security that can be given; *viz.* the body of the accused, in order to ensure that justice shall be done upon him, if guilty. Such persons therefore, as the author of the mirror observes,<sup>7</sup> have no other sureties but the four walls of the prison. By the ancient common law, before<sup>8</sup> and since<sup>9</sup> the conquest, all felonies wereailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. 1. 3 Edw. I. c. 15. takes away the power of bailing in treason, and in diverse instances of felony. The statute 1 & 2 Ph. & Mar. c. 13. gives farther regulations in this matter: and upon the whole we may collect,<sup>10</sup> that no justices of the peace can bail, 1. Upon an accusation of treason: nor, 2. Of murder: nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so; or if any indictment be found against him: nor, 4. Such as, being committed for felony, have broken prison; because it not only carries a presumption of guilt, but is also superadding one felony to another: 5. Persons outlawed: 6. Such as have abjured the realm: 7. Approvers, of whom we shall speak in a subsequent chapter, and persons by them accused: 8. Persons taken with the mainour, or in the fact of felony: 9. Persons charged with arson: 10. Excommunicated persons, taken by writ *de excommunicato capiendo* [for taking an excommunicated person]: all which are clearly not admissible to bail. Others are of a dubious nature, as, 11. Thieves openly defamed and known: 12. Persons charged with other felonies, or manifest and enormous offenses, not being of good fame: and 13. Accessories to felony, that labor under the same want of reputation. These seem to be in the discretion of the justices, whetherailable or not. The last class are such as must be bailed upon offering sufficient surety; as, 14. Persons of good fame, charged with a bare suspicion of manslaughter, or other inferior homicide: 15. Such persons, being charged with petit larceny or any felony, not before specified: or, 16. With being accessory to any felony. Lastly, it is agreed that the court of king's bench (or any judge thereof in time of vacation) may bail for any crime whatsoever, be it treason,<sup>11</sup> murder, or any other offense, according to the circumstances of the case. And herein the wisdom of the law is very manifest. To allow bail to be taken commonly for such enormous crimes, would greatly tend to elude the public justice: and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offense. The law has therefore provided one court, and only one, which has a discretionary power of bailing in any case: except only, even to this high jurisdiction, and of course to all inferior ones, such persons as are committed by either house of parliament, so long as the session lasts; or such as are committed for contempts by any of the king's superior courts of justice.

UPON the whole, if the offense be notailable, or the party cannot find bail, he is to be committed to the county jail by the *mittimus* [commitment] of the justice, or warrant under his hand and seal, containing the cause of his commitment; there to abide till delivered by due course of law.<sup>12</sup> But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only: though what are so requisite, must too often be left to the discretion of the jailers; who are frequently a merciless race of men, and, by being

conversant in scenes of misery, steeled against any tender sensation. Yet the law will not justify them in fettering a prisoner, unless where he is unruly, or has attempted an escape:<sup>13</sup> this being the humane language of our ancient lawgivers,<sup>14</sup> “*custodes poenam sibi commissorum non augeant, nec eos torqueant; sed omni saevitia remota, pietateque adhibita, judicia debite exequantur.*” [“Let not jailers torture or add to the punishment of those entrusted to their keeping; but let the sentence of the law be duly yet mercifully executed.”]

## NOTES

1. Eirenarch. b. 2. c. 7.
2. Pott. Antiq. b. 1. c. 18.
3. See Vol. III. pag. 290.
4. 2 Hawk. P. C. 90.
5. 2 Hawk. P. C. 89.
6. 2 Hal. P. C. 127.
7. c. 2. § 24.
8. 2 Inst. 189.
9. *In omnibus placitis de feloniam solet accusatus per plegios dimitti, praeterquam in placito de homicidio, ubi ad terrorem aliter statutum est.* [In all pleas of felony the accused is usually discharged upon bail, except in the plea of murder, where, to deter others, it is otherwise decreed.] (Glanv. l. 14. c. 1.)
10. 2 Inst. 186. 2 Hal. P. C. 129.
11. In the reign of queen Elizabeth it was the unanimous opinion of the judges, that no court could bail upon a commitment, for a charge of high treason, by any of the queen's privy council. (1 Anders. 298.)
12. 2 Hal. P. C. 122.
13. 2 Inst. 381. 3 Inst. 34.
14. Flet. l. 1. c. 26.

## CHAPTER 23

### Of the Several Modes of Prosecution

THE next step towards the punishment of offenders is their prosecution, or the manner of their formal accusation. And this is either upon a previous finding of the fact by an inquest or grand jury; or without such previous finding. The former way is either by presentment, or indictment.

I. A presentment, generally taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, properly speaking, is the notice taken by a grand jury of any offense from their own knowledge or observation,<sup>1</sup> without any bill of indictment laid before them at the suit of the king. As, the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented as the author can be put to answer it. An inquisition of office is the act of a jury, summoned by the proper officer to inquire of matters relating to the crown, upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traversed or denied; and therefore the inquest, or jury, ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se* [suicide]; of flight in persons accused of felony; of deodands, and the like; and presentments of petty offenses in the sheriff's tourn or court-leet, whereupon the presiding officer may set a fine. Other inquisitions may be afterwards traversed and examined; as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of homicide: for in such cases the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it; which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely.

II. AN indictment<sup>2</sup> is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer and terminer*, and of general jail delivery, twenty four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things, which on the part of our lord the king shall then and there be commanded them.<sup>3</sup> They ought to be freeholders, but to what amount is uncertain:<sup>4</sup> which seems to be *casus omissus* [omitted case], and as proper to be supplied by the legislature as the qualifications of the petit jury; which were formerly equally vague and uncertain, but are now settled by several acts of parliament. However, they are usually gentlemen of the best figure in the county. As many as appear upon this panel, are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty three; that twelve may be a majority. Which number, as well as the constitution itself, we find exactly described, so early as the laws of king Ethelred.<sup>5</sup> “*Exeant seniores duodecim thani, et praefectus cum eis, et jurent super sanctuarium quod eis in manus datur, quod nolint ullum innocentem accusare, nec aliquem noxium celare.*” [“Let twelve elder freemen, and the foreman with them, retire and swear upon the holy book which is given into their hands that they will not accuse any innocent person, nor protect any criminal.”] In the time of king Richard the first (according to Hoveden) the process of electing the grand jury, ordained by that prince, was as follows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably found too large and inconvenient; but the traces of this institution still remain, in that some of the jury must

be summoned out of every hundred. This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury however ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine, that might be applied to very oppressive purposes.<sup>6</sup>

THE grand jury are sworn to inquire, only for the body of the county, *pro corpore comitatus*; and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by act of parliament. And to so high a nicety was this matter anciently carried, that where a man was wounded in one county, and died in another, the offender was at common law indictable in neither, because no complete act of felony was done in any one of them: but by statute 2 & 3 Edw. VI. c. 24. he is now indictable in the county where the party died. And so in some other cases: as particularly, where treason is committed out of the realm, it may be inquired of in any county within the realm, as the king shall direct, in pursuance of statutes 26 Hen. VIII. c. 13. 35 Hen. VIII. c. 2. and 5 & 6 Edw. VI. c. 11. But, in general, all offenses must be inquired into as well as tried in the county where the fact is committed.

WHEN the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, "*ignoramus*;" or, we know nothing of it; intimating, that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English, more absolutely, "not a true bill;" and then are party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then endorse upon it, "a true bill;" anciently, "*billa vera*." The indictment is then said to be found, and the party stands indicted. But, to find a bill, there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offense, unless by the unanimous voice of twenty four of his equals and neighbors: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty upon his trial. But, if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree.<sup>7</sup> And the indictment, when so found, is publicly delivered into court.

INDICTMENTS must have a precise and sufficient certainty. By statute 1 Hen. V. c. 5. all indictments must set forth the Christian name, surname, and addition of the state and degree, mystery, town, or place, and the county of the offender: and all this to identify his person. The time, and place, are also to be ascertained, by naming the day, and township, in which the fact was committed: though a mistake in these points is in general not held to be material, provided the time be laid previous to the finding of the indictment, and the place to be within the jurisdiction of the court. But sometimes the time may be very material, where there is any limitation in point of time assigned for the prosecution of offenders; as by the statute 7 Will. III. c. 3. which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned (except an assassination designed or attempted on the person of the king) unless the bill of indictment be found

within three years after the offense committed:<sup>8</sup> and, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The offense itself must also be set forth with clearness and certainty: and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offense, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done, “reasonably, and against his allegiance;” anciently “*proditorie et contra ligeantiae suae debitum*,” else the indictment is void. In indictments for murder, it is necessary to say that the party indicted “murdered,” not “killed” or “slew,” the other; which till the late statute was expressed in Latin by the word “*murdravit*.”<sup>9</sup> In all indictments for felonies, the adverb “feloniously, *felonice*,” must be used; and for burglaries also, “*burglariter*,” or in English, “burglariously:” and all these to ascertain the intent. In rapes, the word “*rapuit*,” or “ravished,” is necessary, and must not be expressed by any periphrasis; in order to render the crime certain. So in larcenies also, the words “*felonice cepit et asportavit*, feloniously took and carried away,” are necessary to every indictment; for these only can express the very offense. Also in indictments for murder, the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature: but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also where a limb, or the like, is absolutely cut off, there such description is impossible.<sup>10</sup> Lastly, in indictments the value of the thing, which is the subject or instrument of the offense, must sometimes be expressed. In indictments for larcenies this is necessary, that it may appear whether it be grand or petit larceny; and whether entitled or not to the benefit of clergy: in homicide of all sorts it is necessary; as the weapon, with which it is committed, is forfeited to the king as a deodand.

THE remaining methods of prosecution are without any previous finding by a jury, to fix the authoritative stamp of verisimilitude upon the accusation. One of these, by the common law, was when a thief was taken with the mainour, that is, with the thing stolen upon him, *in manu* [in hand]. For he might, when so detected *flagrante delicto* [openly criminal], be brought into court, arraigned, and tried, without indictment: as by the Danish law he might be taken and hanged upon the spot, without accusation or trial.<sup>11</sup> But this proceeding was taken away by several statutes in the reign of Edward the third:<sup>12</sup> though in Scotland a similar process remains to this day.<sup>13</sup> So that the only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury, now seems to be that of information.

III. INFORMATIONS are of two sorts; first, those which are partly at the suit of the king, and partly at that of a subject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer; and are a sort of *qui tam* [who as well] actions, (the nature of which was explained in a former volume<sup>14</sup>) only carried on by a criminal instead of a civil process: upon which I shall therefore only observe, that by the statute 31 Eliz. c. 5. no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the king and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offense; nor on behalf of the crown after the lapse of two years longer; nor, where the forfeiture is originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offense.

THE informations, that are exhibited in the name of the king alone, are also of two kinds: first, those which are truly and properly his own suits, and filed *ex officio* [officially] by his own immediate officer, the attorney general: secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by the king's coroner and attorney in the court of king's bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filed *ex officio* by his own attorney general, are properly such enormous misdemeanors, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal. A power, so necessary, not only to the ease and safety but even to the very existence of the executive magistrate, was originally reserved in the great plan of the English constitution, which has wisely provided for the due preservation of all its parts. The objects of the other species of informations, filed by the master of the crown-office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind,<sup>15</sup> not peculiarly tending to disturb the government (for those are left to the care of the attorney general) but which, on account of their magnitude or pernicious example, deserve the most public animadversion. And when an information is filed, either thus, or by the attorney general *ex officio*, it must be tried by a petit jury of the county where the offense arises: after which, if the defendant be found guilty, he must resort to the court for his punishment.

THERE can be no doubt but that this mode of prosecution, by information (or suggestion) filed on record by the king's attorney general, or by his coroner or master of the crown-office in the court of king's bench, is as ancient as the common law itself.<sup>16</sup> For as the king was bound to prosecute, or at least to lend the sanction of his name to a prosecutor, whenever a grand jury informed him upon their oaths that there was a sufficient ground for instituting a criminal suit; so, when these his immediate officers were otherwise sufficiently assured that a man had committed a gross misdemeanor, either personally against the king or his government, or against the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that information to the court of king's bench by a suggestion on record, and to carry on the prosecution in his majesty's name. But these informations (of every kind) are confined by the constitutional law to mere misdemeanors only: for, wherever any capital offense is charged, the same law requires that the accusation be warranted by the oath of twelve men, before the party shall be put to answer it. And, as to those offenses, in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his majesty's court of king's bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment. But when the statute 3 Hen. VII. c. 1. had extended the jurisdiction of the court of star-chamber, the members of which were the sole judges of the law, the fact, and the penalty; and when the statute 11 Hen. VII. c. 3. had permitted informations to be brought by any informer upon any penal statute, not extending to life or member, at the assizes or before the justices of the peace, who were to hear and determine the same according to their own discretion; then it was, that the legal and orderly jurisdiction of the court of king's bench fell into disuse and oblivion, and Empson

and Dudley (the wicked instruments of king Henry VII) by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devices,<sup>17</sup> continually harassed the subject and shamefully enriched the crown. The latter of these acts was soon indeed repealed by statute 1 Hen. VIII. c. 6. but the court of star-chamber continued in high vigor, and daily increasing its authority, for more than a century longer; till finally abolished by statute 16 Car. I. c. 10.

UPON this dissolution the old common law<sup>18</sup> authority of the court of king's bench, as the *custos morum* [keeper of the morals] of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in practice.<sup>19</sup> And it is observable, that, in the same act of parliament which abolished the court of star-chamber, a conviction by information is expressly reckoned up, as one of the legal modes of conviction of such persons, as should offend a third time against the provisions of that statute.<sup>20</sup> It is true, Sir Matthew Hale, who presided in this court soon after the time of such revival, is said<sup>21</sup> to have been no friend to this method of prosecution: and, if so, the reason of such his dislike was probably the ill use, which the master of the crown-office then made of his authority, by permitting the subject to be harassed with vexatious informations, whenever applied to by any malicious or revengeful prosecutor; rather than his doubt of their legality, or propriety upon urgent occasions.<sup>22</sup> For the power of filing informations, without any control, then resided in the breast of the master: and, being filed in the name of the king, they subjected the prosecutor to no costs, though on trial they proved to be groundless. This oppressive use of them, in the times preceding the revolution, occasioned a struggle, soon after the accession of king William,<sup>23</sup> to procure a declaration of their illegality by the judgment of the court of king's bench. But Sir John Holt, who then presided there, and all the judges, were clearly of opinion, that this proceeding was grounded on the common law, and could not be then impeached. And, in a few years afterwards, a more temperate remedy was applied in parliament, by statute 4 & 5 W. & M. c. 18. which enacts, that the clerk of the crown shall not file any information without express direction from the court of king's bench: and that every prosecutor, permitted to promote such information, shall give security by a recognizance of twenty pounds (which now seems to be too small a sum) to prosecute the same with effect; and to pay costs to the defendant, in case he be acquitted thereon, unless the judge, who tries the information, shall certify there was reasonable cause for filing it; and, at all events, to pay costs, unless the information shall be tried within a year after issue joined. But there is a proviso in this act, that it shall not extend to any other informations, than those which are exhibited by the master of the crown-office: and, consequently, informations at the king's own suit, filed by his attorney general, are no way restrained thereby.

THERE is one species of informations, still farther regulated by statute 9 Ann. c. 20. *viz.* those in the nature of a writ of *quo warranto* [by what warrant]; which was shown in the preceding volume,<sup>24</sup> to be a remedy given to the crown against such as had usurped or intruded into any office or franchise. The modern information tends to the same purpose as the ancient writ, being generally made use of to try the civil rights of such franchises; though it is commenced in the same manner as other informations are, by leave of the court, or at the will of the attorney-general: being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office; yet usually considered at present as merely a civil proceeding.

THESE are all the methods of prosecution at the suit of the king. There yet remains another, which is merely at the suit of the subject, and is called an appeal.



IV. AN appeal, in the sense wherein it is here used, does not signify any complaint to a superior court of an injustice done by an inferior one, which is the general use of the word; but it here means an original suit, at the time of its first commencement.<sup>25</sup> An appeal therefore, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offense against the public. As this method of prosecution is still in force, I cannot omit to mention it: but, as it is very little in use, on account of the great nicety required in conducting it, I shall treat of it very briefly; referring the student for more particulars to other voluminous compilations.<sup>26</sup>

THIS private process, for the punishment of public crimes, had probably its original in those times, when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offenses. This was a custom derived to us, in common with other northern nations,<sup>27</sup> from our ancestors, the ancient Germans; among whom according to Tacitus,<sup>28</sup> “*luitur homicidium certo armentorum ac pecorum numero; recipitque satisfactionem universa domus.*”<sup>29</sup> [“The whole family receives satisfaction, and the homicide is expiated by a certain recompense in flocks and herds.”] In the same manner by the Irish Brehon law, in case of murder, the Brehon or judge was used to compound between the murderer, and the friends of the deceased who prosecuted him, by causing the malefactor to give unto them, or to the child or wife of him that was slain, a recompense which they called an *eriach*.<sup>30</sup> And thus we find in our Saxon laws (particularly those of king Athelstan<sup>31</sup>) the several weregilds, for homicide established in progressive order, from the death of the ceorl or peasant, up to that of the king himself.<sup>32</sup> And in the laws of king Henry I,<sup>33</sup> we have an account of what other offenses were then redeemable by weregild, and what were not so.<sup>34</sup> As therefore, during the continuance of this custom, a process was certainly given, for recovering the weregild by the party to whom it was due; it seems that, when these offenses by degrees grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment upon the offender, though the party injured was allowed no pecuniary compensation for the offense.

BUT, though appeals were thus in the nature of prosecutions for some atrocious injury committed more immediately against an individual, yet it also was anciently permitted, that any subject might appeal another subject of high-treason, either in the courts of common law,<sup>35</sup> or in parliament, or (for treasons committed beyond the seas) in the court of the high constable and marshal. The cognizance of appeals in the latter still continues in force; and so late as 1631 there was a trial by battle awarded in the court of chivalry, on such an appeal of treason:<sup>36</sup> but the first was virtually abolished<sup>37</sup> by the statutes 5 Edw. III. c. 9. and 25 Edw. III. c. 24. and the second expressly by statute 1 Hen. IV. c. 14. So that the only appeals now in force, for things done within the realm, are appeals of felony and mayhem.

AN appeal of felony may be brought for crimes committed either against the parties themselves, or their relations. The crimes against the parties themselves are larceny, rape, and arson. And for these, as well as for mayhem, the persons robbed, ravished, maimed, or whose houses are burnt, may institute this private process. The only crime against one's relation, for which an appeal can be brought, is that of killing him, by either murder or manslaughter. But this cannot be brought by every relation: but only by the wife for the death of her husband, or by the heir male for the death of his ancestor; which heirship was also confined, by an ordinance of king Henry the first, to the four

nearest degrees of blood.<sup>38</sup> It is given to the wife, on account of the loss of her husband: therefore, if she marries again, before or pending her appeal, it is lost and gone; or, if she marries after judgment, she shall not demand execution. The heir, as was said, must also be heir male, and such a one as was the next heir by the course of the common law, at the time of the killing of the ancestor. But this rule has three exceptions: 1. If the person killed leaves an innocent wife, she only, and not the heir, shall have the appeal: 2. If there be no wife, and the heir be accused of the murder, the person, who next to him would have been heir male, shall bring the appeal: 3. If the wife kills her husband, the heir may appeal her of the death. And, by the statute of Gloucester, 6 Edw. I. c. 9. all appeals of death must be sued within a year and a day after the completion of the felony by the death of the party: which seems to be only declaratory of the old common law; for in the Gothic constitutions we find the same “*praescriptio annalis, quae currit adversus actorem, si de homicida ei non constet intra annum a caede facta, nec quenuquam interea arguat et accuset.*”<sup>39</sup> [“The limitation of a year, which runs against the appellor, if he prove not the homicide within a year from its perpetration, or bring his accusation within that time.”]

THESE appeals may be brought, previous to any indictment; and, if the appellee be acquitted thereon, he cannot be afterwards indicted for the same offense. In like manner as by the old Gothic constitution, if any offender gained a verdict in his favor, when prosecuted by the party injured, he was also understood to be acquitted of any crown prosecution for the same offense:<sup>40</sup> but, on the contrary, if he made his peace with the king, still he might be prosecuted at the suit of the party. And so, with us, if a man be acquitted on an indictment of murder, or found guilty, and pardoned by the king, still he may, by virtue of statute 3 Hen. VII. c. 1. be prosecuted by appeal for the same felony, not having as yet been punished for it: though, if he has been found guilty of manslaughter on an indictment, and has had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed. For it is a maxim of law, that “*nemo bis punitur pro eodem delicto.*” [“No one is punished twice for the same offense.”]

IF the appellee be found guilty, he shall suffer the same judgment, as if he had been convicted by indictment: but with this remarkable difference; that on an indictment, which is at the suit of the king, the king may pardon and remit the execution; on an appeal, which is at the suit of a private subject, to make an atonement for the private wrong, the king can no more pardon it, than he can remit the damages recovered on an action of battery.<sup>41</sup> In like manner as, while the weregild continued to be paid as a fine for homicide, it could not be remitted by the king's authority.<sup>42</sup> And the ancient usage was, so late as Henry the fourth's time, that all the relations of the slain should drag the appellee to the place of execution:<sup>43</sup> a custom, founded upon that savage spirit of family resentment, which prevailed universally through Europe, after the irruption of the northern nations, and is peculiarly attended to in their several codes of law; and which prevails even now among the wild and untutored inhabitants of America: as if the finger of nature had pointed it out to mankind, in their rude and uncultivated state. However, the punishment of the offender may be remitted and discharged by the concurrence of all parties interested; and as the king by his pardon may frustrate an indictment, so the appellant by his release may discharge an appeal:<sup>44</sup> “*nam quilibet potest renunciare juri, pro se introducto.*” [“Any one may relinquish a right introduced for his benefit.”]

THESE are the several methods of prosecution instituted by the laws of England for the punishment of offenses; of which that by indictment is the most general. I shall therefore confine my subsequent

observations principally to this method of prosecution; remarking by the way the most material variations that may arise, from the method of proceeding by either information or appeal.

### NOTES

1. Lamb. Eirenarch. 1. 4. c. 5.
2. See appendix. § 1.
3. 2 Hal. P. C. 154.
4. Ibid. 155.
5. Wilk. LL. Angl. Sax. 117.
6. State Trials. IV. 183.
7. 2 Hal. P. C. 161.
8. Fost. 249.
9. See Vol. III. pag. 321.
10. 5 Rep. 122.
11. Stiernh. *de jure Sueon.* L. 3. c. 5.
12. 2 Hal. P. C. 149.
13. Lord Kayms. I. 331.
14. See Vol. III. pag. 160.
15. 2 Hawk. P. C. 260.
16. 1 Show. 118.
17. 1 And. 157.
18. 5 Mod. 464.
19. Styl. Rep. 217. 245. Styl. pract. Reg. tit. Information. pag. 187. (edit. 1657.) 2 Sid. 71. 1 Sid. 152.
20. Stat. 16 Car. I. c. 10. § 6.
21. 5 Mod. 460.
22. 1 Saund. 301. 1 Sid. 174.
23. M. 1. W. & M. 5 Mod. 459. Comb. 141. Farr. 361. 1 Show. 106.
24. See Vol. III. pag. 262.
25. It is derived from the French, “*appeller*,” the verb active, which signifies to call upon, summon, or challenge one; and not the verb neuter, which signifies the same as the ordinary sense of “appeal” in English.
26. 2 Hawk. P. C. ch. 23.
27. Stiernh. *de jure Sueon.* l. 3. c. 4.
28. de M. G. c. 21.
29. And in another place, (c. 12.) “*Delictis, pro modo poenarum, equorum pecorumque numero convicti mulctantur. Pars mulctae regi vel civitati, pars ipsi qui vindicatur, vel propinquis ejus, exsolvitur.*” [“Those convicted of offences are punished

by a fine of a number of horses and cattle. One part of the fine is paid to the king or state, the other part to the plaintiff or to his relations.”]

30. Spenser's state of Ireland, pag. 1513. edit. Hughes.

31. Tudic. Civit. Lund. Wilk. 71.

32. The weregild of a ceorl was 266 thrymsas, that of the king 30000; each thrymsa being equal to about a shilling of our present money. The weregild of a subject was paid entirely to the relations of the party slain: but that of the king was divided; one half being paid to the public, the other to the royal family.

33. c. 12.

34. In Turkey this principle is still carried so far, that even murder is never prosecuted by the officers of the government, as with us. It is the business of the next relations, and then only to revenge the slaughter of their kinsmen; and if they rather choose (as they generally do) to compound the matter for money, nothing more is said about it. (Lady M. W. Montague. Lett. 42.)

35. Britt. c. 22.

36. By Donald lord Rea against David Ramsey. (Rashw. Vol. 2. Part. 2. pag. 122.)

37. 1 Hal. P. C. 349.

38. Mirr. C. 2. § 7.

39. Stiernh. *de jure Goth.* l. 3. c. 4.

40. Ibid. l. 1. c. 5.

41. 2 Hawk. P. C. 392.

42. LL. Edm. § 3.

43. M. 11 Hen. IV. 12. 3 Inst. 131.

44. 1 Hal. P. C. 9.

## CHAPTER 24

### Of Process Upon an Indictment

WE are next, in the fourth place, to inquire into the manner of issuing process, after indictment found, to bring in the accused to answer it. We have hitherto supposed the offender to be in custody before the finding of the indictment; in which case he is immediately to be arraigned thereon. But if he has fled, or secretes himself, in capital cases; or has not, in smaller misdemeanors, been bound over to appear at the assizes or sessions, still an indictment may be preferred against him in his absence; since, were he present, he could not be heard before the grand jury against it. And, if it be found, then process must issue to bring him into court; for the indictment cannot be tried, unless he personally appears: according to the rules of equity in all, and the express provision of statute 28 Edw. III. c. 3. in capital, cases; that no man shall be put to death, without being brought to answer by due process of law.

THE proper process on an indictment for any petty misdemeanor, or on a penal statute, is a writ of *venire facias* [cause to come], which is in the nature of a summons to cause the party to appear. And if by the return to such *venire* it appears, that the party has lands in the county whereby he may be distrained, then a distress infinite shall be issued from time to time till he appears. But if the sheriff returns that he has no lands in his bailiwick, then (upon his non-appearance) a writ of *capias* [taking] shall issue, which commands the sheriff to take his body, and have him at the next assizes; and if he cannot be taken upon the first *capias*, a second, and a third shall issue, called an alias, and a *pluries capias* [multiple takings]. But, on indictments for treason or felony, a *capias* is the first process: and, for treason or homicide, only one shall be allowed to issue,<sup>1</sup> or two in the case of other felonies, by statute 25 Edw. III. c. 14. though the usage is to issue only one in any felony; the provisions of this statute being in most cases found impracticable.<sup>2</sup> And so, in the case of misdemeanors, it is now the usual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant. But if he absconds, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary. For, in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the *exigent* in order to his outlawry: that is, he shall be exacted, proclaimed, or required to surrender, at five county courts; and if he be returned *quinto exactus* [required the fifth time], and does not appear at the fifth exaction or requisition, then he is adjudged to be outlawed, or put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise.

THE punishment for outlawries upon indictments for misdemeanors, is the same as for outlawries upon civil actions; (of which, and the previous process by writs of *capias*, *exigi facias* [cause to be required], and proclamation, we spoke in the preceding book<sup>3</sup>) *viz.* forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offense charged in the indictment, as much as if he had been found guilty by his country.<sup>4</sup> His life is however still under the protection of the law, as has formerly been observed:<sup>5</sup> and though anciently an outlawed felon was said to have *caput lupinum* [a wolf's head], and might be knocked on the head like a wolf, by any one that should meet him;<sup>6</sup> because, having renounced all law, he was to be dealt with as in a state of nature, when every one that should find him might slay him: yet now, to avoid such

inhumanity, it is held that no man is entitled to kill him wantonly or wilfully; but in so doing is guilty of murder,<sup>7</sup> unless it happens in the endeavor to apprehend him.<sup>8</sup> For any person may arrest an outlaw on a criminal prosecution, either of his own head, or by writ or warrant of *capias utlagatum* [take the outlaw], in order to bring him to execution. But such outlawry may be frequently reversed by writ of error; the proceedings therein being (as it is fit they should be) exceedingly nice and circumstantial; and, if any single minute point be omitted or misconducted, the whole outlawry is illegal, and may be reversed: upon which reversal the party accused is admitted to plead to, and defend himself against, the indictment.

THUS much for process to bring in the offender after indictment found; during which stage of the prosecution it is, that writs of *certiorari facias* [cause notice to be given] are usually had though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the court of king's bench; which is the sovereign ordinary court of justice in causes criminal. And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of appeals or indictments and the proceedings thereon: and to quash or confirm them as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justices of *nisi prius* [unless before]: or, 3. It is so removed, in order to plead the king's pardon there: or, 4. To issue process of outlawry against the offender, in those countries or places where the process of the inferior judges will not reach him.<sup>9</sup> Such writ of *certiorari* [notice given], when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of king's bench remands the record to the court below, to be there tried and determined. A *certiorari* may be granted at the instance of either the prosecutor or the defendant: the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the justices of jail delivery, or after issue joined or confession of the fact in any of the courts below.<sup>10</sup>

AT this stage of prosecution also it is, that indictments found by the grand jury against a peer must in consequence of a writ of *certiorari* be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain; and that, in places of exclusive jurisdiction, as the two universities, indictments must be delivered (upon challenge and claim of cognizance) to the courts therein established by charter, and confirmed by act of parliament, to be there respectively tried and determined.

## NOTES

1. See appendix. § 1.
2. 2 Hal. P. C. 195.
3. See Vol. III. pag. 283, 4.
4. 2 Hal. P. C. 205.
5. See pag. 178.
6. Mirr. c. 4. § 4. Co. Litt. 128.

7. 1 Hal. P. C. 49.
8. Bracton. fol. 1256.
9. 2 Hal. P. C. 210.
10. 2 Hawk. P. C. 287. 4 Burr. 749.

## CHAPTER 25

### Of Arraignment, and its Incidents

WHEN the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be arraigned thereon; which is the fifth stage of criminal prosecution.

TO arraign, is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment.<sup>1</sup> The prisoner is to be called to the bar by his name; and it is laid down in our ancient books,<sup>2</sup> that, though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons. But yet in Laver's case, A. D. 1722. a difference was taken between the time of arraignment, and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment.<sup>3</sup>

WHEN he is brought to the bar, he is called upon by name to hold up his hand: which, though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand *constat de persona* [evidence of the person], and he owns himself to be of that name by which he is called.<sup>4</sup> However it is not an indispensable ceremony; for, being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well: therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient.<sup>5</sup>

THEN the indictment is to be read to him distinctly in the English tongue (which was law, even while all other proceedings were in Latin) that he may fully understand his charge. After which it is to be demanded of him, whether he be guilty of the crime, whereof he stands indicted, or not guilty. By the old common law the accessory could not be arraigned till the principal was attained; and therefore, if the principal had never been indicted at all, had stood mute, had challenged above thirty five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned: for *non constitit* [not evident] whether any felony was committed or no, till the principal was attained; and it might so happen that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen, where it was possible, that a trial of the principal might be had, subsequent to that of the accessory: and therefore the law still continues, that the accessory shall not be tried, so long as the principal remains liable to be tried hereafter. But by statute 1 Ann. c. 9. if the principal be once convicted, and before attainder, (that is, before he receives judgment of death or outlawry) he is delivered by pardon, the benefit of clergy, or otherwise; or if the principal stands mute, or challenges peremptorily above the legal number of jurors, so as never to be convicted at all; in any of these cases, in which no subsequent trial can be had of the principal, the accessory may be proceeded against, as if the principal felon had been attained; for there is no danger of future contradiction. And upon the trial of the accessory, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit of justice,<sup>6</sup> that the accessory is at liberty (if he can) to controvert the guilt of his supposed principal, and to prove him innocent of the charge, as well in point of fact as in point of law.



WHEN a criminal is arraigned, he either stands mute, or confesses the fact; which circumstances we may call incidents to the arraignment: or else he pleads to the indictment, which is to be considered as the next stage of proceedings. But, first, let us observe these incidents to the arraignment, of standing mute,

I. REGULARLY a prisoner is said to stand mute, when, being arraigned for treason or felony, he either, 1. Makes no answer at all: or, 2. Answers foreign to the purpose, or with such matter as is not allowable; and will not answer otherwise: or, 3 Upon having pleaded not guilty, refuses to put himself upon the country.<sup>7</sup> If he says nothing, the court ought *ex officio* [officially] to impanel a jury, to inquire whether he stands obstinately mute, or whether he be dumb *ex visitatione Dei* [by the visitation of God]. If the latter appears to be the case, the judges of the court (who are to be of counsel for the prisoner, and to see that he has law and justice) shall proceed to the trial, and examine all points as if he had pleaded not guilty.<sup>8</sup> But whether judgment of death can be given against such a prisoner, who has never pleaded, and can say nothing in arrest of judgment, is a point yet undetermined.<sup>9</sup>

IF he be found to be obstinately mute, (which a prisoner has been held to be, that has cut out his own tongue,<sup>10</sup>) then, if it be on an indictment of high treason, it is clearly settled that standing mute is equivalent to a conviction, and he shall receive the same judgment and execution.<sup>11</sup> And as in this the highest crime, so also in the lowest species of felony, *viz.* in petit larceny, and in all misdemeanors, standing mute is equivalent to conviction. But upon appeals or indictments for other felonies, or petit treason, he shall not be looked upon as convicted, so as to receive judgment for the felony; but shall, for his obstinacy, receive the terrible sentence of penance, or *peine forte et dure* [penance strong and hard].

BEFORE this is pronounced the prisoner ought to have not only *trina admonitio* [a third warning], but also a convenient respite of a few hours, and the sentence should be distinctly read to him, that he may know his danger:<sup>12</sup> and, after all, if he continues obstinate, and his offense is clergyable, he shall have the benefit of his clergy allowed him; even though he is too stubborn to pray it.<sup>13</sup> Thus tender has the modern law been of inflicting this dreadful punishment: but if no other means will prevail, and the prisoner (when charged with a capital felony) continues stubbornly mute, the judgment is then given against him, without any distinction of sex or degree. A judgment, which the law has purposely ordained to be exquisitely severe, that by that very means it might rarely be put in execution.

THE rack, or question, to extort a confession from criminals, is a practice of a different nature: this being only used to compel a man to put himself upon his trial; that being a species of trial in itself. And the trial by rack is utterly unknown to the law of England; though once when the dukes of Exeter and Suffolk, and other ministers of Henry VI, had laid a design to introduce the civil law into this kingdom as the rule of government, for a beginning thereof they erected a rack for torture; which was called in derision the duke of Exeter's daughter, and still remains in the tower of London:<sup>14</sup> where it was occasionally used as an engine of state, not of law, more than once in the reign of queen Elizabeth.<sup>15</sup> but when, upon the assassination of Villiers duke of Buckingham by Felton, it was proposed in the privy council to put the assassin to the rack, in order to discover his accomplices; the judges, being consulted, declared unanimously, to their own honor and the honor

of the English law, that no such proceeding was allowable by the laws of England.<sup>16</sup> It seems astonishing that this usage, of administering the torture, should be said to arise from a tenderness to the lives of men: and yet this is the reason given for its introduction in the civil law, and its subsequent adoption by the French and other foreign nation:<sup>17</sup> viz. because the laws cannot endure that any man should die upon the evidence of a false, or even a single, witness; and therefore contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession. Thus rating a man's virtue by the hardiness of his constitution, and his guilt by the sensibility of his nerves! But there needs only to state accurately,<sup>18</sup> in order most effectually to expose, this inhuman species of mercy: the uncertainty of which, as a test and criterion of truth, was long ago very elegantly pointed out by Tully; though he lived in a state wherein it was usual to torture slaves in order to furnish evidence: "*tamen, says he, illa tormenta gubernat dolor, moderatur natura cujusque tum animi tum corporis, regit quaesitor, flectit libido, corrumpit spes, infirmat metus; ut in tot rerum angustiis nihil veritati loci relinquatur.*"<sup>19</sup> ["Nevertheless, these torments are regulated by pain; they are more or less great in each sufferer, according to his strength of mind or body, the inquisitor directs them, the will bends, hope corrupts, fear enfeebles, so that in the dread and distraction of his situation, there is no place left for the consideration of truth."]

THE English judgment of penance for standing mute<sup>20</sup> is as follows: that the prisoner shall be remanded to the prison from whence he come; and put into a low, dark chamber; and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he can bear, and more; that he shall have no sustenance, save only, on the first day, three morsels of the worst bread; and, on the second day, three drafts of standing water, that shall be nearest to the prison door; and in this situation this shall be alternately his daily diet, till he dies, as the judgment now runs, though formerly it was, till he answered.<sup>21</sup>

IT has been doubted whether this punishment subsisted at the common law,<sup>22</sup> or was introduced in consequence of the statute Westm. 1. 3 Edw. I. c. 12.<sup>23</sup> which seems to be the better opinion. For not a word of it is mentioned in Glanvil or Bracton, or in any ancient author, case, or record, (that has yet been produced) previous to the reign of Edward I: but there are instances on record in the reign of Edward I: but there are instances on record in the reign of Henry III,<sup>24</sup> where persons accused of felony, and standing mute, were tried in a particular manner, by two successive juries, and convicted; and it is asserted by the judges in 8 Hen. IV. that, by the common law before the statute, standing mute on an appeal amounted to a conviction of the felony.<sup>25</sup> This statute of Edward I directs such persons, "as will not put themselves upon inquests of felonies before the judges at the suit of the king, to be put into hard and strong prison (*soient mys en la prisonne fort et dure*) as those which refuse to be at the common law of the land." And, immediately after this statute, the form of the judgment appears in Fleta and Britton to have been only a very straight confinement in prison, with hardly any degree of sustenance; but no weight is directed to be laid upon the body, so as to hasten the death of the miserable sufferer: and indeed any surcharge of punishment on persons adjudged to penance, so as to shorten their lives, is reckoned by Horne in the mirror<sup>26</sup> as a species of criminal homicide: to which we may add, that the record of 35 Edw. I. (cited by a learned author<sup>27</sup>) most clearly proves, that the prisoner might then possibly subsist for forty days under this lingering punishment. I should therefore imagine that the practice of loading him with weights, or, as it is usually called, pressing him to death, was gradually introduced between the reign of Edward I and 8 Hen. IV, when it first appears upon our books,<sup>28</sup> and was intended as a species of mercy to the

delinquent, by delivering him the sooner from his torment: and hence I presume it also was, that the duration of the penance was then first<sup>29</sup> altered; and instead of continuing till he answered, it was directed to continue till he died, which must very soon happen under an enormous pressure.

THE uncertainty of its original, the doubts that may be conceived of its legality, and the repugnance of its theory (for it rarely is carried into practice) to the humanity of the laws of England, all seem to require a legislative abolition of this cruel process, and a restitution of the ancient common law; whereby the standing mute in felony, as well as in treason and in trespass, amounted to a confession of the charge. Or, if the corruption of the blood and the consequent escheat in felony were removed, the *peine forte et dure* might still remain, as a monument of the savage rapacity, with which the lordly tyrants of feudal antiquity hunted after escheats and forfeitures; but no man would ever be tempted to undergo such a horrid alternative. For the law is, that by standing mute, and suffering this heavy penance, the judgment, and of course the corruption of the blood and escheat of the lands, are saved in felony and petit treason; though not the forfeiture of the goods: and therefore this lingering punishment was probably introduced, in order to extort a plea; without which it was held that no judgment of death could be given, and so the lord lost his escheat. But notwithstanding these terrors, some hardy delinquents, conscious of their guilt, and yet touched with a tender regard for their children, have rather chosen to submit to this painful death, than the easier judgment upon conviction, which might expose their offspring not only to present want, but to future incapacities of inheritance. But in high treason, as standing mute is equivalent to a conviction, the same judgment, the same corruption of blood, and the same forfeitures attend it, as in other cases of conviction.<sup>30</sup> And thus much for the demeanor of a prisoner upon his arraignment, by standing mute.

II. THE other incident to arraignments, exclusive of the plea, is the prisoner's confession of the indictment. Upon a simple and plain confession, the court has nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment.<sup>31</sup>

BUT there is another species of confession, which we read much of in our ancient books, of a far more complicated kind, which is called approvement. And that is when a person, indicted of treason or felony, and arraigned for the same, does confess the fact before plea pleaded; and appeals or accuses others, his accomplices, of the same crime, in order to obtain his pardon. In this case he is called an approver or prover, *probatore*, and the party appealed or accused is called the appellee. Such approvement can only be in capital offenses; and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it: and if he has no reasonable and legal exceptions to make to the person of the approver, which indeed are very numerous, he must put himself upon his trial, either by battle, or by the country; and, if vanquished or found guilty, must suffer the judgment of the law, and the approver shall have his pardon, *ex debito justitiae* [as due to justice]. On the other hand, if the appellee be conqueror, or acquitted by the jury, the approver shall receive judgment to be hanged, upon his own confession of the indictment; for the condition of his pardon has failed, *viz.* the convicting of some other person, and therefore his conviction remains absolute.

BUT it is purely in the discretion of the court to permit the approver thus to appeal, or not; and, in fact, this course of admitting approvements has been long disused: for the truth was, as Sir Matthew

Hale observes, that more mischief has arisen to good men by these kind of approvements, upon false and malicious accusations of desperate villains, than benefit to the public by the discovery and conviction of real offenders. And therefore, in the times when such appeals were more frequently admitted, great strictness and nicety were held therein:<sup>32</sup> though, since their discontinuance, the doctrine of approvements is become a matter of more curiosity than use. I shall only observe, that all the good, whatever it be, that can be expected from this method of approvement, is fully provided for in the cases of robbery, burglary, housebreaking, and larceny to the value of five shillings from shops, warehouses, stables, and coachhouses, by statutes 4 & 5 W. M. c. 8. 10 & 11 W. III. c. 23. and 5 Ann. c. 31. which enact, that, if any such felon, being out of prison, shall discover two or more persons, who have committed the like felonies, so as they may be convicted thereof; he shall in most cases receive a reward of 40£ and in general be entitled a pardon of all capital offenses, excepting only murder and treason. And if any such person, having feloniously stolen any lead, iron, or other metals, shall discover and convict two offenders of having illegally bought or received the same he shall by virtue of statute 29 Geo. II. c. 30 be pardoned for all such felonies committed before such discovery.

### NOTES

1. 2 Hal. P. C. 216.
2. Bract. L. 3. de coron. C. 18. § 3. Mirr. c. 5. sect. 1. § 54. Flet. l. 1. c. 31. § 1. Britt. c. 5. Staundt. P. C. 78. 3 Inst. 34. Kel. 10. 2 Hal. P. C. 219 2 Hawk. P. C. 308.
3. State Trials. VI. 230.
4. 2 Hal. P. C. 219.
5. Raym. 408.
6. Foster. 365, etc.
7. 2 Hal. P. C. 316.
8. 2 Hawk. P. C. 327.
9. 2 Hal. P. C. 317.
10. 3 Inst. 178.
11. 2 Hawk. P. C. 329. 2 Hal. P. C. 317.
12. 2 Hal. P. C. 320.
13. 2 Hal. P. C. 321. 2 Hawk. P. C. 332.
14. 3 Inst. 35.
15. Barr. 69. 385.
16. Rushw. Coll. i. 638.
17. Cod. l. 9. t. 41. l. 8. & t. 47. l. 16. Fortesc. de LL. Angl. c. 22.
18. The marquis Beccaria, (ch. 16.) in an exquisite piece of raillery, has proposed this problem, with a gravity and precision that are truly mathematical: "the force of the muscles and the sensibility of the nerves of an innocent person being given, it is required to find the degree of pain, necessary to make him confess himself guilty of a given crime."

19. Pro Sulla. 28.
20. 2 Hal. P. C. 319. 2 Hawk. P. C. 329.
21. Britton. c. 4. & 22. Flet. 1. 1. c. 34. § 33.
22. 2 Inst. 179. 2 Hal. P. C. 322. 2 Hawk. P. C. 330.
23. Staundf. P. C. 149. Barr. 65.
24. Emlyn on 2 Hal. P. C. 322.
25. *Al common ley, avant le statute de West. 1. c. 12. si ascun ust estre appeal, et ust estre mute, il serra convict de felony.* [By the common law before the statute, standing mute on an appeal amounted to a conviction of the felony.] (M. 8 Hen. IV. 2.)
26. ch. 1. § 9.
27. Barr. 62.
28. Yearb. 8 Hen. IV. 1.
29. *Et suit dit, que le contrarie avoit esire fait devant ces heures.* [And it was said, that the contrary had been done before this time.] (Ibid. 2)
30. 2 Hawk. P. C. 331.
31. 2 Hal. P. C. 225.
32. 2 Hal. P. C. ch. 29. 2 Hawk. P. C. ch. 24.

## CHAPTER 26 Of Plea, and Issue

WE are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess, or stand mute. This is either, 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5. The general issue.

FORMERLY there was another plea, now abrogated, that of sanctuary; which is however necessary to be lightly touched upon as it may give some light to many parts of our ancient law: it being introduced and continued during the superstitious veneration, that was paid to consecrated ground in the times of popery. First then, it is to be observed, that if a person accused of any crime (except treason, wherein the crown, and sacrilege, wherein the church, was too nearly concerned) had fled to any church or church-yard, and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offense; and thereupon took the oath in that case provided, *viz.* that he abjured the realm, and would depart from thence forthwith at the port that should be assigned him, and would never return without leave from the king; he by this means saved his life, if he observed the conditions of the oath, by going with a cross in his hand and with all convenient speed, to the port assigned, and embarking. For it, during this forty days privilege of sanctuary, or in his road to the sea side, he was apprehended and arraigned in any court for this felony, he might plead the privilege of sanctuary, and had a right to be remanded, if taken out against his will.<sup>1</sup> But by this abjuration his blood was attainted, and he forfeited all his goods and chattels.<sup>2</sup> The immunity of these privileged places was very much abridged by the statutes 27 Hen. VIII. c. 19. and 32 Hen. VIII. c. 12. And now, by the statute 21 Jac. I. c. 28. all privilege of sanctuary, and abjuration consequent thereupon, is utterly taken away and abolished.

FORMERLY also the benefit of clergy used to be pleaded before trial or conviction, and was called a declinatory plea; which was the name also given to that of sanctuary.<sup>3</sup> But, as the prisoner upon a trial has a chance to be acquitted, and totally discharged; and, if convicted of a clergyable felony, is entitled equally to his clergy after as before conviction; this course is extremely disadvantageous: and therefore the benefit of clergy is now very rarely pleaded; but, if found requisite, is prayed by the convict before judgment is passed upon him.

I PROCEED therefore to the five species of pleas, before mentioned.

I. A PLEA to the jurisdiction, is where an indictment is taken before a court, that has no cognizance of the offense; as if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions: in these or similar cases, he may except to the jurisdiction of the court, without answering at all to the crime alleged.<sup>4</sup>

II. A DEMURRER to the indictment. This is incident to criminal cases, as well as civil, when the fact as alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be. Thus, if a man be indicted for feloniously stealing a greyhound: which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass, to

steal it: in this case the party indicted may demur to the indictment; denying it to be felony, though he confesses the act of taking it. Some have held,<sup>5</sup> that if, on demurrer, the point of law be adjudged against the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others,<sup>6</sup> who hold, that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him. Which appears the more reasonable, because it is clear, that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony, or no; and upon the fact thus shown in appears to be felony; the court will nor record the confession, but admit him afterwards to plead not guilty.<sup>7</sup> And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and, though a man by mispleading may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used: since the same advantages may be taken upon a plea of not guilty; or afterwards, in arrest of judgment, when the verdict has established the fact.

III. A PLEA in abatement is principally for a *misnomer*, a wrong name, or a false addition to the prisoner. As, if James Allen, gentleman, is indicted by the name of John Allen, esquire, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire. And, if either fact is found by a jury, then the indictment shall be abated, as writs or declarations may be in civil actions; of which we spoke at large, in the preceding volume.<sup>8</sup> But, in the end, there is little advantage accruing to the prisoner by means of these dilatory pleas; because if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner is his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he, who takes advantage of a flaw, must at the same time show how it may be amended. Let us therefore next consider a more substantial kind of plea, *viz.*

IV. SPECIAL pleas in bar; which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas, which may be pleaded in bar of an appeal:<sup>9</sup> but these are applicable to both appeals and indictments.

1. FIRST, the plea of *auterfoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offense. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal on an appeal is a good bar to an indictment of the same offense. And so also was an acquittal on an indictment a good bar to an appeal, by the common law:<sup>10</sup> and therefore, in favor of appeals, a general practice was introduced, not to try any person on an indictment of homicide, till after the year and day, within which appeals may be brought, were past; by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which inconvenience, the statute 3 Hen. VII. c. 1. enacts, that indictments shall be proceeded on, immediately, at the king's suit, for the death of a man, without waiting for bringing an appeal; and that the plea, of *auterfoits acquit* on an indictment, shall be no bar to the prosecuting of any appeal.

2. SECONDLY, the plea of *autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be (being suspended by the benefit of clergy or other causes) is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime.<sup>11</sup> Hereupon it has been held, that a conviction of manslaughter, on an appeal, is a bar even in another appeal, and much more in an indictment, of murder; for the fact prosecuted is the same in both, though the offenses differ in coloring and in degree. It is to be observed, that the pleas of *autrefois acquit*, and *autrefois convict*, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime. But the case is otherwise, in

3. THIRDLY, the plea of *autrefois attain*, or a former attainder; which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony, by judgment of death either upon a verdict or confession, by outlawry, or heretofore by adjuration; and whether upon an appeal or an indictment; he may plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felony.<sup>12</sup> And this because, generally, such proceeding on a second prosecution cannot be to any purpose; for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he has forfeited all that he had: so that it is absurd and superfluous to endeavor to attain him a second time. But to this general rule however, as to all others, there are some exceptions; wherein, *cessante ratione, cessat et ipsa lex* [the reason ceasing, the law itself ceases]. As, 1. Where the former attainder is reversed for error, for then it is the same as if it had never been. And the same reason holds, where the attainder is reversed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. 2. Where the attainder was upon indictment, such attainder is no bar to an appeal: for the prior sentence is pardonable by the king; and if that might be pleaded in bar of the appeal, the king might in the end defeat the suit of the subject, by suffering the prior sentence to stop the prosecution of a second, and then, when the time of appealing is elapsed, granting the delinquent a pardon. 3. An attainder in felony is no bar to an indictment of treason: because not only the judgment and manner of death are different, but the forfeiture is more extensive, and the land goes to different persons. 4. Where a person attainted of one felony, as robbery, is afterwards, indicted as principal in another, as murder, to which there are also accessories, prosecuted at the same time; in this case it is held, that the plea of *autrefois attain* is no bar, but he shall be compelled to take his trial, for the sake of public justice: because the accessories to such second felony cannot be convicted till after the conviction of the principal. And from these instances we may collect that the plea of *autrefois attain* is never good, but when a second trial would be quite superfluous.

4. LASTLY, a pardon may be pleaded in bar; as at once destroying the end and purpose of the indictment, by remitting that punishment, which the prosecution is calculated to inflict. There is one advantage that attends pleading a pardon in bar, or in arrest of judgment, before sentence is past; which gives it by much the preference to pleading it after sentence or attainder. This is, that by stopping the judgment it stops the attainder, and prevents the corruption of the blood: which, when once corrupted by attainder, cannot afterwards be restored, otherwise than by act of parliament. But, as the title of pardons is applicable to other stages of prosecution; and they have their respective force and efficacy, as well after as before conviction, outlawry, or attainder; I shall therefore reserve the more minute consideration of them, till I have gone through every other title, except only that of execution.



BEFORE I conclude this head of special pleas in bar, it will be necessary once more to observe; that, though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another if that be determined against him; (as, if on an action of debt the defendant against him; (as, if on an action of debt the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, *nil debet* [nothing owed], as he might at first: for he has made his election what plea to abide by, and it was his own folly to choose a rotten defense) though, I say, this strictness is observed in civil actions, *quia interest reipublicae ut sit finis litium* [it is for the public good to put an end to litigation]: yet in criminal prosecutions, *in favorem vitae* [in deference to life], as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court; still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster* [respond again], and may plead over to the felony the general issue, not guilty.<sup>13</sup> For the law allows many pleas by which a prisoner may escape death; but only one plea, in consequence whereof it can be inflicted; *viz.* on the general issue, after an impartial examination and decision of the facts, by the unanimous verdict of a jury. It remains therefore that I consider,

V. THE general issue, or plea of not guilty,<sup>14</sup> upon which plea alone the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot plead that it was in his own defense against a robber on the highway, or a burglar; but he must plead the general issue, not guilty, and give this special matter in evidence. For (besides that these pleas do in effect amount to the general issue; since, if true, the prisoner is most clearly not guilty) as the facts in treason are laid to be done *proditorie et contra ligeantiae suae debitum* [traitorously and against his due allegiance]; and, in felony, that the killing was done *felonice*; these charges, of a traitorous or felonious intent, are the points and very gist of the indictment, and must be answered directly, by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter, and give their verdict accordingly, as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner.<sup>15</sup>

WHEN the prisoner has thus pleaded not guilty, *non culpabilis*, or *nient culpable*; which was formerly used to be abbreviated upon the minutes, thus, "*non* (or *nient*) *cul.*" the clerk of the assize, or clerk of the arraigns, on behalf of the crown replies, that the prisoner is guilty, and that he is ready to prove him so. This is done by two monosyllables in the same spirit of abbreviation, "*cul. prit.*" which signifies first that the prisoner is guilty, (*cul. culpable*, or *culpabilis*) and then that the king is ready to prove him so; *prit.*, *praesto sum*, or *paratus verificare*. This is therefore a replication on behalf to the king *viva voce* [by voice] at the bar; which was formerly the course in all pleadings, as well in civil as in criminal causes. And that was done in the concisest manner: for when the pleader intended to demur, he expressed his demurrer in a single word, "judgment;" signifying that he demanded judgment whether the writ, declaration, plea, etc, either in form or matter, were sufficiently good in law; and in he meant to rest on the truth of the facts pleaded, he expressed that also in a single syllable, "*prit.*" signifying that he was ready to prove his assertions; as may be observed from the yearbooks and other ancient repositories of law.<sup>16</sup> By this replication the king and the prisoner are therefore at issue: for we may remember, in our strictures upon pleadings in the preceding book,<sup>17</sup> it was observed, that when the parties come to a fact, which is affirmed on one side and denied on the other, then they are said to be at issue in point of fact: which is evidently the

case here, in the plea of *non cul.* by the prisoner; and the replication of *cul.* by the clerk. And we may also remember, that the usual conclusion of all affirmative pleadings, as this of *cul.* or guilty is, was by an averment in these words, “and this he is ready to verify; *et hoc paratus est verificare*.” which same thing is here expressed by the single word, “*prit.*”

HOW our courts came to express a matter of this importance in so odd and obscure a manner, “*rem tantam tam negligenter*,” can hardly be pronounced with certainty. It may perhaps, however, be accounted for by supposing, that these were at first short notes, to help the memory of the clerk, and remind him what he was to reply; or else it was the short method of taking down in court, upon the minutes, the replication and averment; “*cul. prit.*” which afterwards the ignorance of succeeding clerks adopted for the very words to be by them spoken.<sup>18</sup>

BUT however it may have arisen, the joining of issue (which, though now usually entered on the record,<sup>19</sup> is no otherwise joined<sup>20</sup> in any part of the proceedings) seems to be clearly the meaning of this obscure expression;<sup>21</sup> which has puzzled our most ingenious etymologists, and is commonly understood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the prisoner, by asking him, “culprit, how wilt thou be tried?” for immediately upon issue joined it is inquired of the prisoner, by what trial he will make his innocence appear. This form has at present reference to appeal and approvements only, wherein the appellee has his choice, either to try the accusation by battle or by jury. But upon indictments, since the abolition of ordeal, there can be no other trial but that by jury, *per pais*, or by the country: and therefore, if the prisoner refuses to put himself upon the inquest in the usual form, that is, to answer that he will be tried by God and the country,<sup>22</sup> if a commoner; and, if a peer, by God and his peers;<sup>23</sup> the indictment, if in treason, is taken *pro confesso* [as confessed]: and the prisoner, in cases of felony, is adjudged to stand mute, and, if he perseveres in his obstinacy, shall be condemned to the *peine fort et dure* [penance hard and strong].

WHEN the prisoner has thus put himself upon his trial, clerk answers in the humane language of the law, which always hopes that the party's innocence rather than his guilt may appear, “God send thee a good deliverance.” And then they proceed, as soon as conveniently may be, to the trial; the manner of which will be considered at large in the next chapter.

## NOTES

1. *Mirr.* c. 1. § 13. 2 *hawk.* P. C. 335.
2. 2 *Hawk.* P. C. 52.
3. 2 *Hal.* P. C. 236.
4. *Ibid.* 256.
5. 2 *Hal.* P. C. 257.
6. 2 *Hawk.* P. C. 334.
7. 2 *Hal.* P. C. 225.
8. See Vol. III. pag. 302.
9. 2 *Hawk.* P. C. ch. 23.

10. Ibid. 373.
11. 2 Hawk. P. C. 377.
12. Ibid. 375.
13. 2. Hal. P. C. 239.
14. See appendix, § 1.
15. 2 Hal. P. C. 258.
16. North's life of lord Guilford. 98.
17. See Vol. III. pag. 312.
18. Of this ignorance we may see daily instances, in the abuse of two legal terms of ancient French; one, the prologue to all proclamations, “oyez, or hear ye,” which is generally pronounced most unmeaningly “O yes:” the other, a more pardonable mistake, viz. when a jury are all sworn, the officer bids the crier number them, for which the word in law-french is, “countez;” but we now hear it pronounced in very good English, “count these.”
19. See appendix, § 1.
20. 2 Hawk. P. C. 399.
21. 2 Hal. P. C. 258.
22. A learned author, who is very seldom mistaken in his conjectures, has observed that the proper answer is “by God or the country,” that is, either by ordeal or by jury; because the question supposes an option in the prisoner. And certainly it gives some countenance to this observation, that the trial by ordeal used formerly to be called *judicium Dei* [God's judgment]. But it should seem, that when the question gives the prisoner an option, his answer must be positive; and not in the disjunctive, which returns the option back to the prosecutor.
23. Kelyngc. 57. State Trials, *passim*.

## CHAPTER 27 Of Trial, and Conviction

THE several methods of trial and conviction of offenders, established by the laws of England, were formerly more numerous than at present, though the superstition of our Saxon ancestors: who, like other northern nations, were extremely addicted to divination; a character, which Tacitus observes of the ancient Germans.<sup>1</sup> They therefore invented a considerable number of methods of purgation or trial, to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously, to vindicate the guiltless.

I. THE most ancient species of trial was that by ordeal; which was peculiarly distinguished by the appellation of *judicium Dei* [God's judgment]; and sometimes *vulgaris purgation* [common purification], to distinguish it from the canonical purgation, which was by the oath of the party. This was of two sorts,<sup>2</sup> either fire-ordeal, or water-ordeal; the former being confined to persons of higher rank, the latter to the common people.<sup>3</sup> Both these might be performed by deputy: but the principal was to answer for the success of the trial; the deputy only venturing some corporal pain, for hire, or perhaps for friendship.<sup>4</sup> Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red hot iron, of one, two or three pounds weight; or else by walking, barefoot, and blindfold, over nine redhot plowshares, laid lengthwise at unequal distances: and if the party escaped being hurt, he was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty. However, by this latter method queen Emma, the mother of Edward the confessor, is mentioned to have cleared her character, when suspected of familiarity with Alwyn bishop of Winchester.<sup>5</sup>

WATER-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and escaping unhurt thereby: or by casting the person suspected into a river or pond of cold water: and, if he floated therein without any action of swimming, it was deemed an evidence of his guilt; but, if he sunk, he was acquitted. It is easy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity still practiced in many countries to discover witches, by casting them into a pool of water, and drowning them to prove their innocence. And in the Eastern empire the fire-ordeal was used to the same purpose by the emperor Theodore Lascaris; who, attributing his sickness to magic, caused all those whom he suspected to handle the hot iron: thus joining (as has been well remarked<sup>6</sup>) to the most dubious crime in the world, the most dubious proof of innocence.

AND indeed this purgation by ordeal seems to have been very ancient, and very universal, in the times of superstitious barbarity. It was known to the ancient Greeks: for in the *Antigone* of Sophocles,<sup>7</sup> a person, suspected by Creon of a misdemeanor, declares himself ready "to handle hot iron and to walk over fire," in order to manifest his innocence; which, the scholiast [commentator] tells us, was then a very usual purgation. And Grotius<sup>8</sup> gives us many instances of water-ordeal in Bithynia, Sardinia, and other places. There is also a very peculiar species of water-ordeal, said to prevail among the Indians on the coast of Malabar; where a person accused of any enormous crime is obliged to swim over a large river abounding with crocodiles, and, if he escapes unhurt, he is reputed innocent. As in Siam, besides the usual methods of fire and water ordeal, both parties are sometimes exposed to the fury of a tiger let loose for that purpose: and, if the beast spares either, that person is accounted innocent; if neither, both are held to be guilty; but if he spares both, the trial is

incomplete, and they proceed to a more certain criterion.<sup>9</sup>

ONE cannot but be astonished at the folly and impiety of pronouncing a man guilty, unless he was cleared by a miracle; and of expecting that all the powers of nature should be suspended, by an immediate interposition of providence to save the innocent, whenever it was presumptuously required. And yet in England, so late as king John's time, we find grants to the bishops and clergy to use the *judicium ferri, aquae, et ignis* [the judgment of iron, water, and fire].<sup>10</sup> And, both in England and Sweden, the clergy presided at this trial, and it was only performed in the churches or in other consecrated ground: for which Stiernhook<sup>11</sup> gives the reason; “*non defuit illis operae et laboris pretium; semper enim ab ejusmodi judicio aliquid lucri sacerdotibus obveniebat.*” [“They did not go without reward for their pains and labor; for from judgments of this kind some gain always accrued to the priests.”] But, to give it its due praise, we find the canon law very early declaring against trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, “*cum sit contra praeceptum Domini, non tentabis Dominum Deum tuum.*”<sup>12</sup> [“It is against the commandment of the Lord, not to tempt the Lord thy God.”] Upon this authority, though the canons themselves were of no validity in England, it was thought proper (as had been done in Denmark above a century before<sup>13</sup>) to disuse and abolish this trial entirely in our courts of justice, by an act of parliament in 3 Hen III. according to Sir Edward Coke,<sup>14</sup> or rather by an order of the king in council.<sup>15</sup>

II. ANOTHER species of purgation, somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition, was the corsned, or morsel of execration: being a piece of cheese or bread, of about an ounce in weight, which was consecrated with a form of exorcism; desiring of the Almighty that it might cause convulsions and paleness, and find no passage, if the man was really guilty; but might turn to health and nourishment, if he was innocent.<sup>16</sup> as the water of jealousy among the Jews<sup>17</sup> was, by God's especial appointment, to cause the belly to swell and the thigh to rot, if the woman was guilty of adultery. This corsned was then given to the suspected person; who at the same time also received the holy sacrament:<sup>18</sup> if indeed the corsned was not, as some have suspected, the sacramental bread itself; till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly. Our historians assure us, that Godwyn, earl of Kent in the reign of king Edward the confessor, abjuring the death of the king's brother, at last appealed to his corsned, “*per buccellam deglutiendam abjuravit*”<sup>19</sup> [“he abjured it by swallowing the morsel of execration”] which stuck in his throat and killed him. This custom has been long since gradually abolished, though the remembrance of it still subsists in certain phrases of abjuration retained among the common people.<sup>20</sup>

HOWEVER we cannot but remark, that though in European countries this custom most probably arose from an abuse of revealed religion, yet credulity and superstition will, in all ages and in all climates, produce the same or similar effects. And therefore we shall not be surprised to find, that in the kingdom of Pegu there still subsists a trial by the corsned, very similar to that of our ancestors, only substituting raw rice instead of bread.<sup>21</sup> And, in the kingdom of Monomopata, they have a method of deciding lawsuits equally whimsical and uncertain. The witness for the plaintiff chews the bark of a tree, endued with an emetic quality, which, being sufficiently masticated, is then infused in water, which is given the defendant to drink. If his stomach rejects it, he is condemned: if it stays with him, he is absolved, unless the plaintiff will drink some of the same water; and, if it

stays with him also, the suit is left undermined.<sup>22</sup>

THESE two antiquated methods of trial were principally in use among our Saxon ancestors. The next, which still remains in force, though very rarely in use, owes its introduction among us to the princes of the Norman line. And that is

III. THE trial by battle, duel, or single combat: which was another species of presumptuous appeals to providence, under an expectation that heaven would unquestionably give the victory to the innocent or injured party. The nature of this trial in cases of civil injury, upon issue joined in a writ of right, was fully discussed in the preceding book:<sup>23</sup> to which I have only to add, that the trial by battle may be demanded at the election of the appellee, in either an appeal or an approvement; and that it is carried on with equal solemnity as that on a writ of right: but with this difference, that there each party might hire a champion, but here they must fight in their proper persons. And therefore if the appellant or approver be a woman, a priest, an infant, or of the age of sixty, or lame, or blind, he or she may counterplead and refuse the wager of battle; and compel the appellee to put himself upon the country. Also peers of the realm, bringing an appeal, shall not be challenged to wage battle, on account of the dignity of their persons; nor the citizens of London, by special charter, because fighting seems foreign to their education and employment. So likewise if the crime be notorious; as if the thief be taken with the *mainour*, or the murderer in the room with a bloody knife, the appellant may refuse the tender of battle from the appellee;<sup>24</sup> for it is unreasonable that an innocent man should stake his life against one who is already half-convicted.

THE form and manner of waging battle upon appeals are much the same as upon a writ of right; only the oaths of the two combatants are vastly more striking and solemn.<sup>25</sup> The appellee, when appealed of felony, pleads not guilty, and throws down his glove, and declares he will defend the same by his body: the appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the book in his right hand, and in his left the right hand of his antagonist, swears to his effect. "*Hoc audi, homo, quem per manum teneo,*" etc: "hear this, O man whom I hold by the hand, who callest thyself John by the name of baptism, that I, who call myself Thomas by the name of baptism, did not feloniously murder thy father, William by name, nor am any way guilty of the said felony. So help me God, and the saints; and this I will defend against thee by my body, as this court shall award." To which the appellant replies, holding the bible and his antagonist's hand in the same manner as the other: "hear this, O man whom I hold by the hand, who callest thyself Thomas by the name of baptism, that thou art perjured; and therefore perjured, because that thou art perjured; and therefore perjured, because that thou feloniously didst murder my father, William by name. So help me God and the saints; and this I will prove against thee by my body, as this court shall award."<sup>26</sup> The battle is then to be fought with the same weapons, *viz.* batons, the same solemnity, and the same oath against amulets and sorcery, that are used in the civil combat: and if the appellee by so far vanquished, that he cannot or will not fight any longer, he shall be adjudged to be hanged immediately; and then, as well as if he be killed in battle, providence is deemed to have determined in favor of the truth, and his blood shall be attained. But if he kills the appellant, or can maintain the fight from sunrising till the stars appear in the evening, he shall be acquitted. So also if the appellant becomes recreant, and pronounces the horrible word of *craven*, he shall lose his *liberam legem* [legal liberty], and become infamous; and the appellee shall recover his damages, and also be forever quit, not only of the appeal, but of all indictments

likewise for the same offense.

IV. THE fourth method of trial used in criminal cases is that by the peers of Great Britain, in the court of parliament, or the court of the lord high steward, when a peer is capitally indicted. Of this enough has been said in a former chapter;<sup>27</sup> to which I shall now only add, that, in the method and regulations of its proceedings, it differs little from the trial *per patriam*, or by jury: except that the peers need not all agree in their verdict; but the greater number, consisting of twelve at the least, will conclude, and bind the minority.<sup>28</sup>

V. THE trial by jury, or the country, *per patriam*, is also that trial by the peers, of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter,<sup>29</sup> “*nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale iudicium parium suorum, vel per legem terrae.*” [“No free man may be taken or imprisoned, or exiled, or in any manner deprived of life but by the lawful judgment of his peers, or by the law of the land.”]

THE antiquity and excellence of this trial, for the settling of the civil property, has before been explained at large.<sup>30</sup> And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control, by justices of *oyer* and *terminer* occasionally named by the crown; who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure. But the founders of the English laws have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury: and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion. So that the liberties of England cannot but subsist, so long as this *palladium* [safeguard] remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial, by justices of the peace, commissioners of the revenue, and courts of conscience. And however convenient these may appear at first, (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.

WHAT was said of juries in general, and the trial thereby, in civil cases, will greatly shorten our

present remarks, with regard to the trial of criminal suits; indictments, informations, and appeals: which trial I shall consider in the same method that I did the former; by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

WHEN therefore a prisoner on his arraignment has pleaded not guilty, and for his trial has put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto*; that is, freeholders, without just exception, and of the *visne* or neighborhood; which is interpreted to be of the county where the fact is committed.<sup>31</sup> If the proceedings are before the court of king's bench, there is time allowed, between the arraignment and the trial, for a jury to be impaneled by writ of *venire facias* to the sheriff, as in civil causes: and the trial in case of a misdemeanor is had at *nisi prius* [unless before], unless it be of such consequence as to merit a trial at bar; which is always invariably had when the prisoner is tried for any capital offense. But, before commissioners of *oyer and terminer* [hear and determine] and jail delivery, the sheriff by virtue of a general precept directed to him beforehand, returns to the court a panel of forty eight jurors, to try all felons that may be called upon their trial at that session: and therefore it is there usual to try all felons immediately, or soon, after their arraignment. But it is not customary, nor agreeable to the general course of proceedings, unless by consent of parties, to try persons indicted of smaller misdemeanors at the same court in which they have pleaded not guilty, or traversed the indictment. But they usually give security to the court, to appear at the next assizes or session, and then and there to try the traverse, giving notice to the prosecutor of the same.

IN cases of high treason, whereby corruption of blood may ensue, or misprision of such treason, it is enacted by statute 7 W. III. c. 3. first, that no person shall be tried for any such treason, except an attempt to assassinate the king, unless the indictment be bound within three years after the offense committed: next, that the prisoner shall have a copy of the indictment, but not the names of the witnesses, five days at least before the trial; that is, upon the true construction of the act, before his arraignment;<sup>32</sup> for then is his time to take any exceptions thereto, by way of plea or demurrer: thirdly, that he shall also have a copy of the panel of jurors two days before his trial: and, lastly, that he shall have the same compulsive process to bring in his witnesses for him, as was usual to compel their appearance against him. And, by statute 7 Ann. c. 21. (which did not take place till after the decease of the late pretender) all persons, indicted for high treason or misprision thereof, shall have not only a copy of the indictment, but a list of all the witnesses to be produced, and of the jurors impaneled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses; the better to prepare him to make his challenges and defense. But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, is repealed by the statute 6 Geo. III. c. 53. else it had been impossible to have tried those offenses in the same circuit in which they are indicted: for ten clear days, between the finding and the trial of the indictment, will exceed the time usually allotted for any session of *oyer and terminer*.<sup>33</sup> And no person indicted for felony is, or (as the law stands) ever can be, entitled to such copies, before the time of his trial.<sup>34</sup>

WHEN the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party.

CHALLENGES may here be made, either on the part of the king, or on that of the prisoner; and



either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes.<sup>35</sup> For it is here at least as necessary, as there, that the sheriff or returning officer be totally indifferent; that where an alien is indicted, the jury should be de medietate, or half foreigners; (which does not indeed hold in treasons,<sup>36</sup> aliens being very improper judges of the branch of allegiance to the king) that on every panel there should be a competent number of hundredors; and that the particular jurors should be *omni exceptione majores* [above all exception]; not liable to objection either *propter honoris respectum*, *propter defectum*, *propter affectum*, or *propter delictum* [on account of dignity, on account of incompetency, on account of partiality, or on account of criminality].

CHALLENGES upon any of the foregoing accounts are styled challenges for cause; which may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is, *in favorem vitae* [in deference to life], allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a peremptory challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous. This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

THIS privilege, of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. St. 4. which enacts, that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However it is held, that the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged. And then, and not sooner, the king's counsel must show the cause: otherwise the juror shall be sworn.<sup>37</sup>

THE peremptory challenges of the prisoner must however have some reasonable boundary; otherwise he might never be tried. This reasonable boundary is settled by the common law to be the number of thirty five; that is, one under the number of three full juries. For the law judges that five and thirty are fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a greater number, or three full juries, has no intention to be tried at all. And therefore it dealt with one, who peremptorily challenges above thirty five, and will not retract his challenge, as with one who stands mute or refuses his trial; by sentencing him to the *peine forte et dure* [penance strong and hard] in felony, and by attainting him in treason.<sup>38</sup> And so the law stands at this day with regard to treason, of any kind.

BUT by statute 22 Hen. VIII. c. 14. (which, with regard to felonies, stands unrepealed by statute 1 & 2 Ph. & Mar. c. 10.) by this statute, I say, no person, arraigned for felony, can be admitted to make any more than twenty peremptory challenges. But how if the prisoner will peremptorily challenge

twenty one? what shall be done? The old opinion was, that judgment of *peine forte et dure* should be given, as where he challenged thirty-six at the common law:<sup>39</sup> but the better opinion seems to be,<sup>40</sup> that such challenge shall only be disregarded and overruled. Because, first, the common law does not inflict the judgment of penance for challenging twenty one, neither does the statute inflict it; and so heavy a judgment shall not be imposed by implication. Secondly, the words of the statute are, “that he be no admitted to challenge more than twenty;” the evident construction of which is, that any farther challenge shall be disallowed or prevented: and therefore, being null from the beginning, and never in fact a challenge, it can subject the prisoner to no punishment; but the juror shall be regularly sworn.

IF, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded as in civil causes,<sup>41</sup> till the number of twelve is sworn, “well and truly to try, and true deliverance make, between our sovereign lord the king, and the prisoner whom they have in charge; and a true verdict to give, according to their evidence.”

WHEN the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshaled, examined, and enforced by the counsel for the crown, or prosecution. But it is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated.<sup>42</sup> A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular<sup>43</sup>) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass? Nor indeed is it strictly speaking a part of our ancient law: for the mirror,<sup>44</sup> having observed the necessity of counsel in civil suits, “who know how to forward and defend the cause, by the rules of law and customs of the realm,” immediately afterwards subjoins; “and more necessary are they for defense upon indictments and appeals of felony, than upon other venial causes.”<sup>45</sup> And, to say the truth, the judges themselves are so sensible of this defect in our modern practice, that they seldom scruple to allow a prisoner counsel to stand by him at the bar, and instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact: for as to matters of law, arising on the trial, they are entitled to the assistance of counsel. But still this is a matter of too much importance to be left to the good pleasure of any judge, and is worthy the interposition of the legislature; which has shown its inclination to indulge prisoners with this reasonable assistance, by enacting in statute 7 W. III. c. 3. that persons indicted for such high treason, as works a corruption of the blood, or misprision thereof, may make their full defense by counsel, no exceeding two, to be named by the prisoner and assigned by the court or judge: and this indulgence, by statute 20 Geo. II. c. 30. is extended to parliamentary impeachments for high treason, which were excepted in the former act.

THE doctrine of evidence upon pleas of the crown is, in most respects, the same as that upon civil actions. There are however a few leading points, wherein, by several statutes and resolutions, a difference is made between civil and criminal evidence.

FIRST, in all cases of high treason, petit treason, and misprision of treason, by statutes 1 Edw. VI.

c. 11. and 1 & 2 Ph. & Mar. c. 10. two lawful witnesses are required to convict a prisoner; except in cases of coining,<sup>46</sup> and counterfeiting the seals; or unless the party shall willingly and without violence confess the same. By statute 7 W. III. c. 3. in prosecutions for those treasons to which that act extends, the same rule is again enforced, with this addition, that the confession of the prisoner, which shall countervail the necessity of such proof, must be in open court; and it is declared that both witnesses must be to the same overt act of treason, or one to one over act, and the other to another overt act of the same species of treason,<sup>47</sup> and not of distinct heads or kings: and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. And therefore in Sir John Fenwick's case, in king William's time, where there was but one witness, an act of parliament<sup>48</sup> was made on purpose to attain him of treason, and he was executed.<sup>49</sup> But in almost every other accusation one positive witness is sufficient. Baron Montesquieu lays it down for a rule,<sup>50</sup> that those laws which condemn a man to death in any case on the deposition of a single witness, are fatal to liberty: and he adds this reason,<sup>51</sup> that the witness who affirms, and the accused who denies, makes an equal balance; there is a necessity therefore to call in a third man to incline the scale. But this seems to be carrying matters too far: for there are some crimes, in which the very privacy of their nature excludes the possibility of having more than one witness: must these therefore escape unpunished? Neither indeed is the bare denial of the person accused equivalent to the positive oath of a disinterested witness. In cases of indictments for perjury, this doctrine is better founded; and there our law adopts it: for one witness is not allowed to convict a man indicted for perjury; because then there is only one oath against another.<sup>52</sup> In cases of treason also there is the accused's oath of allegiance, to counterpoise the information of a single witness; and that may perhaps be one reason why the law requires a double testimony to convict him: though the principal reason, undoubtedly, is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

SECONDLY, though from the reversal of colonel Sidney's attainder by act of parliament in 1689<sup>53</sup> it may be collected,<sup>54</sup> that the mere similitude of hand-writing in two papers shown to a jury, without other concurrent testimony, is no evidence that both were written by the same person; yet undoubtedly the testimony of witnesses, well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury.<sup>55</sup>

THIRDLY, by the statute 21 Jac. I. c. 27. a mother of a bastard child, concealing its death, must prove by one witness that the child was born dead; otherwise such concealment shall be evidence of her having murdered it.<sup>56</sup>

FOURTHLY, all presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer. And Sir Matthew Hale in particular<sup>57</sup> lays down two rules, most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods: and, 2. Never to convict any person of murder or manslaughter, till at least the body be found dead; on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing.

LASTLY, it was an ancient and commonly received practice,<sup>58</sup> (derived from the civil law, and which also to this day obtains in the kingdom of France<sup>59</sup>) that, as counsel was not allowed to any

prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses. And therefore it deserves to be remembered, to the honor of Mary I, (whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous<sup>60</sup>) that when she appointed Sir Richard Morgan chief justice of the common-pleas, she enjoined him, “that notwithstanding the old error, which did not admit any witness to speak, or any other matter to be heard, in favor of the adversary, her majesty being party; her highness' pleasure was, that whatsoever could be brought in favor of the subject should be admitted to be heard: and moreover, that the justices should not persuade themselves to sit in judgment otherwise for her highness than for her subject.”<sup>61</sup> Afterwards, in one particular instance (when embezzling the queen's military stores was made felony by statute 31 Eliz. c. 4.) it was provided that any person, impeached for such felony, “should be received and admitted to make any lawful proof that he could, by lawful witness or otherwise, for his discharge and defense:” and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath:<sup>62</sup> the consequence of which still was, that the jury gave less credit to the prisoner's evidence, than to that produced by the crown. Sir Edward Coke<sup>63</sup> protests very strongly against this tyrannical practice: declaring that he never read in any act of parliament, book-case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and therefore there was not so much as *scintilla juris* [a spark of law] against it.<sup>64</sup> And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland,<sup>65</sup> when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern countries, they insisted on a clause, and carried it<sup>66</sup> against the efforts of both the crown and the house of lords, against the practice of the courts in England, and the express law of Scotland,<sup>67</sup> “that in all such trials, for the better discovery of the truth, and the better information of the consciences of the jury and justices, there shall be allowed to the party arraigned the benefit of such credible witnesses, to be examined upon oath, as can be produced for his clearing and justification.” At length by the statute 7 W. III. c. 3. the same measure of justice was established throughout all the realm, in cases of treason within the act: and it was afterwards declared by statute 1 Ann. st. 2. c. 9. that in all cases of treason and felony, all witnesses for the prisoner should be examined upon oath, in like manner as the witnesses against him.

WHEN the evidence on both sides is closed, the jury cannot be discharged till they have given in their verdict; but are to consider of it, and deliver it in, with the same forms, as upon civil causes: only they cannot, in a criminal case, give a privy verdict.<sup>68</sup> But an open verdict may be either general, guilty, or not guilty; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, it be murder, manslaughter or no crime at all. This is where they doubt the matter of law, and therefore choose to leave it to the determination so the court; though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths: and, if their verdict be notoriously wrong, they may be punished and the verdict set aside by attainat at the suit of the king; but not at the suit of the prisoner.<sup>69</sup> But the practice, heretofore in use, of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional and illegal: and is treated as such by Sir Thomas Smith, two hundred years ago; who accounted “such doings to be very violent, tyrannical, and contrary to the liberty and custom of the realm of England.”<sup>70</sup> For, as

Sir Matthew Hale well observes,<sup>71</sup> it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions: ) unhappy also for the prisoner; for, if the judge's opinion must rule the verdict, the trial by jury would be useless. Yet in many instances,<sup>72</sup> where contrary to evidence the jury have found the prisoner guilty, their verdict has been mercifully set aside, and a new trial granted by the court of king's bench; for in such case, as has been said, it cannot be set right by attain. But there has yet been no instance of granting a new trial, where the prisoner was acquitted upon the first.<sup>73</sup>

IF the jury therefore find the prisoner not guilty, he is then forever quit and discharged of the accusation;<sup>74</sup> except he be appealed of felony within the time limited by law. But if the jury find him guilty,<sup>75</sup> he is then said to be convicted of the crime whereof he stands indicted. Which conviction may accrue two ways; either by his confessing the offense and pleading guilty; or by his being found so by the verdict of his country.

WHEN the offender is thus convicted, there are two collateral circumstances that immediately arise. 1. On a conviction, in general, for any felony, the reasonable expenses of prosecution are by statute 25 Geo. II. c. 36. to be allowed to the prosecutor out of the county stock, if he petitions the judge for that purpose; and by statute 27 Geo. II. c. 3. poor persons, bound over to give evidence, are likewise entitled to be paid their charges, as well without conviction as with it. 2. On a conviction of larceny in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII. c. 11. For by the common law there was no restitution of goods upon an indictment, because it is at the suit of the king only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again.<sup>76</sup> But, it being considered that the party, prosecuting the offender by indictment, deserves to the full as much encouragement as he who prosecutes by appeal, this statute was made, which enacts, that if any person be convicted of larceny by the evidence of the party robbed, he shall have full restitution of his money, goods, and chattels; or the value of them out of the offender's goods, if has any, by a writ to be granted by the justice. And this writ of restitution shall reach the goods so stolen, notwithstanding the property<sup>77</sup> of them is endeavored to be altered by sale in market overt.<sup>78</sup> And, though this may seem somewhat hard upon buyer, yet the rule of law is that "*spoliatus debet, ante omnia, restitui*" ["restitution to the one robbed, before all others"]; especially when he has used all the diligence in his power to convict the felon. And, since the case is reduced to this hard necessity, that either the owner or the buyer must suffer; the law prefers the right of the owner, who has done a meritorious act by pursuing a felon to condign punishment, to the right of the buyer, whose merit is only negative, that he has been guilty of no unfair transaction. Or else, secondly, without such writ of restitution, the party may peaceably retake his goods, wherever he happens to find them,<sup>79</sup> unless a new property be fairly acquired therein. Or, lastly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods; and recover a satisfaction in damages. But such action lies not, before prosecution; for so felonies would be made up and healed:<sup>80</sup> and also recaption is unlawful, if it be done with intention to smother or compound the larceny; it then becoming the heinous offense of theft-bote, as was mentioned in a former chapter.<sup>81</sup>

IT is not uncommon, when a person is convicted of a misdemeanor, which principally and more immediately affects some individual, as a battery, imprisonment, or the like, for the court to permit the defendant to speak with the prosecutor, before any judgment is pronounced; and, if the

prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done, to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuitry of a civil action. But it surely is a dangerous practice: and, though it may be entrusted to the prudence and discretion of the judges in the superior courts of record, it ought never to be allowed in local or inferior jurisdictions, such as the quarter-sessions; where prosecutions for assaults are by this means too frequently commenced, rather for private lucre than for the great ends of public justice. Above all, it should never be suffered, where the testimony of the prosecutor himself is necessary to convict the defendant: for by this means, the rules of evidence are entirely subverted; the prosecutor becomes in effect a plaintiff, and yet is suffered to bear witness for himself. Nay even a voluntary forgiveness, by the party injured, ought not in true policy to intercept the stroke of justice. “This,” says an elegant writer,<sup>82</sup> (who pleads with equal strength for the certainty as for the lenity of punishment) “may be an act of good-nature and humanity, but it is contrary to the good of the public. For, although a private citizen may dispense with satisfaction for his private injury, he cannot remove the necessity of public example. The right of punishing belongs not to any one individual in particular, but to the society in general, or the sovereign who represents that society: and a man may renounce his own portion of this right, but he cannot give up that of others.”

### NOTES

1. *de mor. Germ.* 10.
2. *Mirr. c. 3. § 23.*
3. *Tenetur se purgare is qui accusatur, per Dei judicium; scilicet, per calidum ferrum, vel per aquam, pro diversitate conditionis hominum: per ferrum calidum, si fuerit homo liber; per aquam, si fuerit rusticus.* [The accused party is bound to clear himself by the judgment of God; that is, either by hot iron, or by water, according to his rank: by hot iron, if he be a free man; by water, if of inferior degree.] (*Glanv. l. 14. c. 1.*)
4. This is still expressed in that common form of speech, of “going through fire and water to serve another.”
5. *Tho. Rudborne Hist. maj. Winton. l. 4. c. 1.*
6. *Sp. L. b. 12 c. 5.*
7. *v. 270.*
8. *On Numb. v. 17.*
9. *Mod. Univ. Hist. vii. 266.*
10. *Spelm. Gloss. 435.*
11. *de jure Sueonum, l. 1. c. 8.*
12. *Decret. part. 2. caus. 2. qu. 5. dist. 7. Decretal. lib. 3. tit. 50. c. 9. & Gloss. ibid.*
13. *Mod. Un. Hist. xxxii. 105.*
14. *9 Rep. 32.*
15. *1 Rym. Foed. 228. Spelm. Gloss. 326. 2. Pryn. Rec. Append, 20. Seld. Eadm. ful. 48.*
16. *Spekn. Gl. 439.*
17. *Numb. ch. 5.*
18. *LL. Canut. c. 6.*

19. Ingulph.
20. As, "I will take the sacrament upon it; may this morsel be my last;" and the like.
21. Mod. Univ. Hist. vii 129.
22. Ibid. xv. 464.
23. See Vol. III. pag. 337.
24. 2 Hawk. P. C. 427.
25. Flet. 1. 1. c. 34. 2 Hawk. P. C. 426.
26. There is a striking resemblance between this process, and that of the court of Areopagus at Athens, for murder; wherein the prosecutor and prisoner were both sworn in the most solemn manner: the prosecutor, that he was related to the deceased (for none but near relations were permitted to prosecute in that court) and that the prisoner was the cause of his death; the prisoner, that he was innocent of the charge against him. (Pott. Antiqu. b. 1. c. 19.)
27. See pag. 259.
28. Kelynge. 56. Stat. 7 W. II. c. 3. § 11. Foster. 247.
29. 9 Hen. III. c. 29.
30. See Vol. III. pag. 379.
31. 2 Hal. P. C. 264. 2 Hawk. P. C. 403.
32. Fost. 230.
33. Fost. 250.
34. 2 Hawk. P. C. 410.
35. See Vol. III. pag. 359.
36. 2 Hawk. P. C. 420. 2 Hal. P. C. 271.
37. 2 Hawk. C. P. 413. 2 Hal. P. C. 271.
38. 2 Hal. P. C. 268.
39. 2 Hawk. P. C. 414.
40. 3 Inst. 227. 2 Hal. P. C. 270.
41. See Vol. III. pag. 364.
42. 2 Hawk. P. C. 400.
43. Sir Edward Coke (3 Inst. 137.) gives another additional reason for this refusal, "because the evidence to convict a prisoner should be so manifest, as it could not be contradicted." It was therefore thought too dangerous an experiment, to let an advocate try, whether it could be contradicted or no.
44. c. 3. § 1.
45. Father Parsons the Jesuit, and after him bishop Ellys, (of English liberty, ii. 26.) have imagined, that the benefit of counsel to plead for them was first denied to prisoners by a law of Henry I, meaning (I presume) chapters 47 and 48 of the code which is usually attributed to that prince. "*De causis criminalibus vel capitalibus nemo quaerat consilium; quin implacitatus statim perneget, sine omni petitione consilii. — In aliis omnibus potest et debet uti consilio.*" ["In criminal or capital cases let no man crave imparlance; but without pleading, and without craving leave to imparl, let him immediately and positively deny. In all other cases he can and ought to have imparlance"] But this *consilium*, I conceive, signifies only an imparlance, and the *petitio consilii* is craving leave to impart; (See Vol. III. pag. 298.) which is not allowable in any

criminal prosecution. This will be manifest by comparing this law with a contemporary passage in the *grand coutumier* of Normandy, (ch. 85.) which speaks of imparlances in personal actions. “*Après ce, est tend le querelle a respondre; et aura congie de soy conseiller, s’il le demande: et quand il sera conseille, it peut nyer le faict dont il est accuse.*” Or, as it stands in the Latin text, (edit. 1539.) “*Querelatus autem postea tenetur respondere; et habebit licentiam consulendi, si requirat: habito autem consilio, debet factum negare quo accusatus est.*” [“But the defendant is afterwards bound to answer; and he shall have the liberty of imparling if he require it; but imparlance being had, he ought to deny the fact of which he is accused.”]

46. 1 Hal. P. C. 297.

47. See St. Tr. II. 144. Foster. 235.

48. Stat. 8 W. III. c. 4

49. St. Tr. V. 40.

50. Sp. L. b. 12. c. 3.

51. Beccar. c. 13.

52. 10 Mod. 194.

53. St. Tr. VIII. 472.

54. 2 Hawk. P. C. 431.

55. Lord Preston's case. A. D. 1690. St. Tr. IV. 453. Francia's case. A. D. 1716. St. Tr. VI. 69. Layer's case. A. D. 1722. *ibid.* 279. Henzey's case. A. D. 1758. 4 Burr. 644.

56. See pag. 198.

57. 2 Hal. P. C. 290.

58. St. Tr. I. *passim*.

59. Domat. publ. law. b. 3. t. 1. Montesq. Sp. L. b. 29. c. 11.

60. See pag. 17.

61. Holingsh. 1112. St. Tr. I. 72.

62. 2 Bulstr. 147. Cro. Car. 292.

63. 3 Inst. 79.

64. See also 2 Hal. P. C. 283. and his summary. 264.

65. Stat. 4. Jac. I. c. 1.

66. Com. Journ. 4, 5, 12, 13, 15, 29, 30 Jun. 1607.

67. *Ibid.* 4 Jun. 1607.

68. 2 Hal. P. C. 300. 2 Hawk. P. C. 439.

69. 2 Hal. P. C. 310.

70. Smith's commonw. l. 3. c. 1.

71. 2 Hal. P. C. 313.

72. 1 Lev. 9. T. Jones. 163. St. Tr. X. 416.

73. 2 Hawk. P. C. 442.



74. The civil law in such case only discharges him from the same accuser, but not from the same accusation. (Ff. 48. 2. 7.
75. In the Roman republic, when the prisoner was convicted of any capital offense by his judges, the form of pronouncing that conviction was something peculiarly delicate: not that he was guilty, but that he had not been enough upon his guard; "*parum cavisse videtur.*" (Festus. 325.)
76. 3 Inst. 242.
77. See Vol. II. pag. 450.
78. 1 Hal. P. C. 543.
79. See Vol. III. pag. 4.
80. 1 Hal. P. C. 546.
81. See pag. 133.
82. Becc. ch. 46.

## CHAPTER 28

### Of the Benefit of Clergy

AFTER trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance; of which the principal is the benefit of clergy: a title of no small curiosity as well as use; and concerning which I shall therefore inquire, 1. Into its original, and the various mutations which this privilege of clergy has sustained. 2. To what persons it is to be allowed at this day. 3. In what cases. 4. The consequences of allowing it.

I. CLERGY, the *privilegium clericale*, or in common speech the benefit of clergy, had its original from the pious regard paid by Christian princes to the church in its infant state; and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions, which they granted to the church, were principally of two kinds: 1. Exemption of places, consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries: 2. Exemption of the persons of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the *privilegium clericale*.

BUT the clergy, increasing in wealth, power, honor, number, and interest, began soon to set up for themselves: and that which they obtained by the favor of the civil government, they now claimed as their inherent right; and as a right of the highest nature, indefeasible, and *jure divino* [divine right].<sup>1</sup> By their canons therefore and constitutions they endeavored at, and where they met with easy princes obtained, a vast extension of these exemptions: as well in regard to the crimes themselves, of which the life became quite universal;<sup>2</sup> as in regard to the persons exempted, among whom were at length comprehended not only every little subordinate officer belonging to the church or clergy, but even many that were totally laymen.

IN England however, although the usurpations of the pope were very many and grievous, till Henry the eighth entirely exterminated his supremacy, yet a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, though often endeavored by the clergy:<sup>3</sup> and therefore, though the ancient *privilegium clericale* was in some capital cases, yet it was not universally, allowed. And in those particular cases, the use was for the bishop or ordinary to demand his clerks to be remitted out of the king's courts, as soon as they were indicted: concerning the allowance of which demand there was for many years a great uncertainty:<sup>4</sup> till at length it was finally settled in the reign of Henry the sixth, that the prisoner should first be arraigned; and might either then claim his benefit of clergy, by way of declinatory plea; or, after conviction, by way of arresting judgment. This latter way is most usually practiced, as it is more to the satisfaction of the court to have the crime previously ascertained by confession or the verdict of a jury; and also as it is more advantageous to the prisoner himself, who may possibly be acquitted, and so need not the benefit of his clergy at all.

ORIGINALLY the law was held, that no man should be admitted to the privilege of clergy, but such as had the *habitum et tonsuram clericalem* [clerical habit and tonsure].<sup>5</sup> But in process of time a much wider and more comprehensive criterion was established: every one that could read (a mark of great learning in those days of ignorance and her sister superstition) being accounted a clerk or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed

with the clerical tonsure. But when learning, by means of the invention of printing, and other concurrent causes, began to be more generally disseminated than formerly; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*: and therefore by statute 4 Hen. VII. c. 13. a distinction was once more drawn between mere lay scholars, and clerks that were really in orders. And though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the statute directs, that no person, once admitted to the benefit of clergy, shall be admitted thereto a second time, unless he produces his orders: and, in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thump. This distinction between learned lawmen, and real clerks in orders, was abolished for a time by the statutes 28 Hen. VIII. c. 1, and 32 Hen. VIII. c. 3. but is held<sup>6</sup> to have been virtually restored by statute 1 Edw. VI. c. 12. which statute also enacts that lords of parliament, and peers of the realm, may have the benefit of their peerage, equivalent to that of clergy, for the first offense, (although they cannot read, and without being burnt in the hand) for all offenses then clergyable to commoners, and also for the crimes of housebreaking, highway robbery, horse-stealing, and robbing of churches.

AFTER this burning the laity, and before it the real clergy, were discharged from the sentence of the law in the king's courts, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary, not satisfied with the proofs adduced in the profane secular court, set himself formally to work to make a purgation of the offender by a new canonical trial; although he had been previously convicted by his country, or perhaps by his own confession. This trial was held before the bishop in person, or his deputy; and by a jury of twelve clerks: and there, first, the party himself was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore they believed he spoke the truth; then, witnesses were to be examined upon oath, but on behalf of the prisoner only and, lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner: otherwise, if a clerk, he was degraded, or put to penance.<sup>7</sup> A learned judge, in the beginning of the last century,<sup>8</sup> remarks with much indignation the vast complication of perjury and subornation of perjury, in this solemn farce of a mock trial; the witnesses, the compurgators, and the jury, being all of them partakers in the guilt: the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offense, yet was permitted evidence, and conscious of his own offense, yet was permitted and almost compelled to swear himself not guilty: nor was the good bishop himself, under whose countenance this scene of wickedness was daily transacted, by any means exempt from a share of it. and yet by this purgation the party was restored to his credit, his liberty, his lands, and his capacity of purchasing afresh, and was entirely made a new and an innocent man.

THIS scandalous prostitution of oaths, and the forms of justice, in the almost constant acquittal of felonious clerks by purgation, was the occasion, that, upon very heinous and notorious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *absque purgatione facienda* [without making purgation]: in which situation the clerk convict could not make purgation; but was to continue in prison during life, and was incapable of acquiring any personal property, or receiving the profits of

his lands, unless the king should please to pardon him. Both these courses were in some degree exceptionable; the latter being perhaps too rigid, as the former was productive of the most abandoned perjury. As therefore these mock trials took their rise from factious and popish tenets, tending to exempt one part of the nation from the general municipal law; it became high time, when the reformation was thoroughly established, to abolish so vain and impious a ceremony.

ACCORDINGLY the statute 18. Eliz. c. 7. enacts, that, for the avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary, as formerly; but, upon such allowance and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso, that the judge may, if he thinks fit, continue the offender in jail for any time not exceeding a year. And thus the law continued, for above a century, unaltered; except only that the statute 21 Jac. I. c. 6. allowed, that women convicted of simple larcenies under the value of ten shillings should, (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, and whipped, stocked, or imprisoned for any time not exceeding a year. And a similar indulgence, by the statutes 3 & 4 W. & M. c. 9. and 4 & 5 W. & M. c. 24. was extended to women, guilty of any clergyable felony whatsoever; who were allowed to claim the benefit of the statute, in like manner as men might claim the benefit of clergy, and to be discharged upon being burned in the hand, and imprisoned for any time not exceeding a year. All women, all peers, and all commoners who could read, were therefore discharged in such felonies; absolutely, if clerks in orders; and for the first offense, upon burning in the hand, if lay: yet all liable (excepting peers) if the judge saw occasion, to imprisonment not exceeding a year. And those men, who could not read, if under the degree of peerage, were hanged.

AFTERWARDS indeed it was considered, that education and learning were no extenuations of guilt, but quite the reverse: and that, if the punishment of death for simple felony was too severe for those who had been liberally instructed, it was, *a fortiori* [consequently], too severe for the ignorant also. And thereupon by statute 5 Ann. c. 6. it was enacted, that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read by way of conditional merit.

BUT a few years experience having shown, that this universal lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony; and that, though capital punishments were too rigorous for these inferior offenses, yet no punishment at all (or next to none, as branding or whipping) was as much too gentle; it was enacted by statutes 4 Geo. I. c. 11. and 6 Geo. I. c. 23. that when any persons shall be convicted of any larceny, either grand or petit, and shall be entitled to the benefit of clergy, or<sup>9</sup> liable only to the penalties of burning in the hand or whipping, the court in their discretion, instead of such burning in the hand or whipping, may direct such offenders to be transported to America for seven years: and, if they return within that time, it shall be felony without benefit of clergy.

IN this state does the benefit of clergy at present stand; very considerably different from its original institution: the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients; and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.

FROM the whole of this detail we may collect, that, however in times of ignorance and superstition that monster in true policy may for a while subsist, of a body of men, residing in the bowels of a state, and yet independent of its laws; yet, when learning and rational religion have a little enlightened mens minds, society can no longer endure an absurdity so gross, as must destroy its very fundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to the united will of the community. This united will is declared in the laws of the land: and that united force is exerted in their due, and universal, execution.

II. I AM next to inquire, to what persons the benefit of clergy is to be allowed at this day: and this must be chiefly collected from what has been observed in the preceding article. For, upon the whole, we may pronounce, that all clerks in orders are, without any branding, and of course without any transportation, (for that is only substituted in lieu of the other) to be admitted to this privilege, and immediately discharged, or at most only confined for one year: and this as often as they offend.<sup>10</sup> Again, all lords of parliament and peers of the realm, by the statute 1 Edw. VI. c. 12. shall be discharged in all clergyable and other felonies, provided for by the act, without any burning in the hand, in the same manner, as real clerks convict: but this is only for the first offense. Lastly, all the commons of the realm, not in orders, whether male or female,<sup>11</sup> shall for the first offense be discharged of the punishment for felonies, within the benefit of clergy; upon being burnt in the hand, imprisoned for a year, or less; or, in case of larceny, being transported for seven years, if the court shall think proper. It has been said, that Jews, and other infidels and heretics, were not capable of the benefit of clergy, till after the statute 5 Ann. c. 6. as being under a legal incapacity for orders.<sup>12</sup> But, with deference to such respectable authority, I much question whether this was ever ruled for law, since the re-introduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the case, the Jews are still in the same predicament, which every day's experience will contradict: the statute of queen Anne having certainly made no alteration in this respect; it only dispensing with the necessity of reading in those persons, who, in case they could read, were before the act entitled to the benefit of their clergy.

III. THE third point to be considered is, for what crimes the *privilegium clericale*, or benefit of clergy, is to be allowed. And, it is to be observed, that neither in high treason, nor in petit larceny, nor in any mere misdemeanors, it was indulged at the common law; and therefore we may lay it down for a rule, that it was allowable only in petit treason and felonies: which for the most part became legally entitled to this indulgence by the statute *de clero* [of clergy], 25 Edw. III. St. 3. c. 4. which provides, that clerks convict for treasons or felonies, touching other persons than the king himself or his royal majesty, shall have the privilege of holy church. But yet it was not allowable in all felonies whatsoever: for in some it was denied even by the common law, *viz. insidiatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or destroying and ravaging a country;<sup>13</sup> and *combustio domorum*, or arson, that is, the burning of houses;<sup>14</sup> all which are kind of hostile acts, and in some degree border upon treason. And farther, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament; which have in general been mentioned under the particular offenses to which they belong, and therefore need not be here recapitulated. Of all which statutes for excluding clergy I shall only observe, that they are nothing else but the restoring of the law to the same rigor of capital punishment in the first offense, that is exerted before the *privilegium clericale* was at all indulged; and which it still exerts upon a second offense in almost all kinds of felonies, unless committed by

clerks actually in orders. We may also remark, that by the marine law, as declared in statute 28 Hen. VIII. c. 15. the benefit of clergy is not allowed in any case whatsoever. And therefore when offenses are committed within the admiralty-jurisdiction, which would be clergyable if committed by land, the constant course is to acquit and discharge the prisoner.<sup>15</sup> And lastly, under this head of inquiry, we may observe the following rules: 1. That in all felonies, whether new created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament.<sup>16</sup> 2. That, where clergy is taken away from the principal, it is not of course taken away from the accessory, unless he be also particularly included in the words of the statute.<sup>17</sup> 3. That, when the benefit of clergy is taken away from the offense, (as in case of murder, buggery, robbery, rape, and burglary) a principal in the second degree, aiding and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree: but, 4. That, where it is only taken away from the person committing the offense, (as in the case of stabbing, or committing larceny in a dwelling house, or privately from the person) his aiders and abettors are not excluded; through the tenderness of the law, which has determined that such statutes shall be taken literally.<sup>18</sup>

IV. LASTLY, we are to inquire what the consequences are to the party, of allowing him this benefit of clergy. I speak not of the branding, imprisonment, or transportation; which are rather concomitant conditions, than consequences of receiving this indulgence. The consequences are such as affect his present interest, and future credit and capacity: as having been once a felon, but now purged from that guilt by the privilege of clergy; which operates as a kind of statute pardon.

AND, we may observe, 1. That by his conviction he forfeits all his goods to the king; which, being once vested in the crown, shall not afterwards be restored to the offender.<sup>19</sup> 2. That, after conviction, and till he receives the judgment of the law, by branding or the like, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon.<sup>20</sup> 3. That, after burning or pardon, he is discharged forever of that, and all other felonies before committed, within the benefit of clergy; but not of felonies from which such benefit is excluded: and this by statutes 8 Eliz. c. 4. and 18 Eliz. c. 7. 4. That by the burning, or pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted.<sup>21</sup> 5. That what is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all. For they have the same privileges, without any burning, which others are entitled to after it.<sup>22</sup>

## NOTES

1. The principal argument, upon which they founded this exemption, was that text of scripture; “touch not mine anointed, and do my prophets no harm.” (Keilw. 181.)
2. See Vol. III. pag. 62.
3. Keilw. 180.
4. 2 Hal. P. C. 377.
5. 2 Hal. P. C. 372. M. Paris. A. D. 1259. See Vol. I. pag. 24.
6. Hob. 294.
7. 3 P. Wms. 447. Hob. 289.

8. hon. 291

9. The printed statute book reads *and* instead of *or*: and, if that be the true reading, it may be doubted, and, as the consequence may in some cases be capital, it deserves to be explained by the legislature, whether women, and persons convicted of petit larceny, are strictly within these statutes of George the first; for the statutes, as printed, seem to extend only to such convicts as are entitled to the benefit of clergy, which no woman, or petit larcener, properly is. For, with regard to the female sex, the statutes of William and Mary (before referred to) very anxiously distinguish between the benefit of clergy, which extends only to men, and the benefit of the statute 3 & 4 W. & M. which is allowed to be claimed by women: and the statute of Anne (as is hereafter observed) does not entitle any one to the benefit of clergy but such as were entitled before; as its whole operation is merely to dispense with their reading.

10. 2 Hal. P. C. 375.

11. See note i. [ note 9.]

12. 2 Hal. P. C. 373. 2 Hawk. P. C. 338. Fost. 306.

13. 2 Hal. P. C. 333.

14. 1 Hal. P. C. 346.

15. Moor. 756. Fost. 288.

16. 2 Hal. P. C. 330.

17. 2 Hawk. P. C. 342.

18. 1 Hal. P. C. 529. Foster. 356.

19. 2 Hal. P. C. 388.

20. 2 P. Wms 487.

21. 2 Hal. P. C. 389. 5 Rep. 110.

22. 2 Hal. P. C. 389, 390.

## CHAPTER 29 Of Judgment, and its Consequences

WE are now to consider the next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemeanors, as are either too high or too low to be included within the benefit of clergy: which is that of judgment. For when, upon a capital charge, the jury have brought in their verdict, guilty, in the presence of the prisoner; he is either immediately, or at a convenient time soon after, asked by the court, if he has anything to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemeanor, (the trial of which may, and does usually, happen in his absence, after he has once appeared) a *capias* is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in arrest or stay of judgment: as for want of sufficient certainty in setting forth either the person, the time, the place, or the offense. And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again.<sup>1</sup> And we may take notice, 1. That none of the statutes of *jeofails*,<sup>2</sup> for amendment of errors, extend to indictments or proceedings in criminal cases; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That, in favor of life, great strictness has at all times been observed, in every point of an indictment. Sir Matthew Hale indeed complains, “that this strictness is grown to be a blemish and inconvenience in the law, and the administration thereof: for that more offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence; and many times gross murders, burglaries, robberies, and other heinous and crying offenses, remain unpunished by these unseemly niceties; to the reproach of the law, to the shame of the government, to the encouragement of villainy, and to the dishonor of God.”<sup>3</sup> And yet, notwithstanding this laudable zeal, no man was more tender of life, than this truly excellent judge.

A PARDON also, as has been before said, may be pleaded in arrest of judgment: and it has the same advantage when pleaded here, as when pleaded upon arraignment; *viz.* the saving the attainder, and of course the corruption of blood: which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And certainly, upon all accounts, when a man has obtained a pardon, he is in the right to plead it as soon as possible.

PRAYING the benefit of clergy may also be ranked among the motions in arrest of judgment; of which we spoke largely in the preceding chapter.

IF all these resources fail, the court must pronounce that judgment, which the law has annexed to the crime, and which has been constantly mentioned, together with the crime itself, in some or other of the former chapters. Of these some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain, or disgrace are superadded: as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, emboweling alive, beheading, and quartering; and in murder, a public dissection. And, in case of any treason committed by a female, the judgment is to be burned alive. But the humanity of the English nation has authorized, by a tacit consent, an almost general mitigation of such part of these



judgments as favor of torture or cruelty: a fledge or hurdle being usually allowed to such traitors as are condemned to be drawn; and there being very few instances (and those accidental or by negligence) of any person's being emboweled or burned, till previously deprived of sensation by strangling. Some punishments consist in exile or banishment, by abjuration of the realm, or transportation to the American colonies: others in loss of liberty, by perpetual or temporary imprisonment. Some extend to confiscation, by forfeiture of lands, or moveables, or both, or of the profits of lands, for life: others induce a disability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occasion a mutilation or dismembering, by cutting off the hand or ears: others fix a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or face. Some are merely pecuniary, by stated or discretionary fines: and lastly there are others, that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; and these are inflicted chiefly for crimes, which arise from indigence, or which render even opulence disgraceful. Such as whipping, hard labor in the house of correction, the pillory, the stocks, and the ducking-stool.

DISGUSTING as this catalogue may seem, it will afford pleasure to an English reader, and do honor to the English law, to compare it with that shocking apparatus of death and torment, to be met with in the criminal codes of almost every other nation in Europe. And it is moreover one of the glories of our English law, that the nature, though not always the quantity or degree, of punishment is ascertained for every offense; and that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike, without respect of persons. For, if judgments were to be the private opinions of the judge, men would then be slaves to their magistrates; and would live in society, without knowing exactly the conditions and obligations which it lays them under. And besides, as this prevents oppression on the one hand, so on the other it stifles all hopes of impunity or mitigation; with which an offender might flatter himself, if his punishment depended on the humor or discretion of the court. Whereas, where an established penalty is annexed to crimes, the criminal may read their certain consequence in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions.

THE discretionary fines and discretionary length of imprisonment, which our courts are enabled to impose, may seem an exception to this rule. But the general nature of the punishment, *viz.* by fine or imprisonment, is in these cases fixed and determinate: though the duration and quantity of each must frequently vary, from the aggravations or otherwise of the offense, the quality and condition of the parties, and from innumerable other circumstances. The *quantum* [amount], in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and, at all events, what is ruin to one man's fortune, may be matter of indifference, to another's. Thus the law of the twelve tables at Rome fined every person, that struck another, five and twenty *denarii* [pence]: this, in the more opulent days of the empire, grew to be a punishment of so little consideration, that Aulus Gellius tells a story of one Lucius Neratius, who made it his diversion to give a blow to whomever he pleased, and then tender them the legal forfeiture. Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offense to be punished by fine, in general, without specifying the certain sum: which is fully sufficient, when we consider, that however unlimited the power of the court may seem, it is far from being wholly arbitrary; but its discretion is regulated by law. For the bill of rights<sup>4</sup> has particularly declared, that excessive fines ought not to be imposed, nor cruel

and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of king James the second) and the same statute farther declares, that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void. Now the bill of rights was only declaratory, throughout, of the old constitutional law of the land: and accordingly we find it expressly held, long before<sup>5</sup> that all such previous grants are void; since thereby many times undue means, and more violent prosecution, would be used for private lucre, than the quiet and just proceeding of law would permit.

THE reasonableness of fines in criminal cases has also been usually regulated by the determination of Magna Carta,<sup>6</sup> concerning ameracements for misbehavior in matters of civil right. "*Liber homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti; salvo contentamento suo: et mercator eodem modo, salva mercandisa sua; et villanus eodem modo amercietur, salvo wainagio suo.*" ["A free man shall be amerced for a small offence, only according to its measure; and for a great offence, only according to its magnitude, saving his land; and the merchant in the same manner, saving his merchandise; and a villein shall be amerced in the same manner, saving his wainage."] A rule, that obtained even in Henry the second's time,<sup>7</sup> and means only, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear: saving to the landholder his contentment, or land; to the trader his merchandise; and to the countryman his wainage, or team and instruments of husbandry. In order to ascertain which, the great charter also directs, that the amercement, which is always inflicted in general terms ("*sit in misericordia*" ["let him be at the mercy"]) shall be set, *ponatur*, or reduced to a certainty, the oath of a jury. This method, of liquidating the amercement to a precise sum, is usually done in the court-leet and court-baron by *affeerors*, or jurors sworn to *affeere*, that is, tax and moderate, the general amercement according to the particular circumstances of the offense and the offender. In imitation of which, in courts superior to these, the ancient practice was to inquire by a jury, when a fine was imposed upon any man, "*quantum inde regi dare valeat per annum, salva sustentatione sua, et uxoris, et liberorum suorum.*"<sup>8</sup> ["How much he could pay a year to the king, saving his maintenance, and the maintenance of his wife and children."] And, since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal punishment, or a stated imprisonment, which is better than an excessive fine, for that amounts to imprisonment for life. And this is the reason why fines in the king's court are frequently denominated ransoms, because the penalty must otherwise fall upon a man's person, unless it be redeemed or ransomed by a pecuniary fine:<sup>9</sup> according to an ancient maxim, *qui non habet in crumena luat in corpore* [let him who has nothing in purse pay in person]. Yet, where any statute speaks both of fine and ransom, it is held, that the ransom shall be treble to the fine at least.<sup>10</sup>

WHEN sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence by the common law is attainder. For when it is now clear beyond all dispute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of its protection, and takes no farther care of him than barely to see him executed. He is then called attaint, *attinctus*, stained, or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law.<sup>11</sup> This is after judgment: for there is

great difference between a man convicted, and attainted; though they are frequently through inaccuracy confounded together. After conviction only, a man is liable to none of these disabilities: for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed: he may obtain a pardon, or be allowed the benefit of clergy; both which suppose some latent sparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of anything to be said in his favor. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted.

THE consequences of attainder are forfeiture, and corruption of blood.

I. FORFEITURE is twofold; of real, and personal, estates. First, as to real estates: by attainder in high treason<sup>12</sup> a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands and tenements, which he held at the time of the offense committed, or at any time afterwards, to be forever vested in the crown: and also the profits of all lands and tenements, which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards to the time of the treason committed; so as to avoid all intermediate sales and encumbrances,<sup>13</sup> but not those before the fact: and therefore a wife's jointure is not forfeitable for the treason of the husband; because settled upon her previous to the treason committed. But her dower is forfeited, by the express provision of statute 5 & 6 Edw. VI. c. 11. And yet the husband shall be tenant by the curtesy of the wife's lands, if the wife be attainted of treason:<sup>14</sup> for that is not prohibited by the statute. But, though after attainder the forfeiture relates back to the time of the treason committed, yet it does not take effect unless an attainder be had, of which it is one of the fruits: and therefore, if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands; for he never was attainted of treason.<sup>15</sup>

THE natural justice of forfeiture or confiscation of property, for treason,<sup>16</sup> is founded in this consideration: that he who has thus violated the fundamental principles of government, and broken his part of the original contract between king and people, has abandoned his connections with society; and has no longer any right to those advantages, which before belonged to him purely as a member of the community: among which social advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections; and will interest every dependent and relation he has, to keep him from offending: according to that beautiful sentiment of Cicero,<sup>17</sup> *“nec vero me fugit quam sit acerbum, parentum scelera filiorum poenis sui: sed hoc praeclare legibus comparatum est, ut caritas liberorum amiciores parentes reipublicae redderet.”* [“Nor has it escaped me how hard it is, that the crimes of parents should be atoned for by punishment of their sons; but it is wisely provided by the laws, that affection for children may make

parents more faithful to the republic.”] And therefore Aulus Cascellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for despising the power of the tyrants; his old age, and his want of children: for children are pledges to the prince of the father's obedience.<sup>18</sup> Yet many nations have thought, that this posthumous punishment favors of hardship to the innocent; especially for crimes that do not strike at the very root and foundation of society, as treason against the government expressly does. And therefore, though confiscations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius in every other instance but than of treason thought it more just, “*ibi esse poenam, ubi et noxa est*” [“where the crime is the punishment should be”] and ordered that “*peccata suos teneant auctores, nec ulterius progrediatur metus, quam reperiatur delictum*.”<sup>19</sup> [“crimes should affect only their perpetrators, and the dread of punishment not extend beyond the sphere of offense”] and Justinian also made a law to restrain the punishment of relations;<sup>20</sup> which directs the forfeiture to go, except in the case of *crimen majestatis* [high treason], to the next of kin to the delinquent. On the other hand the Macedonian laws extended even the capital punishment of treason, not only to the children but to all the relations of the delinquent:<sup>21</sup> and of course their estates must be also forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle,<sup>22</sup> (copied almost verbatim from Justinian's code<sup>23</sup>) the lives of the sons of such as conspire to kill an elector are spared, as it is expressed, by the emperor's particular bounty. But they are deprived of all their effects and rights of succession, and are rendered incapable of any honor ecclesiastical or civil: “to the end that, being always poor and necessitous, they may forever be accompanied by the infamy of their father; may languish in continual indigence; and may find (says this merciless edict) their punishment in living, and their relief in dying.”

WITH us in England, forfeiture of lands and tenements to the crown for treason is by no means derived from the feudal policy, (as has been already observed<sup>24</sup>) but was antecedent to the establishment of that system in this island; being transmitted from our Saxon ancestors,<sup>25</sup> and forming a part of the ancient Scandinavian constitution.<sup>26</sup> But in some treasons relating to the coin, (which, as we formerly observed, seem rather a species of the *crimen falsi* [forgery], than the *crimen laesae majestatis*) it is provided by the several modern statutes which constitute the offense, that it shall work no forfeiture of lands. And, in order to abolish such hereditary punishment entirely, it was enacted by statute 7 Ann. c. 21. that, after the decease of the late pretender, no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person, other than the traitor himself. By which, the law of forfeitures for high treason would by this time have been at an end, had not a subsequent statute intervened to give them a longer duration. The history of this matter is somewhat singular and worthy observation. At the time of the union, the crime of treason in Scotland was, by the Scots law, in many, respects different from that of treason in England; and particularly in its consequence of forfeitures of intailed estates, which was more peculiarly English: yet it seemed necessary, that a crime so nearly affecting government should, both in its essence and consequences, be put upon the same footing in both parts of the united kingdoms. In new-modeling these laws, the Scotch nation and the English house of commons struggled hard, partly to maintain, and partly to acquire, a total immunity from forfeiture and corruption of blood: which the house of lords as firmly resisted. At length a compromise was agree to, which is established by this statute, *viz.* that the same crimes, and no other, should be treason in Scotland that are so in England; and then cease throughout the whole of Great Britain:<sup>27</sup> the lords artfully proposing this temporary clause, in hopes (it is said<sup>28</sup>) that the prudence of succeeding parliaments would make it perpetual.<sup>29</sup> This has partly been done by the statute 17 Geo. II. c. 39. (made in the year preceding the late

rebellion) the operation of these indemnifying clauses being thereby still farther suspended, till the death of the sons of the pretender.<sup>30</sup>

IN petit treason and felony, the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life; and, after his death, all his lands and tenements in fee-simple (but not those in tail) to the crown, for a very short period of time: for the king shall have them for a year and a day, and may commit therein what waste he pleases; which is called the king's year, day, and waste.<sup>31</sup> Formerly the king had only a liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, plowing their meadows, and cutting down their woods. And a punishment of a similar spirit appears to have obtained in the oriental countries, from the decrees of Nebuchadnezzar and Cyrus in the books of Daniel<sup>32</sup> and Ezra;<sup>33</sup> which, besides the pain of death inflicted on the delinquents there specified, ordain, "that their houses shall be made a dunghill." But this tending greatly to the prejudice of the public, it was agreed in the reign of Henry the first, in this kingdom, that the king should have the profits of the land for one year and a day, in lieu of the destruction he was otherwise at liberty to commit.<sup>34</sup> and therefore Magna Carta<sup>35</sup> provides, that the king shall only hold such lands for a year and day, and then restore them to the lord of the fee; without any mention made of waste. But the statute 17 Edw. II. *de praerogativa regis* [of the king's prerogative], seems to suppose, that the king shall have his year, day, and waste; and not the year and day instead of waste. Which Sir Edward Coke (and the author of the mirror, before him) very justly look upon as an encroachment, though a very ancient one, of the royal prerogative.<sup>36</sup> This year, day, and waste are now usually compounded for; but otherwise they regularly belong to the crown: and, after their expiration, the land would naturally have descended to the heir, (as in gavelkind tenure it still does) did not its feudal quality intercept such descent, and give it by way of escheat to the lord. These forfeitures for felony do also arise only upon attainder; and therefore a *felo de se* [suicide] forfeits no lands of inheritance or free hold, for he never is attainted as a felon.<sup>37</sup> They likewise relate back to the time of the offense committed, as well as forfeitures for treason; so as to avoid all intermediate charges and conveyances. This may be hard upon such as have unwarily engaged with the offender: but the cruelty and reproach must lie on the part, not of the law, but of the criminal; who has thus knowingly and dishonestly involved others in his own calamities.

THESE are all the forfeitures of real estates, created by the common law, as consequential upon attainders by judgment of death or outlawry. I here omit the particular forfeitures created by the statutes of *praemunire* [forewarning] and others: because I look upon them rather as a part of the judgment and penalty, inflicted by the respective statutes, than as consequences of such judgment; as in treason and felony they are. But I shall just mention, under this division of real estates, the forfeiture of the profits of lands during life: which extends to two other instances, besides those already spoken of; misprision of treason,<sup>38</sup> and striking in Westminster-hall, or drawing a weapon upon a judge there, sitting the king's courts of justice.<sup>39</sup>

THE forfeiture of goods and chattels accrues in every one of the higher kinds of offense: in high treason or misprision thereof, petit treason, felonies of all sorts whether clergyable or not, self-murder or felony *de se*, petty larceny, standing mute, and the above-mentioned offense of striking in Westminster-hall. For flight also, on an accusation of treason, felony, or even petit larceny, whether the party be found guilty or acquitted, if the jury find the flight, the party shall

forfeit his goods and chattels: for the very flight is an offense, carrying with it a strong presumption of guilt, and is at least an endeavor to elude and stifle the course of justice prescribed by the law. But the jury very seldom finds the slight: forfeiture being looked upon, since the vast increase of personal property of late years, as rather too large a penalty for an offense, to which a man is prompted by the natural love of liberty.

THERE is a remarkable difference or two between the forfeiture of lands and of goods and chattels. 1. Lands are forfeited upon attainder, and not before: goods and chattels are forfeited by conviction. Because in many of the cases where goods are forfeited, there never is any attainder; which happens only where judgment of death or outlawry is given: therefore in those cases the forfeiture must be upon conviction, or not at all; and, being necessarily upon conviction in those, it is so ordered in all other cases, for the law loves uniformity. 2. In outlawries for treason or felony, lands are forfeited only by the judgment: but the goods and chattels are forfeited by a man's being first put in the *exigent*, without staying till he is *quinto exactus* [required the fifth time], or finally outlawed; for the secreting himself so long from justice, is construed a flight in law.<sup>40</sup> 3. The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and encumbrances: but the forfeiture of goods and chattels has no relation backwards; so that those only which a man has at the time of conviction shall be forfeited. Therefore a traitor or felon may *bona fide* [in good faith] sell any of his chattels, real or personal, for the sustenance of himself and family between the fact and conviction:<sup>41</sup> for personal property is of so fluctuating a nature, that it passes through many hands in a short time; and no buyer could be safe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony. Yet if they be collusively and not *bona fide* parted with, merely to defraud the crown, the law (and particularly the statute 13 Eliz. c. 5.) will reach them; for they are all the while truly and substantially the goods of the offender: and as he, if acquitted, might recover them himself, as not parted with for a good consideration; so, in case he happens to be convicted, the law will recover them for the king.

II. ANOTHER immediate consequence of attainder is the corruption of blood, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor.<sup>42</sup>

THIS is one of those notions which our laws have adopted from the feudal constitutions, at the time of the Norman conquest; as appears from its being unknown in those tenures which are indisputably Saxon, or gavelkind: wherein, though by treason, according to the ancient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descents, ensues; and on judgment of mere felony no escheat accrues to the lord. And therefore, as every other oppressive mark of feudal tenure is now happily worn away in these kingdoms, it is to be hoped, that this corruption of blood, with all its connected consequences, not only of present escheat, but of future incapacities of inheritance even to the twentieth generation, may in process of time be abolished by act of parliament: as it stands upon a very different footing from the forfeiture of lands for high treason, affecting the king's person or government. And indeed the legislature has, from time to time, appeared very inclinable to give way to so equitable a provision; by enacting, that, in treasons

respecting the papal supremacy<sup>43</sup> and counterfeiting the public coin,<sup>44</sup> and in many of the new-made felonies, created since the reign of Henry the eighth by act of parliament, corruption of blood shall be saved. But as in some of the acts for creating felonies (and those not of the most atrocious kind) this saving was neglected, or forgotten, to be made, it seems to be highly reasonable and expedient to antiquate the whole of this doctrine by one undistinguishing law: especially as by the afore-mentioned statute of 7 Ann. c. 21. (the operation of which is postponed by statute 17 Geo. II. c. 39.) after the death of the sons of the late pretender, no attainder for treason will extend to the disinheriting any heir, nor the prejudice of any person, other than the offender himself; which virtually abolishes all corruption of blood for treason, though (unless the legislature should interpose) it will still continue for many sorts of felony.

### NOTES

1. 4 Rep. 45.
2. See Vol. III. pag. 406.
3. 2 Hal. P. C. 193.
4. Stat. 1 W. & M. St. 2. c. 2.
5. 2 Inst. 48.
6. cap 14.
7. Glanv. l. 9. c. 8 & 11.
8. Gilb. Exch. c. 5.
9. Mirr. c. 5. § 3. Lamb. Eirenarch. 575.
10. Dyer. 232.
11. 3 Inst. 213.
12. Co. Litt. 392. 3 Inst. 19. 1 Hal. P. C. 240. 2 Hawk. P. C. 448.
13. 3 Inst. 211.
14. 1 Hal. P. C. 359.
15. Co. Litt. 13.
16. See Vol. I. pag. 299.
17. *ad Brutum*, ep. 12.
18. Gravin. l. § 68.
19. Cod. 9. 47. 22.
20. Nov. 134. c. 13.
21. Qu. Curt. l. 6.
22. cap. 24.
23. l. 9. t. 8. l. 5.
24. See Vol. II. pag. 251.

25. LL. Aelfr. c. 4. Canut. c. 54.
26. Stiernh. *de jure Goth.* 1. 2. c. 6. & 1. 3. c. 3.
27. Burnet's Hist. A. D. 1709.
28. Consid. on the law of forfeiture. 6.
29. See Fost. 250.
30. The justice and expediency of this provision were defended at the time, with much learning and strength of argument, in the considerations on the law of forfeiture, first published A. D. 1744. (See Vol. I. pag. 244)
31. 2 Inst. 37.
32. ch. iii. v. 29.
33. ch. vi. v. 11.
34. Mirr. c. 4. § 16. Flet. 1. 1. c. 28.
35. 9 Hen. III. c. 22.
36. Mirr. c. 5. § 2. 2 Inst. 37.
37. 3 Inst. 55.
38. Ibid. 218.
39. Ibid. 141.
40. 3 Inst. 232.
41. 2 Hawk. P. C. 454.
42. See Vol. II. pag. 251.
43. Stat. 5 Eliz. c. 1.
44. Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.



## CHAPTER 30 Of Reversal of Judgment

WE are next to consider how judgments, with their several connected consequences, of attainder, forfeiture, and corruption of blood, may be set aside. There are two ways of doing this; either by falsifying or reversing the judgment, or else by reprieve or pardon.

A JUDGMENT may be falsified, reversed, or voided, in the first place, without a writ of error, for matters foreign to or *dehors* the record, that is, not apparent upon the face of it; so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself: and therefore, if the whole record be not certified, or not truly certified, by the inferior court; the party injured thereby (in both civil and criminal cases) may allege a diminution of the record, and cause it to be rectified. Thus, if any judgment whatever be given by persons, who had no good commission to proceed against the person condemned, it is void; and may be falsified by showing the special matter, without writ of error. As, where a commission issues to A and B, and twelve others, or any two of them, of which A or B shall be one, to take and try indictments; and any of the other twelve proceed without the interposition or presence of either A, or B: in this case all proceedings, trials, convictions, and judgments are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection without the trouble of a writ of error;<sup>1</sup> it being a high misdemeanor in the judges so proceeding, and little (if anything) short of murder in them all, in case the person so attainted be executed and suffer death. So likewise if a man purchases land of another; and afterwards the vendor is, either by outlawry, or his own confession, convicted and attainted of treason or felony previous to the sale or alienation; whereby such land becomes liable to forfeiture or escheat: now, upon any trial, the purchaser is at liberty, without bringing any writ of error, to falsify not only the time of the felony or treason supposed, but the very point of the felony or treason itself; and is not concluded by the confession or the outlawry of the vendor; though the vendor himself is concluded, and not suffered now to deny the fact, which he has by confession or flight acknowledged. But if such attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falsify or contradict the fact of the crime committed; though he is at limited after the alienation, and not before.<sup>2</sup>

SECONDLY, a judgment may be reversed, by writ of error: which lies from all inferior criminal jurisdictions to the court of king's bench, and from the king's bench to the house of peers; and may be brought for notorious mistakes in the judgment or other parts of the record: as where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors; such as any irregularity, omission, or want of form in the process of outlawry, or proclamations; the want of a proper addition to the defendant's name, according to the statute of additions; for not properly naming the sheriff or other office of the court, or not duly describing where his county court was held; for laying an offense, committed in the time of the late king, to be done against the peace of the present; and for many other similar causes, which (though allowed out of tenderness to life and liberty) are not much to the credit or advancement of the national justice. These writs of error, to reverse judgments in case of misdemeanors, are not to be allowed of course, but on sufficient probable cause shown to the attorney-general; and then they are understood to be grantable of common right, and *ex debito justitiae* [as due to justice]. But writs of error to reverse attainders in capital cases are only allowed *ex gratia* [as a favor]; and not without express warrant under the

king's sign manual, or at least by the consent of the attorney-general.<sup>3</sup> These therefore can rarely be brought by the party himself, especially where he is attainted for an offense against the state: but they may be brought by his heir, or executor, after his death, in more favorable times; which may be some consolation to his family. But the easier, and more effectual way, is

LASTLY, to reverse the attainder by act of parliament. This may be and has been frequently done, upon motives of compassion, or perhaps the zeal of the times, after a sudden revolution in the government, without examining too closely into the truth or validity of the errors assigned. And sometimes, though the crime be universally acknowledged and confessed, yet the merits of the criminal's family shall after his death obtain a restitution in blood, honors, and estate, or some, or one of the, by act of parliament; which (so far as it extends) has all the effect of reversing the attainder, without casting any reflections upon the justice of the preceding sentence.

THE effect of falsifying, or reversing, an outlawry is that the party shall be in the same plight as if he had appeared upon the *capias* [taking]: and, if it be before plea pleaded, he shall be put to plead to the indictment; if after conviction, he shall receive the sentence of the law: for all the other proceedings, except only the process of outlawry for his non-appearance, remain good and effectual as before. But when judgment, pronounced upon conviction, is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused; restored in his credit, his capacity, his blood, and his estates: with regard to which last, though they be granted away by the crown, yet the owner may enter upon the grantee, with as little ceremony as he might enter upon a disseizor.<sup>4</sup> But he still remains liable to another prosecution for the same offense: for, the first being erroneous, he never was in jeopardy thereby.

## NOTES

1. 2 Hawk. P. C. 459.
2. 3 Inst. 231. 1 Hal. P. C. 361.
3. 1 Vern. 170. 175.
4. 2 Hawk. P. C. 462.

## CHAPTER 31 Of Reprieve, and Pardon

THE only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

I. A REPRIEVE, from *reprendre*, to take back, is the withdrawing of a sentence for an interval of time; whereby the execution is suspended. This may be, first, *ex arbitrio judicis* [in the judge's discretion]; either before or after judgment: as, where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offense be within clergy; or sometimes if it be a small felony, or any favorable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of jail delivery, although their session be finished, and their commission expired: but this rather by common usage, than of strict right.<sup>1</sup>

REPRIEVES may also be *ex necessitate legis* [from legal necessity]: as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered. This is a mercy dictated by the law of nature, *in favorem prolis* [in favor of offspring]; and therefore no part of the bloody proceedings, in the reign of queen Mary, has been more justly detested than the cruelty, that was exercised in the island of Guernsey, of burning a woman big with child: and, when through the violence of the flames the infant sprang forth at the stake, and was preserved by the bystanders, after some deliberation of the priests who assisted at the sacrifice, they cast it again into the fire as a young heretic.<sup>2</sup> A barbarity which they never learned from the laws of ancient Rome; which direct,<sup>3</sup> with the same humanity as our own, "*quod praegnantis mulieris damnatae poena differatur, quoad pariat*" ["the punishment of a condemned pregnant woman is deferred until delivery"]: which doctrine has also prevailed in England, as early as the first memorials of our law will reach.<sup>4</sup> In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to inquire the fact: and if they bring in their verdict quick with child (for barely, with child, unless it be alive in the womb, is not sufficient) execution shall be staid generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all. But if she once has had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a farther respite for that cause.<sup>5</sup> For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice.

ANOTHER cause of regular reprieve is, if the offender become non compos, between he judgment and the award of execution:<sup>6</sup> for regularly, as was formerly<sup>7</sup> observed, though a man be compos when he commits a capital crime, yet if he becomes non compos after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution: for "*furiosus solo furore punitur*" ["madness alone punishes a madman"], and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he has

to allege, why execution should not be awarded against him: and, if he appears to be insane, the judge in his discretion may and ought to relieve him. Or, he may plead in bar of execution; which plea may be either pregnancy, the king's pardon, an act of grace, or diversity of person, *viz.* that he is not the same that was attainted, and the like. In this last case a jury shall be impaneled to try this collateral issue, namely, the identity of his person; and not whether guilty or innocent; for that has been decided before. And in these collateral issues the trial shall be *instanter* [instantly],<sup>8</sup> and no time allowed the prisoner to make his defense or produce his witnesses, unless he will make oath that he is not the person attainted:<sup>9</sup> neither shall any peremptory challenges of the jury be allowed the prisoner;<sup>10</sup> though formerly such challenges were held to be allowable, whenever a man's life was in question.<sup>11</sup>

II. IF neither pregnancy, insanity, non-identity, nor other plea will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious pardon; the granting of which is the most amiable prerogative of the crown. Laws (says an able writer) cannot be framed on principles of compassion to guilt: yet justice, by the constitution of England, is bound to be administered in mercy: this is promised by the king in his coronation oath, and it is that act of his government, which is the most personal, and most entirely his own.<sup>12</sup> The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his scepter is mercy. His power of pardoning was said by our Saxon ancestors<sup>13</sup> too be derived *a lege suae dignitatis* [from the law of his dignity]: and it is declared in parliament, by statute 27 Hen. VIII. c. 24. that no other person has power to pardon or remit any treason or felonies whatsoever; but that the king has the whole and sole power thereof, united and knit to the imperial crown of this realm.

THIS is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigor of the general law, in such criminal cases as merit an exemption from punishment. Pardons (according to some theorists<sup>14</sup>) should be excluded in a perfect legislation, where punishments are mild but certain: for that the clemency of the prince seems a tacit disapprobation of the laws. but the exclusion of pardons must necessarily introduce a very dangerous power in the judge or jury, that of construing the criminal law by the spirit instead of the letter;<sup>15</sup> or else it must be held, what no man will seriously avow, that the situation and circumstances of the offender (though they alter not the essence of the crime) ought to make no distinction in the punishment. In democracies, however, this power of pardon can never subsist; for there nothing higher is acknowledged than the magistrate who administers the laws: and it would be impolitic for the power of judging and of pardoning to center in one and the same person. This (as the president Montesquieu observes<sup>16</sup>) would oblige him very often to contradict himself, to make and to unmake his decisions: it would tend to confound all ideas of right among the mass of the people; as they would find it difficult to tell, whether a prisoner were discharged by his innocence, or obtained a pardon through favor. In Holland therefore, if there be no stadtholder, there is no power of pardoning lodged in any other member of the state. But in monarchies the king acts in a superior sphere; and, though he regulates the whole government as the first mover, yet he does not appear in any of the disagreeable or invidious parts of it. Whenever the nation see him personally engaged, it is only in works of legislature, magnificence, or compassion. To him therefore the people look up as the fountain of nothing but bounty and grace; and these repeated acts of

goodness, coming immediately from his own hand, endear the sovereign to his subjects, and contribute more than anything to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince.

UNDER this head, of pardons, let us briefly consider, 1. The object of pardon: 2. The manner of pardoning: 3. The method of allowing a pardon: 4. The effect of such pardon, when allowed.

1. AND, first, the king may pardon all offenses merely against the crown, or the public; excepting, 1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm, is by the *habeas corpus* act, 31 Car. II. c. 2. made a *praemunire*, unpardonable even by the king. Nor, 2. Can the king pardon, where private justice is principally concerned in the prosecution of offenders: “*non potest rex gratiam facere cum injuria et damno aliorum.*”<sup>17</sup> [“The king cannot confer a favor by the injury and loss of others.”] Therefore in appeals of all kinds (which are the suit, not of the king, but of the party injured) the prosecutor may release, but the king cannot pardon.<sup>18</sup> Neither can he pardon a common nuisance, while it remains unredressed, or so as to prevent an abatement of it; though afterwards he may remit the fine: because, though the prosecution is vested in the king to avoid multiplicity of suits, yet (during its continuance) this offense favors more of the nature of a private injury to each individual in the neighborhood, than of a public wrong.<sup>19</sup> Neither, lastly, can the king pardon an offense against a popular or penal statute, after information brought: for thereby the informer has acquired a private property in his part of the penalty.<sup>20</sup>

THERE is also a restriction of a peculiar nature, that affects the prerogative of pardoning, in case of parliamentary impeachments; *viz.* that the king's pardon cannot be pleaded to any such impeachment, so as to impede the inquiry, and stop the prosecution of great and notorious offenders. Therefore when, in the reign of Charles the second, the earl of Danby was impeached by the house of commons of high treason and other misdemeanors and pleaded the king's pardon in bar of the same, the commons alleged,<sup>21</sup> “that there was no precedent, that ever any pardon was granted to any person impeached by the commons of high treason, or other high crimes, depending the impeachment;” and therefore resolved,<sup>22</sup> “that the pardon so pleaded was illegal and void, and ought not to be allowed in bar of the impeachment of the commons of England:” for which resolution they assigned<sup>23</sup> this reason to the house of lords, “that the setting up a pardon to be a bar of an impeachment defeats the whole use and effect of impeachments: for should this point be admitted, or stand doubted, it would totally discourage the exhibiting any for the future; whereby the chief institution for the preservation of the government would be destroyed.” Soon after the revolution, the commons renewed the same claim, and voted,<sup>24</sup> “that a pardon is not pleadable in bar of an impeachment.” And, at length, it was enacted by the act of settlement, 12 & 13 W. III. c. 2. “that no pardon under the great seal of England shall be pleadable to an impeachment by the commons in parliament.” But, after the impeachment has been solemnly heard and determined, it is not understood that the king's royal grace is farther restrained or abridged: for, after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's most gracious pardon.

2. AS to the manner of pardoning: it is a general rule, that, wherever it may reasonably be presumed the king is deceived, the pardon is void.<sup>25</sup> Therefore any suppression of truth, or suggestion of

falsehood, in a charter of pardon, will vitiate the whole; for the king was misinformed.<sup>26</sup> General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony; (for it is perfumed the king knew not of those proceedings) but the conviction or attainder must be particularly mentioned:<sup>27</sup> and a pardon of felonies will not include piracy;<sup>28</sup> for that is no felony punishable at the common law. It is also enacted by statute 13 Ric. II. St. 2. c. 1. that no pardon for treason, murder, or rape, shall be allowed, unless the offense be particularly specified therein; and particularly in murder it shall be expressed, whether it was committed by lying in wait, assault, or malice prepense. Upon which Sir Edward Coke observes,<sup>29</sup> that it was not the intention of the parliament that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offense by name, which was attended with such high aggravations. And it is remarkable enough, that there is no precedent of a pardon in the register for any other homicide, than that which happens *se defendendo* [in self-defense] or *per infortunium* [by accident]: to which two species the king's pardon was expressly confined by the statutes 2 Edw. III. c. 2. and 14 Edw. III. c. 15. which declare that no pardon of homicide shall be granted, but only where the king may do it by the oath of his crown; that is to say, where a man slays another in his own defense, or by misfortune. But the statute of Richard the second, before-mentioned, enlarges by implication the royal power; provided the king is not deceived in the intended object of his mercy. And therefore pardons of murder were always granted with a *non obstante* [notwithstanding] of the statute of king Richard, till the time of the revolution; when the doctrine of *non obstante's* ceasing, it was doubted whether murder could be pardoned generally: but it was determined by the court of king's bench,<sup>30</sup> that the king may pardon on an indictment of murder, as well as a subject may discharge an appeal. Under these and a few other restrictions, it is a general rule, that a pardon shall be taken most beneficially for the subject, and most strongly against the king.

A PARDON may also be conditional: that is, the king may extend his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend: and this by the common law.<sup>31</sup> Which prerogative is daily exerted in the pardon of felons, on condition of transportation to some foreign country (usually to some of his majesty's colonies and plantations in America) for life, or for a term of years; such transportation or banishment<sup>32</sup> being allowable and warranted by the *habeas corpus* act, 31 Car. II. c. 2. §. 14. and rendered more easy and effectual by statute 8 Geo. III. c. 15.

3. WITH regard to the manner of allowing pardons; we may observe, that a pardon by act of parliament is more beneficial than by the king's charter: for a man is not bound to plead it, but the court must *ex officio* [officially] take notice of it;<sup>33</sup> neither can he lose the benefit of it by his own *laches* [delay] or negligence, as he may of the king's charter of pardon.<sup>34</sup> The king's charter of pardon must be specially pleaded, and that at a proper time: for if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon.<sup>35</sup> But, if a man avails himself thereof as soon as by course of law he may, a pardon may either be pleaded upon arraignment, or in arrest of judgment, or in the present stage of proceedings, in bar of execution. Anciently, by statute 10 Edw. III. c. 2. no pardon of felony could be allowed, unless the party found sureties for the good behavior before the sheriff and coroners of the county.<sup>36</sup> But that statute is repealed by the statute 5 & 6 W. & M. c. 13. which, instead thereof,

gives the judges of the court a discretionary power to bind the criminal, pleading such pardon, to his good behavior, with two sureties, for any term not exceeding seven years.

4. LASTLY, the effect of such pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offense for which he obtains his pardon; and not so much to restore his former, as to give him a new, credit and capacity. But nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and transcendent power of parliament. Yet if a person attainted receives the king's pardon, and afterwards has a son, that son may be heir to his father; because the father, being made a new man, might transmit new inheritable blood: though, had he been born before the pardon, he could never have inherited at all.<sup>37</sup>

### NOTES

1. 2 Hal. P. C. 412.
2. Fox, Acts and Mon.
3. Ff. 48. 19. 3.
4. Flet. 1. 1. c. 38.
5. 1 Hal. P. C. 369.
6. Ibid. 370.
7. See pag. 24.
8. 1 Sid. 72.
9. Fost. 42.
10. 1 Lev. 61. Fost. 42. 46.
11. Staundf. P. C. 163. Co. Litt. 157. Hal. Sum. 259.
12. Law of Forfeit. 99.
13. LL. Edw. Conf. c. 18.
14. Beccar. ch. 46.
15. Ibid. ch. 4.
16. Sp. L. b. 6. c. 5.
17. 3 Inst. 236.
18. Ibid. 237.
19. 2 Hawk. P. C. 391.
20. 3 Inst. 238.
21. Com. Journ. 28 Apr. 1679.
22. Ibid. 5 May 1679.
23. Ibid. 26 May 1679.

24. Ibid. 6 Jun. 1689.
25. 2 Hawk. P. C. 383.
26. 3 Inst. 238.
27. 2 Hawk. P. C. 383.
28. 1 Hawk. P. C. 99.
29. 3 Inst. 236.
30. Salk. 499.
31. 2 Hawk. P. C. 394.
32. Transportation is said (Barr. 352.) to have been first inflicted, as a punishment, by statute 39 Eliz. c. 4.
33. Fost. 43.
34. 2 Hawk. P. C. 397.
35. Ibid. 396.
36. Balk. 499.
37. See Vol. II. pag. 254.



## CHAPTER 32 Of Execution

THERE now remains nothing to speak of, but execution; the completion of human punishment. And this, in all cases, as well capital as otherwise, must be performed by the legal officer, the sheriff or his deputy; whose warrant for so doing was anciently by precept under the hand and seal of the judge, as it is still practiced in the court of the lord high steward, upon the execution of a peer:<sup>1</sup> though, in the court of the peers in parliament, it is done by writ from the king.<sup>2</sup> Afterwards it was established,<sup>3</sup> that, in case of life, the judge may command execution to be done without any writ. And now the usage is, for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff. As, for a capital felony, it is written opposite to the prisoner's name, "hanged by the neck;" formerly, in the days of Latin and abbreviation,<sup>4</sup> "*sus. per coll.*" for "*suspendatur per collum.*" And this is the only warrant that the sheriff has, for so material an act as taking away the life of another.<sup>5</sup> It may certainly afford matter of speculation, that in civil causes there should be such a variety of writs of execution to recover a trifling debt, issued in the king's name, and under the seal of the court, without which the sheriff cannot legally stir one step; and yet that the execution of a man, the most important and terrible task of any, should depend upon a marginal note.

THE sheriff, upon receipt of his warrant, is to do execution within a convenient time; which in the country is also left at large. In London indeed a more solemn and becoming exactness is used, both as to the warrant of execution, and the time of executing thereof: for the recorder, after reporting to the king in person the case of the several prisoners, and receiving his royal pleasure, that the law must take its course, issues his warrant to the sheriffs; directing them to do execution on the day and at the place assigned.<sup>6</sup> And, in the court of king's bench, if the prisoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution; either specifying the time and place,<sup>7</sup> or leaving it to the discretion of the sheriff.<sup>8</sup> And, throughout the kingdom, by statute 25 Geo. II. c. 37. it is enacted that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after sentence passed.<sup>9</sup> It has been well observed,<sup>10</sup> that it is of great importance, that the punishment should follow the crime as early as possible; that the prospect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas; and then the execution itself affects the minds of the spectators rather as a terrible fight, than as the necessary consequence of transgression.

THE sheriff cannot alter the manner of the execution by substituting one death for another, without being guilty of felony himself, as has been formerly said.<sup>11</sup> It is held also by Sir Edward Coke<sup>12</sup> and Sir Matthew Hale,<sup>13</sup> that even the king cannot change the punishment of the law, by altering the hanging or burning into beheading; though, when beheading is part of the sentence, the king may remit the rest. And, notwithstanding some examples to the contrary, Sir Edward Coke stoutly maintains, that "*judicandum est legibus, non exemplis.*" ["We must judge by the laws, not by examples."] But others have thought,<sup>14</sup> and more justly, that this prerogative, being founded in mercy and immemorially exercised by the crown, is part of the common law. For hitherto, in every instance, all these exchanges have been for more merciful kinds of death; and how far this may also fall within the king's power of granting conditional pardons, (*viz.* by remitting a severe kind of death,

on condition that the criminal submits to a milder) is a matter that may bear consideration. It is observable, that when lord Stafford was executed for the popish plot in the reign of king Charles the second, the then sheriffs of London, having received the king's writ for beheading him, petitioned the house of lords, for a command or order from their lordships, how the said judgment should be executed: for, he being prosecuted by impeachment, they entertained a notion (which is said to have been countenanced by lord Russel) that the king could not pardon any part of the sentence.<sup>15</sup> The lords resolved,<sup>16</sup> that the scruples of the sheriffs were unnecessary, and declared, that the king's writ ought to be obeyed. Disappointed of raising a flame in that assembly, they immediately signified<sup>17</sup> to the house of commons by one of the members, that they were not satisfied as to the power of the said writ. That house took two days to consider of it; and then<sup>18</sup> sullenly resolved, that the house was content that the sheriff do execute lord Stafford by severing his head from his body. It is farther related, that when afterwards the same lord Russel was condemned for high treason upon indictment, the king, while he remitted the ignominious part of the sentence, observed, "that his lordship would now find he was possessed of that prerogative, which in the case of lord Stafford he had denied him."<sup>19</sup> One can hardly determine (at this distance from those turbulent times) which most to disapprove of, the indecent and sanguinary zeal of the subject, or the cool and cruel sarcasm of the sovereign.

TO conclude: it is clear, that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the sheriff must hang him again.<sup>20</sup> For the former hanging was no execution of the sentence; and, if a false tenderness were to be indulged in such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force,<sup>21</sup> such a criminal, so reviving, was not allowed to take sanctuary and abjure the realm; but his fleeing to sanctuary was held an escape in the officer.<sup>22</sup>

AND, having thus arrived at the last stage of criminal proceedings, or execution, the end and completion of human punishment, which was the sixth and last head to be considered under the division of public wrongs, the fourth and last object of the laws of England; it may now seem high time to put a period to these commentaries, which, the author is very sensible, have already swelled to too great a length. But he cannot dismiss the student, for whose use alone these rudiments were originally compiled, without endeavoring to recall to his memory some principal outlines of the legal constitution of this country; by a short historical review of the most considerable revolutions, that have happened in the laws of England, from the earliest to the present times. And this task he will attempt to discharge, however imperfectly, in the next or concluding chapter.

## NOTES

1. 2 Hawk. P. C. 409.
2. See appendix. § 5.
3. Finch. L. 478.
4. Staundf. P. C. 182.
5. 5 Mod. 22.
6. See appendix, § 4.

7. St. Trials. VI. 332. Fost. 43.
8. See appendix, § 3.
9. See pag. 202.
10. Beccar. ch. 19.
11. See pag. 179.
12. 3 Inst. 52.
13. 2 Hal. P. C. 412,
14. Fost. 270.
15. 2 Hume Hist. of G. B. 328.
16. Lords Journ. 21. Dec. 1680.
17. Com. Journ. 21 Dec. 1680.
18. Ibid. 23 Dec. 1680.
19. 2 Hume. 360.
20. 2 Hal. P. C. 412. 2 Hawk. P. C. 463.
21. See pag. 326.
22. Fitzh. Abr. t. coront. 335. Finch. L. 467.

CHAPTER 33  
**Of The Rise, Progress, And Gradual  
Improvements, of The Laws of England**

BEFORE we enter on the subject of this chapter, in which I propose, by way of supplement to the whole, to attempt an historical review of the most remarkable changes and alterations, that have happened in the laws of England, I must first of all remind the student, that the rise and progress of many principal points and doctrines have been already pointed out in the course of these commentaries, under their respective divisions: these having therefore been particularly discussed already, it cannot be expected that I should re-examine them with any degree of minuteness; which would be a most tedious undertaking. What I therefore at present propose, is only to mark out some outlines of an English juridical history, by taking a chronological view of the state of our laws, and their successive mutations at different periods of time.

THE several periods, under which I shall consider the state of our legal polity, are the following six: 1. From the earliest times to the Norman conquest: 2. From the Norman conquest to the reign of king Edward the first: 3. From thence to the reformation: 4. From the reformation to the restoration of king Charles the second: 5. From thence to the revolution in 1688: 6. From the revolution to the present time.

I. AND, first, with regard to the ancient Britons, the aborigines of our island, we have so little handed down to us concerning them with any tolerable certainty, that our inquiries here must needs be very fruitless and defective. However, from Caesar's account of the tenets and discipline of the ancient Druids in Gaul, in whom centered all the learning of these western parts, and who were, as he tells us, sent over to Britain, (that is, to the island of Mona or Anglesey) to be instructed; we may collect a few points, which bear a great affinity and resemblance to some of the modern doctrines of our English law. Particularly, the very notion itself of an oral unwritten law, delivered down from age to age, by custom and tradition merely, seems derived from the practice of the Druids, who never committed any of their instructions to writing: possibly for want of letters; since it is remarkable that in all the antiquities, unquestionably British which the industry of the moderns has discovered, there is not in any of them the least trace of any character or letter to be found. The partible quality also of lands, by the custom of gavelkind, which still obtains in many parts of England, and did universally over Wales till the reign of Henry VIII, is undoubtedly of British original. So likewise is the ancient division of the goods of an intestate between his widow and children, or next of kin; which has since been revived by the statute of distributions. And we may also remember an instance of a slighter nature mentioned in the present volume; where the same custom has continued from Caesar's time to the present, that of burning a woman guilty of the crime of petit treason by killing her husband.

THE great variety of nations, that successively broke in upon, and destroyed both the British inhabitants and constitution, the Romans, the Picts, and, after them, the various clans of Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom; as they were very soon incorporated and blended together, and therefore, we may suppose, mutually communicated to each other their respective usages,<sup>1</sup> in regard to the rights of property and the punishment of crimes. So that it is morally impossible to trace out, with any degree

of accuracy, when the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them to their first and component principles. We can seldom pronounce, that this custom was derived from the Britons; that was left behind by the Romans; this was a necessary precaution against the Picts; that was introduced by the Saxons, discontinued by the Danes, but afterwards restored by the Normans.

WHEREVER this can be done, it is matter of great curiosity, and some use: but this can very rarely be the case; not only from the reason above-mentioned, but also from many others. First, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice:<sup>2</sup> so that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river, which varies its shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and its government: which alone, though it had been disturbed by no foreign invasions, would make it an impossible thing to search out the original of its laws; unless we had as authentic monuments thereof, as the Jews had by the hand of Moses.<sup>3</sup>

Thirdly, this uncertainty of the true origin of particular customs must also in part have arisen from the means, whereby Christianity was propagated among our Saxon ancestors in this island; by learned foreigners brought over from Rome and other countries: who undoubtedly carried with them many of their own national customs; and probably prevailed upon the state to abrogate such usages as were inconsistent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cause, that we find not only some rules of the Mosaic, but also of the imperial and pontifical laws, blended and adopted into our own system.

A FARTHER reason may also be given for the great variety, and of course the uncertain original, of our ancient established customs; even after the Saxon government was firmly established in this island: *viz.* the subdivision of the kingdom into an heptarchy, consisting of seven independent kingdoms, peopled and governed by different clans and colonies. This must necessarily create an infinite diversity of laws: even though all those colonies, of Jutes, Angles, proper Saxons, and the like, originally sprung from the same mother country, the great northern hive; which poured forth its warlike progeny, and swarmed all over Europe, in the sixth and seventh centuries. This multiplicity of laws will necessarily be the case in some degree, where any kingdom is cantoned out into provincial establishments; and not under one common dispensation of laws, though under the same sovereign power. Much more will it happen, where seven unconnected states are to form their own constitution and superstructure of government, though they all begin to build upon the same or similar foundations.

WHEN therefore the West-Saxons had swallowed up all the rest, and king Alfred succeeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a most great and necessary work, which he is said to have executed in as masterly a manner. No less than to new-model the constitution; to rebuild it on a plan that should endure for ages; and, out of its old discordant materials, which were heaped upon each other in a vast and rude

irregularity, to form one uniform and well connected whole. This he effected, by reducing the whole kingdom under one regular and gradual subordination of government, wherein each man was an answerable too his immediate superior for his own conduct and that of his nearest neighbors: for to him we owe that masterpiece of judicial polity, the subdivision of England into tithings, and hundreds, if not into counties; all under the influence and administration of one supreme magistrate, the king; in whom, as in a general reservoir, all the executive authority of the law was lodged, and from whom justice was dispersed to every part of the nation by distinct, yet communicating, ducts and channels: which wise institution has been preserved for near a thousand years unchanged, from Alfred's to the present time. He also, like another Theodosius, collected the various custom that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his *dom-bec*, or *liber judicialis* [judgment book]. This he compiled for the use of the court-baron, hundred, and county court, the court-leet, and sheriff's town; tribunals, which he established, for the trial of all causes civil and criminal, in the very districts wherein the complaint arose: all of them subject however to be inspected, controlled, and kept within the bounds of the universal or common law, by the king's own courts; which were then itinerant, being kept in the king's palace, and removing with his household in those royal progresses, which he continually made from one end of the kingdom to the other.

THE Danish invasion and conquest, which introduced new foreign customs, was a severe blow to this noble fabric: but a plan, so excellently concerted, could never be long thrown aside. So that, upon the expulsion of these intruders, the English returned to their ancient law: retaining however some few of the customs of their late visitants; which went under the name of *Dane-Lage*: as the code compiled by Alfred was called the *West-Saxon-Lage*; and the local constitutions of the ancient kingdom of Mercia, which obtained in the counties nearest to Wales, and probably abounded with many British customs, were called the *Mercen-Lage*. And these three laws were, about the beginning of the eleventh century, in use in different counties of the realm: the provincial polity of counties, and their subdivisions, having never been altered or discontinued through all the shocks and mutations of government, from the time of its first institution; though the laws and customs therein used, have (as we shall see) often suffered considerable changes.

FOR king Edgar, (who besides his military merit, as founder of the English navy, was also a most excellent civil governor) observing the ill effects of three distinct bodies of laws, prevailing at once in separate parts of his dominions, projected and begun, what his grandson king Edward the confessor afterwards completed; *viz.* one uniform digest or body of laws, to be observed throughout the whole kingdom: being probably no more than a revival of king Alfred's code, with some improvements suggested by necessity and experience; particularly the incorporating some of the British or rather Mercian customs, and also such of the Danish as were reasonable and approved, into the *West-Saxon-Lage*, which was still the groundwork of the whole. And this appears to me the best supported and most plausible conjecture (for certainty is not to be expected) of the rise and original of that admirable system of maxims and unwritten customs, which is now known by the name of the common law, as extending its authority universally over all the realm; and which is doubtless of Saxon parentage.

AMONG the most remarkable of the Saxon laws we may reckon, 1. The constitution of parliaments, or rather, general assemblies of the principal and wisest men in the nation; the *wittena-gemote*, or

*commune concilium* [common council] of the ancient Germans; which was not yet reduced to the forms and distinctions of our modern parliament: without whose concurrence however, no new law could be made, or old one altered. 2. The election of their magistrates by the people; originally even that of their kings, till dear bought experience evinced the convenience and necessity of establishing an hereditary succession to the crown. But that of all subordinate magistrates, their military officers or heretochs, their sheriffs, their conservators of the peace, their coroners, their port-reeves, (since changed into mayors and bailiffs) and even their tithingmen and borsholders at the leet, continued, some till the Norman conquest, others for two centuries after, and some remain to this day. 3. The descent of the crown, when once a royal family was established, upon nearly the same hereditary principles upon which it has ever since continued: only that perhaps, in case of minority, the next of kin of full age would ascend the throne, as king, and not as protector; though, after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital punishments for the first offense: even the most notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment perpetual bondage; to which our benefit of clergy has now in some measure succeeded. 5. The prevalence of certain customs, as heriots and military services in proportion to every man's land, which much resembled the feudal constitution; but yet were exempt from all its rigorous hardships: and which may be well enough accounted for, by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feudal law; before it got into the hands of the Norman jurists, who extracted the most slavish doctrines, and oppressive consequences, out of what was originally intended as a law of liberty. 6. That their estates were liable to forfeiture for treason, but that the doctrine of escheats and corruption of blood for felony, or any other cause, was utterly unknown amongst them. 7. The descent of their lands was to all the males equally, without any right of primogeniture; a custom, which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman conquest: though really inconvenient, and more especially destructive to ancient families; which are in monarchies necessary to be supported, in order to form and keep up a nobility, or intermediate state between the prince and the common people. 8. The courts of justice consisted principally of the county courts, and in cases of weight or nicety the king's courts held before himself in person, at the time of his parliaments; which were usually held in different places, according as he kept the three great festivals of Christmas, Easter, and whitsuntide. An institution which was adopted by king Alonso VII of Castile about a century after the conquest: who at the same three great feasts was wont to assemble his nobility and prelates in his court; who there heard and decided all controversies, and then, having received his instructions, departed home.<sup>4</sup> These county courts however differed from the modern ones, in that the ecclesiastical and civil jurisdiction were blended together, the bishop and the ealdorman of sheriff sitting in the same county court; and also that the decisions and proceedings therein were much more simple and unembarrassed: an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials, among a people who had a very strong tincture of superstition, were permitted to be by ordeal, by the corsned or morsel of execration, or by wager of law with compurgators, if the party chose it; but frequently they were also by jury: for, whether or no their juries consisted precisely of twelve men, or were bound to a strict unanimity; yet the general constitution of this admirable criterion of truth, and most important guardian both of public and private liberty, we owe to our Saxon ancestors. Thus stood the general frame of our polity at the time of the Norman invasion; when the second period of our legal history commences.

II. THIS remarkable event wrought as great an alteration in our laws, as it did in our ancient line of kings: and, though the alteration of the former was effected rather by the consent of the people, than any right of conquest, yet that consent seems to have been partly extorted by fear, and partly given without any apprehension of the consequences which afterwards ensued.

1. AMONG the first of these alterations we may reckon the separation of the ecclesiastical courts from the civil: effected in order to ingratiate the new king with the popish clergy, who for some time before had been endeavoring all over Europe to exempt themselves from the secular power; and whose demands the conqueror, like a politic prince, thought it prudent to comply with, by reason that their reputed sanctity had a great influence over the minds of the people; and because all the little learning of the times was engrossed into their hands, which made them necessary men, and by all means to be gained over to his interests. And this was the more easily effected, because, the disposal of all the episcopal sees being then in the breast of the king, he had taken care to fill them with Italian and Norman prelates.

2. ANOTHER violent alteration of the English constitution consisted in the depopulation of whole countries, for the purposes of the king's royal diversion; and subjecting both them, and all the ancient forests of the kingdom, to the unreasonable severities of forest laws imported from the continent, whereby the slaughter of a beast was made almost as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chase the king's deer, yet he might start any game, pursue, and kill it, upon his own estate. But the rigor of these new constitutions vested the sole property of all the game in England in the king alone; and no man was entitled to disturb any fowl of the air, or any beast of the field, of such kinds as were specially reserved for the royal amusement of the sovereign, without express license from the king, by a grant of a chase or free warren: and those franchises were granted as much with a view to preserve the breed of animals, as to indulge the subject. From a similar principle to which, though the forest laws are now mitigated, and by degrees grown entirely obsolete, yet from this root has sprung a bastard slip, known by the name of the game law, now arrived to and wantoning in its highest vigor: both founded upon the same unreasonable notions of permanent property in wild creatures; and both productive of the same tyranny to the commons: but with this difference; that the forest laws established only one mighty hunter throughout the land, the game laws have raised a little Nimrod in every manor. And in one respect the ancient law was much less unreasonable than the modern: for the king's grantee of a chase or free-warren might kill game in every part of his franchise; but now, though a freeholder of less than 100£, a year is forbidden to kill a partridge upon his own estate, yet nobody else (not even the lord of the manor, unless he has a grant of free-warren) can do it without committing a trespass, and subjecting himself to an action.

3. A THIRD alteration in the English laws was by narrowing the remedial influence of the county courts, the great seats of Saxon justice, and extending the original jurisdiction of the king's justiciars to all kinds of causes, arising in all parts of the kingdom. To this end the *aula regis* [king's court], with all its multifarious authority, was erected; and a capital justiciary appointed, with powers so large and boundless, that he became at length a tyrant to the people, and formidable to the crown itself. The constitution of this court, and the judges themselves who presided there, were fetched from the duchy of Normandy: and the consequence naturally was, the ordaining that all proceedings in the king's courts should be carried on in the Norman, instead of the English, language. A provision the more necessary, because none of his Norman justiciars understood English; but as



evident a badge of slavery, as ever was imposed upon a conquered people. This lasted till king Edward the third obtained a double victory, over the armies of France in their own country, and their language in our courts here at home. But there was one mischief too deeply rooted thereby, and which this caution of king Edward came too late to eradicate. Instead of the plain and easy method of determining suits in the county courts, the chicanes and subtleties of Norman jurisprudence had taken possession of the king's courts, to which ever cause of consequence was drawn. Indeed that age, and those immediately succeeding it, were the era of refinement and subtlety. There is an active principle in the human soul, that will ever be exerting its faculties to the utmost stretch, in whatever employment, by the accidents of time and place, the general plan of education, or the customs and manners of the age and county, it may happen to find itself engaged. The northern conquerors of Europe were then emerging from the grossest ignorance in point of literature; and those, who had leisure to cultivate its progress, were such only as were cloistered in monasteries, the rest being all soldiers or peasants. And, unfortunately, the first rudiments of science which they imbibed were those of Aristotle's philosophy, conveyed through the medium of his Arabian commentators; which were brought from the east by the Saracens into Palestine and Spain, and translated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a rising state, were those of the noblest kind; the establishment of religion, and the regulations of civil polity; yet, having only such tools to work with, their execution was trifling and flimsy. Both the divinity and the law of those times were therefore frittered into logical distinctions, and drawn out into metaphysical subtleties, with a skill most amazingly artificial; but which serves no other purpose, than to show the vast powers of the human intellect, however vainly or preposterously employed. Hence law in particular, which (being intended for universal reception) ought to be a plain rule of action, became a science of the greatest intricacy; especially when blended with the new refinements engrafted upon feudal property: which refinements were from time to time gradually introduced by the Norman practitioners, with a view to supersede (as they did in great measure) the more homely, but more intelligible, maxims of distributive justice among the Saxons. And, to say the truth these scholastic reformers have transmitted their dialect and finesses to posterity, so interwoven in the body of our legal polity, that they cannot now be taken out without a manifest injury to the substance. Statute after statute has in later times been made, to pare off these troublesome excrescences, and restore the common law to its pristine simplicity and vigor; and the endeavor has greatly succeeded: but still the fears are deep and visible; and the liberality of our modern courts of justice is frequently obliged to have recourse to unaccountable fictions and circuities, in order to recover that equitable and substantial justice, which for a long time was totally buried under the narrow rules and fanciful niceties of metaphysical and Norman jurisprudence.

4. A FOURTH innovation was the introduction of the trial by combat, for the decision of all civil and criminal questions of fact in the last resort. This was the immemorial practice of all the northern nations; but first reduced to regular and stated forms among the Burgundi, about the close of the fifth century: and from them it passed to other nations, particularly the Franks and the Normans; which last had the honor to establish it here, though clearly an unchristian, as well as most uncertain, method of trial. But it was a sufficient recommendation of it to the conqueror and his warlike countrymen, that it was the usage of their native duchy of Normandy.

5. BUT the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates, a few only excepted, the fiction of feudal tenure; which drew after

it a numerous and oppressive train of servile fruits and appendages, aids, reliefs, primer seizins, wardships, marriages, escheats, and fines for alienation; the genuine consequences of the maxim then adopted, that all the lands in England were derived from, and held, mediately or immediately, of the crown.

THE nation at this period seems to have groaned under as absolute a slavery, as was in the power of a warlike, an ambitious, and a politic prince to create. The consciences of men were enslaved by four ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived: who now imported from Rome for the first time the whole farrago of superstitious novelties, which had been engendered by the blindness and corruption of the times, between the first mission of Augustin the monk, and the Norman conquest; such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images not forgetting the universal supremacy and dogmatical infallibility of the holy see. The laws too, as well as the prayers, were administered in an unknown tongue. The ancient trial by jury gave way to the impious decision by battle. The forest laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the melancholy curfew. The ultimate property of all lands, and a considerable share out of the present profits, were vested in the king, or by him granted out to his Norman favorites; who, by a gradual progression of slavery, were absolute vassals to the crown, and as absolute tyrants to the commons, unheard of forfeitures, talliages, aids, and fines, were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And, to crown all, as a consequence of the tenure by knight-service, the king had always ready at his command an army of sixty thousand knights or *milites*: who were bound, upon pain of confiscating their estates, to attend him in time of invasion, or to quell any domestic insurrection. Trade, or foreign merchandise, such as it then was, was carried on by the Jews and Lombards; and the very name of an English fleet, which king Edgar had rendered so formidable, was utterly unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the baron, or great lords of the land; the knights or soldiery, who were the subordinate landholders; and the burghers, or inferior tradesmen, who from their insignificancy happily retained, in their socage and burgage tenure, some points of their ancient freedom. All the rest were villeins or bondmen.

FROM so complete and well concerted a scheme of servility, it has been the work of generations, for our ancestors, to redeem themselves and their posterity into that state of liberty, which we now enjoy: and which therefore is not to be looked upon as consisting of mere encroachments on the crown, and infringements of the prerogative, as some slavish and narrow-minded writers in the last century endeavored to maintain; but as, in general, a gradual restoration of that ancient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman. How that restoration has, in a long series of years, been step by step effected, I now proceed to inquire.

WILLIAM Rufus proceeded on his father's plan, and in some points extended it; particularly with regard to the forest laws. but his brother and successor, Henry the first, found it expedient, when first he came to the crown, to ingratiate himself with the people; by restoring (as our monkish historians tell us) the laws of king Edward the confessor. The ground whereof is this: that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary fruits of his feudal

tenures; but reserved the tenures themselves, for the same military purposes that his father introduced them. He also abolished the curfew,<sup>5</sup> yet it is rather spoken of as a known time of night (so denominated from that abrogated usage) than as a still subsisting custom. There is extant a code of laws in his name,<sup>6</sup> consisting partly of those of the confessor, but with great additions and alterations of his own; and chiefly calculated for the regulation of the county courts. It contains some directions as to crimes and their punishments, (that of theft being made capital in his reign) and a few things relating to estates, particularly as to the descent of lands: which being by the Saxon laws equally to all the sons, by the feudal or Norman to the eldest only, king Henry here moderated the difference; directing the eldest son to have only the principal estate, "*primum patris feudum*" the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots; reserving however these ensigns of patronage, *conge d'eslire* [leave to elect], custody of the temporalities when vacant, and homage upon their restitution. He lastly united again for a time the civil and ecclesiastical courts, which union was soon dissolved by him Norman clergy: and, upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father's time: from whence we may easily perceive how far short this was of a thorough restitution of king Edward's, or the Saxon, laws.

THE usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest laws, but performed no great matter either in that or in any other point. It is from his reign however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

BY the time of king Henry the second, if not earlier, the charter of Henry the first seems to have been forgotten: for we find the claim of marriage, ward, and relief, then flourishing in full vigor. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public than the parceling of estates into a multitude of minute subdivisions. However in this prince's reign much was done to methodize the laws, and reduce them into a regular order; as appears from that excellent treatise of Glanvil: which, though some of it be now antiquated and altered, yet, when compared with the code of Henry the first, it carries a manifest superiority.<sup>7</sup> Throughout his reign also was continued the important struggle, which we have had occasion so often to mention, between the laws of England and Rome; the former supported by the strength of the temporal nobility, when endeavored too be supplanted in favor of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward the first; when the laws of England, under the new discipline introduced by that skillful commander obtained a complete and permanent victory. In the present reign, of Henry the second, there are four things which peculiarly merit the attention of a legal antiquarian: 1. The constitutions of the parliament at Clarendon, A. D. 1164. whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction: though his farther progress was unhappily stopped, by the fatal event of the disputes between him and archbishop Becket. 2. The institution of the office of justices in eyre, *in itinere* [itinerant]; the king having divided the kingdom into six circuits (a little different from the present) and commissioned these new created judges to administer justice, and try writs of assize, in the several counties. These remedies are said to have been then first invented: before which all causes were usually terminated in the county courts, according to the Saxon custom; or before the

king's justiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of which tribunals, traveling about with the king's person, occasioned intolerable expense and delay to the suitors; and the former, however proper for little debts and minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment. 3. The introduction and establishment of the grand assize, or trial by a special king of jury in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battle. 4. To this time must also be referred the introduction of escuage, or pecuniary commutation for personal military service; which in process of time was the parent of the ancient subsidies granted to the crown by parliament, and the land tax of later times.

RICHARD the first, a brave and magnanimous prince, was a sportsman as well as a soldier; and therefore enforced the forest laws with some rigor; which occasioned many discontents among his people: though (according to Matthew Paris) he repealed the penalties of castration, loss of eyes, and cutting off the hands and feet, before inflicted on such as transgressed in hunting; probably finding that their severity prevented prosecutions. He also, when abroad, composed a body of naval laws at the isle of Oleron; which are still extant, and of high authority: for in his time we began again to discover, that (as an island) we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the jews, and the justices in eyre: the king's thoughts being chiefly taken up by the knight errantry of a crusade against the Saracens in the holy land.

IN king John's time, and that of his son Henry the third, the rigors of the feudal tenures and the forest laws were so warmly kept up, that they occasioned many insurrections of the barons or principal feudatories: which at last had this effect, that first king John, and afterwards his son, consented to the two famous charters of English liberties, *Magna Carta*, and *carta de foresta* [the forest charter]. Of these the latter was well calculated to redress many grievances, and encroachments of the crown, in the exertion of forest-law: and the former confirmed many liberties of the church, and redressed many grievances incident to feudal tenures, of no small moment at the time; though now, unless considered attentively and with this retrospect, they seem but of trifling concern. But, besides these feudal provisions, care was also taken therein to protect the subject against other oppressions, then frequently arising from unreasonable ameracements, from illegal distresses or other process for debts or services due to the crown, and from the tyrannical abuse of the prerogative of purveyance and preemption. It fixed the forfeiture of lands for felony in the same manner as it still remains; prohibited for the future the grants of exclusive fisheries; and the erection of new bridges so as to oppress the neighborhood. With respect to private rights: it established the testamentary power of the subject over part of his personal estate, the rest being distributed among his wife and children; it laid down the law of dower, as it has continued ever since; and prohibited the appeals of women, unless for the death of their husbands. In matters of public police and national concern: it enjoined an uniformity of weights and measures; gave new encouragements to commerce, by the protection of merchant-strangers; and forbade the alienation of lands in mortmain. With regard to the administration of justice: besides prohibiting all denials or delays of it, it fixed the court of common pleas at Westminster, that the suitors might no longer be harassed with following the king's person in all his progresses; and at the same time brought the trial of issues home to the very doors of the freeholders, by directing assizes too be taken in the proper counties, and establishing annual circuits:

it also corrected some abuses then incident to the trials by wager of law and of battle; directed the regular awarding of inquests for life or member; prohibited the king's inferior ministers from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwise have unjustly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of justice, the county court, sheriff's turn, and court-leet. It confirmed and established the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, lastly, (which alone would have merited the title that it bears, of the great charter) it protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land.

HOWEVER, by means of these struggles, the pope in the reign of king John gained a still greater ascendant here, than he ever before had enjoyed; which continued through the long reign of his son Henry the third: in the beginning of whose time the old Saxon trial by ordeal was also totally abolished. And we may by this time perceive, in Bracton's treatise, a still farther improvement in the method and regularity of the common law, especially in the point of pleadings.<sup>8</sup> Nor must it be forgotten, that the first traces which remain, of the separation of the greater barons from the less, in the constitution of parliaments, are found in the great charter of king John; though omitted in that of Henry III: and that, towards the end of the latter of these reigns, we find the first record of any writ for summoning knights, citizens, and burgesses to parliament. And here we conclude the second period of our English legal history.

III. THE third commences with the reign of Edward the first; who may justly be styled our English Justinian. For in his time the law did receive so sudden a perfection, that Sir Matthew Hale does not scruple to affirm,<sup>9</sup> that more was done in the first thirteen years of his reign to settle and establish the distributive justice of the kingdom, than in all the ages since that time put together.

IT would be endless to enumerate all the particulars of these regulations but the principal may be reduced under the following general heads. 1. He established, confirmed, and settled, the great charter and charter of forests. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and establishing the bounds of ecclesiastical jurisdiction: and by obliging the ordinary, to whom all the goods of intestates at that time belonged, to discharge the debts of the deceased. 3. He defined the limits of the several temporal courts of the highest jurisdiction, those of the king's bench, common pleas, and exchequer; so as they might not interfere with each other's proper business: to do which, they must now have recourse to a fiction, very necessary and beneficial in the present enlarged state of property. 4. He settled the boundaries of the inferior courts in counties, hundreds, and manors: confining them to causes of no great amount, according to their primitive institution; though of considerably greater, than by the alteration of the value of money they are now permitted to determine. 5. He secured the property of the subject, by abolishing all arbitrary taxes, and talliages, levied without consent of the national council. 6. He guarded the common justice of the kingdom from abuses, by giving up the royal prerogative of sending mandates to interfere in private causes. 7. He settled the form, solemnities, and effects, of fines levied in the court of common pleas; though the thing itself was of Saxon original. 8. He first established a repository for the public records of the kingdom; few of which are ancients than the reign of his father, and those were by him collected. 9. He improved upon the laws of king Alfred, by that great and orderly method of watch and ward, for preserving the public peace and preventing robberies,

established by the statute of Winchester. 10. He settled and reformed many abuses incident to tenures, and removed some restraints on the alienation of landed property, by the statute of *quia emptores* [because of purchasers]. 11. He instituted a speedier way for the recovery of debts, by granting execution not only upon goods and chattels, but also upon lands, by writ of *elegit* [he has chosen]; which was of signal benefit to a trading people: and, upon the same commercial ideas, he also allowed the charging of lands in a statute merchant, to pay debts contracted in trade, contrary to all feudal principles. 12. He effectually provided for the recovery of advowsons, as temporal rights; in which, before, the law was extremely deficient. 13. He also effectually closed the great gulf, in which all the landed property of the kingdom was in danger of being swallowed, by his re-iterated statutes of mortmain; most admirably adapted to meet the frauds that had then been devised, though afterwards contrived to be evaded by the invention of uses. 14. He established a new limitation of property by the creation of estates tail; concerning the good policy of which, modern times have however entertained a very different opinion. 15. He reduced all Wales to the subjection, not only of the crown, but in great measure of the laws, of England; (which was thoroughly completed in the reign of Henry the eighth) and seems to have entertained a design of doing the like by Scotland, so as to have formed an entire and complete union of the island of Great Britain.

I MIGHT continue this catalogue much farther: ) but, upon the whole, we may observe, that the very scheme and model of the administration of common justice between party and party, was entirely settled by this king;<sup>10</sup> and has continued nearly the same, in all succeeding ages, to this day; abating some few alterations, which the humor or necessity of subsequent times has occasioned. The forms of writs, by which actions are commenced, were perfected in his reign, and established as models for posterity. The pleadings, consequent upon the writs, were then short, nervous, and perspicuous; not intricate, verbose, and formal. The legal treatises, written in his time, as Britton, Fleta, Hengham, and the rest, are for the most part, law at this day; or at least were so, till the alteration of tenures took place. And, to conclude, it is from this period, from the exact observation of Magna Carta, rather than from its making or renewal, in the days of his grandfather and father, that the liberty of Englishmen began again to rear its head; though the weight of the military tenures hung heavy upon it for many ages after.

I CANNOT give a better proof of the excellence of his constitutions, than that from his time to that of Henry the eighth there happened very few, and those not very considerable, alterations in the legal forms of proceedings. As to matter of substance: the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and conservators of the peace, were taken from the people in the reigns of Edward II and Edward III; and justices of the peace were established instead of the latter. In the reign also of Edward the third the parliament is supposed most probably to have assumed its present form; by a separation of the commons from the lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modeled assembly; and the translation of the law proceedings from French into Latin another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the statute staple; whereby he might the more readily pledge his lands for the security of his mercantile debts. And, as personal property now grew, by the

extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law; to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of *praemunire* [forewarning], for effectually depressing the civil power of the pope, were the work of this and the subsequent reign. And the establishment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown possessions of the monasteries, added luster to the close of the fourteenth century: though the seeds of the general reformation, which were thereby first sown in the kingdom, were almost overwhelmed by the spirit of persecution, introduced into the laws of the land by the influence of the regular clergy.

FROM this time to that of Henry the seventh, the civil wars and disputed titles to the crown gave no leisure farther juridical improvement: "*nam silent leges inter arma*" ["laws are silent amidst arms"]. ) And yet it is to these very disputes that we owe the happy loss of all the dominions of the crown on the continent of France; which turned the minds of our subsequent princes entirely to domestic concerns. To these likewise we owe the method of barring entails by the fiction of common recoveries; invented originally by the clergy, to evade the statutes of mortmain, but introduced under Edward the fourth, for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavored to protect them by the universal establishment of uses, another of the clerical inventions.

IN the reign of king Henry the seventh, his ministers (not to say the king himself) were more industrious in hunting out prosecutions upon old and forgotten penal laws, in order to extort money from the subject, than in framing any new beneficial regulations. For the distinguishing character of this reign was that of amassing treasure into the king's coffers, by every means that could be devised: and almost every alteration in the laws, however salutary or otherwise in their future consequences, had this and this only for their great and immediate object. To this end the court of star-chamber was new-modeled, and armed with powers, the most dangerous and unconstitutional, over the persons and properties of the subject. Informations were allowed to be received, in lieu of indictments, at the assizes and sessions of the peace, in order to multiply fines and pecuniary penalties. The statute of fines for landed property was craftily and covertly contrived, to facilitate the destruction of entails, and make the owners of real estates more capable to forfeit as well as to aliene. The benefit of clergy (which so often intervened to stop attainders and save the inheritance) was now allowed only once to lay offenders, who only could have inheritances to lose. A writ of *capias* [taking] was permitted in all actions on the case, and the defendant might in consequence be outlawed; because upon such outlawry his goods became the property of the crown. In short, there is hardly a statute in this reign, introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer.

IV. THIS brings us to the fourth period of our legal history, *viz.* the reformation of religion, under Henry the eighth, and his children: which opens an entirely new scene in ecclesiastical matters; the usurped power of the pope being now forever routed and destroyed, all his connections with this island cut off, the crown restored to its supremacy over spiritual men and causes, and the patronage of bishoprics being once more indisputably vested in the king. And, had the spiritual courts been at this time re-united to the civil, we should have seen the old Saxon constitution with regard to

ecclesiastical polity completely restored.

WITH regard also to our civil polity, the statute of wills, and the statute of uses, (both passed in the reign of this prince) made a great alteration as to property: the former, by allowing the devise of real estates by will, which before was in general forbidden; the latter, by endeavoring to destroy the intricate nicety of uses, though the narrowness and pedantry of the courts of common law prevented this statute from having its full beneficial effect. And thence the courts of equity assumed a jurisdiction, dictated by common justice and common sense: which, however arbitrarily exercised or productive of jealousies in its infancy, has at length been matured into a most elegant system of rational jurisprudence; the principles of which (notwithstanding they may differ in forms) are now equally adopted by the courts of both law and equity. From the statute of uses, and another statute of the same antiquity, (which protected estates for years from being destroyed by the reversioner) a remarkable alteration took place in the mode of conveyancing: the ancient assistance by feoffment and livery upon the land being now very seldom practiced, since the more easy and more private invention of transferring property, by secret conveyances to uses, and long terms of years being now continually created in mortgages and family settlements, which may be molded to a thousand useful purposes by the ingenuity of an able artist.

THE farther attacks in this reign upon the immunity of estates-tail, which reduced them to little more than the conditional fees at the common law, before the passing of the statute *de donis* [of gifts]; the establishment of recognizances in the nature of a statute-staple, for facilitating the raising of money upon landed security; and the introduction of the bankrupt laws, as well for the punishment of the fraudulent, as the relief of the unfortunate, trader; all these were capital alterations of our legal polity, and highly convenient to that character, which the English began now to re-assume, of a great commercial people, the incorporation of Wales with England, and the more uniform administration of justice, by destroying some counties palatine, and abridging the unreasonable privileges of such as remained, added dignity and strength to the monarchy: and, together with the numerous improvements before observed upon, and the redress of many grievances and oppressions which had been introduced by his father, will ever make the administration of Henry VIII a very distinguished era in the annals of juridical history.

IT must be however remarked, that (particularly in his later years) the royal prerogative was then strained to a very tyrannical and oppressive height; and, what was the worst circumstance, its encroachments were established by law, under the sanction of those pusillanimous parliaments, one of which to its eternal disgrace passed a statute, whereby it was enacted that the king's proclamations should have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and new-fangled treasons which were slightly touched upon in a former chapter.<sup>11</sup> Happily for the nation, this arbitrary reign was succeeded by the minority of an amiable prince; during the short sunshine of which, great part of these extravagant laws were repealed. And, to do justice to the shorter reign of queen Mary, many salutary and popular laws, in civil matters, were made under her administration; perhaps the better to reconcile the people to the bloody measures which she was induced to pursue, for the re-establishment of religious slavery: the well concerted schemes for effecting which, were (through the providence of God) defeated by the seasonable accession of queen Elizabeth.



THE religious liberties of the nation being, by that happy event, established (we trust) on an eternal basis; (though obliged in their infancy to be guarded, against papists and other non-conformists, by laws of too sanguinary a nature) the forest laws having fallen into disuse; and the administration of civil right in the courts of justice being carried on in a regular course, according to the wise institutions of king Edward the first, without any material innovations; all the principal grievances introduced by the Norman conquest seem to have been gradually shaken off, and our Saxon constitution restored, with considerable improvements: except only in the continuation of the military tenures, and a few other points, which still armed the crown with a very oppressive and dangerous prerogative. It is also to be remarked, that the spirit of enriching the clergy and endowing religious houses had (through the former abuse of it) gone over to such a contrary extreme, and the princes of the house of Tudor and their favorites had fallen with such avidity upon the spoils of the church, that a decent and honorable maintenance was wanting to many of the bishops and clergy. This produced the restraining statutes, to prevent the alienations of lands and tithes belonging to the church and universities. The number of indigent persons being also greatly increased, by withdrawing the alms of the monasteries, a plan was formed in the reign of queen Elizabeth, more humane and beneficial than even feeding and clothing of millions; by affording them the means (with proper industry) to feed and to clothe themselves. And, the farther any subsequent plans for maintaining the poor have departed from this institution, the more impracticable and even pernicious their visionary attempts have proved.

HOWEVER, considering the reign of queen Elizabeth in a great and political view, we have no reason to regret many subsequent alterations in the English constitution. For, though in general she was a wise and excellent princess, and loved her people; though in her time trade flourished, riches increased, the laws were duly administered, the nation was respected abroad, and the people happy at home; yet, the increase of the power of the star-chamber, and the erection of the high commission court in matters ecclesiastical, were the work of her reign. She also kept her parliaments at a very awful distance: and in many particulars she, at times, would carry the prerogative as high as her most arbitrary predecessors. It is true, she very seldom exerted this prerogative, so as to oppress individuals; but still she had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power, to play the tyrant. This is a high encomium on her merit; but at the same time it is sufficient to show, that these were not those golden days of genuine liberty, that we formerly were taught to believe: for, surely, the true liberty of the subject consists not so much in the gracious behavior, as in the limited power, of the sovereign.

THE great revolutions that had happened, in manners and in property, had paved the way, by imperceptible yet sure degrees, for as great a revolution in government: yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progress of those very means which afterwards reduced its power. It is obvious to every observer, that, till the close of the Lancastrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a state of great ignorance; their personal wealth, before the extension of trade, was comparatively small; and the nature of their landed property was such, as kept them in continual dependence upon their feudal lord, being usually some powerful baron, some opulent abbey, or sometimes the king himself. Though a notion of general liberty had strongly pervaded and animated the whole constitution, yet the particular liberty, the natural equality, and personal independence of individuals, were little regarded or

thought of; nay even to assert them was treated as the height of sedition and rebellion. Our ancestors heard, with detestation and horror, those sentiments rudely delivered, and pushed to most absurd extremes, by the violence of a Cade and a Tyler; which have since been applauded, with a zeal almost rising to idolatry, when softened and recommended by the eloquence, the moderation, and the arguments of a Sidney, a Locke, and a Milton.

BUT when learning, by the invention of printing and the progress of religious reformation, began to be universally disseminated; when trade and navigation were suddenly carried to an amazing extent, by the use of the compass and the consequent discovery of the Indies; the minds of men, thus enlightened by science and enlarged by observation and travel, began to entertain a more just opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants, and middling rank; while the two great estates of the kingdom, which formerly had balanced the prerogative, the nobility and clergy, were greatly impoverished and weakened. The popish clergy, detected in their frauds and abuses, exposed to the resentment of the populace, and stripped of their lands and revenues, stood trembling for their very existence. The nobles, enervated by the refinements of luxury, (which knowledge, foreign travel, and the progress of the politer arts, are too apt to introduce with themselves) and fired with disdain at being rivaled in magnificence by the opulent citizens, fell into enormous expenses: to gratify which they were permitted, by the policy of the times, to dissipate their overgrown estates, and alienate their ancient patrimonies. This gradually reduced their power and their influence within a very moderate bound: while the king, by the spoil of the monasteries and the great increase of the customs, grew rich, independent, and haughty: and the commons were not yet sensible of the strength they had acquired, nor urged to examine its extent by new burdens or oppressive taxations, during the sudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the insolence and tyranny of the orders more immediately above them, they never dreamt of opposing the prerogative, to which they had been so little accustomed; much less of taking the lead in opposition, to which by their weight and their property they were now entitled. The latter years of Henry the eighth were therefore the times of the greatest despotism, that have been known in this island since the death of William the Norman: the prerogative, as it then stood by common law, (and much more when extended by act of parliament) being too large to be endured in a land of liberty.

QUEEN Elizabeth, and the intermediate princes of the Tudor line, had almost the same legal powers, and sometimes exerted them as roughly, as their father king Henry the eighth. But the critical situation of that princess with regard to her legitimacy, her religion, her enmity with Spain, and her jealousy of the queen of Scots, occasioned greater caution in her conduct. She probably, or her able advisers, had penetration enough to discern how the power of the kingdom had gradually shifted its channel, and wisdom enough not to provoke the commons to discover and feel their strength. She therefore drew a veil over the odious part of prerogative; which was never wantonly thrown aside, but only to answer some important purpose: and, though the royal treasury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, she asked for supplies with such moderation, and managed them with so much economy, that the commons were happy in obliging her. Such, in short, were her circumstances, her necessities, her wisdom, and her good disposition, that never did a prince so long and so entirely, for the space of half a century together, reign in the affections of the people.

ON the accession of king James I, no new degree of royal power was added to, or exercised by, him; but such a scepter was too weighty to be wielded by such a hand. The unreasonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occasions, and the claim of a more absolute power inherent in the kingly office than had ever been carried into practice, soon awakened the sleeping lion. The people heard with astonishment doctrines preached from the throne and the pulpit, subversive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciously supported: and common reason assured them, that, if it were of human origin, no constitution could establish it without power of revocation, no precedent could sanctify, no length of time could confirm it. The leader felt the pulse of the nation, and found he had ability as well as inclination to resist it: and accordingly resisted and opposed it, whenever the pusillanimous temper of the reigning monarch had courage to put it to the trial; and they gained some little victories in the cases of concealments, monopolies, and the dispensing power. In the mean time very little was done for the improvement of private justice, except the abolition of sanctuaries, and the extension of the bankrupt laws, the limitation of suits and actions, and the regulating of informations upon penal statutes. For I cannot class the laws against witchcraft and conjuration under the head of improvements; nor did the dispute between lord Ellesmere and Sir Edward Coke, concerning the powers of the court of chancery, tend much to the advancement of justice.

INDEED when Charles the first succeeded to the crown of his father, and attempted to revive some enormities, which had been dormant in the reign of king James, the loans and benevolences extorted from the subject, the arbitrary imprisonments for refusal, the exertion of martial law in time of peace, and other domestic grievances, clouded the morning of that misguided prince's reign; which, though the noon of it began a little to brighten, at last went down in blood, and left the whole kingdom in darkness. It must be acknowledged that, by the petition of right, enacted to abolish these encroachments, the English constitution received great alteration and improvement. But there still remained the latent power of the forest laws, which the crown most unseasonably revived. The legal jurisdiction of the star-chamber and high commission courts was also extremely great; though their usurped authority was still greater. And, if we administration to these the disuse or parliaments, the ill-timed zeal and despotic proceedings of the ecclesiastical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ship money, and other projects, we may see grounds most amply sufficient for seeking redress in a legal constitutional way. This redress, when sought, was also constitutionally given: for all these oppressions were actually abolished by the king in parliament, before the rebellion broke out, by the several statutes for triennial parliaments, for abolishing the star-chamber and high commission courts, for ascertaining the extent of forests and forest-laws, for renouncing ship-money and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* [in chief] in consequence of their feudal tenures: though it must be acknowledged that these concessions were not made with so good a grace, as to conciliate the confidence of the people. Unfortunately, either by his own mismanagement, or by the arts of his enemies, the king had lost the reputation of sincerity; which is the greatest unhappiness that can befall a prince. Though he formerly had strained his prerogative, not only beyond what the genius of the present times would bear, but also beyond the example of former ages, he had now consented to reduce it to a lower ebb than was consistent with monarchical government. A conduct so opposite to his temper and principles, joined with some rash actions and unguarded expressions, made the people suspect that this condescension was merely temporary.

Flushed therefore with the success they had gained, fired with resentment for past oppressions, and dreading the consequences if the king should regain his power, the popular leaders (who in all ages have called themselves the people) began to grow insolent and ungovernable: their insolence soon rendered them desperate: and, joining with a set of military hypocrites and enthusiasts, they overturned the church and monarchy, and proceeded with deliberate solemnity to the trial and murder of their sovereign.

I PASS by the crude and abortive schemes for amending the laws in the times of confusion which followed; the most promising and sensible whereof (such as the establishment of new trials, the abolition of feudal tenures, the act of navigation, and some others) were adopted in the

V. FIFTH period, which I am next to mention, *viz.* after the restoration of king Charles II. Immediately upon which, the principal remaining grievance, the doctrine and consequences of military tenures, were taken away and abolished, except in the instance of corruption of inheritable blood, upon attainder of treason and felony. And though the monarch, in whose person the royal government was restored, and with it our ancient constitution, deserves no commendation from posterity, yet in his reign, (wicked, sanguinary, and turbulent as it was) the concurrence of happy circumstances was such, that from thence we may date not only the re-establishment of our church and monarchy, but also the complete restitution of English liberty, for the first time, since its total abolition at the conquest. For therein not only these slavish tenures, the badge of foreign dominion, with all their oppressive appendages, ere removed from encumbering the estates of the subject; but also an additional security of his person from imprisonment was obtained, by that great bulwark of our constitution, the *habeas corpus* act. These two statutes, with regard to our property and persons, form a second Magna Carta, as beneficial and effectual as that of Running-Mead. That only pruned the luxuriancies of the feudal system; but the statute of Charles the second extirpated all its slaveries: except perhaps in copyhold tenure; and there also they are now in great measure enervated by gradual custom, and the interposition of our courts of justice. Magna Carta only, in general terms, declared, that no man shall be imprisoned contrary to law: the *habeas corpus* act points him out effectual means, as well to release himself, though committed even by the king in council, as to punish all those who shall thus unconstitutionally misuse him.

To these I may add the abolition of the prerogatives of purveyance and preemption; the statute for holding triennial parliaments; the test and corporation acts, which secure both our civil and religious liberties; the abolition of the writ *de haeretico comburendo* [of burning heretics]; the statute of frauds and perjuries, a great and necessary security to private property; the statute for distribution of intestates' estates; and that of amendments and *jeofails*, which cut off those superfluous niceties which so long had disgraced our courts; together with many other wholesome acts, that were passed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewise consider the freedom from taxes and armies which the subject then enjoyed, will be sufficient to demonstrate this truth, "that the constitution of England had arrived to its full vigor, and the true balance between liberty and prerogative was happily established by law, in the reign of king Charles the second."

IT is far from my intention to palliate or defend many very iniquitous proceedings, contrary to all law, in that reign, through the artifice of wicked politicians, both in and out of employment. What

seems incontestable is this; that by the law,<sup>12</sup> as it then stood, (notwithstanding some invidious, nay dangerous, branches of the prerogative have since been lopped off, and the rest more clearly defined) the people had as large a portion of real liberty, as is consistent with a state of society; and sufficient power, residing in their own hands, to assert and preserve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable catastrophe of the next reign. For when king Charles's deluded brother attempted to enslave the nation, he found it was beyond his power: the people both could, and did, resist him; and, in consequence of such resistance, obliged him to quit his enterprise and his throne together. Which introduces us to the last period of our legal history; *viz.*

VI. FROM the revolution in 1688 to the present time. In this period many laws have passed; as the bill of rights, the toleration-act, the act of settlement with its conditions, the act for uniting England with Scotland, and some others: which have asserted our liberties in more clear and emphatic terms; have regulated the succession of the crown by parliament, as the exigencies of religious and civil freedom required; have confirmed, and exemplified, the doctrine of resistance, when the executive magistrate endeavors to subvert the constitution; have maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal; have indulged tender consciences with every religious liberty, consistent with the safety of the state; have established triennial, since turned into septennial, elections of members to serve in parliament; have excluded certain officers from the house of commons; have restrained the king's pardon from obstructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow peers; have regulated trials for high treason; have afforded our posterity a hope that corruption of blood may one day be abolished and forgotten; have (by the desire of his present majesty) set bounds to the civil list, and placed the administration of that revenue in hands that are accountable to parliament; and have (by the like desire) made the judges completely independent of the king, his ministers, and his successors. Yet, though these provisions have, in appearance and nominally, reduced the strength of the executive power to a much lower ebb than in the preceding period; if on the other hand we throw into the opposite scale (what perhaps the immoderate reduction of the ancient prerogative may have rendered in some degree necessary) the vast acquisition of force, arising from the riot-act, and the annual expedience of a standing army; and the vast acquisition of personal attachment, arising from the magnitude of the national debt, and the manner of levying those yearly millions that are appropriated to pay the interest; we shall find that the crown has, gradually and imperceptibly, gained almost as much in influence, as it has apparently lost in prerogative.

THE chief alterations of moment, (for the time would fail me to descent to minutiae) in the administration of private justice during this period, are the solemn recognition of the law of nations with respect to the rights of ambassadors: the cutting off, by the statute for the amendment of the law, a vast number of excrescences, that in process of time had sprung out of the practical part of it: the protection of corporate rights by the improvements in writs of *mandamus* [we command], and informations in nature of *quo warranto* [by what warrant]: the regulations of trials by jury, and the admitting witnesses for prisoners upon oath: the farther restraints upon alienation of lands in mortmain: the extension of the benefit of clergy, by abolishing the pedantic criterion of reading: the counterbalance to this mercy, by the vast increase of capital punishment: the new and effectual methods for the speedy recovery of rents: the improvements which have been made in ejectments for the trying of titles: the introduction and establishment of paper credit, by endorsements upon bills

and notes, which have shown the possibility (so long doubted) of assigning a *chose in action*: the translation of all legal proceedings into the English language: the erection of courts of conscience for recovering small debts, and (which is much the better plan) the reformation of which the foundations have been laid, by clergy developing the principles on which policies of insurance are founded, and by happily applying those principles to particular cases: and, lastly, the liberality of sentiment, which (though late) has now taken possession of our courts of common law, and induced then to adopt (where facts can be clearly ascertained) the same principles of redress as have prevailed in our courts of equity, from the time that lord Nottingham presided there; and this, not only where specially empowered by particular statutes, (as in the case of bonds, mortgages, and set-offs) but by extending the remedial influence of the equitable writ of trespass on the case, according to its primitive institution by king Edward the first, to almost every instance of injustice not remedied by any other process. And these, I think, are all the material alterations, that have happened with respect to private justice, in the course of the present century.

THUS therefore, for the amusement and instruction of the student, I have endeavored to delineate some rude outlines of a plan for the history of our laws and liberties; from their first rise, and gradual progress, among our British and Saxon ancestors, till their total eclipse at the Norman conquest; from which they have gradually emerged, and risen to the perfection they now enjoy, at different periods of time. We have seen, in the course of our inquiries, in this and the former volumes, that the fundamental maxims, and rules of the law, which regard the rights of persons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wisdom of ages: that the forms of administering justice came to perfection under Edward the first; and have not been much varied, nor always for the better, since: that our religious liberties were fully established at the reformation: but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained, till after the restoration of king Charles, nor fully and explicitly acknowledged and defined, till the era of the happy revolution. Of a constitution, so wisely contrived, so strongly raised, and so highly finished, it is hard to speak with that praise, which is justly and severely its due: ) the thorough and attentive contemplation of it will furnish its best panegyric. It has been the endeavor of these commentaries, however the execution may have succeeded, to examine its solid foundations, to mark out its extensive plan, to explain the use and distribution of its parts, and from the harmonious concurrence of those several parts to demonstrate the elegant proportion of the whole. We have taken occasion to admire at every turn the noble monuments of ancient simplicity, and the more curious refinements of modern art. Nor have its faults been concealed from view; for faults it has, lest we should be tempted to think it of more than human structure: defects, chiefly arising from the decays of time, or the rage of unskillful improvements in later ages. To sustain, to repair, to beautiful this noble pile, is a charge entrusted principally too the nobility, and such gentlemen of the kingdom, as are delegated by their country to parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind.

THE END.

## NOTES

1. Hal. Hist. C. L. 62.
2. Ibid. 57.
3. Ibid. 59.
4. Mod. Un. Hist. xx. 114.
5. Spelm. Cod. Likewise. W. 1. 288. Hen. 1. 299.
6. Stat. Civ. Lond. 13 Edw. I.
7. Hal. Hist. C. L. 138.
8. Hal. Hist. C. L. 156.
9. Ibid. 158.
10. Hal. Hist. C. L. 162.
11. See pag. 86.
12. The point of time, at which I would choose to fix this theoretical perfection of our public law, is the year 1679; after the *habeas corpus* act was passed, and that for licensing the press had expired: though the years which immediately followed it were times of great practiced oppression.

## APPENDIX

### § 1. Record of an Indictment and Conviction of Murder, at the Assizes.

Warwickshire, } **Be it remembered**, that at the general session of the lord the king of *oyer* and  
to wit. } *terminer* held at Warwick, in and for the said county of Warwick, on Friday the  
twelfth day of March in the second year of the reign of the lord George the third, now king of Great  
Britain, before Sir Michael Foster, knight, one of the justices of the said lord the king assigned to  
hold pleas before the king himself, Sir Edward Clive, knight, one of the justices of the said lord the  
king of his court of common bench, and others their fellows, justices of the said lord the king,  
assigned by letters patent of the said lord the king, under his great seal of Great Britain, made to  
them the aforesaid justices and others, and any two or more of them, whereof one of them the said  
Sir Michael Foster and Sir Edward Clive, the said lord the king would have to be one, to inquire (by  
the oath of good and lawful men of the county aforesaid, by whom the truth of the matter might be  
the better known, and by other ways, methods, and means, whereby they could or might the better  
know, as well within liberties as without) more fully the truth of all treasons, misprisions of treasons,  
insurrections, rebellions, counterfeittings, clippings, washings, false coinings, and other falsities of  
the monies of Great Britain, and of other kingdoms or dominions whatsoever; and of all murders,  
felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles,  
unlawful uttering of words, unlawful assemblies, misprisions, confederacies, false allegations,  
trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments,  
maintenances, oppressions, champarties, deceits, and all other misdeeds, offenses, and injuries  
whatsoever, and also the accessories of the same, within the county aforesaid, as well within liberties  
as without, by whomsoever and howsoever done, had, perpetrated, and committed, and by whom,  
to whom, when, how, and in what manner; and of all other articles and circumstances in the said  
letters patent of the said lord the king specified, the premises and every or any of them howsoever  
concerning; and for this time to hear and determine the said treasons and other the premises,  
according to the law and custom of the realm of England; and also keepers of the peace, and justice  
of the said lord the king, assigned to hear and determine diverse felonies, trespasses, and other  
misdemeanors committed within the county aforesaid: by the oath of Sir James Thompson, baronet,  
Charles Roper, Henry Dawes, Peter Wilson, Samuel Rogers, John Dawson, James, Philips, John  
Mayo, Richard Savage, William Bell, James Morris, Laurence Hall, and Charles Carter, esquires,  
good and lawful men of the county aforesaid, then and there impaneled, sworn, and charged to  
inquire for the said lord the king and for the body of the said county, it is presented, **that** Peter Hunt,  
late of the parish of Lighthorne in the said county, gentleman, not having the fear of God before his  
eyes, but being moved and seduced by the instigation of the devil, on the fifth, day of March in the  
said second year of the reign of the said lord the king, at the parish of Lighthorne aforesaid, with  
force and arms, in and upon one Samuel Collins, in the peace of God and of the said lord the king  
then and there being, feloniously, willfully, and of his malice aforethought, did make an assault; and  
that the said Peter Hunt with a certain drawn sword, made of iron and steel, of the value of five  
shillings, which he the said Peter Hunt in his right hand then and there had and held, him the said  
Samuel Collins in and upon the left side of the belly of him the said Samuel Collins then and there  
feloniously, willfully, and of his malice aforethought, did strike, thrust, stab, and penetrate; giving  
unto the said Samuel Collins, then and there, with the sword drawn as aforesaid, in and upon the left  
side of the belly of him the said Samuel Collins, one mortal wound of the breadth of one inch, and



the depth of nine inches; of which said mortal wound he the said Samuel Collins, at the parish of Lighthorne aforesaid in the said county of Warwick, from the said fifth day of March in the year aforesaid until the seventh day of the same month in the same year, did languish, and languishing did live; on which said seventh day of March, in the year aforesaid, the said Samuel Collins, at the parish of Lighthorne aforesaid in the county aforesaid, of the said mortal wound did die: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Peter Hunt him the said Samuel Collins, in manner and form aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, against the peace of the said lord the now king, his crown, and dignity. **Whereupon** the sheriff of the county aforesaid is commanded, that he omit not for any liberty in his bailiwick, but that he take the said Peter Hunt, if he may be found in his bailiwick, and him safely keep, to answer to the felony and murder whereof he stands indicted. **Which** said indictment the said justices of the lord the king abovenamed, afterwards, to wit, at the delivery of the jail of the said lord the king, held at Warwick in and for the county aforesaid, on Friday the sixth day of August, in the said second year of the reign of the said lord the king, before the right honorable William lord Mansfield, chief justice of the said lord the king assigned to hold pleas before the king himself, Sir Sidney Stafford Smythe, knight, one of the barons of the said lord the king, and others their fellows, justices of the said lord the king, assigned to deliver his said jail of the county aforesaid of the prisoners therein being, by their proper hands do deliver here in court of record in form of law to be determined. **And afterwards**, to wit, at the same delivery of the jail of the said lord the king of his county aforesaid, on the said Friday the sixth day of August, in the said second year of the reign of the said lord the king, before the said justices of the lord the king last above-named and others their fellows aforesaid, here comes the said Peter Hunt, under the custody of William Browne, esquire, sheriff of the county aforesaid, (in whose custody in the jail of the county aforesaid, for the cause aforesaid, he had been before committed) being brought to the bar here in his proper person by the said sheriff, to whom he is here also committed; **And** forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he says, that he is not guilty thereof; and thereof for good and evil he puts himself upon the country: and John Blencowe, esquire, clerk of the assizes for the county aforesaid, who prosecutes for the said lord the king in this behalf, does the like: **Therefore** let a jury thereupon here immediately come before the said justices of the lord the king last abovementioned, and others their fellows aforesaid, of free and lawful men of the neighborhood of the said parish of Lighthorne in the county of Warwick aforesaid, by whom the truth of the matter may be the better known, and who are not of kin to the said Peter Hunt, to recognize upon their oath, whether the said Peter Hunt be guilty of the felony and murder in the indictment aforesaid above specified, or not guilty: because as well the said John Blencowe, who prosecutes for the said lord the king in this behalf, as the said Peter Hunt, have put themselves upon the said jury. And the jurors of the said jury by the said sheriff for this purpose impaneled and returned, to wit, David Williams, John Smith, Thomas Horne, Charles Nokes, Richard May, Walter Duke, Matthew Lyon, James White, William Bates, Oliver Green, Bartholomew Nash, and Henry Long, being called, come; who being elected, tried, and sworn, to speak the truth of an concerning the premises, upon their oath say, **that** the said Peter Hunt is guilty of the felony and murder aforesaid, on him above charged in the form aforesaid, as by the indictment aforesaid is above supposed against him; and that the said Peter Hunt at the time of committing the said felony and murder, or at any time since to this time, had not nor has any goods or chattels, lands or tenements, in the said county of Warwick, or elsewhere, to the knowledge of the said jurors. And upon this it is forthwith demanded of the said Peter Hunt, if he has or knows anything to say, wherefore the said

justices here ought not upon the premises and verdict aforesaid to proceed to judgment and executions him: who nothing farther says, unless as he before had said. **Whereupon**, all and singular the premises being seen, and by the said justices here fully understood, **it is considered** by the court here, that the said Peter Hunt betaken to the jail of the said lord the king of the said county of Warwick from whence he came, and from thence to the place of execution on Monday now next ensuing, being the ninth day of this instant August, and there be hanged by the neck until he be dead; and that afterwards his body be dissected and anatomized.

## § 2. Conviction of Manslaughter.

\_\_\_\_\_ upon their oath say, **that** the said Peter Hunt is not guilty of the murder aforesaid, above charged upon him; but that the said Peter Hunt is guilty of the felonious slaying of the aforesaid Samuel Collins; and that he had not nor has any goods or chattels, lands or tenements, at the time of the felony and manslaughter aforesaid, or ever afterwards to this time, to the knowledge of the said jurors. And immediately it is demanded of the said Peter Hunt, if he has or knows anything to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: **who says** that he is a clerk, and prays the benefit of clergy to be allowed him in this behalf. **Whereupon**, all and singular the premises being seen, and by the said justices here fully understood, **it is considered** by the court here, that the said Peter Hunt be burned in his left hand, and delivered. And immediately he is burned in his left hand, and is delivered, according to the form of the statute.

## § 3. Entry a Trial *Instanter* in the Court of King's Bench, upon a Collateral Issue; and Rule of Court for Execution Thereon.

Michaelmas term, in the sixth year of the reign of king George the third.

Kent: The King  
against Thomas Rogers } **The prisoner** at the bar being brought into this court in custody of the sheriff of the county of Sussex, by virtue of his majesty's writ of *habeas corpus*, **it is ordered** that the said writ and the return thereto be filed. **And** it appearing by a certain record of attainder, which has been removed into this court by his majesty's writ of *certiorari*, that the prisoner at the bar stands attainted, by the name of Thomas Rogers, of felony for a robbery on the highway, and the said prisoner at the bar having heard the record of the said attainder now read to him, is now asked by the court here, what he has to say for himself, why the court here should not proceed to award execution against him upon the said attainder. **He** for plea says, that he is not the same Thomas Rogers in the said record of attainder named, and against whom judgment was pronounced: and this he is ready to verify and prove, etc. **To** which said plea the honorable Charles Yorke, esquire, attorney general so our present sovereign lord the king, who for our said lord the king in this behalf prosecutes, being now present here in court, and having heard what the said prisoner at the bar has now alleged, for our said lord the king by way of reply says, that the said prisoner now here at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was pronounced as aforesaid: and this he prays may be inquired into by the country; and the said prisoner at the bar does the like: **Therefore** let a jury in this behalf

immediately come here into court, by whom the truth of the matter will be the better known, and who have no affinity to the said prisoner, to try upon their oath, whether the said prisoner at the bar be the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as aforesaid, or not: because as well the said Charles Yorke, esquire, attorney general of our said lord the king, who for our said lord the king in this behalf prosecutes, as the said prisoner at the bar, have put themselves in this behalf upon the said jury. **And** immediately thereupon the said jury come here into court; and being elected, tried, and sworn to speak the truth touching and concerning the premises aforesaid, and having heard the said record read to them, do say upon their oath, that the said prisoner at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as aforesaid, in manner and form as the said attorney general has by his said replication to the said plea of the said prisoner now here at the bar alleged. **And hereupon** the said attorney general on behalf of our said lord the king now prayeth, that the court here would proceed to award execution against him the said Thomas Rogers upon the said attainder. **Whereupon**, all and singular the premises being now seen and fully understood by the court here, **it is ordered** by the court here, that execution be done upon the said prisoner at the bar for the said felony in pursuance of the said judgment, according to due form of law: **And** it is lastly ordered, that he the said Thomas Rogers, the prisoner at the bar, be now committed to the custody of the sheriff of the county of Kent (now also present here in court) for the purpose aforesaid; and that the said sheriff of Kent do execution upon the said defendant the prisoner at the bar for the said felony, in pursuance of the said judgment, according to due form of law.

On the motion of Mr. Attorney General.

By the Court.

#### § 4. Warrant of Execution on Judgment of Death, at the General Jaildelivery in London and Middlesex.

London and Middlesex { To the sheriffs of the city of London; and to the sheriff of the county of Middlesex: and to the keeper of his majesty's jail of Newgate.

**Whereas** at the session of jail delivery of Newgate, for the city of London and county of Middlesex, held at Justice Hall in the Old Bailey, on the nineteenth day of October last, Patrick Mahony, Roger Jones, Charles King, and Mary Smith, received sentence of death for the respective offenses in their several indictments mentioned; **Now it is hereby ordered**, that execution of the said sentence be made and done upon them the said Patrick Mahony and Roger Jones, on Wednesday the ninth day of this instant month of November at the usual place of execution. **And** it is his majesty's command, that execution of the said sentence upon them the said Charles King and Mary Smith be respited, until his majesty's pleasure touching them be farther known.

**Given** under my hand and seal this fourth day of November, one thousand seven hundred and sixty eight.

James Eyre, Recorder. L. S.

**§ 5. Writ of Execution upon a Judgment of Murder, Before the King in Parliament.**

GEORGE the second by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth; to the sheriffs of London and sheriff of Middlesex, greeting. **Whereas** Lawrence earl Ferrers, viscount Tamworth, has been indicted of felony and murder by him done and committed, which said indictment has been certified before us in our present parliament; and the said Lawrence earl Ferrers, viscount Tamworth, has been thereupon arraigned, and upon such arraignment has pleaded not guilty; and the said Lawrence earl Ferrers, viscount Tamworth, has before us in our said parliament been tried, and in due form of law convicted thereof; and whereas judgment has been given in our said parliament, that the said Lawrence earl Ferrers, viscount Tamworth, shall be hanged by the neck till he is dead, and that his body be dissected and anatomized, the execution of which judgment yet remains to be done: **We** require, and by these presents strictly command you, that upon Monday the fifth day of May instant between the hours of nine in the morning and one in the afternoon of the same day, him the said Lawrence earl Ferrers, viscount Tamworth, without the gate of our tower of London (to you then and there to be delivered, as by another writ to the lieutenant of our tower of London or to his deputy directed, we have commanded) into your custody you then and there receive: and him in your custody so being, you forthwith convey to the accustomed place of execution at Tyburn: and that you do cause execution to be done upon the said Lawrence earl Ferrers, viscount Tamworth, in your custody so being, in all things according to the said judgment. And this you are by no means to omit, at your peril. **Witness** ourself at Westminster the second day of May, in the thirty third year of our reign.

Yorke and Yorke.

T H E E N D.