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 offences;[c] 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 as liable as others to commit, for these an infant[d] is equally liable to suffer as a person of the full age of twenty-one.

With regard to 'felonies,' the law is still more minute and circumspect, distinguishing with greater nicety the several degrees of age and discretion. By the antient Saxon law, the age of twelve years was established for the age of possible discretion, when first the understanding might open;[e] and from thence till the offender was fourteen, it was *ætas 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 cases our maxim is, that "*malitia supplet ætatem.*" Under seven years of age, indeed, an infant cannot be guilty of felony,[f] for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony.[g] Also, under fourteen, though an infant shall be *primâ facie* adjudged to be *doli incapax*;[h] 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.

[c] 1 Hal. P. C. 20, 21, 22.

[d] Sir William Blackstone here adds, *above the age of fourteen;* but if an infant under that age may be convicted of *felony*, it is difficult to see why he should not be equally responsible for an offence that amounts only to a *misdemeanor*. These words are, therefore, omitted.

[e] LL. Athelstan; 1 Thorpe, 199.

[f] Mirr. c. 4, § 16; 1 Hal. P. C. 27.

[g] Dalt. Just. c. 147.

[h] *Rex* v. *Owen*, 4 C. & P. 236.

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.[i] And there 'is' an instance in 'our books' 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.[j] Thus also, a boy of ten years old 'has been' convicted on his own confession of murdering his bedfellow, there appearing in his whole behaviour 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.[k] But, in all such cases, the evidence of that malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction.

II. The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from 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*." 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.[l] Also, if a man in his sound 'mind' commits an offence, and before arraignment for it he becomes mad, he ought not to be 'called on to plead to it, because he is unable to do so' 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 defence? 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

[i] 1 Hal. P. C. 26, 27.
[j] Emlyn on 1 Hal. P. C. 25.
[k] Foster, 72.
[l] 3 Inst. 6.

memory, he might have alleged something in stay of judgment or execution.[m] Indeed, in the bloody reign of Henry the Eighth, a statute was made,[n] which enacted that if a person, being *compos mentis*, 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,[o] "the execution of an offender is, "for example, *ut pœna 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."

'The insanity of a prisoner is ordinarily ascertained at the trial; in which case it lies on the accused to establish that he was *non compos mentis* when the offence was committed, which, if proved, entitles him to an acquittal. If, however, there be any reason to suppose that the accused ought not to be called upon to answer the charge against him, a jury may be impanelled on his arraignment to try the question of insanity only; and if found insane, whether on his trial or on his arraignment, the offender is detained in custody during the pleasure of the crown. But in the one case, having been acquitted of the indictable offence, he cannot be again put on his trial; in the other, he may be tried if he regains the possession of his faculties;[p] for' if a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals, as if he had no deficiency.[q] In the case of 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 'community.' It was the doctrine of our antient law, that persons deprived of their reason might be confined till they recovered their senses,[r] without waiting for the forms of a commission or other special authority from the crown; 'afterwards, by express enactment, persons discovered under circumstances denoting a derangement of mind, and a purpose

[m] 1 Hal. P. C. 34.

[n] 33 Hen. VIII. c. 20.

[o] 3 Inst. 6.

[p] See 39 & 40 Geo. III. c. 94, and 3 & 4 Vict. c. 54.

[q] 1 Hal. P. C. 31. 'As to the nature of the insanity which takes away the responsibility for crime, and the mode in which it is to be left to the jury, see the rules laid down by the Judges in *M'Naughten's* case, 10 Cl. & Fin. 200.'

[r] Bro. Abr. tit. *Corone*, 101.

of committing some indictable offence, might be apprehended and committed as a dangerous person suspected to be insane.[s] But now constables, relieving officers, and overseers of parishes are required to apprehend all persons wandering at large, and deemed to be lunatics, and take them before a justice, when, on due inquiry, they are sent to an asylum.'[t]

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 offence, rather than as an excuse for any criminal misbehaviour.[u] A drunkard, says Sir Edward Coke,[v] who is *voluntarius dæmon*, hath no privilege thereby, but what hurt or ill soever he doth, his drunkenness doth aggravate it: *nam omne crimen ebrietas, incendit, et detegit.* 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 the 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,[w] 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 warm 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 inebriety which prompted him to commit it.[x] The Roman law, indeed, made great allowances for this vice: "*per "vinum delapsis capitalis pœna remittur.*"[y] But the law of England, considering how easy it is to counterfeit this excuse, and how weak an excuse it is, will not suffer any man thus to privilege one crime by another.[z]

IV. A fourth deficiency of will is where a man commits an unlawful act by *misfortune* or *chance*, and not by design. Here

[s] 39 & 40 Geo. III. c. 94, s. 3.
[t] 16 & 17 Vict. c. 97, s. 68.
[u] *R.* v. *Carroll*, 7 C. & P. 145.
[v] 1 Inst. 247.
[w] Sp. L. b. 14, c. 10.
[x] Puff. L. of N. b. 8, c. 3.
[y] Ff. 49, 16, 6.
[z] Plowd. 19.

the will observes a total neutrality, and does not co-operate 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 'in a lawful manner,'[a] 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 offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour.[b]

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 the 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, 'under circumstances which would justify that act,' by mistake kills one of his own family, this is no criminal action:[c] 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 defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law,[d] as it was of the Roman.[e]

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.

[a] 1 East, P. C. c. 5, s. 36.
[b] 1 Hal. P. C. 39.
[c] Cro. Car. 538.
[d] Plowd. 343. 'Ignorance of our law is no defence even for a *foreigner*, when charged with an offence.' *R.* v. *Esop*, 7 C. & P. 456.
[e] Ff. 22, 6, 9.

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 conscientiæ*, 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 endeavoured 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 a 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;[f] though in some cases the command or authority of the husband, either express or implied, will privilege the wife from punishment. And therefore, if a woman commit theft, burglary, or other civil offences against the laws of society, by the coercion of her husband; or even in his company, which the law construes a coercion; she is not guilty of any crime, being considered, 'until the presumption be rebutted,' as acting by compulsion, and not of her own will;[g] 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.[h] 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 offence with a freeman; the male or freeman only was punished, the female or slave dismissed: "*proculdubio quod alterum libertas, alterum necessitas impelleret.*"[i] But besides that in our law, which is a

[f] 1 Hawk. P. C. b. 1, c. 1, s. 14.

[g] 1 Hal. P. C. 45; *R.* v. *Price*, 8 C. & P. 19.

[h] Cap. 57; 1 Thorpe, 139.

[i] Stiernh. de Jure Sueon. l. 2, c. 4.

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;[j] 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:[k] because of the odiousness and dangerous consequence of the crime itself.[l] In inferior misdemeanors, we may remark another exception: that a wife may be indicted *with* her husband, for keeping a brothel; for this is an offence touching the domestic economy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex.[m] And in all cases where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence as much as any feme-sole.[n]

2. Another species of compulsion or necessity is what our law calls *duress per minas;* 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 Bracton expresses it,[o] in the words of the civil law.[p] 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.[q] This, however, seems only, or at least principally, to hold

[j] *Reg.* v. *Manning*, 2 Car. & K. 903.

[k] 1 Hal. P. C. 47.

[l] 'Blackstone adds,' 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; 'but this reasoning is applicable to every crime, in which a wife is joined with her husband.'

[m] 1 Hawk. P. C. 2, 3.

[n] Russ. & Ry. C. C. 270.

[o] L. 2, f. 16.

[p] Ff. 4, 2, 5 & 6.

[q] 1 Hal. P. C. 50.

as to positive crimes, so created by the laws of society, and which, therefore, society may excuse; but not as to natural offences 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 and force shall not acquit him of murder, for he ought rather to die himself than escape by the murder of an innocent.[r] But in such a case he is permitted to kill the assailant; for there the law of nature and self-defence, 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 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 offence, 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 the felony which the killing would otherwise amount to.[s]

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[t] and Puffendorf,[u] together with many other of the foreign jurists, hold in the affirmative; maintaining by many ingenious, humane, and plausible reasons, that in such cases the community

[r] 1 Hal. P. C. 51.
[s] Ibid. 53.
[t] De Jure B. & P. l. 2, c. 2.
[u] L. of Nat. & N. l. 2, c. 6.

of goods by a kind of tacit concession of society is revived. And some even of our lawyers have held the same,[v] 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.[w] And this its doctrine is agreeable not only to the sentiments of many of the wisest ancients, particularly Cicero,[x] who holds that "*suum cuique* "*incommodum ferendum est, potius quam de alterius commodis* "*detrahendum;*" but also to the Jewish law, as certified by King Solomon himself;[y] "if a thief steal to satisfy his soul when he "is hungry, he shall restore seven-fold, 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 that 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 Puffendorf, and whereon he builds his principal arguments: which, however they may hold elsewhere, 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 sovereign, on the representation of his ministers of justice, has a power to soften the law, and to extend mercy in cases of peculiar hardship.

VII. To these several cases, in which the incapacity of committing crimes arises from a deficiency of the will, 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 the mind. I mean the case of the sovereign; who, by virtue of his royal prerogative, is not under the coercive power of the law;[z] which

[v] Britton, c. 10; Mirr. c. 4, § 16.
[w] 1 Hal. P. C. 54.
[x] De Off. l. 3, c. 5.
[y] Prov. vi. 30.
[z] 1 Hal. P. C. 44.

will not suppose him capable of committing a folly, much less a crime. We are therefore, out of reverence and decency, to forbear any idle inquiries of what would be the consequence, if the sovereign 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 grievance.

CHAPTER III.

OF PRINCIPALS AND ACCESSORIES.

It having been shown what persons are, or are 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*.

I. A man may be *principal* in an offence in two degrees. A principal in the first degree is he 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. 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. 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 persuading another to drink it, who is ignorant of its poisonous quality, or giving it to him for that purpose; and yet not administer it himself, nor be present when the very deed of poisoning is committed. And the same reasoning will hold, with regard to other murders committed in the absence of the murderer, by means which he had prepared beforehand, 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.

II. An *accessory* is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either *before* or *after* the fact committed. In considering the nature of which degree of guilt, we will, first, examine what offences 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 principals, are to be treated.

1. And, first, as to what offences 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.[a] Besides, it is to be considered, that the bare intent to commit treason is many times actual treason: as imagining the death of the sovereign, 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.[b] In murder and other felonies, there may be accessories: except only in those offences, which by judgment of law are sudden and premeditated, as manslaughter and the like; which therefore cannot have any accessories *before* the fact.[c] So too in 'misdemeanors' and in all crimes under the degree of felony, there are no accessories either *before* or *after* the fact; but all persons concerned therein, if guilty at all, are principals:[d] the same rule holding with regard to the highest and lowest offences, though upon different reasons. In treason all are principals, *propter odium delicti;* in trespass all are principals, because the law, *quæ de minimus non curat*, does not

[a] 3 Inst. 138; 1 Hal. P. C. 613.
[b] Foster, 342.
[c] 1 Hal. P. C. 615.
[d] 1 Hal. P. C. 613; *Reg.* v. *Greenwood*, 2 Den. & P. C. C. R. 453.

descend to distinguish the different shades of guilt in petty misdemeanors. It is a maxim, that *accessorius sequitur naturam sui principalis*:[e] and therefore an accessory cannot be guilty of a higher crime than his principal; being only punished as a partaker of his guilt.

2. As to the second point, who may be an accessory *before* the fact, Sir Matthew Hale[f] defines him to be one, who being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime.[g] Herein absence 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 holds, even though the party killed be not in *rerum naturæ* 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.[h] And it is also settled,[i] 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 unconsequential nature.[j] 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, and dies; the command 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.[k]

3. An accessory *after* the fact may be where a person, knowing

[e] 3 Inst. 139.
[f] 1 Hal. P. C. 615, 616.
[g] *R.* v. *Tuckwell*, 1 Car. & M. 215.
[h] Dyer, 186.
[i] Foster, 125.
[j] 1 Hal. P. C. 617.
[k] 2 Hawk. P. C. 316.

a felony to have been committed, receives, relieves, comforts, or assists the felon. Therefore, to make an accessory *ex post facto*, it is in the first place requisite that he knows of the felony committed.[l] 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.[m] So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessory to the felony. But to relieve a felon in gaol with clothes or other necessaries, is no offence; for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law.[n] 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 made not the receiver accessory to the theft, because he received the *goods* only, and not the *felon*.[o] But now all such offenders are made accessories 'and felons.'[p] In France receivers 'were formerly' punished with death, 'but are now' subject to the same punishment as the principal offender.[q] The Gothic constitutions distinguished also three sorts of thieves, "*unum qui consilium daret, alterum qui "contractaret, tertium qui receptaret et occuleret; pari pœnæ singulos "obnoxios.*"[r]

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.[s] 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 the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any

[l] 2 Hawk. P. C. 319.
[m] Ibid. 317, 318.
[n] 1 Hal. P. C. 620, 621.
[o] Ibid. 620.
[p] See *post*, ch. x.
[q] Code Penal, lib. 2, art. 62, 63.
[r] Stiernhook, l. 3, c. 5.
[s] 2 Hawk. P. C. 320.

of them committed a felony, the receivers become accessories *ex post facto*.[t] 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.[u]

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,[v] is this, that accessories shall suffer the same punishment as their principals: if one be liable to death, the other is also liable;[w] as, by the laws of Athens, delinquents and their abettors were to receive the same punishment.[x] 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 harbouring the robber. 2. Because, though by the ancient common law the rule is as before laid down, that both shall be punished alike, yet 'subsequently'[y] a distinction was made between them: accessories *after* the fact being allowed the benefit of clergy in all cases, except horse-stealing and stealing of linen from bleaching grounds, while it was denied to the principals and accessories *before* the fact, in many cases; and especially in murder, robbery, and wilful burning. 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 treated 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.[z] 3. Because 'formerly' no man could be tried as accessory till after the principal was convicted, or at least he must have been tried at the same time with him; though the law 'in this respect' is now altered, as will be shown more fully in its proper place.

[t] 3 Inst. 108; 2 Hawk. P. C. 320.

[u] 1 Hal. P. C. 621; *Reg.* v. *Good*, 1 Car. & K. 185.

[v] Stiernhook, l. 3, c. 5.

[w] 3 Inst. 188.

[x] Pott. Antiq. b. 1, c. 26.

[y] By statutes relating to the benefit of clergy. *Post*, ch. xxvii.

[z] Beccar. c. 37.

4. Because, though a man be indicted as accessory and acquitted, he may afterwards be indicted as principal: for an acquittal of receiving or counselling a felon, is no acquittal of the felony itself; 'and' one acquitted as principal may be indicted as an accessory *after* the fact; since that is always an offence 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 'in respect to accessories *after* the fact; but these reasons do not apply to accessories *before* the fact, and they accordingly may be indicted, tried, convicted, and punished in all respects like the principal.'[a]

[a] 11 & 12 Vict. c. 46, s. 1, now repealed, but re-enacted by the statute 24 & 25 Vict. c. 94, s. 1.

CHAPTER IV.

OF OFFENCES AGAINST GOD AND RELIGION.

We are now 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, 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 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: 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 is 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 malevolent lying are *in foro conscientiæ* 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 have in themselves nothing criminal, but are made unlawful by the positive constitutions of the state for public convenience. Such as poaching, 'smuggling,' and the like. These are naturally no offences 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 offences to be enumerated in the following sheets are offences against the revealed law of God, others against the law of nature, and some are offences 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 offences, 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 executive power of the state, or the sovereign and his government; *fourthly*, such as more directly infringe the rights of the public or commonwealth; and, *lastly*, such as derogate from those rights and duties, which are owing to particular individuals, and in the preservation and vindication of which the community is deeply interested.

First then, of 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 *apostacy*, or a total renunciation of Christianity, by embracing either a false religion, or no religion at all. This offence can only take place in such as have once professed the true religion. The perversion of a Christian to Judaism, Paganism, or other false religion, was

punished by the Emperors Constantius and Julian with confiscation of goods, to which the Emperors Theodosius and Valentinian added capital punishment, in case the apostate endeavoured to pervert others to the same iniquity. A punishment too severe for any temporal laws to inflict upon any spiritual offence: and yet the zeal of our ancestors imported it into this country; for we find by Bracton, 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 in 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 Saviour Christ, these are the grand foundation of all judicial oaths; which call God to witness the truth of those facts, which perhaps may be only known to him and the party attesting: all moral evidence, therefore, all confidence in human veracity, must be weakened by apostacy, and overthrown by total infidelity. Wherefore all affronts to Christianity, or endeavours to depreciate its efficacy, in those who have once professed it, are highly deserving of censure. But yet the loss of life is a heavier penalty than the offence, 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 offence of apostacy 'has for a long time been' the object only of the ecclesiastical courts, which correct the offender *pro salute animæ*.[a]

[a] About the close of the 'seventeenth' century, the civil liberties to which we were then restored being used as a cloak of maliciousness, and the most horrid doctrines subversive of all religion being publicly avowed both in discourse and writings, it was thought necessary for the civil power to interpose, by not admitting those miscreants to the privileges of society, who maintained such principles as destroyed all moral obligation. To this end it was enacted by statute 9 & 10 Will. III. c. 32, that if any person educated in the Christian religion, or professing the same, should deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he should upon the first offence be rendered incapable to hold any office or place of trust; and, for the second, be rendered incapable of bringing any action, or being guardian, executor, legatee, or purchaser of lands, and shall suffer three years' imprisonment without bail. 'The penalties of this act extended to persons denying the doctrine of the Trinity, but so far, it was repealed by the stat. 53 Geo. III. c. 160, s. 2; and the act may now be regarded as practically obsolete.'

II. A second offence is that of *heresy*, which consists not in a total denial of Christianity, but of some of its essential doctrines, publicly and obstinately avowed; being defined by Sir Matthew Hale, "*sententia rerum divinarum humano sensu excogitata, palam "docta et pertinaciter defensa.*" 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 a heretic given by Lyndewood, extends to the smallest deviations from the doctrines of holy church, "*hæreticus est qui dubitat de fide catholicâ, et qui negligit "servare ea, quæ Romana ecclesia statuit, seu servare decreverit.*" Or, as the statute 2 Hen. IV. c. 15, expresses it, in English, "teachers of erroneous opinions, contrary to the faith and blessed "determinations of the holy church." Very contrary this is to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness.

What ought to have alleviated the punishment, the uncertainty of the crime, seems 'in the early Christian centuries rather' to have enhanced it. 'For to the blind zeal of the age only, can be attributed' the capital punishments inflicted on the Donatists and Manichæans by the Emperors Theodosius and Justinian: 'and' the constitution of the Emperor Frederic, mentioned by Lyndewode, adjudging all persons without distinction to be burnt with fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, indeed, 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 to more dutiful sons of the Church.[b]

[b] 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. Baldus in Cod. 1, 5, 4.

Christianity being thus deformed by the demon 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 a writ *de hæretico comburendo*, 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 hæretico comburendo* being not a writ of course, but issuing only by the special direction of the king in council.

But in the reign of Henry the Fourth,[c] the clergy, taking advantage from the king's dubious title to demand an increase of their own power, obtained an act of parliament, which sharpened the edge of persecution to its utmost keenness. For, by '2 Hen. IV. c. 15,' the diocesan alone, without the intervention of a 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*, if required by the bishop, to commit the unhappy victim to the flames, without waiting for the consent of the crown. By the statute 2 Hen. V. c. 7, Lollardy was also made a temporal offence, and indictable in the king's courts; which did not thereby gain an exclusive, but only a concurrent jurisdiction with the bishop's consistory.

The power of the ecclesiastics was 'not long afterwards' 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 offences 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

[c] 'Sir W. Blackstone says,' when the eyes of the Christian world began to open, and the seeds of the Protestant religion, though under the opprobrious name of Lollardy, took root in this kingdom. These Lollards were so called, not from *lolium*, or tares, an etymology which was afterwards devised in order to justify the *burning* of them, Matth. xiii. 30, but from one Walter Lolhard, a German reformer, A.D. 1315.

only diverted into a lay channel. For in six years afterwards, the bloody statute, 'as it is called,' of the Six Articles was made; 'and' transubstantiation, communion in one kind,[d] the celibacy of the clergy, monastic vows, 'private masses,'[e] and auricular confession 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 of the first to be heretics, and to be burnt with fire; and of the five last to be felons, and to suffer death.

I shall not perplex this detail with the various repeals and revivals of these sanguinary laws in the two succeeding reigns, but shall proceed directly to the reign of Queen Elizabeth, 'by whose very first act' all former statutes relating to heresy are repealed, 'thus leaving' 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. 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 hæretico comburendo* was not demandable of common right, but grantable or otherwise, merely at the sovereign's discretion. 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 of the canonical scriptures.

[d] That is, *the sufficiency of* communion in one kind.

[e] Sir W. Blackstone says, "the sacrifice of the mass;" but see the words of the statute itself; 31 Hen. VIII. c. 14.

For the writ *de hæretico 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 animæ*, by virtue of the statute 29 Car. II. c. 9. 'In which position it has ever since remained; and prosecutions for heresy have accordingly become entirely obsolete.'

III. Another species of offences against religion are those which affect the *established Church*. And these are either positive, or negative: positive, by reviling its ordinances; or negative, by nonconformity to its worship. Of both of these in their order.

1. And, first, of the offence of *reviling the ordinances* of the Church. This is a crime of a much grosser nature than the other of mere nonconformity, since it carries with it the utmost indecency, arrogance, and ingratitude; indecency, by setting up private judgment in virulent and factious opposition to public authority; 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 undisturbed liberty of conscience to the members of the national Church, which the retainers of 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 the statute 1 Eliz. c. 2, that if any minister shall speak anything in derogation of the Book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second: and if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second offence he shall be deprived, and suffer one year's imprisonment; and for the third, shall, in like manner, be deprived, and suffer imprisonment for life. And that if *any person* whatsoever shall, in plays, songs, or other open words, speak anything in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be used in its stead, he shall forfeit for the first offence a hundred marks, for the second, four hundred, and

for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life. These penalties were framed in the infancy of our present establishment, when the disciples of Rome and 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; so far as they are' levelled at the offence, not of *thinking* differently from the national Church, but of *railing* at that Church and *obstructing* its ordinances, for not submitting its public judgment to the private opinion of others. For, though it is clear that no restraint should be laid upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship, yet contumely and contempt are what no establishment can tolerate.[f] A rigid attachment to trifles, and an intemperate zeal for reforming them, are equally ridiculous and absurd; but the latter is at present the less excusable, because from political reasons, it would now be extremely unadvisable to make any alterations in the service of the Church, unless by its own consent, or unless it can be shown that some manifest impiety or shocking absurdity will follow from continuing the present forms.

2. Nonconformity to the worship of the Church is the other, or negative branch of this offence. 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 show 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.

Nonconformists are of two sorts: first, such as absent them-

[f] By an ordinance, 23 Aug. 1645, which continued till the Restoration, to preach, write, or print anything in derogation of the *directory*, for the then established Presbyterian worship, subjected the offender to a discretionary fine, not exceeding fifty pounds. Scobell, 98.

selves from 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, 'were liable to' forfeit one shilling to the poor every Lord's Day they so absented themselves, and 20*l.* to the crown if they continued such default for a month together. And if they kept any inmate, thus irreligiously disposed, in their houses, they forfeited 10*l.* per month. 'But these enactments being thought inconsistent with the more tolerant spirit of the present age, have been entirely repealed,[g] and this kind of nonconformity is no longer an offence.'

The second species of nonconformists 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 not communicating with the national Church, with this difference, that the papists divided from it upon material, though erroneous reasons; but many of the dissenters upon matters of indifference, or, in other words, upon no reason at all. 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; and, if this can be better effected by admitting none but its genuine members to offices of trust and emolument, he is certainly at liberty so to do, the disposal of offices being matter of favour and discretion.[h]

[g] 9 & 10 Vict. c. 59; 26 & 27 Vict. c. 125.

[h] In order, as it was thought, the better to secure the established Church against perils from nonconformists of all denominations, infidels, Turks, Jews, heretics, papists, and sectaries, there were two bulwarks erected, 'on the restoration of Charles II.,' called the *Corporation* and *Test* Acts: by the former of which no person could be legally elected to any office relating to the government of any city or corporation, unless, within a twelvemonth before, he had received the sacrament of the Lord's Supper according to the rites of the Church of England; and he was also enjoined to take the oaths of allegiance

But this point 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 colour 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 upon them by abundance of statutes,[i] yet at length the legislature, with a 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.[j] The penalties were conditionally suspended by the statute 1 W. & M. st. 1, c. 18, "for exempting their "Majesties' Protestant subjects, dissenting from the Church of "England, from the penalties of certain laws," commonly called the *Toleration Act;* which was confirmed by statute 10 Anne, c. 2, and declared that neither the laws above mentioned, nor the statutes 1 Eliz. c. 2, s. 14, 3 Jac. I. c. 4 & 5, nor any other penal laws made against popish recusants, except the Test Acts, should extend to any dissenters, other than papists, and such as denied the Trinity. 'These exceptions, as to papists, unitarians, and others, which were long considered essential to the well-being of the state, were, however, removed by the statutes 31 Geo. III.

and supremacy at the same time that he took the oath of office: or, in default of either of these requisites, such election was void. The other, called the Test Act, directed all officers, civil and military, to take the oaths and make the declaration against transubstantiation, in any of the king's courts at Westminster, or at the quarter sessions, within six calendar 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 churchwarden, and also to prove the same by two credible witnesses; upon forfeiture of 500*l.* and disability to hold the office. 'Both acts were repealed by the statute 9 Geo. IV. c. 17.'

[i] 23 Eliz. c. 1; 29 Eliz. c. 6; 35 Eliz. c. 1; 22 Car. II. c. 1.

[j] The ordinance of 23 August, 1645, inflicted imprisonment for a year on the third offence, and pecuniary penalties on the former two, in case of using the Book of Common Prayer, not only in a place of public worship, but also in any private family.

c. 32, 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 59. And by these and other acts, especially those of the last and present reign, permitting the marriages of dissenters in their own places of worship, imposing penalties on persons disturbing meetings lawfully assembled for public worship, or the teachers or preachers therein,[k] and providing for a civil registration of births, deaths, and marriages, independently of the established Church,' the crime of nonconformity, though by no means universally abrogated, is suspended, 'if it does not altogether' cease to exist: and all persons are left at full liberty to act as their consciences shall direct them, in the matter of religious worship.

As to *papists*, what has been said of the Protestant dissenters holds equally strong for a general toleration of them; 'nevertheless it was long before the amelioration of the laws accorded to Protestant dissenters, was followed by the grant of corresponding privileges to the adherents of the Church of Rome. In justification of this treatment it was urged that their position differed from that of the dissenters, whose' separation was founded only upon difference of opinion in religion, and whose principles did not also extend to a subversion of the civil government; and that while Roman Catholics acknowledged a foreign power, superior to the sovereignty of the kingdom, they could not complain if the laws of that kingdom did not treat them upon the footing of good subjects.

'The disabilities under which they so long laboured have, with slight exceptions, been removed after a long and arduous struggle; but it may nevertheless be useful to take a concise' view of the laws which formerly prevailed against the papists, 'as they are termed in our books, which for this purpose divide them' into three classes: persons professing popery, popish recusants convict, and popish priests. 1. *Persons professing the popish religion*, besides the penalties for not frequenting their parish church, were disabled

[k] 9 & 10 Vict. c. 59. 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. 'This gave rise to the statute 5 Geo. I. c. 4, whereby no mayor or principal magistrate could appear at any dissenting meeting with the ensigns of his office, on pain of disability to hold that or any other office. And as recently as 10 Geo. IV. c. 7, officers of corporations were forbidden to attend with the insignia of office at any place of worship other than the established Church, under a penalty of 100*l*. Both statutes are virtually repealed by 30 & 31 Vict. c. 75, s. 4.'

from taking their lands either by descent or purchase, after eighteen years of age, until they renounced their errors: at the age of twenty-one they were obliged to register their estates before acquired, and also to register all future conveyances and wills relating to them; they were, 'and still remain,' incapable of presenting to any advowson, or granting to any other person any avoidance of the same; they could not keep or teach any school under pain of perpetual imprisonment; and if they willingly said or heard mass, they forfeited for the one offence two hundred, for the other one hundred marks, and were subject to suffer a year's imprisonment. Thus much for persons who were attached to the Romish church from their infancy, and publicly professed its 'faith.' But, if any person sent another abroad to be educated in the popish religion, or to reside in any religious house abroad for that purpose, or contributed to their maintenance when there; both the sender, the sent, and the contributor were disabled to sue in law or equity, to be executor or administrator to any person, to take any legacy or deed of gift, or to bear any office in the realm, and forfeited all their goods and chattels, and likewise all their real estate for life. And when these errors, 'as they were termed,' were also aggravated by apostacy, or perversion, where a person was reconciled to the see of Rome, or procured others to be reconciled, the offence amounted to high treason. 2. *Popish recusants*, convicted in a court of law of not attending the service of the Church of England, were subject to the following disabilities, penalties, and forfeitures, over and above those before mentioned. They were considered as persons excommunicated; they could hold no office or employment; they could not keep arms in their houses, but the same might be seized by the justices of the peace; they were forbidden to come within ten miles of London under a penalty of 100*l.*; they could bring no action at law, or suit in equity; they were not permitted to travel above five miles from home, unless by licence, upon pain of forfeiting all their goods; and they could not come to court under a penalty of 100*l.* No marriage or burial of such recusant, or baptism of his child, could be had otherwise than by the ministers of the Church of England, under other severe penalties. A married woman, when recusant, forfeited two-thirds of her dower or jointure, could not be executrix or administratrix to her husband, nor have any part of his goods; and during the coverture might be kept in prison, unless her husband redeemed her at the

rate of 10*l.* a month, or the third part of all his lands. And, lastly, as a feme-covert recusant might be imprisoned, so all others were, within three months after conviction, either to submit and renounce their errors, or, if required so to do by four justices, to abjure and renounce the realm; and if they did not depart, or if they returned without the king's license, were guilty of felony, and might suffer death as felons without benefit of clergy. There was 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 resided within ten miles of London, made him an absolute recusant convict; or if at a greater distance, suspended him from having any seat in parliament, keeping arms in his house, or any horse above the value of five pounds. This was the state of a lay papist, by the laws in being, 'with slight modifications, down to nearly the end of the eighteenth century.' But, 3. the remaining species or degree, viz., *popish priests*, were in a still more dangerous condition. For popish priests or bishops, celebrating mass, or exercising any part of their functions in England, except in the houses of ambassadors, were liable to perpetual imprisonment. And any popish priest, born in the dominions of the Crown of England, who should come over hither from beyond sea, unless driven by stress of weather, and tarrying only a reasonable time, or should be in England three days without conforming and taking the oaths, was guilty of high treason; and all persons harbouring him were guilty of felony without the benefit of clergy.

'Of these laws' the President Montesquieu observes,[1] that they were so rigorous, though not professedly of the sanguinary kind, that they did all the hurt that can possibly be done in cold blood. In answer to this it can only be said, that these laws were seldom exerted to their utmost rigour: and that they are 'only' to be accounted for from their history, and the urgency of the times which produced them. 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 so dangerous a spirit by laws of a great, and then perhaps necessary, severity. The powder-treason, in the succeeding reign, struck a

[1] Sp. L. b. 19, c. 27.

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 the 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 in that and subsequent reigns, will account for the extension of these penalties at those several periods of our history. But 'these causes having long since vanished, it became evident that' it ought not to be left in the breast of every merciless bigot, to drag down the vengeance of these occasional laws upon inoffensive, though mistaken subjects; in opposition to the lenient inclinations of the civil magistrate, and to the destruction of every principle of toleration and religious liberty.

Accordingly by statute 11 Geo. III. c. 60, such papists as duly took the oath therein prescribed, of allegiance to his majesty, abjuration of the pretender, renunciation of the pope's civil power, and abhorrence of the doctrines of destroying and not keeping faith with heretics, and deposing or murdering princes excommunicated by authority of the see of Rome, were relieved from the statute of 11 & 12 Will. III., so far as it disabled them from purchasing or inheriting, or authorized the apprehending or prosecuting the popish clergy, or subjected to perpetual imprisonment either them or any teachers of youth. 'And subsequently' by the statute 31 Geo. III. c. 32, amended and explained by the 43 Geo. III. c. 30, many of the severe and cruel restrictions and penalties above enumerated were removed from those Roman Catholics, who appeared at some of the courts of Westminster, or at the quarter sessions, and made and subscribed a declaration that they professed the Roman Catholic religion, and also took an oath similar to that required by the 11 Geo. III. c. 60. 'The statute, however, which went further than any other to place the Roman Catholic on a footing with his fellow-subjects in this country, is the 10 Geo. IV. c. 7, usually called the *Roman Catholic Emancipation Act*, and which only became law after a protracted and memorable struggle both in and out of the legislature. By that act the statutes requiring declarations against transubstantiation, invocation of saints, &c., were repealed; and the Roman Catholics relieved from nearly all the disabilities previously imposed on them; being enabled to sit in parliament on taking a prescribed oath, to vote at elections, to hold, with certain

exceptions, civil and military offices under the crown, and to be members of lay corporations. Some restrictions were, however, retained. A Roman Catholic cannot vote on ecclesiastical appointments, nor present to a benefice, all such presentations devolving on the Archbishop of Canterbury; nor can he advise the crown on the appointment to any offices in the established Church. And the establishment of any religious order of males is still prohibited; while Jesuits may be banished the kingdom, and, if they return, transported for life.[m]

Thus much 'of heresy and nonconformity.' 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 animæ;* 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 offences, 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 Saviour Christ. Whither also may be referred all profane scoffing at the Holy Scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment:[n] for Christianity is part of the laws of England.[o] 'And the statute 9 & 10 Will. III. c. 32, which

[m] A silly outburst of the old spirit of intolerance took place in 1851, on the occasion of the Pope's issuing a bull professing to divide England and Wales into dioceses, and to create bishops with territorial jurisdiction. The statute 14 & 15 Vict. c. 60, prohibited English Roman Catholic dignitaries from assuming ecclesiastical titles, in respect of places within the realm; declared all briefs, rescripts, or letters apostolical for that purpose void, and imposed penalties on persons procuring them from the see of Rome. The bishops, however, took and used the prohibited titles; no persecution was resorted to; no penalties were ever imposed; and the statute was finally repealed after an existence of only twenty years, by 34 & 35 Vict. c. 53.

[n] 1 Hawk. P. C. 7.

[o] 1 Ventr. 293; 2 Strange, 834; 'see also stat. 60 Geo. III. and 1 Geo. IV. c. 8 & c. 9, and stat. 11 Geo. IV. and 1 Will. IV. c. 73.'

has been already mentioned in treating of apostacy and heresy, and is still in force, except as to the denial of the doctrine of the Trinity, has not altered the common law as to these offences; it has only given a cumulative punishment by the infliction of civil disabilities.[p] But whatever may be the law on the subject, and it may well be doubted whether the old cases can be relied on at the present day as a correct exposition of it, the government has of late years wisely abstained from any attempt to enforce it. To do so would involve the prosecution of many authors and publishers of works, undoubtedly written with an earnest desire to arrive at the truth; and would not only be an abuse of the law, but would wholly fail in effecting the object in view.'

V. Somewhat allied to this, though in an inferior degree, is the offence of profane and common *swearing* and *cursing*. By the last statute against which, 19 Geo. II. c. 21, which repeals all former ones, every labourer, sailor, or soldier, profanely cursing or swearing, shall forfeit 1*s.*; 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 offence, 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 justice of 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*l.* and the constable 40*s.*[q]

VI. A sixth species of offences 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 offence of *witchcraft, conjuration, enchantment*, or *sorcery*. To deny the possibility,

[p] *R.* v. *Carlile*, 3 B. & Ald. 161; *R.* v. *Waddington*, 1 B & C. 26.

[q] This Act was appointed to be read in all parish churches and public chapels the Sunday after every quarter-day, on pain of 5*l.*, to be levied by warrant from any justice; but this provision was repealed by the statute 4 Geo. IV. c. 31. Besides the above punishment for taking God's name in vain in common discourse, it was 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, were jestingly or profanely used, the offender should forfeit 10*l.*, one moiety to the king and the other to the informer.

nay, actual existence of witchcraft and sorcery, is 'said to be' at once flatly to contradict the revealed word of God, in various passages both of the Old and New Testament; and to the thing itself, every nation in the world has in its turn borne testimony, either by examples seemingly well attested, or by prohibitory laws, which at least suppose the possibility of commerce with evil spirits. The civil law punishes with death not only the sorcerers themselves, but also those who consult them,[r] imitating in the former the express law of God,[s] "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.[t] The President Montesquieu[u] 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; 'and the only apology for mentioning it, is its recognition in our ancient statutes and text-books.'

Our forefathers were stronger believers, when they enacted by statute 33 Henry VIII. c. 8, all witchcraft and sorcery to be felony without benefit of clergy; and again by statute 1 Jac. 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 that if any person should attempt by sorcery to discover hidden treasure, or to restore stolen goods, or to provoke unlawful love, or to hurt any man or beast, though the same were not effected, he or she should suffer imprisonment and pillory for the first offence, and death for the second. These acts continued in force 'until nearly the middle of the eighteenth century:' and many poor wretches were sacrificed thereby to the prejudice of their

[r] Col. l. 9, t. 18.
[s] Exod. xxii. 18.
[t] 3 Inst. 44.
[u] Sp. L. b. 12, c. 5.

neighbours and their own illusions; not a few having, by some means or other, confessed the fact at the gallows. Our legislature 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;[v] and accordingly it was with us enacted by statute 9 Geo. II. c. 5, that no prosecution should for the future be carried on against any person for conjuration, witchcraft, sorcery, or enchantment. 'But people pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of the queen's subjects, are now deemed rogues and vagabonds, and may be subjected to a year's imprisonment with hard labour.'[w]

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 and imprisonment; to which infamous corporal punishment was 'formerly added.'[x]

VIII. Simony, or the corrupt presentation of any one to an ecclesiastical benefice for gift or reward, is also to be considered as an offence 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.[y] The statute 31 Eliz. c. 6, 'accordingly' 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 years' value of the benefice or dignity; one moiety to the crown, 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.[z] And persons who shall corruptly ordain or license

[v] Voltaire, Siècle de Louis XIV. ch. 29.

[w] 5 Geo. IV. c. 8, s. 4.

[x] 1 Hawk. P. C. 7.

[y] 3 Inst. 156.

[z] Any resignation or exchange for money is corrupt. *Young* v. *Jones*, 3 Doug. 97.

any minister, or procure him to be ordained or licensed, which is the true idea of simony, shall incur a like forfeiture of 40*l.*; and the minister himself of 10*l.*, 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. 'The statute 9 Geo. IV. c. 99, however, permits bonds or agreements to secure the resignation of a living in favour of any person whomsoever, and in favour of any two persons, being the near relatives of the patron, providing the presentation, in pursuance of such resignation, be within six months.'

IX. Profanation of the Lord's Day, vulgarly, but improperly, called *sabbath-breaking*, is a ninth offence against God and religion, punished by the municipal law 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 humanises 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 labour, without any stated times of recalling them to the worship of their Maker. And therefore the laws of King Athelstan[a] forbade 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, on pain of forfeiting the goods exposed to sale.[b] And since, by the statute 1 Car. I. c. 1, no person shall assemble out of their own parishes, for any sport whatsoever upon this day; nor in their

[a] C. 24; 1 Thorpe, 213.

[b] This statute excepted the four Sundays in harvest, but the exception itself is repealed by 13 & 14 Vict. c. 23.

parishes shall use any bull or bear-baiting, interludes, plays, or other *unlawful* exercises or pastimes, on pain that every offender shall pay 3*s.* 4*d.* 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 expose any goods to sale,[c] 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 a penalty of 20*s.* 'No prosecution can now, however, be commenced without the consent of the chief officer of police of the district, or of two justices, or a stipendiary magistrate.'[d]

'By the statute 21 Geo. III. c. 49, any place used for public entertainment or amusement, or for publicly debating on any subject whatsoever, on Sunday, and to which persons shall be admitted by payment or tickets sold for money, is to be deemed a disorderly house; and as such, as we shall see afterwards, may on indictment be suppressed and fined.'[e]

X. Drunkenness 'was formerly' punished by statute 21 Jac. I. c. 7, with the forfeiture of 5*s.*, or the sitting six hours in the stocks, 'if the offender were not able to pay the penalty;' by which time the statute presumes the offender will have regained his senses, and not be able to do mischief to his neighbours. There were many wholesome statutes, by way of prevention, chiefly passed in the same reign of King James I., regulating the licensing of alehouses, and punishing persons found tippling therein, or the masters of such houses permitting them; 'and provisions to the same effect are happily still in force.'[f]

[c] The sale of beer and other liquors on Sunday is regulated by several statutes.

[d] 34 & 35 Vict. c. 87.

[e] This statute, which imposes heavy penalties, was passed in 1780, in consequence of houses being opened on Sunday, under pretence of inquiring into religious doctrines, at which debates were held concerning texts of Holy Scripture, by persons unlearned and incompetent to explain the same, to the corruption of good morals, and the great encouragement of irreligion and profaneness. After having become almost forgotten, it has been recently revived and made the foundation of a prosecution, *Terry* v. *The Brighton Aquarium Company*, 10 Law Rep. Q. B. 306; which led, not as might have been reasonably expected to the repeal of the act, but to the statute 38 & 39 Vict. c. 80, conferring power on the Crown to remit the penalties. The result is, that an action may be brought and judgment obtained; and thereupon the Home Secretary may interfere to prevent the plaintiff obtaining the fruits of it.

[f] 9 Geo. IV. c. 61, s. 35.

XI. The last offence 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 'keeping, or indeed, it has been said, in even' frequenting, houses of ill fame, which is an indictable offence;[g] or by some grossly scandalous and public indecency, 'or the sale of immoral pictures and prints,' for which the punishment 'at common law' is by fine and imprisonment,[h] 'to which hard labour may now be added.'[i] 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 wilful 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.[j] 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 rigour. And these offences 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 offence of incontinence, nay, even adultery itself, with a great degree of tenderness and lenity, owing, perhaps, to the constrained celibacy of its first compilers. The temporal courts, therefore, take no cognizance of the crime of adultery, otherwise than as a private injury.

'But whatever openly outrages decency, and is injurious to public morals, is a misdemeanor at common law. Thus, to undress in order to bathe in a place exposed to public view is an offence *contra bonos mores*, punishable by fine and imprisonment.[k] The grosser crime of exposure of the person, with intent to insult a female, may also be made the subject of an indictment,[l] or be summarily punished under the Vagrant Act;[m] the wilful exposure of an obscene print, whether in a shop window or otherwise, is an offence of the same character.[n] And a common prostitute wandering in public, and behaving in a riotous and indecent manner, may on the like grounds be treated as an idle and disorderly person.'[o]

[g] Poph. 208; *R.* v. *Pierson*, 2 Ld. Raym. 1197.

[h] 1 Siderfin. 168; *R.* v. *Sedley*, 2 Str. 791; 10 St. Tr. App. 93; *Rex.* v. *Wilks*, 4 Burr. 2527; and *Reg.* v. *Rowed*, 3 Q. B. 180.

[i] 14 & 15 Vict. c. 100, s. 29.

[j] Scobell, 121.

[k] *Rex.* v. *Crunden*, 2 Camp. N. P. 89.

[l] 14 & 15 Vict. c. 100, s. 29.

[m] 5 Geo. IV. c. 83, s. 4.

[n] 1 & 2 Vict. c. 83.

[o] 5 Geo. IV. c. 83, s. 3.

'A conspiracy to procure the defilement of a young woman is also an indictable misdemeanor at common law, as being an offence against good morals;[p] and any person who by false pretences, false representations, or other fraudulent means, procures any woman or child under the age of twenty-one years, to have illicit carnal connection with any man, is by statute guilty of a misdemeanor, punishable by imprisonment with or without hard labour for any term not exceeding two years.'[q]

Before leaving this subject, we must take notice of the temporal punishment 'at one time imposed' 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. By the statute 18 Eliz. c. 3, two justices might take order for the punishment of the mother and reputed father; but what that punishment should be is not therein ascertained, though the contemporary exposition was that a corporal punishment was intended.[r] By statute 7 Jac. I. c. 4, a specific punishment was inflicted on the woman only, viz., commitment to the house of correction, there to be punished and set to work for one year; and, in case of a second offence, till she found sureties never to offend again, 'a punishment practically of imprisonment for life. This consideration may possibly have led to the repeal of this extraordinary enactment by the 50 Geo. III. c. 51; but it did not produce any modification in the law itself, which disgraced the statute book until our own day, having been at last repealed by the Poor Law Amendment Act, 4 & 5 Will. IV. c. 76.'

[p] *Rex.* v. *Mears*, 2 Den. C. C. R. 79.

[q] 24 & 25 Vict. c. 100, s. 49.

[r] Dalt. Just. ch. ii.

CHAPTER V.

OF OFFENCES AGAINST THE LAW OF NATIONS.

We are next to consider the offences 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; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. 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. 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 civilised 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 law-merchant, which is a branch of the law of nations, is, 'in so far as it has not been altered by act of parliament,' regularly and constantly adhered to. 'A similar observation applies to' all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, for which 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 offences against the law of nations can rarely be the object of the criminal law of any particular state. For offences against this law are principally incident to whole states or nations; in which case recourse can only be had to war, 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 the 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 demand 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 offences against the law of nations, animadverted on as such by the municipal laws of England, are of 'four' kinds:

1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; 3. Piracy; 'and, 4. Trading in slaves.'

I. As to the first, *violation* of *safe-conducts* or *passports*, expressly granted by the sovereign or his ambassadors to the subjects of a foreign power in time of mutual war; or committing acts of hostilities against such as are in amity, league, or truce with us, who are here under a general implied safe-conduct: these 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 offences 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 expressed or implied, the foreigner is under the protection of the sovereign and the law: and, more especially, as it is one of the articles of *Magna Charta*, that foreign merchants should 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 sovereign, whose honour is more particularly engaged in supporting his own safe-conduct.

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. 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 intrench 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 Anne, 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 law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the said judges, or any two of them, shall think fit. Thus, in cases of extraordinary outrage, for which the law has provided no special penalty, the legislature has intrusted to the three principal judges of the kingdom an unlimited power of proportioning the punishment to the crime.

III. The crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke,[a] *hostis humani generis*. 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-defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for 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. st. 5, c. 2, it is held to be only felony in a subject. Formerly it was only cognizable by the admiralty courts, which proceeded by the rules of the civil law.[b] 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 'legislature' 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 offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there.[c] But, by statute, some other offences are made piracy also: as by statute 11 Wm. 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 colour of a commission from any foreign power;[d]

[a] 3 Inst. 113.

[b] 1 Hawk. P. C. 98.

[c] Ibid. 100.

[d] This act was passed to put an end

this, though it would only be an act of war in an alien, shall be construed piracy in a subject. And further, any commander, or 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 persons assaulting the commander of a vessel to hinder him from fighting in defence of his ship, or confining him, or making or endeavouring to make a revolt on board; shall for each of these offences be adjudged a pirate, felon, and robber. And by the statute 8 Geo. I. c. 24, 'made perpetual by the statute 2 Geo. II. c. 28, s. 7,' the trading with known pirates, or furnishing them with stores or ammunition, or fitting out any vessel for that purpose, or in anywise 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 such accessories to piracy as are described by the statute of William III., are declared to be principal pirates, 'and guilty of felony.' And further, by statute 18 Geo. II. c. 30, any natural-born subject, or denizen, who in time of war shall commit hostilities at sea against any of his fellow-subjects, or shall assist an enemy on that element, is liable to be tried and convicted as a pirate.

'The punishment for these offences was formerly' death, whether the guilty party were a principal, or merely accessory by setting forth such pirates, or abetting them before the fact, or receiving or concealing them or their goods after it. 'This was first altered by the statute 7 Wm. IV. and 1 Vict. c. 88, which, while it re-imposed the capital punishment when murder had been attempted, or when the offence had been attended with stabbing, cutting, or wounding, substituted in other cases transportation, for which penal servitude has now been substituted, or imprisonment not exceeding three years.[e] Principals in the second degree, and accessories before the fact, are punishable in the same manner as principals in the first degree; and accessories after the fact, with imprisonment for any term not exceeding two years.'

'The capture of piratical vessels was formerly encouraged by

to a doubt started immediately after the Revolution, whether James II. did not still retain in himself the right of making war, so as to protect those who acted under his commissions.

[e] 9 & 10 Vict. c. 24; 27 & 28 Vict. c. 47.

bounties on pirates taken or killed;[f] and seamen wounded in piratical engagements, were' entitled to the pension of Greenwich Hospital; which no other seamen were, except only such as had served in a ship of war. 'The statutes as to bounties and rewards for services in piratical engagements are, however, no longer in force. Property captured from pirates is now liable to condemnation as *droits of the Admiralty*, to be restored, if private property, to the rightful owners on payment of one-eighth of the value as salvage; while fitting rewards are assigned for services against pirates.'[g] 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 forfeits all his wages, and suffers six months' imprisonment.

IV. 'The carrying on a traffic in slaves may be regarded as another class of offences against the law of nations. Not merely is it an offence against the victims of the trade, but happily for the interests of humanity, it is now in many instances an offence against express treaties entered into between this country and other states.'

'Taking any of the crew or passengers of a vessel for the purpose of selling them as slaves, seems to have amounted to the offence of piracy at common law;[h] but this had reference rather to the kidnapping of British subjects than to the traffic in the natives of Africa. Be this as it may, the statute 46 Geo. III. c. 52, prohibited the importation of slaves by subjects of this country into any foreign state, and the fitting out of foreign slave-ships from British ports. In the following year another act, 47 Geo. III. sess. 1, c. 36, was passed for the abolition of the trade altogether; and by the statute 51 Geo. III. c. 23, slave-dealing was made a felony punishable by transportation. By 5 Geo. IV. c. 17, the shipping and conveying of slaves by British subjects was made piracy; and by 5 Geo. IV. c. 113, s. 9, amending and consolidating all laws relating to slavery, and amended in its turn by the statutes 9 Geo. IV. c. 84, and 5 & 6 Vict. c. 101, any subject of the king, or any person residing or being in any of his dominions, or under the government of the East India Company, or on the high seas, further extended by the 6 & 7 Vict. c. 98,

[f] 11 & 12 Will. III. c. 7; 8 Geo. I. c. 24; and 6 Geo. IV. c. 49.

[g] 13 & 14 Vict. cc. 26 & 27.

[h] Molloy, C3, s. 16.

s. 1, to all *British subjects*, who conveys or removes any person as a slave, is declared to be guilty of piracy, felony, and robbery, and punishable with death; for which penal servitude for life, or an imprisonment not exceeding three years, is now substituted.[i] The dealing for or purchasing or bartering persons as slaves, or fitting out or navigating any ship for this purpose, or in any way being connected with the traffic in slaves, also subjects the offender to penal servitude for any term not exceeding fourteen years, or imprisonment for a term not exceeding five years; and the embarking on board of any vessel as a petty officer or seaman, knowing that such vessel is to be employed in the traffic in slaves, likewise subjects the offender to imprisonment for two years. The abolition of slavery in the British colonies[j] accompanied by the legislative declaration, that it was to be mitigated at once and abolished as soon as possible in India,[k] has been followed by several statutes for the more effectual suppression of the slave trade.[l] Numerous treaties have also been entered into with many foreign nations and states, for extending similar provisions to the ships and subjects of those countries; and these treaties may now be carried into immediate execution by the Queen in Council, without waiting for the authority of Parliament.'

[i] 7 Will IV., and 1 Vict. c. 91, s. 1; and 20 & 21 Vict. c. 3.

[j] 3 & 4 Will. IV. c. 73; 1 & 2 Vict. c. 19.

[k] 3 & 4 Will. IV. c. 95, s. 88.

[l] See the statutes 2 & 3 Vict. c. 73; 5 & 6 Vict. c. 91, & c. 114; and 6 & 7 Vict. c. 98.

CHAPTER VI.

OF HIGH TREASON 'AND HEREIN OF SEDITION.'

The next general division of crimes consists of such as more especially affect the supreme executive power, or the Queen and her 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. We have already had occasion to mention the nature of allegiance, as the tie or *ligamen* which binds every subject to be true and faithful to his sovereign, in return for that protection which is afforded him. And this allegiance, we may remember, was distinguished into two species: the one natural and perpetual, which is inherent only in natives of the sovereign's dominions; the other local and temporary, which is incident to aliens also. Every offence, 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 royal prerogative. 3. *Præmunire.* 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:[a] for treason is indeed a general appellation, made use of by the law, to denote not only offences against the sovereign and his 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 the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the

[a] C. 1, § 7.

life of any such superior or lord.[b] This is looked upon as proceeding from the same principle of treachery in private life, as would have urged him who harbours 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 'in our old law books' 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 læsæ majestatis* of the Romans, as Glanvil[c] 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 Montesquieu, is sufficient to make any government degenerate into arbitrary power.[d] 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, offences 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*l.*:[e] 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.[f] 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.[g] 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 offences only for the future

[b] LL. Aelfredi. c. 4; Aethelst. c. 4; Canuti. c. 54, 61.
[c] L. 1, c. 2.
[d] Sp. L. b. 12, c. 7.
[e] 1 Hal. P. C. 80.
[f] Britt. c. 22; 1 Hawk. P. C. 34.
[g] Cod. 9, 8, 5.

should be held to be treason: in like manner as the *lex Julia majestatis* among the Romans, promulgated by Augustus Cæsar, comprehended all the ancient laws, that had before been enacted to punish transgressors against the state. This statute must, therefore, be our text and guide, in order to examine into the several species of high treason 'existing at common law.' And we shall find that it comprehends all kinds of high treason 'then known,' under seven distinct branches.

1. "When a man doth 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, Queen Anne, 'and Queen Victoria,' is within the words of the act, being invested with royal power, and entitled to the allegiance of her subjects;[h] but the husband of such a queen is not comprised within these words, and therefore no treason can be committed against him.[i] The king here intended is the king in possession, without any respect to his title: for it is held that a king *de facto* and not *de jure*, 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.[j] And a 'text writer of authority' on the crown-law carries the point of possession so far, that he holds,[k] 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 was declaratory of the common law, and pronounced all subjects excused from any penalty or forfeiture, who assisted and obeyed a king *de facto*. But, in truth, this seems to be confounding all notions of right and wrong; and

[h] 1 Hal. P. C. 101.
[i] 3 Inst. 7; 1 Hal. P. C. 106.
[j] 3 Inst. 7; 1 Hal. P. C. 104.
[k] 1 Hawk. P. C. 36.

the consequence would 'be that were a' foreign sovereign 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 by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry VII. 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 *primâ 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 favour, 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.[l] 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, 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, &c. These are synonymous terms; the word *compass* signifying the purpose or design of the mind or will, and not, as in common speech, the carrying such design to effect.[m] And, therefore, an accidental stroke, which may mortally wound the sovereign, *per infortuniam,* 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. 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

[l] 1 Hal. P. C. 104.

[m] 1 Hal. P. C. 107.

some open or *overt* act. And yet the tyrant Dionysius is recorded[n] 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.[o] 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;[p] 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.[q]

How far mere *words*, spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, was 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 favourite 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.[r] 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.[s] For they may be spoken in heat, without any intention, or be mistaken, perverted, or mis-remembered by the hearers; their

[n] Plutarch. in vit.
[o] 3 Inst. 12.
[p] 1 Hal. P. C. 109.
[q] 1 Hawk. P. C. 38; 1 Hal. P. C. 119; Foster, 194.
[r] 1 Hal. P. C. 115.
[s] Foster, 202.

meaning depends always on their connexion 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."[t] 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*. 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;[u] and of Algernon Sydney, for some papers found in his closet; which, had they been plainly relative to any previously-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.[v] 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 Sydney 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;[w] though 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

[t] Cro. Car. 117-126.
[u] Ibid. 125.
[v] Foster, 198.
[w] 1 Hal. P. C. 118; 1 Hawk. P. C. 38.

of Henry VIII. 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: 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; but not so, if he only vitiated his widow.

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 pretence to reform religion, or the laws, or to remove evil counsellors, or other grievances whether real or pretended.[x] 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* inclosures, *all* brothels, and the like; the universality of the design making it a rebellion against the state, a usurpation of the powers of government, and an insolent invasion of the king's authority.[y] But 'there must be an insurrection, and that insurrection must be accompanied with force, and it must be for an object of a general nature. Therefore, if an armed body enter a town with a leader, their object being neither to take the town nor to attack the military, but merely to make a demonstration of strength to procure the liberation of certain political prisoners, this, though an aggravated misdemeanor, is not high treason.[z] So' a tumult, with a view to pull down a particular house, or lay

[x] 1 Hawk. P. C. 37. 'Lord Mansfield, upon the trial of Lord George Gordon, said that an attempt, by intimidation and violence, to force the repeal of a law, was a levying war and high treason. Doug. 570. The practical effect, however, of the statute 11 Vict. c. 12, is to reduce this kind of offence to felony, though the act expressly provides that it shall not affect the statute of Edw. III.'

[y] 1 Hal. P. C. 132.

[z] *Reg.* v. *Frost*, 9 Car. & P. 129.

open a particular inclosure, amounts at most to a riot; this being no general defiance of public government; and, if two subjects quarrel and levy war against each other, in that spirit of private war which prevailed all over Europe in the early feudal times, 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 other's lands, burning houses, attended with the loss of many lives; yet this was held to be no high treason, but only a great misdemeanor.[a] 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.[b]

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,[c] by sending them provisions, by selling them arms, by treacherously surrendering a fortress or the like. 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 them any assistance is also clearly treason; either in the light of adhering to the public enemies of the king and kingdom, or else in that of levying war against the sovereign. 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 fellow-subjects in actual rebellion at home, amount to high treason under the description of levying war against the king.[d] 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.[e] And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of

[a] 1 Hal. P. C. 136.
[b] 3 Inst. 9; Foster, 211, 213.
[c] *Dr. Henley's Case*, 1 Burr. 650; *Rex* v. *Stone*, 6 T. R. 527.
[d] Foster, 216.
[e] 1 Hawk. P. C. 38.

injury to his life or person, this fear of compulsion will excuse his even joining with either rebels or enemies *in* the kingdom, provided he leaves them whenever he has a safe opportunity.[f]

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 glewed 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[g] mentions it with some indignation, that the party was living at that day.

6. The next species of treason under 'the statute of Edward III.,' 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, to merchandise and make pay-"ment withal." As to the first branch, counterfeiting the king's money; this was treason, whether the false money were uttered in payment or not. Also if the king's own minters altered the standard or alloy established by law, it was treason. But gold and silver money only were held to be within the statute.[h] With regard likewise to the second branch, importing foreign counterfeit money, in order to utter it here; it was held that uttering it, without importing it, was not within the statute.[i] 'But so much of the statute as relates to this species of treason is now repealed, and the crime itself reduced to felony.'[j]

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

[f] Foster, 216.
[g] 3 Inst. 16.
[h] 1 Hawk. P. C. 42.
[i] 1 Hawk. P. C. 43.
[j] 2 Will. IV. c. 34.

"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 offices, 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.[k]

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 cause "supposed to be treason, which is not above specified, doth "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[l] 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 over hasty 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* 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

[k] 1 Hal. P. C. 231. [l] 1 Ibid. 259.

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 offence: the most arbitrary and absurd of all which was by the statute 21 Rich. 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,[m] reciting "that no man knew how he ought to behave himself, to "do, speak, or say, for doubt of such pains of treason; and there-"fore 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 offences of clipping money; breaking prison or rescue, when the prisoner is committed for treason; burning houses to extort money; stealing cattle by Welshmen; counterfeiting foreign coin; wilful poisoning; execrations against the king; calling him opprobrious names by public writing; counterfeiting the sign manual or signet; refusing to abjure the pope; deflowering or marrying, without the royal licence, 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 Cleves; derogating from the king's royal style and title; and 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 Edw. VI. c. 12,' which once more reduced all treasons to the standard of the

[m] Stat. 1 Hen. IV. c. 10.

statute of Edw. III. Since which time, though the legislature has been more cautious in creating new offences of this kind, yet the number is considerably increased, as we shall find upon a short review.

'For this purpose it will be a convenient course to see how far the seven heads of treason, enumerated by the statute 25 Edw. III., have been extended or interfered with, and then notice the additional or new acts of treason for which the legislature has provided.'

'The first head, confined by the statute of Edw. III. to compassing or imagining the death of the king, or the queen consort, or their eldest son and heir, may be considered as extended by the 36 Geo. III. c. 7, which, as made perpetual by the 57 Geo. III. c. 6, enacts that if any person shall within the realm or without compass, imagine, invent, devise, or intend death or destruction, or any bodily harm tending to death or destruction, maim or wounding, imprisonment or restraint of the person of his then Majesty, his heirs or successors, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, being legally convicted thereof, shall be adjudged a traitor, and suffer death and forfeit as in cases of high treason.'[n]

'The third head of the statute of Edward III., the levying war against the sovereign, has also been extended by modern legislation; but as the particular crimes provided against do not now constitute treason, they will be more properly considered in the conclusion of the present chapter.'

'The offence of counterfeiting the great or privy seal of England, which, under the statute of Edward III., constituted high treason, has been reduced to felony, and extended to the forging of the great seal and privy seal of the United Kingdom, the privy signet, royal sign manual, any of the seals appointed to be used in Scotland, or the great or privy seal of Ireland.'[o]

'The sixth species of treason included in the statute of Edward the Third no longer exists; the offences of counterfeiting

[n] This statute contained other provisions, which, being repealed by the 11 Vict. c. 12, are not referred to here.

[o] 1 Will. IV. c. 66, s. 2; 24 & 25 Vict. c. 98, s. 1.

the king's money, and bringing in false gold or silver money into the realm, being reduced to felony. But the offence of slaying the king's ministers or justices, the lord keeper or commissioners of the great seal, would still seem to be treason, by virtue of the statutes 5 Eliz. c. 18, and the 1 W. & M. sess. 1, c. 21.'

'To the treasons thus comprehended under the *six* subsisting heads of the statute of Edward III., must now be added:—

1. 'Endeavouring 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 maliciously and directly attempting the same by any overt act, which was made treason by the statute 1 Anne, st. 2, c. 21.'

2. By statute 6 Anne, c. 7, if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that any other person hath 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 offence, or indeed maintaining this doctrine in anywise, 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* succession. But it was again raised into high treason, by the statute of Anne before mentioned, at the time of a projected invasion in favour 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.*"[p]

3. 'In case the crown shall descend on any issue of her present Majesty, while under the age of eighteen, persons aiding or abetting the marriage of the king or queen without the consent of the regent and parliament, and the person married to such king or queen while under the age of eighteen, are by the statute 3 & 4 Vict. c. 52, s. 4, guilty of high treason.'

[p] State Tr. IX. 680.

'Under one or other of these *nine* heads the offences now constituting high treason may be ranged. But the reader would derive a very incorrect notion of the course of legislation on this important subject, and of the perturbations which have affected the government of this country, if he were left to suppose that the statutes, to which reference has been made, constituted the whole of the past as well as the present law relating to this offence. For there are several' treasons, created since the statute 1 Mary c. 1, 'which have been subsequently repealed, and are therefore not comprehended under the preceding descriptions. These may be comprised' under three heads. 1. Such as related to papists. 2. Such as related to falsifying the coin or other royal signatures. 3. Such as were created for the security of the Protestant succession in the house of Hanover, 'from the attempts of the pretenders and their adherents.'

1. The first species, relating to *papists*, was considered in a preceding chapter, among the penalties incurred by that branch of nonconformists 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 was, for the first time, a heavy misdemeanour; and, if the offence were repeated, it was high treason. Also by statute 27 Eliz. c. 2, if any popish priest, born in the dominions of the Crown of England, came over hither from beyond the seas, unless driven by stress of weather, and departing in a reasonable time; or should tarry here three days without conforming to the Church, and taking the oaths; was guilty of high treason. And by statute 3 Jac. I. c. 4, if any natural-born subject withdrew from his allegiance, and became reconciled to the pope or see of Rome, or any other prince or state, both he and all such as procured such reconciliation incurred the guilt of high treason.

2. With regard to treasons relative to the *coin* or other *royal signatures*, we may recollect that the only two offences respecting the coinage, which are enumerated as 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 were subsequently made for that

purpose. The crime itself was made a species of high treason; as being a breach of allegiance, by infringing the royal prerogative, and assuming one of the attributes of the sovereign, to whom alone it belongs to set the value and denomination of coin made at home, or to fix the currency of foreign money: and 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 no doubt 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, false coiners were declared guilty of high treason, and were condemned to be burnt alive: as by the laws of Athens all counterfeiters, debasers, and diminishers of the current coin were subject to capital punishment. However, this method of reasoning was overstrained: counterfeiting or debasing the coin being usually practised, 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, Bracton, and Fleta, than by Constantine and our Edward the Third, a species of the *crimen læsæ majestatis*, or high treason. For this confounds the distinction and proportion of offences; 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 of Edw. III. the offence of counterfeiting the coin was held to be only a species of petit treason: but subsequent acts, in their new extensions of the offence, followed the example of that statute, and made it equally high treason with an endeavour to subvert the 'government, though not quite equal in its punishment. These offences have, however, been again taken out of, and will in all probability never be restored to, the category of high treason.'

3. The other 'obsolete' species of high treason was that created for the security of the *Hanoverian succession* 'from the attempts of the pretenders.' For this purpose, after the Act of Settlement was made, for transferring the crown to the house

of Hanover, it was enacted by statute 13 & 14 Will. 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, 'since repealed,' it was enacted, that if any of the sons of the pretender should 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 should be judged attainted of high treason, and suffer the pains thereof. And to correspond with them, or to remit money for their use, was made high treason in the same manner as it was to correspond with the father.

Thus much for the crime of treason, or *læsæ 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.[q] It is now time to pass on from defining the crime to describing its punishment.

The punishment of high treason in general was very solemn and terrible. It was 1. That the offender be drawn to the gallows, and not be carried or walk; though usually, by connivance, at length ripened by humanity into law, a sledge or hurdle was allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 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.[r] But in treasons

[q] 'It may be mentioned in this place that the Scotch and English laws respecting the crimes of high treason and misprision of treason, were assimilated by the statute 7 Anne, c. 21; and that no acts in Scotland, except slaying the lords of session or lords of justiciary, shall be construed high treason in Scotland, which are not high treason in England.

[r] 'As an instance of how the Bible may be quoted in support of almost any

of every kind the punishment of women was the same, and different from that of men. For, as the decency due to the sex forbade the exposing and publicly mangling their bodies, their sentence, which is to the full as terrible to sensation as the other, was to be drawn to the gallows, and there to be burned alive.[s]

'This was altered, however, by the statutes 30 Geo. III. c. 48, and 54 Geo. III. c. 146; under which the offender was directed to be drawn on a hurdle to the place of execution, and to be there hanged by the neck until he were dead; and that afterwards his head should be severed from his body, and his body divided into four quarters, to be disposed of as the Crown should think fit. And so the law stood till the recent act, 33 & 34 Vict. c. 23, provided that so much of the two acts of Geo. III. as required the drawing of the criminal on a hurdle to the place of execution, and after execution the severing of the head from the body, and the dividing of the body also, should be repealed. So that the punishment of high treason is now simply death by hanging.'

'The offence of forging or counterfeiting the great seal is now simply felony, and punishable by penal servitude for life, or for any term not less than five years, or imprisonment, to which hard labour and certain periods of solitary confinement may be added, for any term not exceeding two years.'

'The consequences of this judgment, which were formerly attainder, forfeiture, and corruption of blood, must be referred to the latter end of this book, when we shall treat of them altogether, as well in treason as in other offences.'

'Before closing this chapter, however, it is necessary to refer to a class of offences, which in former times ranked as high treason; but which, although calling for severe punishment, the humanity of our present laws will not allow to incur the fatal consequences attached to crimes of that serious nature. These may be classed under the head of 1. Sedition; and 2. Attempts to injure or alarm the sovereign.'

'The insults publicly offered to the person of George III. at the period of the French revolution, the ferment then created among the people by numerous publications advocating a change

practice, good, bad, or indifferent, it may be observed that' Sir Edward Coke tells us, that this punishment for treason is warranted by divers examples in Scripture; for Joab was drawn, Bithan was hanged, Judas was embowelled, and so on; 3 Inst. 211.

[s] 2 Hal. P. C. 399.

in the institutions of this country, and the frequent assemblies held under the pretext of deliberating on public grievances, and agreeing on petitions, remonstrances, or other addresses to the king or the houses of parliament, led to the passing of two acts of parliament, the one, 36 Geo. III. c. 7, intituled "An Act for the "safety and preservation of his Majesty's Person and Government "against treasonable and seditious practices and attempts;" and the other, 36 Geo. III. c. 8, "An Act for the more effectually "preventing seditious meetings and assemblies."'

'By the first-named statute, which has been already mentioned, it was made treason to compass the destruction, or bodily harm, deposition, or restraint of the king; while any one using any words or sentences to excite the people to hatred and contempt of his Majesty, or of the government and constitution of this realm, thereby incurred the punishment of a high misdemeanor; that is, fine, imprisonment, and the pillory: and for a second offence, was subjected to a similar punishment, or transportation for seven years, at the discretion of the court.'

'This act has, however, been repealed, except so far as regards the death or destruction, personal injury or restraint of the sovereign, by the statute 11 & 12 Vict. c. 12; which was passed to meet the mischievous but absurd attempts made shortly before its enactment, to effect a repeal of the legislative union between Great Britain and Ireland. It was felt that to dignify these proceedings with the name of high treason, was only to encourage their continuance or repetition, by endowing the foolish and misguided persons who engaged in them with the name of patriots or martyrs; and the statute accordingly provides that if any person shall compass, invent, or intend to deprive or depose her Majesty, her heirs or successors, from the style, honour, or royal name of the imperial crown of the United Kingdom, or of any other of her dominions, or to levy war within any part of the kingdom, in order by force or constraint to compel the queen to change her measures or counsels, or to put any constraint upon or intimidate or overawe both houses or either house of parliament, or to move or stir any foreigner or stranger with force to invade the kingdom, or any of the queen's dominions, and such compassings, inventions, or intentions, or any of them, shall express or declare, by publishing any printing or writing, or by open and advised speaking, or by any overt act or deed,

he shall be guilty of *felony*, and liable, at the discretion of the court, to be transported beyond the seas for the term of his natural life, or for any term not less than seven years, for which penal servitude for similar terms or not less than five years is now substituted,[t] or to be imprisoned for any term not exceeding two years, with or without hard labour, as the court shall direct. Principals in the second degree, and accessories before the fact, are punishable as principals in the first degree; for accessories after the fact, the punishment is imprisonment, with or without hard labour, for any term not exceeding two years. And offenders are not to be entitled to an acquittal, on the ground that the crime charged against them amounts to high treason.'

'The other statute which has been mentioned, 36 Geo. III. c. 8, was only of a temporary character; but at the same period, and for the same reasons, other provisions still in force were made to repress mutinous and seditious practices. Thus by statute 37 Geo. III. c. 70,[u] if any person shall maliciously and advisedly endeavour to *seduce* any person in the service of the crown by sea or land from his duty and allegiance, or to incite any person to commit any act of mutiny or mutinous practice, he shall be adjudged guilty of felony; and may now, instead of the punishment of death, which was originally attached to this offence, be sentenced to penal servitude for life, or not less than five years, or imprisonment, with or without hard labour and with or without solitary confinement, for not more than three years.'[v]

'By the statutes 37 Geo. III. c. 123, and 52 Geo. III. c. 104, it is further enacted, that whoever shall administer, or cause to be administered, or shall be present at and consenting to the administering of, or shall take any oath or engagement intended to bind any person in any mutinous or seditious purpose, or to belong to any seditious society or confederacy, or to obey any committee, or any person, not having legal authority for that purpose, or not to give evidence against any confederate or other person, or not to discover any unlawful combination, or any illegal act, or any illegal oath or engagement, shall be guilty of felony, now punishable by

[t] 20 & 21 Vict. c. 3; 28 & 29 Vict. c. 47.

[u] Continued by 54 Geo. III. c. 158, and 55 Geo. III. c. 171, and revived and made perpetual by 57 Geo. III. c. 7.

[v] 7 Will. IV. & 1 Vict. c. 91, s. 1; 9 & 10 Vict. c. 24, s. 1; 20 & 21 Vict. c. 3.

penal servitude for life, or not less than five years.[w] And compulsion is no excuse, unless the party, within four days after he has an opportunity, discloses the whole of the case to a justice of the peace or, if a seaman or soldier, to his commanding officer.'

'Finally, by the statutes 39 Geo. III. c. 79, 52 Geo. III. c. 104, and 57 Geo. III. c. 19, societies taking unlawful oaths, or secretly constituted, are declared to be unlawful combinations and confederacies, punishments and penalties being imposed on the members thereof; and public meetings of more than fifty persons are prohibited from assembling in any open place within a mile of Westminster Hall, for the purpose of petition, remonstrance, or address to the crown or either house of parliament, while the parliament or any of the courts at Westminster Hall shall be sitting.'

'The only other statute I need mention was passed to prevent a repetition of those annoyances to which the queen was exposed soon after her accession to the throne, by idle and ill-disposed youths discharging fire-arms in her presence, if not at her person. As this was done apparently from a morbid love of notoriety, it was considered that a disgraceful punishment would be most appropriate; and the statute 5 & 6 Vict. c. 51, accordingly provides in very precise terms, that any person discharging or attempting to discharge any fire-arms, or any explosive substance, at or near the person of the queen, or striking or attempting to strike, or throwing or attempting to throw anything whatsoever at or upon the person of her Majesty, with intent to injure her person, or break the public peace, or whereby the public peace may be endangered, or to alarm her Majesty, shall be guilty of a high misdemeanor, punishable at the discretion of the court, with penal servitude for the term of seven or not less than five years,[x] or imprisonment, with or without hard labour, for any period not exceeding three years, the offender being liable, during the period of such imprisonment, to be publicly or privately whipped, as often and in such manner and form as the court shall order and direct, not exceeding thrice.'

'The wise tendency of this legislation has been happily evinced by the complete cessation of the offence.'

[w] 20 & 21 Vict. c. 3; 1 Vict. c. 91; 27 & 28 Vict. c. 47.

[x] 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

CHAPTER VII.

OF OFFENCES AGAINST THE PREROGATIVE.

As we are next to consider such *felonies* as are more immediately injurious to the royal prerogative, it will not be amiss here to inquire briefly into the nature and meaning of *felony:* before we proceed upon any of the particular branches into which it is divided, 'the felonies spoken of at the close of the last chapter being merely the creatures of the statute law.'

Felony, then, in the general acceptation of our English law, comprises every species of crime, which 'formerly occasioned' at common law the forfeiture of lands or goods. This most frequently happened in those crimes, for which a capital punishment either is or was liable to be inflicted: for those felonies which were called clergyable, or to which the benefit of clergy extended, were anciently punished with death in all lay, or unlearned offenders. Treason itself, says Sir Edward Coke, 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 there be 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 not only all offences formerly capital, are in some degree or other felony; but that this is likewise the case with some other offences which never were punished with death; as suicide, where the party is already dead; homicide by chance-medley, or in self-defence; and 'the small thefts formerly termed' *petit* larceny or pilfering: all which are, strictly speaking, felonies, as they 'formerly subjected' 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 offence which 'formerly occasioned,' 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 *felonia*, is of undoubted feudal origin, being frequently to be met with in the books of feuds, &c.; but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the rest: some deriving it from the Greek φηλος, an impostor or deceiver; others from the Latin *fallo, fefelli*, to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a still stranger etymology:[a] that is, *crimen animo felleo perpetratum*, with a bitter or gallish inclination. But all of them agree in the description, that it is such a crime as occasions 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:[b] in which language indeed, as the word is clearly of feudal origin, we ought rather to look for its signification, than among the Greeks and Romans. *Fe-lon* then, according to him, is derived from the two northern words—fee, which signifies the fief, feud, or beneficiary estate; and lon, 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 'amounted to' forfeitures of copyhold estates, are styled *felonia* in the feudal law: "*scilicet, per quas feudum amittitur.*" As, "*si domino deservire "noluerit; si per annum et diem cessaverit in petenda investitura; "si dominum ejuravit, i.e., negavit se a domino feudum habere; si a "domino, in jus eum vocante, ter citatus non comparuerit;*" all these, with many others, 'originally' causes of forfeiture in our copyhold estates, 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; vitiating his wife or daughter, "*si dominum cucurbitaverit, "i.e., cum uxore ejus concubuerit;*" all these are esteemed felonies, and the latter is expressly so denominated, "*si fecerit feloniam, "dominum forte cucurbitando.*" And as these contempts, or smaller offences, were felonies or acts of forfeiture, of course greater crimes,

[a] 1 Inst. 391. [b] Glossar. tit. *Felon.*

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 vasallus amitteret feudum si eam commiserit in dominum, "feudi proprietatem etiam dominus perdere debet.*" 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*" 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 deflexion 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 by no means entered into the true idea and definition of felony. Felony might have been 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 offence be no felony; as in case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods,[c] an inseparable incident to felony. And of the same nature was the punishment of standing mute, without pleading to an indictment; which at the common law was capital, but without any forfeiture, and therefore such standing mute was no felony. In short, the true criterion of felony 'was' forfeiture; for in all felonies which 'were' punishable with death, the offender 'lost' all

[c] 3 Inst. 13.

his lands in fee-simple, and also his goods and chattels; in such as were not so punishable, his goods and chattels only.[d]

The idea of felony 'was' indeed, 'until recently,' so generally connected with that of capital punishment, that it was hard to separate them; and to this usage the interpretations of the law conformed. And therefore, if a statute 'made' any new offence felony, the law[e] implied that it should be punished with death, viz., by hanging, as well as with forfeiture: unless the offender prayed the benefit of clergy; which 'originally' all felons were entitled once to have, provided the same were not expressly taken away by statute. 'The law has, however, been considerably ameliorated in this respect,[f] as any person now convicted of a felony, for which *no* punishment has been provided, is liable only to transportation for seven years, a punishment for which penal servitude for the same period, or not less then five years, is now substituted,[g] or imprisonment, with whipping, if the court think fit, for any term not exceeding two years.'

I proceed now to consider such felonies as are more immediately injurious to the royal prerogative. These are, 1. Offences relating to the coin. 2. The offence of serving a foreign prince. 3. The offence of embezzling or destroying the sovereign's stores of war. 4. Desertion from the sovereign's armies in time of war.

1. *Offences relating to the coin*, under which may be ranked some inferior misdemeanors not amounting to felony, 'have been the subject of' a series of statutes, 'commencing in the reign of Edward the First; nearly all of which were repealed by the statute 2 Will. IV. c. 34, which consolidated the then laws relating to these crimes. The punishments imposed by that and other statutes relating to the coin were modified, however, by more recent enactments,[h] and the law on the whole subject has again been consolidated by the statute 24 and 25 Vict. c. 99.'

'It is now felony, punishable with penal servitude for life, or for any term not less than five years, or imprisonment for any

[d] 1 Inst. 391.
[e] 1 Hawk. 107; 2 Hawk. 444.
[f] 8 Geo. IV. c. 28, s. 8.
[g] 20 & 21 Vict. c. 3, s. 2; 27 & 28 Vict. c. 47.
[h] 7 Will. IV., and 1 Vict. c. 90; 9 & 10 Vict. c. 24; 20 & 21 Vict. c. 3, s. 2; 27 & 28 Vict. c. 47.

term not exceeding two years, for any person to make or counterfeit any coin resembling, or apparently intended to resemble or pass for, any of the current gold or silver coin; the offence being deemed complete, although the counterfeit coin is not in a fit state to be uttered, or the counterfeiting is not finished or perfected. It is also felony, punishable in the same way, to gild or silver, or with any wash or materials capable of producing the colour of gold or silver, to wash, colour, or case over any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals, with intent that the same shall be coined into false and counterfeit coin, resembling or intended to resemble any of the current gold or silver coin; or to gild, or with any wash or materials capable of producing the colour of gold, to wash, colour, or case over any of the current gold or silver coin, or to file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the current gold coin; or to gild or silver any of the current copper coin, or to file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the gold or silver coins.'

'These are the penalties which attach to the offence of making counterfeit coin. The same punishment is imposed upon the offences of buying, selling, receiving, paying, or putting off, or offering to do so, any false or counterfeit coin, resembling, or intended to resemble or pass for, any of the current gold or silver coin, at a lower rate or value than the same by its denomination imports, or of importing any false or counterfeit coin, resembling any of the current gold or silver coin.'

'And tampering with the genuine coin of the realm is almost as penal; for any person who impairs, diminishes, or lightens any of the gold or silver coin, with intent to make the coin so impaired, diminished, or lightened, pass for the current gold or silver coin, is guilty of a felony, punishable with penal servitude for any term not exceeding fourteen nor less than five years, or imprisonment for any term not exceeding three years.'[i]

'The law, however, deals much more mildly with the *utterer* of base coin, who is often led into the commission of the offence

[i] 'The statute also authorises all persons to break and deface light gold coin tendered to them, the person tendering to bear the loss; unless the coin be of due weight, when the person breaking it is to take it.'

by the more guilty counterfeiter or seller. For any person who tenders, utters, or puts off any false or counterfeit coin, resembling any of the current gold or silver coin, knowing the same to be false or counterfeit, is guilty only of a *misdemeanor*, and liable to imprisonment for any term not exceeding one year. But if he has in his possession at the time of such uttering any other like counterfeit coin, or if on the same day, or within ten days next ensuing, he utter any more, he is subject to imprisonment for any term not exceeding two years. And if, having been convicted of any of these misdemeanors, he commit any of them afterwards, he is then guilty of *felony*, and may be sentenced to penal servitude for life, or for not less than five years, or to imprisonment for any term not exceeding two years. It is also a misdemeanor, punishable by penal servitude for five, or an imprisonment not exceeding two years, for a person to have in his custody or possession, that is to say, either in his *personal* custody or possession, or *knowingly* or *wilfully* in any dwelling-house, building, lodging, apartment, field, or other place, either for his own use or benefit, or for that of another, three or more pieces of false or counterfeit coin, resembling any of the current gold or silver coin, knowing them to be false or counterfeit, and with intent to utter or put off the same; a repetition of the offence after a previous conviction being *felony*, and punishable in like manner as in the case of uttering, after a previous conviction.'

'With respect to these misdemeanors it may be observed that as there are no accessories in misdemeanors, all persons who are engaged in the common purpose of uttering counterfeit coin, although the uttering be by one only in the absence of the others, may be jointly, or any one of them separately convicted.[j] As to felonies, again, it is expressly provided that every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree; while every accessory after the fact is liable to be imprisoned for two years; the imprisonment in all these cases being accompanied, at the discretion of the court, with hard labour and solitary confinement.'

'The statute I have referred to likewise contains provisions directed against the knowingly, and without lawful authority,

[j] *Reg.* v. *Greenwood*, 2 Den. C. C. 453.

making, mending, buying or selling, or being in possession of any description of coining tools, each of which offences is made a *felony;* and is punishable with penal servitude for life, or for any term not less than five years, or imprisonment not exceeding two years. It is also *felony,* subjecting the offender to the like punishment, to convey out of the Mint, without lawful authority, any coining tools, coin, bullion, metal, or mixture of metals.'

'Finally, the offences which are felonies when committed with respect to the gold and silver coin of the realm, are, except as regards importing or clipping, also felonies when committed with respect to the *copper* coin; but involve at the utmost penal servitude for seven or five years, or imprisonment not exceeding two years; while the guilty uttering of counterfeit copper coin, or the guilty possessing of three or more pieces of counterfeit copper money, are misdemeanors subjecting the offender to imprisonment not exceeding one year.'

'A practice having arisen of defacing the coin by stamping it for advertising purposes, it has been made a misdemeanor punishable by imprisonment,[k] to deface any of the current coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, or to use any machine or instrument for the purpose of bending it; any person tendering, uttering, or putting off any coin so defaced, stamped, or bent, being liable on summary conviction, at the instance of the Attorney-General or other officer of the government, to forfeit a sum not exceeding forty shillings.'

'The counterfeiting of *foreign coin,* and bringing it into this country to circulate, were for the first time made offences by the statute 37 Geo. III. c. 126, s. 2, with reference more especially to *louis d'or* and *dollars.* That act has been repealed; but its provisions have been re-enacted, and any person making or counterfeiting any kind of coin, not the proper coin of this realm, but resembling, or intended to resemble or pass for, any gold or silver coin of a foreign state, is guilty of felony, and liable to penal servitude for any period not exceeding seven nor less than five years, or imprisonment, with or without hard labour and solitary confinement, not exceeding two years. The bringing or receiving

[k] 16 & 17 Vict. c. 102, re-enacted 24 and 25 Vict. c. 99, s. 16.

such counterfeit foreign coin into this country, without lawful excuse, is also a felony punishable in the same way; the punishment for tendering it in payment being for the first offence six months', and for the second offence two years' imprisonment. A third offence originally was a capital felony; but is now punishable with penal servitude for life or not less than five years, or imprisonment not exceeding two years. The counterfeiting of foreign copper coin is also highly penal; and persons having in their custody, without lawful excuse, more than five pieces of foreign counterfeit coin, are liable, on summary conviction, to a fine not exceeding forty nor less than ten shillings for every piece of false coin found in their possession, and to three months' imprisonment, with hard labour, in default of payment.'

2. *Serving in foreign states*, which service is generally inconsistent with allegiance to one's natural prince, 'was at one time' restrained and punished by stat. 3 Jac. I. c. 4, which made 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 was felony, also, for any gentleman, or person of higher degree, or who had 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, nor to enter into any conspiracy against his natural sovereign. 'This statute was declared to extend to Protestant Dissenters by 1 W. & M. sess. 1, c. 18, s. 2, and afterwards to Roman Catholics by 31 Geo. III. c. 32, s. 2, on their taking certain oaths of allegiance. But before the last-mentioned statute was passed, further provisions had been made by the' stat. 9 Geo. II. c. 30, which declared any subject of Great Britain who enlisted himself, or any person who procured him to be enlisted in any foreign service, or detained or embarked him for that purpose, without license under the sign manual, guilty of felony without benefit of clergy; but if the person so enlisted or enticed, discovered his seducer within fifteen days, so as he might have been apprehended and convicted of the same, he was indemnified. By the statute 29 Geo. II. c. 17, it was also enacted, that to serve under the French king as a military officer, should 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, involved a forfeiture of

500*l*. 'These two acts of Geo. II. were, however, repealed by the Foreign Enlistment Act, 59 Geo. III. c. 69, which was itself repealed by the statute 33 & 34 Vict. c. 90, passed in consequence of the disputes which arose with the United States of America, during the suppression of the rebellion of the Southern confederacy. This list makes it a misdemeanor for a British subject to accept, without the royal license, any commission on the military or naval service of a foreign state at war with any foreign state which is at peace with her Majesty, or to quit her dominions with intent so to do. It is also a misdemeanor in any person, whether a British subject or not, within her Majesty's dominions, to induce any person to accept such service, or to quit the Queen's dominions with intent so to do; or to embark therefrom under false representations as to the service in which such person is to be engaged. Masters of vessels taking, or engaging to take, or leaving on board any such persons, are also guilty of misdemeanor; and so is any person who builds or agrees to build any ship, or issues or delivers commissions for any ship, or equips or despatches any ship, with intent or knowledge, or having reasonable cause to believe that the ship is to be employed in the service of a foreign state at war with a friendly state. All such offenders, and those who aid and abet, are liable to two years' imprisonment.'

3. *Embezzling* or *destroying* the sovereign's warlike *stores*, was first declared to be felony by statute 31 Eliz. c. 4, which enacted that if any person having the charge or custody of any armour, ordnance, munition, shot, powder, or habiliments of war, of the Queen's Majesty's, or of any victual provided for victualling soldiers or mariners, should, either for gain or to impede her Majesty's service, embezzle the same to the value of twenty shillings, such offence should be felony. The statute 22 Car. II. c. 5, took away the benefit of clergy from this offence, with a power for the judge after sentence to transport the offender for seven years. 'Both statutes were, with others relating to the same subject, repealed by 7 & 8 Geo. IV. c. 27; and numerous other enactments made by 9 & 10 Will. III. c. 41; 1 Geo. I. st. 2, c. 25; 9 Geo. I. c. 8; 17 Geo. II. c. 40; 39 & 40 Geo. III. c. 89; 54 Geo. III. c. 60; 55 Geo. III. c. 127; and 4 Geo. IV. c. 53, have been repealed in the present reign, so far as they relate to naval and military or ordnance stores in England. Several acts,

25 & 26 Vict. c. 64; 27 & 28 Vict. c. 91; 30 & 31 Vict. c. 119; and 32 Vict. c. 12, each of which repealed preceding enactments, have successively made provisions relating to naval stores, and by 30 & 31 Vict. c. 128, like provisions have been made with respect to military, ordnance, and war department stores. These two statutes, after providing that certain marks may be used to denote public stores, make it a felony punishable with penal servitude for five years, or with imprisonment for two years, with or without hard labour and solitary confinement, to obliterate wholly or in part any such marks; and by each it is made a misdemeanor, punishable with imprisonment and hard labour not exceeding two years, to apply any such mark on stores without proper authority. The statute 30 & 31 Vict. c. 128, s. 7, makes it a misdemeanor, punishable with imprisonment and hard labour not exceeding one year, to receive, possess, keep, or sell any marked military stores without lawful authority; with a proviso, that if the value of the stores does not exceed 5*l.*, the offender may be punished summarily by a fine not exceeding 5*l.*, or imprisonment with hard labour not exceeding six months. The statute 32 Vict. c. 12, does not contain any like provision as to naval stores, but inflicts a penalty not exceeding 5*l.*, or imprisonment with hard labour not exceeding two months, upon any person having or conveying naval stores, reasonably suspected of being stolen or unlawfully obtained, and not giving a satisfactory account of the possession thereof.'

'These statutes, it may be added, only supersede the former statutes as to England, and only as to naval and military stores there. Many of the former acts still apply to Scotland and Ireland. The annual Mutiny Acts contain provisions for the trial and punishment by court-martial of persons, concerned in the care or distribution thereof, embezzling military or naval stores.'

By statute 12 Geo. III. c. 24, to set on fire, burn, or destroy any of the sovereign's ships of war, whether built, building, or repairing; or any of the royal arsenals, magazines, dockyards, rope-yards, or victualling offices, or materials thereunto belonging; or 'military, naval, or victualling stores, or ammunition; or causing, aiding, procuring, abetting, or assisting in such offence, is made, and still continues a capital felony.'

4. Desertion from the sovereign's armies in time of war,

whether by land or sea, in England or in parts beyond the sea, is by the standing laws of the land felony.[1] 'These offences are, however, usually punished under the annual Mutiny Acts. The offence of seducing soldiers and sailors has been already referred to in a previous chapter.'

[1] It was made so specially by 18 Hen. VI. c. 10, and 5 Eliz. c. 5; both of which statutes are repealed by 31 & 32 Vict. c. 45.

CHAPTER VIII.

PRÆMUNIRE.

Another species of offence more immediately affecting the sovereign and government, though not subject to capital punishment, is that of *præmunire*, so called from the words of the writ preparatory to the prosecution thereof: "*præmunire facias A. B.*," cause A. B. to be forewarned that he appeared before us to answer the contempt wherewith he stands charged: which contempt is particularly recited in the preamble to the writ. It took its origin 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.

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 favoured Duke William in his projected invasion, by blessing 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 turn, were as blindly devoted to the will of their sovereign pontiff, whose decisions they held to be infallible, and his authority co-extensive with the Christian world. Hence his legates *á latere* were introduced into every kingdom of Europe, his bulls and 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 Christ.

But, though the being spiritual head of the Church was a thing of great sound, 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 offences 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 animæ*, 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 holden 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:* 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 donative, 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; the *primer seisins* 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 *â 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, 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 personæ consueverint "et debuerint per electionem aut quemvis alium modum assumi.*" And this last, the canonists declared, was no detriment at all to the patron, being only like the change of a life in a feudal estate 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 for ever St. Peter's patrimony; and the dastardly monarch re-accepted his sceptre 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 endeavoured 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 realm. To this end they introduced the monks of the Benedictine and other rules, men of sour and austere religion, separated from the world and its concerns by a vow of perpetual celibacy, yet fascinating the minds of the people by pretences 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, as well as of purchases in mortmain, 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 so 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 endeavours 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 befal 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 vigour 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 effect 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 endeavoured to trace out the origin and subsequent progress of the papal usurpations in England, let us now return to the statutes of *præmunire*, 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.[a] He would not suffer his bishops to attend a general council, till they had sworn not to

[a] Sir John Davis, *The Case of Præmunire*, Rep. p. 83, &c.

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 pretence 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.[b] And in the thirty-fifth year of his reign was made the first statute against papal provisions, the foundation of all the subsequent statutes of *præmunire*, which we rank as an offence immediately against the sovereign, 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 endeavoured 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, 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 defence of the liberties of the crown. Hereupon more sharp and penal laws were devised against provisors,[c] which enact severally, that the court of Rome shall not present or collate to any 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

[b] Bro. Abr. tit. *Coron.* 115; *Treason*, 14; 5 Rep. part 1, fol. 12; 3 Ass. 19.

[c] Stat. 25 Edw. III. st. 6; 27 Edw. III. st. 1, c. 1; 38 Edw. III. st. 1, c. 4, and st. 2, cc. 1, 2, 3, 4.

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,[d] that if the Pope should endeavour by process or otherwise to maintain these usurpations, they would resist and withstand him with all their power.

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 Rich. II. c. 3, and 7 Rich. 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 Rich. 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 Rich. 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 *præmunire facias*, being, as we said, used to command a citation of the party, have denominated in common speech not only the writ, but the offence itself of maintaining the papal power, by the name of *præmunire*. And accordingly the next statute I shall mention, which is generally referred to by all subsequent statutes, is usually called *the* Statute of *præmunire*. It is the statute 16 Rich. 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

[d] Seld. in Flet. 10, 4.

"attached by their bodies to answer to the king and his council: "or process of *præmunire 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 *præmunire*. And this is the last of our ancient statutes touching this offence; 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,[e] 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 Rich. 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 suits 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

[e] Sir John Davis, 96.

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.[f]

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 uncle from being then made a cardinal, and legate *â 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 behaviour, in 6 Hen. VI., when he refused to obey the commands of Pope Martin V., who had required him to exert his endeavours to repeal the statute of *præmunire*, "*execrabile illud statutum*," 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 defence; 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.[g]

This then is the original meaning of the offence, which we call

[f] Wilk. *Concil. Mag. Brit.* iii. 533.

[g] See Wilk. *Concil. Mag. Brit.* 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 *præmunire* and provisors were made to restrain.

præmunire; viz., introducing a foreign power into this land, and creating *imperium in imperio*, 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 *præmunire* 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 and 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 licence or dispensation; or to obey any process from thence, are made liable to the pains of *præmunire*. 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 statute 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 *præmunire*.[h]

Thus far the penalties of *præmunire* seem to have kept within the proper bounds of their original institution, the depressing the power of the Pope;[i] but, they being pains of no inconsiderable consequence, it has been thought fit 'at various periods of our legal history' to apply the same to other offences; some of which bear more, and some less, relation to this original offence, and some no relation at all.[j]

[h] 'See Dr. Hampden's case, reported by Mr. Jebb.'

[i] 'Formerly,' by statute 5 Eliz. c. 1, 'repealed by the statute 9 & 10 Vict. c. 59,' to refuse the oath of supremacy incurred the pains of *præmunire;* and to defend the Pope's jurisdiction in this realm was a *præmunire* for the first offence, and high treason for the second. So, too, by the statute 13 Eliz. c. 2, 'also repealed as to punishments by the statute 9 & 10 Vict. c. 59,' to import any *agnus Dei*, 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, did not within fourteen days declare it to a privy councillor, they all incurred *præmunire*. But importing or selling mass-books, or other popish books, was, by statute 3 Jac. I. c. 5, § 25, made liable only to 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, was by statute 27 Eliz. c. 2, made liable to the penalties of *præmunire;* 'but this last statute seems to have been repealed by statute 10 Geo. IV. c. 17, s. 28.'

[j] Thus, 1. By the statute 1 & 2 Ph. & Mar. c. 8, to molest the possessors of

Thus, 1. To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is a *præmunire* by statute 21 Jac. I. c. 3. 2. On the abolition, by statute 12 Car. II. c. 24, of purveyance, and the prerogative of pre-emption, or taking any victual, beasts, or goods for the king's use, at a stated price, without consent of the proprietor, the exercise of any such power for the future was declared to incur the penalties of *præmunire*. 3. To assert, maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king is declared a *præmunire* by statute 13 Car. II. c. 1. 4. By the *Habeas Corpus* Act also, 31 Car. II. c. 2, it is a *præmunire*, and incapable of the king's pardon, besides other heavy penalties, to send any subject of this realm a prisoner into parts beyond the seas. 5. By the statute 6 Anne, c. 41, to assert maliciously and directly, by preaching, teaching, or advisedly 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 advisely speaking is a *præmunire:* as writing, printing, or publishing the same doctrines amounted, we may remember, to high treason. 6. By statute 6 Anne, c. 78, if the assembly of peers of Scotland, convened to elect their sixteen representatives in the

abbey lands granted by parliament to Henry the Eighth and Edward the Sixth, was, 'until the year 1863,' a *præmunire*. So, 2. was, till 1854, the offence of acting as a broker or agent in any usurious contract, where above ten *per cent.* interest 'was' taken, by stat. 13 Eliz. c. 10. 3. To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, was a *præmunire* 'till 1863,' by statute 16 Car. I. c. 21. 4. By the statute 1 Will. & 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, were subject to the penalties of a *præmunire*. 'But the statute 31 Geo. III. c. 32, s. 18, having enacted that no person should thereafter be summoned to take the oath of supremacy, or make the declaration against transubstantiation, or be prosecuted for not obeying the summons for that purpose, this offence may be considered as having ceased to exist.' 5. By statute 7 & 8 Will. III. c. 24, serjeants, counsellors, proctors, attorneys, and all officers of courts, practising without having taken the proper oaths, 'were till 1867' guilty of a *præmunire*. 6. The stat. 6 Geo. I c. 18, enacted in the year after the infamous South Sea project had beggared half the nation, made all unwarrantable undertakings by unlawful subscriptions, then commonly known by the name of bubbles, subject to the penalties of a *præmunire*. 'But the provisions of this statute were repealed by the act 4 Geo. IV. c. 18, and such companies are now left to be dealt with according to the common law.'

British parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *præmunire*. 7. The statute 12 Geo. III. c. 11, subjects to the penalties of the statute of *præmunire* all such as knowingly and wilfully solemnize, assist, or are present at, any forbidden marriage of such of the descendants of the body of King George II. as are by that act prohibited to contract matrimony without the consent of the crown.

Having thus inquired into the nature and several species of *præmunire*, its punishment may be gathered from the foregoing statutes, which are thus shortly summed up by Sir Edward Coke: "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:*" both which amount to the same thing; as the sovereign 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*. These forfeitures here inflicted do not, by the way, bring this offence 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 offence of *præmunire*, 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,[k] 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-defence. To obviate indeed such savage and mistaken notions,[l] the statute 5 Eliz. c. 1, provided, that it should not be lawful to kill any person attainted in a *præmunire*, any law, statute, opinion, or exposition of law to the contrary notwithstanding; 'and although this statute has been repealed by the act 9 & 10 Vict. c. 59, it can scarcely be suggested that a man convicted upon a *præmunire* is wholly out of the pale of the law.' 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,

[k] Stat. 25 Ed. III. st. 5, c. 22.

[l] Bro. Abr. t. *Corone*, 196.

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 safely give him comfort, aid, or relief.

'In conclusion it may be observed, that prosecutions upon a *præmunire* are unheard of in our courts. There is only one instance of such a prosecution in the State Trials, in which case the penalties of a *præmunire* were inflicted upon some persons, for refusing to take the oath of allegiance in the reign of Charles the Second.[m] The offence therefore, though still a head of our criminal law, may be considered obsolete.'

[m] Harg. St. Tr. vol. ii. 463.

CHAPTER IX.

OF MISPRISIONS AND CONTEMPTS AFFECTING THE SOVEREIGN AND GOVERNMENT.

THE next species of offences, more immediately against the sovereign and government, are entitled misprisions and contempts.

Misprisions, a term derived from the old French, *mespris*, a neglect or contempt, are, in the acceptation of our law, generally understood to be all such high offences 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 crown so please, the offender may be proceeded against for the misprision only.[a] 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.[b] 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 not 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

[a] Year B. 2 Rich. III. 10; Staundf. P. C. 37; Kel, 71; 1 Hal. P. C. 37; 1 Hawk. P. C. 55, 56.

[b] Hudson, of the Court of Star-chamber; MS. in Mus. Brit.; Collectanea Juridica, vol. ii. p. 1-241.

other states of Italy.[c] But it is now enacted by the statute 1 & 2 P. & M. c. 10, that a bare concealment of treason shall be only held a misprision. This concealment becomes criminal, if the party apprised of the treason does not, as soon as conveniently may be, reveal it to some judge of assize or justice of the peace.[d] 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 sovereign; 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 actual high treason.[e]

The punishment of misprision of treason is loss of the profits of lands during life, forfeiture of goods,[f] and imprisonment during life.[g] Which total forfeiture of the goods was originally inflicted while the offence 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, that wherever an offence 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 Westminster 1, 3 Edw. I. c. 9, is imprisonment for a year and a day; in a common person, imprisonment for a less discretionary time; and, in both, fine and ransom at the royal pleasure: which pleasure of the sovereign must be observed, once for all, not to signify any extra-judicial 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.*"[h]

There is also another species of negative misprisions: namely, the *concealing of treasure-trove*, which belongs to the sovereign or his grantees by prerogative royal;[i] the concealment of which was formerly punishable by death, but now only by fine and imprisonment.[j]

[c] Guicciard. Hist. b. 3 & 13.

[d] 1 Hal. P. C. 372.

[e] 1 Hawk. P. C. 56.

[f] The stat. 33 & 34 Vict. c. 23, which has abolished all forfeiture of property on conviction of treason or felony, does not seem to extend to this offence.

[g] 1 Hal. P. C. 374.

[h] Ibid. 375.

[i] Glan. l. 1, c. *Reg.* v. *Thomas*: Lewis and Cave, Crim. Cases, 313.

[j] 3 Inst. 133.

II. Misprisions, which are 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 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, fine, or perpetual disability. Hitherto also may be referred the offence 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.[k] 'This offence, which,' with us, is not a capital crime, formerly subjected the committer of it to a discretionary fine and imprisonment; 'but since the statute 2 Will. IV. c. 4, he is guilty of felony, and liable to penal servitude for any term not exceeding fourteen nor less than five years, or an imprisonment with or without hard labour not exceeding two years.[l] By an earlier statute[m] officers concerned in the receipt or management of the revenue, giving in false statements of money in their hands, are guilty of a misdemeanor.'

Other misprisions are, in general, such contempts of the executive magistrate, as demonstrate themselves by some arrogant and undutiful behaviour towards the crown and government. These are,

2. Contempts against the royal *prerogative*. As, by refusing to assist the sovereign for the good of the public; either in his councils, by advice, if called upon; or in his wars, by personal service for defence of the realm, against a rebellion or invasion.[n] 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,[o] 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. 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 favour of such extrinsic power:

[k] Inst. 4, 18, 9.
[l] 24 & 25 Vict. c. 96, ss. 69, 70.
[m] 59 Geo. III. c. 59, s. 2.
[n] 1 Hawk. P. C. 59.
[o] Lamb. Eir. 315.

as, by taking a pension from any foreign prince without the consent of the crown.[p] Or, by disobeying the sovereign'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 sovereign to a subject commanding him to return from beyond 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 regno*, or proclamation, commanding the subject to stay at home. 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 courts of justice.[q]

3. Contempts and misprisions against the royal *person* and *government* may be by speaking or writing against him, cursing or wishing him ill, giving out 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. 'Thus to assert falsely that the sovereign labours under mental derangement is an offence:[r] and so is a publication calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy.'[s] It has been also 'considered' an offence 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:[t] these being acts which impliedly encourage rebellion.[u] And for this species of contempt a man may not only be fined and imprisoned, but might 'before that punishment was abolished[v] have' suffered the pillory or other infamous corporal punishment: in like manner, as in the ancient German empire, such persons as endeavoured to sow sedition, and

[p] 3 Inst. 144.

[q] 1 Hawk. P. C. 60.

[r] *Rex* v. *Harvey*, 2 B. & C. 257.

[s] *Rex* v. *Cobbett*, E. T., K. B. 1804; *Rex* v. *Burdett*, 3 B. & Ald. 717; 4 B. & Ald. 95.

[t] Jeremy Collier, a clergyman of the Church of England, publicly absolved Sir John Friend and Sir William Perkins, at Tyburn, before their execution for high treason. The Attorney-General filed an information; but as Collier was resolved not to recognize in any way the authority of a usurper, as he termed William III., which he considered he would do by giving bail in the King's Bench, he fled, and was outlawed.

[u] 1 Hawk. P. C. 23.

[v] 56 Geo. III. c. 138; 7 Will. IV., and 1 Vict. c. 23.

disturb the public tranquillity, were condemned to become the objects of public notoriety and derision, by carrying a dog upon their shoulders from one great town to another, a punishment which the Emperors Otho I. and Frederic Barbarossa inflicted on noblemen of the highest rank. 'Such offences are with us punishable, if at all, under the statutes against sedition and seditious practices, which have been already considered.'

4. Contempts against the sovereign's *title*, not amounting to treason or *præmunire*, are the denial of his right to the crown in common and unadvised discourse; for, if it be by advisedly speaking, we have seen that it amounts to a *præmunire*. This heedless species of contempt is punished by our law with fine and imprisonment.

A contempt may also arise from refusing or neglecting to take the oaths appointed by statute, and yet acting in a public office, place of trust, or other capacity, for which the said oaths are required to be taken. The penalties 'for not taking, within six months after admission to office,[w] the oaths of allegiance, abjuration, and supremacy, were formerly' very little, if anything, short of those of a *præmunire:* 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 to forfeit 500*l.* to him or them that sues for the same.[x] Members on the foundation of any college in the two universities 'were also bound' to take these oaths, 'and' register a certificate thereof in the college register within one month after; otherwise, if the electors 'did' not remove him, and elect another within twelve months, or after, the sovereign 'might' nominate a person to succeed him by his great seal or sign manual. 'And' any two justices of the peace might 'formerly' summon and tender these oaths to any person whom they suspected to be disaffected; and every person refusing the same, who was called a *non-juror*, was adjudged a popish recusant convict, and subjected to the same penalties that were mentioned in a former chapter, which in the end might amount to the alternative of abjuring the realm, or suffering death as a felon. 'But an act of indemnity has, for a long period, been passed annually, to relieve all such persons as through ignorance of the law, absence, or unavoidable accident,

[w] 1 Geo. I. s. 2, c. 13; repealed 34 & 35 Vict. c. 48.
[x] 1 Geo. I. st. 2, c. 13.

omit to take and subscribe the several oaths required by law; and the statute 31 & 32 Vict. c. 72, now carefully prescribes the oaths to be taken, and by whom, and enacts that no person, except as therein mentioned, shall be required to take the oaths of allegiance, supremacy, or abjuration.'[y]

5. Contempts against the royal *palaces* or *courts of justice* have always been looked upon as high misprisions: and by the ancient law, before the Conquest, fighting in the king's palace, or before the king's judges, was punished with death.[z] So too, in the old Gothic constitution, there were many places privileged by law *quibus major reverentia et securitas debetur, ut templa et judicia, quæ sancta habebantur,—arces et aula regis,—denique locus quilibet præsente aut adventante rege.*[a] By the statute 33 Hen. VIII. c. 12, malicious striking in the king's palace, wherein his royal person resides, whereby blood is drawn, was made 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.[b] 'But this act has been repealed,[c] and the offence is therefore only punishable now as a contempt at common law.'

Striking in the superior courts of justice, in Westminster-hall, or at the assizes, was still more penal than even in the royal palace. The reason seems to be, that those courts being anciently held in the palace and before the sovereign himself, striking there included the former contempt against the royal palace, and something more, viz., the disturbance of public justice. For this reason by the ancient common law before the

[y] Amended by 34 & 35 Vict. c. 48.

[z] 3 Inst. 140; LL. Alured. cap. 7 & 34.

[a] Stiernh. de Jure Goth. l. 3, c. 3.

[b] Mr. Hargrave has given, State Trials, vol. xi. p. 16, an extract from Stow's Annals, containing a very curious account of the circumstances of the trial of Sir Edmund Knevet, who was prosecuted upon this statute, soon after it was enacted: "for which offence he was not onely judged to lose his hand, but also his body to remain in prison, and his lands and goods at the king's pleasure. Then the said Sir Edmund Knevet desired that the king, of his benigne grace, would pardon him of his right hand, and take the left; for, quoth he, if my right be spared, I may hereafter doe such good service to his grace as shall please him to appoint. Of this submission and request the justices forthwith informed the king, who of his goodness, considering the gentle heart of the said Edmund, and the good report of lords and ladies, granted him pardon, that he should lose neither hand, land, nor goods, but should go free at liberty." —[CHRISTIAN.]

[c] 9 Geo. IV. c. 31.

Conquest,[d] striking in the king's court of justice, or drawing a sword therein, was a capital felony: and our modern law retained 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 blow in such a 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, was 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.[e] A *rescue* also of a prisoner from any of the said courts, without striking a blow, was punished with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life:[f] being looked upon as an offence of the same nature with the last; but only, as no blow was actually given, the amputation of the hand was excused. For the like reason, an affray, or riot, near the said courts, but out of their actual view, is punished with fine and imprisonment.[g]

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.[h] And, even in the inferior courts, an affray or contemptuous behaviour is punishable with a fine by the judge there sitting; as by the steward in a court-leet, or the like.

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 counsellor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody, and properly executing his duty: which offences, when they proceeded farther than bare threats, were punished in the Gothic constitutions with exile and forfeiture of goods.

Lastly, to endeavour 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 impedi-

[d] LL. Inae. c. 6; LL. Canut. 65; LL. Alured. c. 7.

[e] Staund. P. C. 38; 3 Inst. 140, 141.

[f] 1 Hawk. P. C. 57.

[g] Cro. Car. 373; 1 East, P. C. 438.

[h] Cro. Car. 503. '*Rex* v. *Clement*, 4 B. & Ald. 218.'

ments of justice, are high misprisions and contempts of court, 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 offence, if felony, and in treason a principal. And at this day it is agreed, that he is guilty of a high misprision, and liable to be fined and imprisoned.[i]

[i] 1 Hawk. P. C. 59.

CHAPTER X.

OF OFFENCES 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 out against the lives and security of private subjects, are also offences against the sovereign, as the *paterfamilias* 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 presumed 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 offences, and to the punishments inflicted by law for each particular offence; with now and then a few incidental observations: referring the student for more particulars to those 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 commonwealth, may be divided into five species; viz., offences 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 offences against public *justice:* some of which are felonious, 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 offence against public justice. It was enacted by statute 8 Hen. VI. c. 12, that if any clerk, or other person, should wilfully take away, withdraw, or avoid any record, or process in the superior courts of justice in Westminster Hall, by reason whereof the judgment should be reversed or not take effect, it should be felony, not only in the principal actors, but also in their procurers and abettors. 'This act, which extended only to the courts expressly mentioned in it, and to the court of Chancery so far as it proceeded according to the rules of the common law, has been repealed; but its provisions, so far as relates to this offence, were at the same time re-enacted and extended.[a] And now any person who steals, or for any fraudulent purpose removes from its place of deposit, or obliterates, injures, or destroys any record, writ, affidavit, rule, order, or other document relating to any court of law or equity, is guilty of felony, and may be kept in penal servitude for five years, or imprisoned, with or without hard labour and solitary confinement, for a term not exceeding two years.'[b]

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, was felony without benefit of clergy: 'but the punishment for offences of this nature has been reduced to penal servitude or imprisonment. And as the statute extended' only to proceedings in the courts themselves, 'its provisions have been enlarged, first by the statute 4 W. & M. c. 4, and finally by 24 and 25 Vict. c. 98, s. 34. To personate any other person as bail is now felony, and is punishable by penal servitude for seven or not less than five years, or imprisonment, with or without hard labour and solitary confinement, for a term not exceeding three years.'

No man's property would be safe, if records might be suppressed or falsified, or persons' names be falsely usurped in courts,

[a] 7 & 8 Geo. IV. cc. 27, 29.

[b] 24 & 25 Vict. c. 96, s. 30; 27 & 28 Vict. c. 47.

or before their public officers.[c] 'And a variety of statutes have accordingly provided for the punishment of the crime of forging official documents; the earliest of which was the statute 8 Ric. II. c. 4, which imposed penalties for making false entries in records. Passing over the intervening enactments, it may be sufficient to observe that the law on this subject was consolidated and extended by the statute 24 & 25 Vict. c. 98, which contains elaborate provisions against the forgery, alteration, or uttering of false official or public documents; these offences being in all cases felony, and punishable with long periods of penal servitude, or imprisonment accompanied at the discretion of the court with hard labour and solitary confinement. The forging of the seals or of the signatures of the judges, commissioners, registrars, and other officers of our other courts of justice is in general punishable, under particular statutes, in the same way; and so, indeed, is the forgery of the seals or signatures to foreign and colonial acts of state, or to the judgments, orders, or other judicial proceedings of any court of justice in any foreign state or British colony.'[d]

2. A second offence against public justice is *obstructing* the execution of lawful *process*. This is at all times an offence 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;* that is, an accessory in felony, and a principal in high treason.[e]

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 South-

[c] Sir William Blackstone here adds that, to prevent abuses by the extensive power which the law is obliged to repose in gaolers, it was enacted by stat. 14 Edw. III. c. 10, that if any *gaoler*, by too great duress of imprisonment, made any prisoner that he had in ward become an *approver* or an *appellor* against his will, that is, to accuse and turn evidence against some other person, it was felony in the gaoler. For, as Sir Edward Coke observes, 3 Inst. 91, 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 gaoler, to whom the prisoner is committed for safe custody. This act of Edw. III., long entirely obsolete, was repealed by the statute 4 Geo. IV. c. 64.

[d] 14 & 15 Vict. c. 99, s. 17.

[e] 2 Hawk. P. C. 121.

wark, under the pretext of their having been ancient palaces of the Crown, or the like:[f] all of which sanctuaries for iniquity are now demolished. The opposing of any process therein was made highly penal by the statutes 8 & 9 Will. III. c. 27, 9 Geo. I. c. 28, and 11 Geo. I. c. 22; 'but the extreme penalty thereby imposed was subsequently taken away.[g] And now any assault upon, resistance to, or wilful obstruction of, a peace officer in the execution of his duty, or any person acting in his aid, with intent to resist or prevent the apprehension of the party so assaulting or of any other person, is a misdemeanor, and subjects the offender to imprisonment, with or without hard labour, for any term not exceeding two years; and the court may, if it think fit, also inflict a fine, and require the offender to find sureties of the peace. If, however, the resistance exceeds an ordinary assault, it then becomes more penal; for any person who shoots or attempts to discharge loaded arms at, or causes bodily harm to, or wounds any person, with intent to resist the lawful apprehension or detainer of any person, is guilty of felony, and punishable with penal servitude for life or not less than five years, or imprisonment, with or without hard labour and solitary confinement, for any term not exceeding two years.'[h]

3. 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 offence against public justice, and the party himself is punishable by fine or imprisonment.[i] 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:[j] but *voluntary* escapes, by consent and connivance of the officer, are a much more serious offence: for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. And this whether

[f] Such as Whitefriars, the Savoy, and the Mint in Southwark.

[g] 1 Geo. IV. c. 116.

[h] 9 Geo. IV. c. 31, s. 25; 7 Will. IV. and 1 Vict. c. 85, ss. 4, 8; 9 & 10 Vict. c. 24, s. 1; 20 & 21 Vict. c. 3; 24 & 25 Vict. c. 100, ss. 38, 18; 27 & 28 Vict. c. 47.

[i] 2 Hawk. P. C. 122.

[j] 1 Hal. P. C. 600.

he were actually committed to gaol, or only under a bare arrest.[k] But the officer cannot be thus punished, till the original delinquent has actually received judgment, or 'at least been convicted'[l] 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.[m] 'And *private individuals*, who have persons lawfully in their custody, are guilty of this offence if they suffer them illegally to depart, for they may at any time protect themselves from liability by delivering over their prisoner to a peace-officer.'[n]

4. *Breach of prison* by the offender himself, when committed for any cause, was felony at the common law:[o] or even conspiring to break it.[p] But this severity is mitigated by the statute *de frangentibus prisonam*, 1 Edw. II. st. 2, which enacts, that no person shall have judgment of life or member for breaking prison, unless committed for some capital offence. So that to break prison and escape, when lawfully committed for any treason or felony, remains still felony as at the common law; 'but the punishment now imposed by statute is penal servitude for not more than seven nor less than five years, or imprisonment, with or without hard labour and solitary confinement, not exceeding two years.'[q] To break prison, whether it be the county-gaol, the stocks, or other usual place of security, 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 offence shall be no longer capital, never meant to exempt it entirely from every degree of punishment.[r]

5. *Rescue* is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offence in the stranger so rescuing, as it would have been in a gaoler to have

[k] 1 Hal. P. C. 590; 2 Hawk. P. C. 134.

[l] By the old law "attainted."

[m] 1 Hal. P. C. 588-9; 2 Hawk. P. C. 134-5.

[n] 1 Hale, 594-5; 2 Hawk. c. 20, s. 6.

[o] 1 Hal. P. C. 607.

[p] Bract. l. 3, c. 9.

[q] 7 & 8 Geo. IV. c. 28, ss. 8, 9; 7 Will. IV. & 1 Vict. c. 90, s. 5; 20 & 21 Vict. c. 3.

[r] 2 Hawk. P. C. 128.

voluntarily permitted an escape. A rescue, therefore, of one apprehended for felony, is felony; for treason, treason; and for a misdemeanor, a misdemeanor also. But here likewise, as upon voluntary escapes, because perhaps in fact it may turn out that there has been no offence committed, the principal must first be attainted or receive judgment before the rescuer can be punished 'as for the *felony;* for although the principal be not convicted, the party rescuing may still be punished as for a misdemeanor.[s] But many daring attempts having been made to prevent the detention of persons charged with felony, the statute 1 & 2 Geo. IV. c. 88, s. 1, was passed to enlarge the powers of the courts in this respect, by enabling them to direct that any person rescuing or aiding the rescue from lawful custody of a person charged with or suspected of or committed for felony, should, instead of being fined and imprisoned, be transported, or imprisoned and kept to hard labour. So that this offence is now punishable, as for a misdemeanor, with fine and imprisonment, or, if the party rescued be convicted, as for the offence of which he was guilty; and if that offence were a felony, the rescuers may be subjected to penal servitude for not exceeding seven years, or imprisonment, with or without hard labour, for not more than three years.'[t] Aiding a prisoner to escape from gaol is also highly penal. For by 'statute 28 & 29 Vict. c. 126, every person who aids a prisoner to escape, or to attempt to escape, or conveys into any prison any mask or disguise or other thing with intent to facilitate the escape of a prisoner, is guilty of felony, and punishable by imprisonment, with hard labour, for a term not exceeding two years.'[u] This statute applies to all prisons, except prisons for convicts, and military and naval prisons; aiding any prisoner to escape from which is punishable under' the statute 16 Geo. II. c. 31, whereby to convey to any prisoner in custody for treason or any felony, except petit larceny, any arms, instruments of escape, or disguise, without the knowledge of the gaoler, though no escape be attempted, or any way to assist such prisoner to attempt an escape, though no escape be actually made, is made felony, and 'by modern statutes subjects the offender to penal servitude for seven or not less than five years.' If the prisoner be in custody for petit larceny or other inferior offence, or charged with a debt of 100*l.*, it is then a mis-

[s] 2 Hawk. c. 21, s. 8. It is a misdemeanor at common law to aid a person to escape from a lawful detention. *Reg.* v. *Allan*, Car. & Mar. 295.

[t] 20 & 21 Vict. c. 3.

[u] 27 & 28 Vict. c. 126, s. 37.

demeanor, punishable with fine and imprisonment. Any person rescuing or attempting to rescue out of prison any person committed for or found guilty of murder, or any murderer going to or during execution, is guilty of a felony, 'which by statute 25 Geo. II., c. 37, s. 9, was capital, but is now punishable with penal servitude for life or not less than five years, or imprisonment, with or without hard labour and solitary confinement, not exceeding three years.' [v]

6. Another offence against public justice is the *returning from transportation*, or being at large in Great Britain, before the expiration of the term for which the offender was ordered to be transported, or had agreed to transport himself, 'or been sentenced to penal servitude.' By various statutes this was made felony without benefit of clergy; 'but the previous enactments on this subject are virtually repealed by the statute 5 Geo. IV. c. 84, consolidating the laws relating to the transportation of offenders. By that act if any offender sentenced to be transported, or having agreed to transport himself, shall be afterwards found at large, without lawful excuse, before the expiration of the term of transportation or banishment, he shall suffer death as in cases of felony, without benefit of clergy. But this punishment has been reduced by subsequent statutes to penal servitude for life, or not less than five years, with previous imprisonment, with or without hard labour, for any term not exceeding four years; or imprisonment, with or without hard labour, not exceeding two years.' [w]

7. A seventh offence against public justice is *taking a reward*, under pretence of *helping* the owner to his *stolen goods*. This was a contrivance carried to a great length of villany 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 whosoever shall take a reward under the pretence of helping any one to stolen

[v] 7 Will. IV. and 1 Vict. c. 91, s. 1; 9 & 10 Vict. c. 24, s. 1, and c. 91, s. 2; 20 & 21 Vict. c. 3.

[w] 4 & 5 Will. IV. c. 67; 9 & 10 Vict. c. 24; 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.

goods, shall suffer as the felon who stole them; unless he causes such principal felon to be apprehended and brought to trial, and also gives evidence against him. Wild, still continuing in his old practice, was at last convicted and executed upon this very statute; 'which has, however, been superseded by more modern enactments, making the corruptly taking any reward, under pretence of helping any person to any money, security, or other property whatsoever,[x] which shall by any felony or misdemeanor have been stolen or obtained, a felony, punishable with penal servitude for any term not exceeding seven nor less than five years, or imprisonment, with or without hard labour and solitary confinement, and whipping in a male under sixteen years of age, not exceeding two years.[y] It is also an offence to take money under pretence of helping a man to goods stolen from him, though the prisoner had no acquaintance with the felon, and though he had no power to apprehend the felon, and the prisoner had no power to restore the goods.'[z]

8. 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, that this offence, which is only a misdemeanor at common law, by the statutes 3 & 4 W. & M. c. 9, and 5 Anne, c. 31, made the offender accessory to the theft and felony. But because the accessory could not in general be tried, unless with the principal or after the principal was convicted, the receivers by that means frequently eluded justice. To remedy which, it was enacted by statute 1 Anne, c. 9, and 5 Anne, c. 31, that such receivers might still be prosecuted for a misdemeanor, and punished by fine and imprisonment, though the principal felon had not been before taken, so as to be prosecuted and convicted. 'These acts have, however, been superseded by modern statutes, whereby every person receiving property knowing the same to have been feloniously stolen, is guilty of felony, and may be indicted and convicted either as an accessory after the fact, or for a substantive felony; and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. This offence is now punishable

[x] 'Any person corruptly taking any reward under pretence of aiding any person to recover any *dog* which shall have been stolen, is guilty of a misdemeanor, and may be imprisoned for eighteen calendar months.'

[y] 7 & 8 Geo. IV. c. 29, s. 58; re-enacted by 24 & 25 Vict. c. 96, s. 101.

[z] *Rex* v. *Ledbitter*, 1 Mood. C. C. 76; *Reg.* v. *Pascoe*, 1 Den. C. C. 456.

with penal servitude not exceeding fourteen nor less than five years, or imprisonment not exceeding two years, with or without hard labour and solitary confinement, and with whipping in a male under sixteen if the court think fit.[a] Where the original stealing or converting of the property is a misdemeanor, the receiver is guilty of a misdemeanor, and is now liable to penal servitude for seven or not less than five years, or imprisonment, with or without hard labour and solitary confinement, not exceeding two years, and if a male under sixteen whipping in addition if the court think fit; and where the original offence is punishable on summary conviction, the receiver is liable to the same punishment which may be imposed on the principal.'[b]

Besides this statute, which is of general application, special enactments have been made with respect to the guilty receiving of particular species of property. Thus receiving letters or property sent by post and stolen, is a felony, which may be punished by penal servitude for life.[c] It is a misdemeanor, for which a penalty may be imposed, for any person knowingly to purchase or receive embezzled materials or tools of workmen employed in the woollen, worsted, linen, cotton, flax, mohair, or silk-hosiery manufactures;[d] and persons fraudulently purchasing boats, anchors, &c., or goods taken possession of from wrecks, may be punished as receivers of stolen goods.[e]

9. Of a nature somewhat similar to the two last 'species of offences,' is *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.[f] 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 "occultè sine judice compositionem ejus admittere.*"[g] By statute 25 Geo. II. c. 36, 'as re-enacted first by the 7 & 8 Geo. IV. c. 29, s. 59, and recently by 24 & 25 V. c. 96,' even to advertise a reward

[a] 24 & 25 Vict. c. 96.
[b] 24 & 25 Vict. c. 96, ss. 95, 97.
[c] 7 Will. IV. and 1 Vict. c. 36, ss. 30, 41, 42, and c. 90, s. 5; 20 & 21 Vict. c. 3.
[d] 6 & 7 Vict. c. 40.
[e] 9 & 10 Vict. c. 99, s. 29.
[f] 1 Hawk. P. C. 125.
[g] Stiernh. de Jure Goth. l. 3, c. 5.

for the return of things stolen, 'or lost,' with no questions asked, or words to the same purport, subjects the advertiser and the printer 'or publisher' to a forfeiture of 50*l.* to any person who will sue for the same, who is entitled also to his full costs of suit.

10. Common *barretry* is the offence of frequently exciting and stirring up suits and quarrels between her Majesty's subjects, either at law or otherwise,[h] 'and was the subject of a prohibitory statute as early as the reign of Edward the First.'[i] The punishment for this offence, 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 practising for the future.[j] Hereunto may also be referred another offence, 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 offence, if committed in any of the 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 not 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.

11. Maintenance is an offence 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: a practice that was greatly encouraged by the first introduction of uses.[k] This is an offence 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* to enter into any confederacy, or do any act to support another's lawsuit, by money, witnesses, or

[h] 1 Hawk. P. C. 243.

[i] 3 Edw. I. c. 33.

[j] 1 Hawk. P. C. 244. By 12 Geo. I. c. 29, '& 21 Geo. II. c. 3,' if any one, who has been convicted of common barretry, shall practise as an attorney, solicitor, or agent, in any suit, the court, upon complaint or information, shall examine the matter in a summary way in open court; and, if the fact be proved, shall direct the offender to be transported for seven years. 'But though many undoubtedly exist, it is difficult if not impossible to convict a common barretor under this statute, or at common law.'

[k] Dr. & St. 203.

patronage.[l] A man may however maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with impunity. Otherwise the punishment by common law is fine and imprisonment;[m] and by the statute 32 Hen. VIII. c. 9, a forfeiture of ten pounds.

12. Champerty, *campi partitio*, is a species of maintenance, and punished in the same manner:[n] 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.[o] 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 pretence to sue in another's right.[p] These pests of civil society, that are perpetually endeavouring to disturb the repose of their neighbours, 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 cœunt in alienam "litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit "inter eos communicaretur, lege Julia de vi privata tenentur:*"[q] and they were punished by the forfeiture of a third part of their goods, and perpetual infamy. These offences relate chiefly to the commencement of *civil* suits: but

13. The *compounding of informations* upon penal statutes are offences of an equivalent nature in *criminal* causes; and are, besides, an additional misdemeanor against public justice, by

[l] Ff. 48, 10, 20.

[m] 1 Hawk. P. C. 255.

[n] Ibid. 257.

[o] Stat. of Conspirat. 33 Edw. I.

[p] 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 of the land, or of the reversion or remainder; on pain that both purchaser and vendor shall each forfeit the value of such land to the king and the prosecutor. 'Hence the necessity, which formerly existed, of alleging, in certain pleadings relating to real property, that the party was seised or possessed by *taking the esplees* or profits of the land.'

[q] Ff. 48, 7, 6.

contributing to make the laws odious to the people. At once therefore to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it is enacted by statute 18 Eliz. c. 5, that if any person, informing under pretence 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 his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good, he shall forfeit 10*l.*, shall stand two hours on the pillory, 'for which punishment fine and imprisonment are now substituted,'[r] and shall be for ever disabled to sue on any popular or penal statute.

14. A *conspiracy* also to indict an innocent man of felony falsely and maliciously,[s] is a farther abuse and perversion of public justice; for which the party injured may either have a civil action, or the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the crown, and were by the ancient common law[t] to receive what is called the *villenous* judgment; viz., to lose their *liberam legem*, whereby they were discredited and disabled as jurors or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses rased, their trees rooted up, and their own bodies committed to prison.[u] But the villenous judgment is by long disuse become obsolete; it not having been pronounced for some ages: but instead thereof the delinquents are sentenced to imprisonment, 'with or without hard labour,'[v] and fine,—and, 'when that species of punishment existed, were put in the' pillory. 'It is no excuse for a conspiracy to carry on a malicious prosecution, that the indictment was itself insufficient, or that the court before which it was preferred had no jurisdiction to try it, although, in consequence of these circumstances, the party was never really brought into danger. Nor will it avail the defendant that he intended only to give evidence on a trial not then commenced, for the law makes the mere intent in such case criminal.'[w]

[r] 56 Geo. III. c. 138.

[s] 'Sir W. Blackstone adds,' who is accordingly indicted and acquitted; 'but it is difficult to see on what principle the indictment and acquittal of the innocent individual is necessary to constitute the offence.'

[t] Bro. Abr. tit. *Conspiracy*, 28.

[u] 1 Hawk. P. C. 193.

[v] 14 & 15 Vict. c. 100, s. 29.

[w] 1 Hawk. c. 72, s. 3.

'The *intent* is indeed the essence of the offence of conspiracy; which is defined to be, when two or more combine together to execute some act for the purpose of injuring a third person or the public. It consists, not in the accomplishment of any unlawful or injurious purpose, nor in any one act moving towards that purpose; but in the actual concert or agreement of two or more persons to effect something, which, *being so concerted and agreed*, the law regards as the object of conspiracy. The offence is consequently more difficult to be ascertained than any other known to the law; and we must look to the decisions of the courts for guidance as to what is and what is not a conspiracy.'[x]

'All confederacies to prejudice a third person, as to impoverish him so as to prevent him carrying on his trade; to cheat him in the purchase of a horse; to charge him with being the reputed father of a bastard child; to prefer an indictment against him, for the purpose of extorting money; or to injure his reputation by preferring a complaint before a magistrate, though no complaint be preferred, are indictable.'

'The combination among brokers usually called a "knock out," is indictable as a conspiracy; the difficulty is to prove it. Bankers may conspire to cheat their creditors by false balance sheets; horsedealers to defraud a purchaser by selling him an unsound horse; traders to cheat an intending partner by false representations of their profits; and persons to defraud tradesmen by causing themselves to be reputed men of property.'

'There have been conspiracies to hiss and so condemn a play; to marry a girl for her fortune; to seduce a girl; to get a pauper married by unlawful means, so as to shift the burden of supporting her from one parish to another; to commit an offence; and to prevent the prosecution of an offence.'[y]

[x] Burns' Justice of the Peace, tit. *Conspiracy*.

[y] 'It is laid down, that journeymen confederating and refusing to work for certain wages may be indicted for a conspiracy, the offence consisting in the *conspiracy*, and not in the refusal; all conspiracies being illegal, although the subject-matter may be lawful. See Burns' Justice, tit. *Conspiracy*. The conviction, in 1874, of certain gas stokers, as of a conspiracy to abstain from work, upon this view of the law, led to the statute 38 & 39 Vict. c. 86; whereby it is enacted that an agreement or combination by two or three persons, to do, or procure to be done, any act in contemplation or furtherance of a trade dispute between employers and workmen, shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as a crime.'

15. The next offence against public justice is the crime of wilful and corrupt *perjury;* which is defined by Sir Edward Coke,[z] to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully*, *absolutely*, and *falsely*, in a matter *material* to the issue or point in question. The 'common' 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. 'The statute 5 & 6 Will. IV. c. 62, however, substituting declarations in lieu of oaths in various cases, subjects all false declarations to the penalties of perjury; and a great many statutes, too numerous to be mentioned here, expressly provide that persons making false statements or declarations on oath, relating to the subject-matter of these acts, shall be liable to the penalties of perjury, and punished accordingly.'

The perjury must be corrupt, that is, committed *malo animo*, wilful, 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 circumstance, to which no regard is paid, it is not penal.

Subornation of perjury is the offence 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,[a] 'with or without hard labour, as the court shall think fit.'[b] The statutes 5 Eliz. c. 9, and 29 Eliz. c. 5, if the offender were prosecuted thereon, inflicted the penalty of perpetual infamy, and a fine of 40*l.* 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*l.*, or to have both ears nailed to the pillory. To these

[z] 3 Inst. 164.

[a] 'The offender was formerly' never more capable of bearing testimony, 3 Inst. 163; 'but this was altered by the statute 6 & 7 Vict. c. 85.'

[b] 3 Geo. IV. c. 114.

penalties the statutes 2 Geo. II. c. 25, 'and 9 Geo. II. c. 18,' superadded a power for the court to order the offender to be sent to the house of correction and kept to hard labour for a term not exceeding seven years, or to be transported for the same period; 'for which latter punishment penal servitude for any term not exceeding seven, nor less than five years, is now substituted.' [c]

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. And where indeed the death of an innocent person has actually been the consequence of such wilful perjury, it falls within the guilt of deliberate murder, and deserves an equal punishment; which our ancient law in fact inflicted.[d] But 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 offences, for which death cannot 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,[e] derived from the law of the twelve tables, "*perjurii pœna divina, exitium; humana, dedecus.*"

16. *Bribery* is the next species of offence against public justice. It is an offence against public justice when a judge, or other person concerned in its administration, takes any undue reward to influence his behaviour in his office.[f] 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:[g] not

[c] 20 & 21 Vict. c. 3; 27 & 28 Vict. c. 47.
[d] Britton, c. 5.
[e] De Leg. 2, 9.
[f] 1 Hawk. P. C. 168.
[g] Ff. 48, 11, 6.

considering the insinuating nature and gigantic progress of this vice, when once admitted. Plato therefore more wisely, in his ideal republic,[h] 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.[i] In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same.[j] But in judges, especially the superior ones, it has been always looked upon as so heinous an offence, that the chief justice Thorpe was hanged for it in the reign of Edward III. By the 'now repealed' statute 11 Hen. IV.[k] all judges and officers of the king, convicted of bribery, 'forfeited' treble the bribe, 'were punishable' at the king's will, and discharged from the king's service for ever. 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.

'At the present day, however, the species of bribery to which the attention of the public and of the legislature is chiefly directed, is that which destroys the purity of the elections for members of the House of Commons. The unsuccessful attempts to prevent this crime, for in no other light can it be regarded, are evinced by the numerous statutes which have been passed professedly to effect that object, and to which we have already had occasion to refer in the first volume of these commentaries. The statute now in force, 17 & 18 Vict. c. 102, carefully defines what acts shall amount to bribery, and makes the offence a misdemeanor, and therefore punishable by fine and imprisonment; and, apparently to induce prosecution, adds a penalty of 100*l.* to any person who shall sue for the same. A penalty of 50*l.* is assigned for the offence of *treating*, which is only a lesser kind of bribery.'

17. *Embracery* is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like.[l] The punishment for the person embracing is 'at common law' by fine and imprisonment; and for the juror so embraced, if it were by taking money, the punishment was, by

[h] De Leg. l. 12.
[i] Pott. Antiq. b. 1, c. 23.
[j] 3 Inst. 147; 4 Burr. 2500.
[k] 3 Inst. 146; 20 Edw. III. c. 1.
[l] 1 Hawk. P. C. 259.

divers statutes of the reign of Edward III., perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value. 'This offence is now punishable, by 6 Geo. IV. c. 50, s. 61, with fine and imprisonment.'

18. The *false verdict* of jurors, whether occasioned by embracery or not, was anciently considered as criminal, and therefore exemplarily punished by attaint in the manner formerly mentioned. 'It can now, in certain cases, be set aside by the court on an application for a new trial; but a corrupt juror may always be proceeded against by indictment or information.'

19. Another offence of the same species is the *negligence of public officers*, intrusted 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.[m]

20. There is yet another offence 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 colour of their office. However, when prosecuted, either by impeachment or by information, according to the rank of the offenders, it is sure to be severely punished with forfeiture of their offices, either consequential or immediate, fines, imprisonment, or other discretionary censure, regulated by the nature and aggravations of the offence committed.

21. Lastly, *extortion* is an abuse of public justice, which consists in an officer's unlawfully taking, by colour 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.[n]

'The statute 3 Edw. I. c. 26, in affirmance of the common law, enacts, that no sheriff, nor other king's officer, shall take any reward to do his office, but shall be paid of that which they take of the king; and that he who so doth, shall yield twice as much, and shall be punished at the king's pleasure. This act,

[m] 1 Hawk. P. C. 168. [n] Ibid. 170.

which thus particularly names the sheriff, extends to every ministerial officer concerned in the administration or execution of justice, the common good of the subject, or the service of the king.[o] Where, therefore, a statute annexes a fee to an office, it will be extortion in the officer to take more than is specified, for which offence he may be indicted.[p] Stated and known fees allowed by the courts of justice to their officers are, however, legal, and may be properly demanded. Nor is it criminal for an officer to accept a reward, voluntarily offered, for the more diligent or expeditious performance of his duty. But a promise to pay him money for any act of duty which the law does not suffer him to receive, is absolutely void, however freely it may have been given.'[q]

The punishment for extortion is fine and imprisonment, and sometimes a forfeiture of the office: 'and by the statute already mentioned, the defendant shall render double to the party aggrieved, and be punished at the king's pleasure; that is to say, at the discretion of the court.'[r]

[o] 2 Inst. 209.
[p] 3 Mod. 247; 3 Inst. 150.
[q] *Stotesbury* v. *Smith*, 2 Burr. 924; 1 Wm. Bla. 204.
[r] 2 Inst. 210.

CHAPTER XI.

OF OFFENCES AGAINST THE PUBLIC PEACE.

We are next to consider offences against the public *peace;* the conservation of which is intrusted to the sovereign and his officers, in the manner and for the reasons which were mentioned at large in the first volume of these commentaries. These offences 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 Mary, 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 Mary, st. 2, c. 12, which made the same offence a 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 endeavouring 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 the 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. s. 2, c. 5, commonly called the Riot Act, 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 wilfully 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 hinderance and not dispersing, are felons without benefit of clergy. 'The capital punishment for these offences has, however, been taken away, and they are now punishable with penal servitude for life, or for any term not less than five years, or imprisonment, with or without hard labour and solitary confinement, not exceeding three years.'[a] The 'statute of George the First also contains an' indemnifying clause, in case any of the mob be unfortunately killed in the endeavour to disperse them; this clause being also copied from the act of Queen Mary.

2. 'The *riotous demolition of buildings or machinery* was first struck at by statute 1 Geo. I. st. 2, c. 5, enacting that if any' persons, riotously assembled, began, even before proclamation, to pull down any church, chapel, meeting-house, dwelling-house, or out-house, they should be felons without benefit of clergy. 'But the provisions to this effect have been repealed;[b] and the riotous destruction of churches and other buildings, and of machinery, is now provided for by the statute 24 & 25 Vict. c. 97, s. 11,[c]

[a] 7 Will. IV. and 1 Vict. c. 91, s. 1; 9 & 11 Vict. c. 24, s. 1; 20 & 21 Vict. c. 3; 3 Geo. IV. c. 114.

[b] 7 & 8 Geo. IV. c. 27.

[c] Re-enacting 7 & 8 Geo. IV. c. 30, s. 8, and subsequent enactments. See 27 & 28 Vict. c. 47.

whereby any persons riotously assembled together to the disturbance of the public peace, who shall demolish or destroy, or begin to demolish, any church or chapel, or any house, outhouse, warehouse, shop, mill, malt-house, hop-oast, barn, or granary, or any building used in carrying on any trade or manufacture, or any machinery, steam-engine, or other engine for working any mine, or any building used in conducting the business of any mine, or any bridge, waggonway, or trunk, for conveying materials from any mine, are declared guilty of felony. Such offenders are now liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned, with or without hard labour and solitary confinement, for any term not exceeding two years. The same statute provides for the punishment of persons injuring or damaging buildings or machinery, an offence which, though only a misdemeanor, is highly penal.'

'In these cases of felonious destruction of property the law gives to the parties injured a civil remedy against *the hundred* in which the premises are situated. This liability, which at one time extended to any damage done in a riot, is now defined by the statute 7 & 8 Geo. IV. c. 31, which enacts, that if any church, chapel, house, building, or machinery shall be *feloniously* demolished, wholly or in part, by persons riotously and tumultuously assembled together, the inhabitants of the hundred shall be liable to yield full compensation in an action; provided the persons damnified, or such of them as have knowledge of the circumstances, or the servants who had the care of the property demolished, shall, within seven days, go before a justice of the peace, and state upon oath the names of the offenders, if known, and submit to examination touching the circumstances, and become bound by recognizances to prosecute. The action must also be commenced within *three* calendar months after the offence was committed.[d] This liability of the hundred has since been extended by the statute 2 & 3 Will. IV. c. 72, to the case of damage done to threshing machines; and by the statute 9 & 10 Vict. c. 90, s. 44, to the plundering, damaging, or destroying ships wrecked or in distress, by any riotous assemblage. Where the damage does not exceed 30*l.*, the parties damnified may proceed summarily before justices at a special petty session.'

[d] See also the statute 15 & 16 Vict. c. 76, s. 16.

3 'To *rob* or *attempt to rob*, by means of *threats*, is an offence of a very heinous nature. Thus the offence of 'accusing or threatening to accuse, or' sending letters 'accusing or' threatening to accuse, any person of a crime punishable with death or penal servitude, 'or for any assault with intent to commit, or any attempt to commit any rape, or infamous crime,' with a view to extort any property, money, security, or other valuable thing,[e] is punishable, at the discretion of the court, with 'penal servitude for life, or not less than five years, or imprisonment, with or without hard labour and solitary confinement, not exceeding two years, and whipping in addition for a male under sixteen, if the court think fit.' And by the statute '24 & 25 Vict. c. 96, any person knowingly sending or delivering any letter or writing, demanding of any person, with menaces, and without any reasonable or probable cause, any property, money, or valuable security, is guilty of felony; the punishment for which may also be penal servitude for life, or for any term not less than five years, or imprisonment, with or without hard labour and solitary confinement, for a term not exceeding two years, to which whipping, if the offender be a male under sixteen, may be added. Any person knowingly sending, or delivering, or uttering to any other person any letter or writing, accusing or threatening to accuse that or any other person of any of certain infamous crimes named in the act, with intent to extort any property, money, or valuable security, is likewise guilty of felony, and liable to the same punishment.'

'An offence of a somewhat similar nature to these crimes, but not interfering with or affecting them, is provided for by the statute 6 & 7 Vict. c. 96, s. 3; whereby any person who publishes or threatens to publish a libel upon any other person, or who, directly or indirectly, threatens to print or publish, or proposes to abstain from printing or publishing, or offers to prevent the printing or publishing of, any matter or thing touching any other person, with intent to extort any money or security, or any valuable thing, from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, is made liable to imprisonment, with or without hard labour, for any term not exceeding three years.' Similar offences were formerly high treason by the statute 8 Hen. V. c. 6.

[e] 7 & 8 Geo. IV. c. 29, ss. 8, 9; re-enacted by 24 & 25 Vict. c. 96, ss. 44-47.

4. To pull down or destroy any *lock, sluice,* or *flood-gate,* erected by authority of parliament on a navigable river, was made a felony, punishable with transportation for seven years, 'by various statutes.[f] All previous enactments on the subject were, however, consolidated by the statute 24 and 25 Vict. c. 97, which declares any person who shall unlawfully and maliciously break or cut down any sea-wall, or the bank of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously level or otherwise destroy any lock, sluice, flood-gate, or other work on any navigable river or canal, guilty of felony; for which the offender is now liable to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned, with or without hard labour and solitary confinement, and with whipping in a male under sixteen, if the court think fit, for any term not exceeding two years.'

'The unlawful and malicious removing of any piles or other materials fixed in the ground, and used for securing any sea-bank, &c., or the opening of any flood-gate, or the doing of any other injury or mischief to any navigable river or canal, with intent, and so as thereby to obstruct the navigation thereof, is also declared to be felony; and so is the destruction of public bridges. These offences are punishable with penal servitude, which in no case is for less than five years, or imprisonment not exceeding two years, with or without hard labour, and whipping in a male.'[g]

The remaining offences against the public peace are merely misdemeanors, and not felonies; as,

5. *Maliciously destroying turnpike-gates and toll-bars.* By the statute 7 Geo. III. c. 40, maliciously to pull down or otherwise destroy any *turnpike-gate* or fence, toll-house, or weighing-engine thereunto belonging, erected by authority of parliament, or to rescue any person in custody for the same, was made felony without benefit of clergy. 'But this statute has been repealed, and the offence is now a misdemeanor only, and punishable accordingly.[h] The offence consists in the throwing down, levelling, or otherwise

[f] 1 Geo. II. s. 2, c. 19; 8 Geo. II. c. 20; 4 Geo. III. c. 2; 7 & 8 Geo. IV. c. 30.

[g] 24 and 25 Vict. c. 97, s. 33; 27 & 82 Vict. c. 47.

[h] 24 & 25 Vict. c. 97, s. 34, re-enacting 7 & 8 Geo. IV. c. 30, s. 14.

destroying, "in whole or in part, any turnpike-gate or toll-bar, or "any wall, chain, rail, post, bar, or other fence belonging to any "turnpike-gate or toll-bar, or set up or erected to prevent passen- "gers passing by without paying any toll, directed to be paid by "any act of parliament relating thereto, or any house, building, "or weighing-engine erected for the better collection, ascertain- "ment, or security of any such toll."'

6. '*Maliciously destroying* or *damaging* any *book, print, statue, bust, vase,* or other article, kept for the purposes of art, science, or literature, or as an object of curiosity, in any museum, gallery, cabinet, library, or other repository to which the public has access, or any picture, statue, monument, or painted glass in any church or chapel, or other place of religious worship, or in any public building, college hall, street, square, churchyard, or public garden, or any statue or monument exposed to public view, is a misdemeanor; and the offender may be punished by imprisonment, with or without hard labour, for any period not exceeding six months; and if a male under sixteen, may be whipped.'[i]

7. Affrays, from *affraier*, to terrify, are the fighting of two or more persons in some public place, to the terror of the queen's subjects; for, if the fighting be in private, it is no *affray*, but an *assault.*[j] Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue.[k] But more especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may 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.[l] 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

[i] See the statute 24 & 25 Vict. c. 97, s. 39, re-enacting and extending the provisions of the statute 8 & 9 Vict. c. 44; which had been previously extended to public statues within the metropolitan police district by 17 & 18 Vict. c. 33.

[j] 1 Hawk. P. C. 134.

[k] Ibid. 136.

[l] Ibid. 137.

justice of the nation, is a strong aggravation of the affray, though no mischief has actually ensued.[m] 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 behaviour, more than in common ones; as in the courts of justice, and the like. And upon the same account also all affrays in a church or churchyard are esteemed very heinous offences, as being indignities to Him to whose service those places are consecrated. 'And therefore' by statute 5 & 6 Edw. VI. c. 4, if any 'clerk in orders' shall, by words only, quarrel, chide, or brawl, in a church or churchyard, the ordinary shall suspend him from the ministration of his office during pleasure. But if 'he,' in such church or churchyard, proceeds to smite or lay violent hands upon another person, he shall be excommunicated *ipso facto*.[n] '*Laymen* guilty of riotous, violent, or indecent behaviour in any church or chapel, churchyard or burying ground, or who molest, disturb, trouble, or misuse any preacher or any clerk in holy orders, incur on conviction a penalty of five pounds for each offence, or an imprisonment not exceeding two months.' *Two* persons may be guilty of an affray: but

8. *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.[o] 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.[p] A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel;[q] as if they beat a man; or hunt and kill game in another's park, chase,

[m] 1 Hawk. P. C. 138.

[n] 'This statute extended until quite recently to laymen, 23 & 24 Vict. c. 32, s. 5, and was originally of a highly penal character. For if any person' struck with a weapon, or drew any weapon with intent to strike, the offender was, besides excommunication, being convicted by a jury, to have one of his ears cut off; or, having no ears, to be branded with the letter F in his cheek. 'By the statute 9 Geo. IV. c. 31, however, "the punishment of persons convicted of striking with any weapon, or drawing any weapon with intent to strike" was repealed.'

[o] 3 Inst. 176.

[p] Bro. Abr. tit. *Riot*, 4, 5.

[q] 3 Inst. 176.

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. Unlawfully assembling, if to the number of twelve, we have just now seen, 'may constitute a felony;' but, from the number of three to eleven, 'the offence is a misdemeanor, punishable by fine' and imprisonment only, 'to which hard labour may be added.'[r] The same is the case in riots and routs by the common law; to which the pillory in very enormous cases 'was, while that species of punishment existed,' sometimes superadded.[s] Moreover, by the statute 13 Hen. IV. c. 7, any two justices, together with the sheriff or under-sheriff of the county, may come with the *posse comitatus*, 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.[t] 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 military if sent to keep the peace, may amount to overt acts of high treason, by levying war against the sovereign.

9. Nearly related to this head of riots is the offence 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;[u] and that no

[r] 3 Geo. IV. c. 114.

[s] 1 Hawk. P. C. 159.

[t] 1 Hal. P. C. 495; 1 Hawk. P. C. 161.

[u] Sir W. Blackstone observes, in a note to this passage, that the enactment referred to might be one reason, among

petition shall be delivered by a company of more than ten persons; on pain in either case of incurring a penalty not exceeding 100*l.* and three months' imprisonment. 'But as the Bill of Rights, 1 W. & M. sess. 2, c. 2, expressly declares the right of the subject to petition the crown, and all commitments and prosecutions for such petitioning to be illegal, the statute of Charles is practically repealed.' [v]

'The provision preventing the assemblage of persons near the houses of parliament, or courts of justice in Westminster, has been already noticed.'

10. 'Another' offence against the public peace is that of a *forcible entry* or *detainer;* which is committed by violently taking or keeping possession of lands and tenements, with menaces, force, and arms, and without the authority of law. This was formerly allowable to every person disseised, 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 the third volume of these commentaries. 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.[w] 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 Rich. 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 Rich. 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 his own view, as in case of riots; and upon such conviction may commit the offender to gaol, 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,

others, why the corporation of London, after the Restoration, usually took the lead in petitions to Parliament for the alteration of any established law.

[v] Dougl. 592.

[w] 1 Hawk. P. C. 141.

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 endeavour 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.[x]

11. The offence 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 armour.[y]

12. *Spreading false news*, to make discord between the king and nobility, or concerning any great man of the realm, is punishable by common law with fine and imprisonment; which is confirmed by statutes Westm. 1, 3 Edw. I. c. 34, 2 Rich. II. st. 1, c. 5, and 12 Rich. II. c. 11.

13. *False* and *pretended prophecies*, with intent to disturb the peace, are equally unlawful, and 'were formerly' 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.[z] Such false and pretended prophecies were punished capitally by statute '33 Hen. VIII. c. 14,' which was 'altered' in the reign of 'Edw. VI.' By the statute 5 Eliz. c. 15, the penalty for the first offence was a fine of ten pounds and one year's imprisonment; for the second, forfeiture of all goods and chattels, and imprisonment during life.[a] 'This latter statute is now repealed, and the offenders are therefore only punishable by fine and imprisonment, or as vagabonds, on summary conviction.'

[x] Holding over by force, where the tenant's title was under a lease, now expired, is said to be a forcible detainer. *Baron Snigge* v. *Shirton*, Cro. Jac. 199.

[y] Pott. Antiq. b. 1, c. 26.

[z] Cæs. de Bell. Gall. lib. 6, cap. 19.

[a] 'The enactments relating to this and the two preceding offences are practically obsolete.'

14. Besides actual breaches of the peace, anything that tends to provoke or excite others to break it, is an offence 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 offence.[b]

15. 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, 'or' ridicule.[c] 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:[d] 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. For the same reason it is immaterial 'at common law,' with respect to the essence of a libel, whether the matter of it be true or false; since the provocation, and not the falsity, is the thing to be punished criminally; though, doubtless, the falsehood of it may, 'independently of any statutory provision,' 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; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence 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. In a criminal prosecution, on the other hand, the tendency which all libels have to create animosities, and to disturb the public peace, is 'what' the law considers; 'and at common law, therefore, the truth of the libel not only constitutes no defence to the charge, but cannot even be given in evidence in mitigation of punishment. The statute 6 & 7 Vict. c. 96, now, however, enables a defendant, when put on his trial for a defamatory libel, to plead and prove

[b] 1 Hawk. P. C. 135, 138. '*Rice's* case, 3 East, 581.'

[c] 1 Hawk. P. C. 193.

[d] Moor. 813.

its truth; but this does not amount to a defence, unless it was for the public benefit that the facts should be published. And after such a plea, if the defendant is convicted, the punishment imposed for his offence may be more severe, if in the opinion of the court his guilt is aggravated by the defence which he has set up, or the evidence given in support of it.'[e]

'The truth of the libel cannot in any case be inquired into without being pleaded under the provisions of the statute; which applies only to libels of a private and personal character, and does not extend to those denominated seditious or blasphemous.[f] In these, therefore, and in all cases in which there is no plea of justification,' the only points to be inquired into, 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 offence against the public is complete. 'But upon both points the jury must exercise their judgment and pronounce their opinion, as a question of fact, as required by the statute 32 Geo. III. c. 60, which was passed expressly to remove doubts respecting the functions of juries in cases of libel. This celebrated measure, which, from its still more celebrated author, is usually called *Fox's Act*, was the result of a lengthened and acrimonious discussion between government, backed by the courts of law on the one hand, and the advocates of popular rights, with whom the juries generally sympathized, on the other; the courts holding that the jury had no question to determine but the mere fact of writing, printing, or publishing,[g] the latter contending that the guilt or innocence of the defendant was thus taken away entirely from that tribunal, whose proper constitutional function it was to determine that very question.[h] And the statute, therefore, after reciting that doubts had arisen, whether, on a trial for publishing a libel, it were competent to the jury, on the plea of not guilty pleaded, to give their verdict on the whole matter at issue, proceeds to *declare* and enact, "that "on every such trial, the jury sworn to try the issue may give a "general verdict of *guilty* or *not guilty* upon the whole matter put

[e] *Reg.* v. *Newman*, 1 El. & Bl. 268.

[f] *Reg.* v. *Duffy*, 2 Cox C. C. 45.

[g] 'Per Lords Raymond, Mansfield, and Kenyon. Starkie on Libel, vol. ii. ch. 16.'

[h] The names and views of the writers on this memorable period of our annals will be found collected in Buckle's Introduction to the History of Civilization in England, vol. i. p. 443.

"in issue; and shall not be required or directed by the court * * * "to find the defendant or defendants guilty, merely on the proof "of the publication, by such defendant or defendants, of the paper "charged to be a libel, and of the sense ascribed to the same in "such indictment or information." But in every such trial the court is to direct the jury as in other criminal cases; and the jury may in their discretion, as with other offences, find a special verdict.'[i]

'The punishment on conviction for maliciously publishing any defamatory libel is fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year. If, however, the defendant published the libel *knowing* it to be *false*, the imprisonment may be for two years.[j] And it is to be observed, that the defendant is entitled, on judgment given for him, upon any indictment or information by a private prosecutor for the publication of a defamatory libel, to recover costs from the prosecutor: who, on the other hand, if the issue upon a plea of justification is found for him, is entitled to recover his costs from the defendant.'[k]

By the law of the twelve tables at Rome, libels, which affected the reputation of another, were made a capital offence: but, before the reign of Augustus, the punishment became corporal only.[l] Under the Emperor Valentinian[m] 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 vigour, 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*

[i] '*Rex* v. *Burdett*, 4 B. & Ald. 95. The statute 32 Geo. III. c. 60, is strictly applicable to criminal trials. Being a *declaratory* act, however, its provisions have been adopted in civil actions, in which it is the practice for the judge to define what is a libel in law, and then leave the jury to determine whether the libel complained of falls within that definition or not. *Parmiter* v. *Coupland*, 6 M. & W. 105.'

[j] 6 & 7 Vict. c. 96, ss. 4, 5.

[k] 6 & 7 Vict. c. 96, s. 8. This statute contains several provisions for facilitating the proof of publication in the case of newspapers and public journals.

[l] Hor. ad Aug. 152.

[m] Cod. 9, 36.

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 publication, 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,[n] 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 is the object of legal punishment. Neither is any restraint 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

[n] 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 licence, 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, 'except perhaps during a short interval from 1793 to 1802,' has ever since so continued.

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 the 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 laws, 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.

CHAPTER XII.

OF OFFENCES AGAINST PUBLIC TRADE.

Offences against public *trade*, like those of the preceding classes, are either felonious or not felonious, 'although strictly they do not admit of that division; for we shall find that offences of the same general character are either felonies or misdemeanors, according to the particular circumstances attendant on their commission.' Of the first sort are,[a]

1. Smuggling, or the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise, is an offence restrained by several statutes, which inflict pecuniary penalties and seizure of the goods for clandestine smuggling; and affix the guilt of felony, with 'penal servitude for life,' upon more open, daring, and avowed practices. 'Thus,' if three or more persons 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

[a] 'The first offence against public trade mentioned by Sir William Blackstone in this place is' *owling*, so called from its having been usually carried on in the night, which was the offence of transporting wool or sheep out of the kingdom, to the detriment of its staple manufacture. This was forbidden at common law, Mirror, c. I, § 3, and more particularly by statute 11 Edw. III. c. 1, when the importance of our woollen manufacture was first attended to; and there were many later statutes relating to this offence, the principal of which were those enacted in the reign of Queen Elizabeth. The statute 8 Eliz. c. 3, made the transportation of live sheep, or embarking them on board any ship, for the first offence forfeiture of goods and imprisonment for a year, and that at the end of the year the left hand should be cut off in some public market, and be there nailed up in the openest place; and the second offence was felony. The statutes 12 Car. II. c. 32, and 7 & 8 Will. III. c. 28, made 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 the 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 by 12 Geo. II. c. 21, and 19 Geo. II. c. 34, made it transportation for seven years, if the penalties were not paid. 'All these statutes were repealed by 5 Geo. IV. c. 47.'

custody for such offences, 'they are guilty of felony, and are now liable to penal servitude for life, or not less than five years, or imprisonment, with or without hard labour and solitary confinement, not exceeding three years.' Any person maliciously shooting at any vessel or boat belonging to the royal navy or in the service of the reveune, within one hundred leagues of any part of the coast of the United Kingdom; or maliciously shooting at, maiming, or dangerously wounding any officer of the army, navy, or marines, employed for the prevention of smuggling, or any officer of customs or excise, is, as a felon, punishable in the like manner.

'These are forcible acts of smuggling, carried on in defiance of the statutes; but attempts even to evade the laws of the customs may in some cases be felonies. Thus if any person, in company with more than four others, is found with goods liable to forfeiture, or in company with one other person within five miles of the sea-coast, or of any navigable river, with such goods, and carrying offensive arms or weapons, or disguised in any way, he shall be adjudged guilty of felony; and is punishable now by penal servitude for seven or not less than five years.'[b] Persons assaulting or obstructing officers of the revenue when in the execution of their duty, 'are only guilty of a misdemeanor; but it is punishable with penal servitude for seven or not less than five years, or imprisonment, with hard labour, for not more than three years. Making signals to vessels engaged in smuggling is not so penal, being a misdemeanor punishable by a fine of 100*l.*, or imprisonment, with hard labour, not exceeding one year.'

2. Another offence against public trade is fraudulent *bankruptcy*, which was sufficiently spoken of in the second volume of these commentaries. I shall therefore here barely mention the several species of fraud taken notice of by the 'Debtors Act, 1869; which provides specially for the punishment of fraudulent debtors.'

'Any person then adjudged bankrupt, or whose affairs are liquidated by arrangement, is guilty of a misdemeanor, and liable to be imprisoned for any time not exceeding two years, with or without hard labour, if he does not, to the best of his knowledge and belief, fully and truly discover to the trustee all his property; if he does not deliver up to the trustee all such

[b] 16 & 17 Vict. c. 107, ss. 244, 248, 249, 250, 251; 20 & 21 Vict. c. 3; 7 Will. IV. and 1 Vict. c. 91, s. 2.

part of his property as is in his custody or under his control, and all books, papers, and writings relating thereto; if, after the presentation of a petition or the commencement of the liquidation, or within four months before such presentation or commencement, he conceals any part of his property to the value of ten pounds, or any debt due to or from him; or fraudulently removes any part of his property of the value of ten pounds; or makes any material omission in any statement relating to his affairs; or conceals, destroys, mutilates, or falsifies, any book or document relating to his property or affairs; or is privy to the making of any false entry in any book or document relating to his property or affairs; or fraudulently parts with, alters, or makes any omission in, any document affecting or relating to his property or affairs: or is privy to the doing so; or if, after the presentation of a petition or the commencement of the liquidation, he prevents the production of any book, paper, or writing relating to his property; or, knowing or believing that a false debt has been proved, he fail for the period of a month to inform the trustee thereof; or if, after the presentation of a petition or the commencement of the liquidation, or at any meeting of his creditors within four months before such presentation or commencement, he attempts to account for any part of his property by fictitious losses or expenses; or if, within four months next before the presentation of a petition or the commencement of the liquidation, he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same; or, being a trader, has obtained, under the false pretence of carrying on business and dealing in the ordinary way of his trade, any property on credit and has not paid for the same; or has pawned, pledged, or disposed of otherwise than in the ordinary way of his trade any property which he has obtained on credit and has not paid for; or finally, whether trader or no, if he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors to any agreement with reference to his bankruptcy or liquidation.'

'All these offences are misdemeanors. But any debtor who is adjudged a bankrupt or has his affairs liquidated by arrangement, and who after the presentation of the petition or the commencement of the liquidation, or within four months before such presentation or commencement, quits England and takes with him, or attempts or makes preparation for quitting England and for

taking with him, any part of his property to the amount of twenty pounds, is guilty of felony, punishable with imprisonment for a time not exceeding two years, with or without hard labour.'

All these offences may, indeed, justly be considered as atrocious species of the *crimen falsi*, which 'might properly be' put upon a level with those of forgery and falsifying the coin. 'But the honest bankrupt, as we have seen, is no longer treated as a criminal, as was formerly the case; since' even without actual fraud, if he could not make it appear that he was disabled from paying his debts by some casual loss, he was liable by the statute 21 Jac. I. c. 19, to be set on the pillory for two hours, with one of his ears nailed to the same, and cut off.

3. 'The malicious destruction of machinery, or of goods in the process of manufacture, is an offence against public trade as well as against the property of the individual sufferer; for the immediate object of the offender is often the destruction of property generally, irrespective altogether of its ownership. This crime is now prosecuted under the statute 24 & 25 Vict. c. 97,[c] consolidating and amending the laws relating to malicious injuries to property, defining the offences, which are generally felonies, and prescribing the punishments; which may in certain cases be penal servitude for life; although it is in the discretion of the court to award imprisonment, with or without hard labour and solitary confinement, for any term not exceeding two years, and, in the case of a male offender under sixteen, whipping. The statute provides for injuries to agricultural machines, and to machines employed in any manufacture whatever; and extends to mines, the malicious drowning of which, or destroying or obstructing any airway, waterway, pit-level, or shaft belonging thereto, is highly penal; as is likewise the setting fire, or attempting to set fire to a mine; and the offence is complete, whether committed from malice conceived against the owner of the property, or otherwise.'[d]

4. 'Unlawful combinations among workmen may be considered offences against trade, and have formed the subject of several enactments, all of which were, however, consolidated by the

[c] Re-enacting 7 & 8 Geo. IV. c. 30, 7 Will. IV., and 1 Vict. c. 90, s. 5, and 20 & 21 Vict. c. 3.

[d] See the statute 24 & 25 Vict. c. 97, ss. 26, 27, 28, 29, 58; re-enacting so far 23 & 24 Vict. c. 29.

statute 38 & 39 Vict. c. 86, which prohibits the use of any violence, intimidation, molestation, or obstruction, on the part of either masters or workmen, the offender being liable on conviction to a penalty of 20*l.*, or imprisonment with or without hard labour for a term not exceeding three months. Workmen, as well as masters, may meet together for the purpose of consulting upon and determining the rate of wages, or the hours of work, and may make any arrangements among themselves for giving effect to their resolutions. But if they agree together not to work under certain wages, they must carry out their object by lawful means, and not attempt to intimidate or prevent masters from employing, or workmen from taking employment, at any wages they may agree for.'[e]

5. Cheating is another offence 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 were made to restrain and punish deceits in particular trades, but are 'now either repealed or in desuetude.'

The obsolete offence also of *breaking the assize* of bread, or the rules laid down by law for ascertaining its price in every given quantity, was reducible to this head of cheating: as is likewise in a peculiar manner the offence of selling by '*false scales* or' *false weights and measures*, the standard of which fell under our consideration in a former volume. 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 dung-cart; 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 cerevisiam faciens in cathedra ponebatur stercoris.*"[f] 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, 'to which hard labour may be added;'[g] 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.

'Under this head of cheating, however, may be ranked one or two other crimes of a more serious nature. Of these the first I shall

[e] *Reg.* v. *Rowlands*, 2 Den. C. C. 364. [f] Seld. Tit. of Hon. b. 2, c. 5, § 3.
[g] 14 & 15 Vict. c. 100, s. 29.

mention is the offence of *obtaining money or goods by false pretences*, now provided for by the statute 24 & 25 Vict. c. 96, ss. 88 & 89,[h] whereby any person who, by any false pretence, obtains from any person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or security to be delivered to any other person, with intent to defraud, is declared guilty of a misdemeanor, for which the offender is now liable to be kept in penal servitude for five years, or to be imprisoned, with or without hard labour and solitary confinement, for any term not exceeding two years.'

'The provisions of this act have been extended by the Debtors Act, 1869; by which any person who in incurring any debt or liability obtains credit under false pretences, or by means of any other fraud: or with intent to defraud his creditors, makes or causes to be made any gift, delivery, or transfer of or any charge on his property: or conceals or removes any part of his property since or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him, is guilty of a misdemeanor, and liable on conviction to be imprisoned for any time not exceeding one year, with or without hard labour.'

'The same statute punishes in a similar way any creditor in a bankruptcy or liquidation who, with intent to defraud, makes a false claim, proof, or statement of account.'

'Another kind of false pretence is the *personation* of another, or of an heir, executor, administrator, wife, widow, next of kin or relation, with intent fraudulently to obtain any land, estate, money, chattel, or valuable security. This crime, which at common law is only a misdemeanor,[i] has now been made a felony,[j] punishable with penal servitude for life or not less than five years, or imprisonment not exceeding two years, with or without hard labour, and with or without solitary confinement.'

'Obtaining the signature of any person to any bill, note, or valuable security with intent to cheat or defraud is a misdemeanor, and subjects the offender to be kept in penal servitude for five years, or to be imprisoned for two years, with or without hard

[h] Re-enacting 7 & 8 Geo. IV. c. 29, s. 53.

[i] 2 East P. C. c. 20, s. 6, p. 1010.

[j] 37 & 38 Vict. c. 36, s. 1.

labour.[k] Indeed,' any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, is punishable with fine or imprisonment. 'Thus, any seller or mortgagor of property, or any solicitor or agent of such seller or mortgagor, who conceals from the purchaser or mortgagee any settlement, deed, will, or other instrument material to the title of or any incumbrance affecting the property, or falsifies any pedigree upon which the title does or may depend, in order to induce the acceptance of the title with intent to defraud, is guilty of a misdemeanor, punishable, at the discretion of the court, by fine, or imprisonment for any time not exceeding two years, with or without hard labour, or by both; besides being liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under him.'[1]

'Of a less heinous nature, though often of most mischievous consequences, is the offence of personating a master, and giving a *false character* to a servant, which is also a kind of cheat, and exposes the offender to a fine of 20*l.*, and in default thereof, to be imprisoned and kept to hard labour for a period of not less than one or more than three months; while a similar punishment may be inflicted on any person offering himself as a servant with a false certificate of character.'[m]

'The fraudulent use of trade marks is also a mode of cheating the true owner of such marks, by representing goods, not of his manufacture, to possess the qualities which he professes, in the articles he sells, to supply. This offence is by the statute 25 & 26 Vict. c. 88, punishable by imprisonment, with or without hard labour, and with or without a fine, not exceeding two years, besides the forfeiture of all the falsely marked goods. Knowingly selling or exposing for sale goods falsely marked is punishable by fine.'[n]

[k] 24 & 25 Vict. c. 96, s. 90, re-enacting and extending 21 & 22 Vict. c. 47.

[1] No prosecution for any of these offences can be commenced without the sanction of the attorney or solicitor general; and this sanction is not to be given without such previous notice to the person intended to be prosecuted as the attorney or solicitor general shall think fit to direct, 22 & 23 Vict. c. 35, s. 24; 32 & 33 Vict. c. 62.

[m] 32 Geo. III. c. 56.

[n] Besides the offences against public trade above enumerated, there were formerly some others, which, although they have now no legal existence, deserve a passing notice.

Thus, usury was defined to be an *unlawful* contract upon the loan of money, to receive the same again with exorbitant increase, and was considered an offence against trade; which was

accordingly struck at by statute 37 Hen. VIII. c. 9, whereby the rate of interest was fixed at 10*l.* per cent. per per annum, which the statute 13 Eliz. c. 8, confirmed; and ordained that all brokers should be guilty of a *præmunire* that transacted any contracts for more, and that the securities themselves should be void. This rate was by various statutes subsequently reduced to five per cent.; and not only were all contracts for taking more in themselves totally void, but the lender also forfeited treble the amount borrowed. Relaxations were made from time to time by modern statutes, as sounder views on the nature of money as an instrument of commerce came to prevail; until finally, the usury laws were, as we have already seen, wholly repealed by the statute 17 & 18 Vict. c. 90.

What was termed *forestalling* the market was also considered an offence against trade; being an offence at common law, and described by statute 5 & 6 Edw. VI. c. 14, to be the buying or contracting for any merchandize or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading persons to enhance the price, when there: any of which practices make the market dearer to the fair trader. *Regrating* is described by the same statute to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place; for this also enhances the price of the provisions, as every successive seller must have a successive profit: and *engrossing* to be getting into one's possession, or buying up large quantities of corn, or other dead victuals, with intent to sell them again. This was considered to 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 so the total engrossing of any other commodity, with intent to sell it at an unreasonable price, was an offence indictable and finable at the common law. And the general penalty for these three offences by the common law, for all the statutes concerning them were repealed by 12 Geo. III. c. 71, was, as in other minute misdemeanors, discretionary fine and imprisonment.

Monopolies were considered much the same offence in other branches of trade that engrossing was in provisions; being a licence or privilege allowed by the sovereign for the sole buying and selling, making, working, or using of anything whatsoever; whereby the subject in general was restrained from that liberty of manufacturing or trading which he had before. These had been carried to an enormous height during the reign of Queen Elizabeth, and were heavily complained of by Sir Edward Coke, in the beginning of the reign of King James the First; but were in great measure remedied by statute 21 Jac. I. c. 3, which declared such monopolies, with certain exceptions, to be contrary to law and void, and made the monopolies themselves punishable with the forfeiture of treble damages and double costs, to those whom they attempted to disturb; and if they procured any action, brought against them for these damages, to be stayed by an extra-judicial order, other than of the court wherein it was brought, they incurred the penalties of *præmunire*. In the same manner, by a constitution of the Emperor Zeno, all monopolies and combinations to keep up the price of merchandize, provisions, or workmanship, were prohibited upon pain of forfeiture of goods and perpetual banishment.

To *exercise a trade* in any town, without having previously served as an *apprentice* for seven years, was formerly looked upon to be detrimental to public trade, upon the supposed want of sufficient skill in the trader; and therefore was punished by 5 Eliz. c. 4, with the forfeiture of forty shillings by the month. But this statute was repealed by the 54 Geo. III. c. 96, except as to the customs of the city of London; which, again, have long ceased to be enforced, and are not likely ever to be revived.

Lastly, to prevent the destruction of

our home manufactures, which it was supposed must necessarily result from *transporting and seducing our artists* to settle abroad, it was provided by statute 5 Geo. I. c. 27, that such as so enticed or seduced them should be fined 100*l.*, and be imprisoned three months; and for the second offence should 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 resided, were to be deemed aliens, and to forfeit all their lands and goods, and be incapable of any legacy or gift. By statute 23 Geo. II. c. 13, the seducers incurred for the first offence a forfeiture of 500*l.* for each *artificer* contracted with to be sent abroad, and imprisonment for twelve months; and for the second, 1000*l.*, and were liable to two years' imprisonment: and by the same statute, connected with 14 Geo. III. c. 71, and 15 Geo. III. c. 5, if any person *exported any tools or utensils* used in the silk, linen, cotton, or woollen manufactures, excepting wool-cards to North America, he forfeited the same and 200*l.*, and the captain of the ship 100*l.*; and if any captain of a king's ship, or officer of the customs, knowingly suffered such exportation, he forfeited 100*l.* and his employment; and was for ever made incapable of bearing any public office; and every person collecting such tools or utensils, in order to export the same, on conviction at the assizes, forfeited such tools and also 200*l.* All the acts relating to artificers leaving the kingdom were, however, repealed by the statute 5 Geo. IV. c. 97; and by the statute 6 & 7 Vict. c. 84, all pre-existing restrictions on the exportation of machinery were entirely removed.

CHAPTER XIII.

OF OFFENCES AGAINST THE PUBLIC HEALTH, AND THE PUBLIC POLICE OR ECONOMY.

THE fourth series of offences, 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 'as with us' special magistrates or curators appointed.

1. The first statute 'on this subject deserving of notice, is the' 1 Jac. I. c. 31, 'by which' it was enacted, that if any person infected with the plague, or dwelling in any infected house, were commanded by the mayor or constable, or other head officer of his town or vill, to keep his house, and should venture to disobey it, he might be enforced, by the watchmen appointed on such melancholy occasions, to obey such necessary command: and, if any hurt ensued by such enforcement, the watchmen were thereby indemnified. And farther, if such person so commanded to confine himself went abroad, and conversed in company, if he had no plague sore upon him, he was punishable as a vagabond by whipping, and bound to his good behaviour; but if he had any infectious sore upon him, uncured, he was then guilty of felony. 'This statute, long obsolete in consequence of the absence of the plague from this country, was, together with all the acts continuing it, repealed by the statute 7 Will. IV. and 1 Vict. c. 91, s. 4. But it has been held to be a misdemeanor at common law to expose a person labouring under an infectious disorder, such as the small-pox, in the streets or other public places;[a] and it is now an offence not only in any person suffering from an infectious disorder to expose himself on any public way, but for the person in charge of him to do so,—or to expose without previous disinfection bedding, clothing, or other things

[a] *Rex* v. *Kantandillo*, 4 M. & S. 73; *Rex* v. *Burnett*, 4 M. & S. 272.

which have been exposed to infection. It is also an offence of the driver of a public conveyance not to disinfect after exposure to infection,—and for any person to let houses in which infected persons have lived without previous disinfection, or to make a false answer to inquiries as to such houses.' [b]

'It is an offence punishable by imprisonment for any term not exceeding one month, to produce or attempt to produce, by *inoculation* or otherwise, the disease of small-pox. The *vaccination* of all children by the public vaccinator, or by a duly qualified medical practitioner, is now compulsory, under penalties summarily recoverable before two justices of the peace.' [c]

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, was 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, were guilty of felony without benefit of clergy. The same penalty also attended 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. 'But by 6 Geo. IV. c. 78, this and all other statutes relative to quarantine were repealed; elaborate provisions being made, at the same time, for securing the proper performance of quarantine, and obedience to any regulations issued by the privy council with respect to vessels coming from foreign parts, and suspected of having the plague or other infectious disease on board. Offences against this statute, or disregard of the orders in council, are in ordinary cases punishable by a heavy fine; but the forgery of any of the certificates required by the act as to the performance of quarantine and fulfilment of the other regulations therein referred to, constitutes and is punishable as felony.'

'The Local Government Board have also power, whenever any part of the country is threatened with or affected by any epidemic, to make regulations, which may be enforced by penalties, for the speedy interment of the dead, for house to

[b] The Public Health Act, 1875.

[c] 3 & 4 Vict. c. 29; 30 & 31 Vict. c. 84; 34 & 35 Vict. c. 98.

house visitation, and for providing medical aid and otherwise guarding against the spread of the disease.' [d]

2. A second, but much inferior, species of offence against public health is selling of *unwholesome provisions*. To prevent which the statute 51 Hen. III. st. 6, and the ordinance for bakers, c. 7, prohibited the sale of corrupted wine, contagious or unwholesome flesh, or flesh that had been bought of a Jew; under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. 'But an indictment under either statute was quite unknown in practice; and, both being now repealed, the usual method of proceeding is a prosecution before the magistrates under the statute 38 & 39 Vict. c. 63; which, repealing but re-enacting previous acts, has been passed to prevent the adulteration of food and drugs, which include every possible article of human consumption.' [e]

3. 'The third species of offences I shall mention are the result of negligence, rather than of any evil design. They comprise those acts of omission which consist in allowing any premises to remain uncleansed, or permitting any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain, or ashpit, to be so foul, or any animal to be so kept, as to be injurious to health. For summarily abating these nuisances, as well as punishing offenders who continue them, by fine, full powers are conferred on the local authorities of towns and populous districts by the Public Health Act, 1875: who may appoint and pay sanitary inspectors; these officers having power to enter and inspect premises, and, on application to the justices, to obtain an order for abating the nuisances complained of. These orders may in some cases be enforced by penalties, in others carried into effect by the local authority at the cost of the owner or occupier of the premises.'

4. 'A fourth offence against the public health is the carrying on within the limits of any city, town, or populous district, any noxious or offensive trade, business, or manufacture. This may also be made the subject of complaint by the local authority

[d] The Public Health Act, 1875, s. 134.
[e] See also the Public Health Act, 1875, s. 116.

to the justices, and punished by fine. But if the defendant enter into recognizances to abide the event of legal proceedings at law or equity, the local authority must then take proceedings in the High Court for abating the nuisance. It may be added here that allowing any washing or other substance produced in making or supplying gas, to flow into or pollute any stream, aqueduct, reservoir, pond, or place for water, is also an offence against the public health, exposing the offender to a penalty of two hundred pounds, which may be sued for either by the party injured, or by the local authority.'

5. 'Other offences injurious to health, and punishable under the same statute by fine on summary conviction before justices, result from over-crowding, and a disregard of the sanitary regulations made for common lodging-houses and workshops.'

These are the offences which may properly be said to respect the public health.

V. The last species of offences 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 behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations. This head of offences must therefore be very miscellanous, 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 offence of *clandestine marriages:* for by the statute '4 Geo. IV. c. 76;'[f] 1. To solemnize marriage in any other place besides a church, or public chapel wherein banns have been usually published, 'or at any other time than between eight and twelve in the forenoon, unless by special' licence from the Archbishop of Canterbury;—or, 2. To solemnize marriage without due publication of banns, or licence obtained from a proper authority;

[f] Re-enacting Lord Hardwicke's Act, 26 Geo. II. c. 33.

—'or, 3. To solemnize marriage according to the rites of the Church of England under a false pretence of being in holy orders;' not only renders the marriage void, but subjects the person solemnizing it to felony, punishable by 'penal servitude' for fourteen years.

'It is not less penal to disregard the provisions of the statutes,[g] regarding the marriages contracted in dissenting places of worship, or before the superintendent registrar; which, as we saw in the first volume of these commentaries, must also be attended with all the publicity required in marriages celebrated *in facie ecclesiæ*. For knowingly and wilfully to solemnize any marriage, except by special licence, in any other place than the registered building or office specified in the notice and certificate given according to the statute, except as to marriages between Quakers and Jews,[h] or knowingly to solemnize any marriage in any such registered building or office, in the absence of a registrar of the district; or to solemnize any marriage, except by licence, within twenty-one days after the entry of the notice to the superintendent registrar; or, if the marriage is by licence, within seven days of such entry, or after three calendar months after such entry, is felony, punishable by penal servitude or imprisonment. Any superintendent registrar unduly issuing a certificate for marriage, is also guilty of felony.'

'By the statute 26 Geo. II. c. 33,' to make a false entry in a marriage register; to alter it when made; to forge or counterfeit such entry, or a marriage licence; to cause or procure, or act or assist in, 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 that act; all these offences, knowingly and wilfully committed, subjected the party to the guilt of felony without benefit of clergy. 'This act has, with certain exceptions, been repealed;[i] but its provisions have been re-enacted and extended by the statute now in force on this subject.'[j]

'Thus it is felony, punishable, at the discretion of the court, with penal servitude for life, or not less than five years, or

[g] 6 & 7 Will. IV. c. 85; 10 & 11 Vict. c. 58.

[h] 10 & 11 Vict. c. 58.

[i] 4 Geo. IV. c. 76.

[j] 24 & 25 Vict. c. 98, re-enacting 11 Geo. IV. and 1 Will. IV. c. 66.

imprisonment for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, wilfully to insert, or cause to be inserted, in any register of marriages, any false entry of any matter relating to any marriage, or to forge or alter any such entry in a register, or knowingly to utter any forged writing as a copy of an entry in a register, or wilfully to destroy, deface, or injure any register. The forgery or the altering, or uttering, knowing it to be forged or altered, of any licence of marriage is equally penal. Similar provisions are made with reference to the falsification of any registers, entries, or certificates of births, baptisms, or burials, which now are or hereafter may be authorised to be kept, or to the forgery of the seals or certificates of any register office or burial board.'

Another felonious offence, with regard to this holy estate of matrimony, is what some have corruptly called *bigamy*, which properly signifies being twice married; but is more justly denominated *polygamy*, or having a plurality of wives at once.[k] 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,[1] "*prope soli barbarorum singulis uxoribus contenti sunt.*" It was anciently punished by the laws

[k] 3 Inst. 88. Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other, or once marrying a widow. Such were esteemed incapable of orders, &c.; and by a canon of the council of Lyons, A.D. 1274, held under Pope Gregory X., were *omni privilegio clericali nudati, et coercioni fori secularis addicti;* 6 Decretal. 1, 12. This canon was adopted and explained in England by statute 4 Edw. I. st. 3, c. 5, and *bigamy* thereupon became no uncommon counter-plea to the claim of the benefit of clergy. M. 40 Edw. III. 42; M. 11 Hen. IV. 11, 48; M. 13 Hen. IV. 6; Staundf. P. C. 134. The cognizance of the plea of *bigamy* was declared by statute 18 Edw. III. st. 3, c. 2, to belong to the court-Christian, like that of *bastardy*. But by stat. 1 Edw. VI. c. 12, s. 16, *bigamy* was declared to be no longer an impediment to the claim of clergy. See Dal. 21; Dyer, 201.

[1] De Mor. Germ. 18.

of Sweden with death.[m] And with us in England it is enacted by statute '24 & 25 Vict. c. 100, s. 57,[n] that whosoever being married shall marry any other person during the life of the former husband or wife, shall be guilty of felony, whether the second marriage have taken place in England or elsewhere. This offence is now punishable by penal servitude for not more than seven nor less than five years,[o] or imprisonment, with or without hard labour, not exceeding two years.'

The first wife in this case shall not be admitted as a witness against her husband, because she is the true wife; but the second may, for she is indeed no wife at all;[p] and so, *vice versâ*, of a second husband. This act makes an exception of 'four cases' in which such second marriage, though in the 'second case' it is void, is yet no felony.[q] 1. The case of a second marriage contracted out of England and Ireland by any other than a British subject. 2. The case of a person marrying again whose husband or wife shall have been continually absent from that person for seven years then last past, and shall not have been known by such person to be living within that time.[r] 3. The case of any person who at the time of the second marriage shall have been divorced *a vinculo* from the first marriage; and, 4. The case of any person whose former marriage shall, at the time of the second marriage, have been declared void, by any court of competent jurisdiction.'[s]

To descend next to 'offences which are not felonious:'—

3. *Common nuisances* are a species of offences against the public order and economical regimen of the state; being either the doing of a thing to the annoyance of all the queen's subjects, or the neglecting to do a thing which the common good requires.[t] The nature of *common* nuisances, and their distinction from *private* nuisances, were explained in the preceding volume; 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 offences, as annoy the whole community in general, and not

[m] Stiernh. de Jure Sueon. l. 3, c. 2.

[n] Re-enacting 1 Jac. I. c. 11, and 9 Geo. IV. c. 31.

[o] 20 & 21 Vict. c. 3; 24 & 25 Vict. c. 100, s. 57; 27 & 28 Vict. c. 47.

[p] 1 Hal. P. C. 693.

[q] 3 Inst. 89; Kel. 27; 1 Hal. P. C. 694.

[r] *Rex* v. *Cullen*, 9 C. & P. 681.

[s] 1 Leach, 146; *Duchess of Kingston's* case, 2 Smith's Leading Cases.

[t] 1 Hawk. P. C. 197.

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 person 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. Formerly a presentment thereof by a judge of assize, &c., or a justice of the peace, was in all respects equivalent to an indictment; 'but this method of proceeding has been abolished, and provision made, at the same time, for enforcing the obligation to repair, by summary proceedings before magistrates, in cases where the liability is not disputed.'[u] Where there is a house erected, or an enclosure made, upon any part of the royal demesnes, or of a highway, or common street, or public water, or such like public things, it is properly called a *purpresture*.[v] 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 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.[w] 'Nor is it necessary that such nuisances should be injurious to health.'[x] All disorderly *inns*, or *ale-houses*, *bawdy-houses*,[y] *gaming-houses*, *stage-plays* unlicensed,[z] booths and stages for *rope-dancers*, *mountebanks*, and the like,[a] are public

[u] See the General Highway Act, 5 & 6 Will. c. 50, and the Public Health Act, 1875, s. 144.

[v] Co. Litt. 277, from the French *pourpris*, an enclosure.

[w] Salk. 460.

[x] *Rex* v. *White*, 1 Burr. 333; *Rex* v. *Niel*, 2 C. & P. 485.

[y] 'Hawk. b. 1, c. 74; Bac. Abr. *Nuisances*. See *Rex* v. *Thomas & Wife*, Rep. Temp. Hardw. 278. A wife, as well as her husband, may be indicted for keeping a disorderly house; 1 Salk. 384. And as to the prosecution of persons keeping such houses by the parish authorities, see 25 Geo. II. c. 36, as amended by 58 Geo. III. c. 70.

[z] Players and playhouses were formerly subjected to various regulations by the statutes 3 Jac. I. c 21, 10 Geo. II. c. 19, and 25 Geo. II. c. 36. These statutes were repealed by the act 6 & 7 Vict. c. 68, under which all theatres for the performance of plays must now be licensed, unless they exist by a grant of letters patent.

[a] 'Booths and shows at fairs and feasts are not unlawful when allowed by the local authorities; 6 & 7 Vict. c. 68, s. 23.'

nuisances, and may upon indictment be suppressed and fined. Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the innkeepers fined, if they refuse to entertain a traveller without a very sufficient cause; for thus to frustrate the end of their institution is held to be disorderly behaviour. 'Disorderly conduct in inns is, however, in practice provided against by the legislative provisions regulating the granting of licenses for the sale of exciseable articles.'[b] 4. By statute 10 & 11 Will. III. c. 17, all *lotteries* are declared to be public nuisances, and all grants, patents, or licences for the same to be contrary to law. But, as state-lotteries were for many years found a ready mode for raising the supplies, an act was made, 19 Geo. III. c. 21, to license and regulate the keepers of such lottery-offices. 'They were, however, suppressed altogether by the statute 4 Geo. IV. c. 60.' 5. The making and selling of *fireworks* and *squibs*, or throwing them about in any street, 'which is an offence at common law, was' also, on account of the danger that might ensue to any thatched or timber buildings, declared to be a common nuisance by statute 9 & 10 Will. III. c. 7. And the making, keeping, or carriage of too large a quantity of *gunpowder* at one time, or in one place or vehicle, though not declared a common nuisance, was prohibited by statute 12 Geo. III. c. 61, under heavy penalties and forfeiture. 'But both offences are now punishable under the statute 38 Vict. c. 17, repealing those acts and at the same time re-enacting and extending their provisions. Erecting powder-mills or keeping powder-magazines near a town, is a nuisance at common law.'[c]

[b] 'The licensing of inns and public-houses is regulated by a variety of statutes, the latest of which is 32 & 33 Vict. c. 27.

[c] *Rex* v. *Taylor*, 2 Stra. 1167. 'Sir William Blackstone includes among common nuisances two others, the first being' *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, who are a common nuisance and presentable at the court-leet, Kitch. of Courts, 20: or are indictable at the sessions, and punishable by fine and finding suretics for their good behaviour, 1 Hawk. P. C. 132. 'The second is' a *common scold*, *communis rixatrix*, for our law-Latin confines it to the feminine gender, who is a public nuisance to her neighbourhood. For which offence she may be indicted, 6 Mod. 21; and if convicted, shall, 1 Hawk. P. C. 198, 200, be sentenced to be placed in a certain engine of correction called the trebuchet, castigatory, or *cucking* stool, which in the Saxon language is said to signify 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; 3 Inst. 219.

4. Idleness in any person whatsoever is also a high offence 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 the 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,[d] that the Athenians, knowing that 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; 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;" all these are offenders against the good order, and blemishes in the government, of any kingdom.

'Offences of this character formerly amounted, indeed, in some cases to felony. Thus it was felony in' idle *soldiers* and *mariners wandering* about the realm, or persons pretending so to be, and abusing the name of that honourable profession.[e] 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 fell sick; or forging such testimonial; was by statute 39 Eliz. c. 17, made guilty of felony without benefit of clergy. This sanguinary law 'remained' a disgrace to our statute-book 'till repealed by the act 52 Geo. III. c. 31. But while in force, it was' attended with this mitigation, that the offender might be delivered, if any honest freeholder or other person of substance would take him into his service, and he abode in the same for one year; unless licensed to depart by his employer, who in such case forfeited ten pounds.

Outlandish persons, calling themselves *Egyptians*, or *gypsies*,

'It need scarcely be added that the two last-mentioned species of offences are quite obsolete, so far as regards their prosecution or punishment.'

[d] Valer. Maxim. l. 2, c. 6.

[e] 3 Inst. 85.

'were long' another object of the severity of some of our statutes. These are a strange kind of commonwealth among themselves of wandering impostors and jugglers, who were first taken notice of in Germany about the beginning of the fifteenth century, and have since spread themselves all over Europe. Munster,[f] who is followed and relied upon by Spelman[g] and other writers, fixes the time of their first appearance to the year 1417; under passports, real or pretended, from the Emperor Sigismund, king of Hungary. And Pope Pius II., who died A.D. 1464, mentions them in his history as thieves and vagabonds, then wandering with their families over Europe under the name of Zigari; and whom he supposes to have migrated from the country of the Zigi, which nearly answers to the modern Circassia. In the compass of a few years they gained such a number of idle proselytes, who imitated their language and complexion, 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.[h] 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 merchandize, who have come into this realm and "gone from shire to shire and place to place in great company, "and used great, subtil, and crafty means to deceive the people; "bearing them in hand, that they by palmestry could tell men's "and women's fortunes; and so many times by craft and subtilty "have deceived the people of their money, and also have com- "mitted 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 are not to be entitled to a jury *de medietate linguæ*. Afterwards, it was enacted by statutes 1 & 2 P. & M. c. 4, and 5 Eliz. c. 20, that if any such persons should be imported into this kingdom, the importer should forfeit 40*l*. And if the Egyptians themselves remained one month in this kingdom, or if any person, being fourteen years old, whether natural-born subject or stranger, who had been seen or found in the fellowship of such Egyptians, or who had disguised him or herself like them, should remain in the same one month, at one or several times, it was felony without benefit of

[f] Cosmogr. l. 3. [g] Gloss. 193. [h] Dufresne, Gloss. i. 200.

clergy: and Sir Matthew Hale informs us,[i] that at one Suffolk assizes no less than thirteen gypsies were executed upon these statutes, a few years before the Restoration.

But, to the honour of our national humanity, there are no instances more modern than this, of carrying these laws into practice; and the statutes of Philip and Mary and of Elizabeth having been repealed,[j] gypsies are now only punishable as vagrants, in common with other disorderly persons.

'These idle and disorderly persons and vagabonds were first divided into three classes, *idle* and *disorderly* persons, *rogues* and *vagabonds*, and *incorrigible rogues*, by the statute 17 Geo. II. c. 5. But this act, and several others subsequently passed relating to *vagrants*, were repealed, and in great part re-enacted, by the statute 5 Geo. IV. c. 84, usually called the Vagrant Act, whereby *idle* and *disorderly* persons are defined to be, 1. Any person able to maintain himself or family by any means, who refuses or neglects so to do, whereby he or they become chargeable to the parish. 2. Any person returning to and becoming chargeable in the parish whence he has been removed, unless he produce a certificate of the churchwardens and overseers of the poor of some other parish acknowledging him to be settled there. 3. Petty chapmen or pedlars wandering abroad and trading without being licensed. 4. Common prostitutes, wandering in the public streets or highways, or in any place of public resort, and behaving in a riotous or indecent manner. 5. Persons placing themselves in any public place, street, court, or passage, to beg, or causing, or procuring, or encouraging any child so to do. To which other statutes have since added, 6. Paupers in workhouses, not doing task-work, or injuring their clothes or damaging the property of the guardians.[k] 7. Women neglecting to maintain their illegitimate children.[l] And, 8. Persons applying for relief as paupers, having possession of money, &c., of which they do not make disclosure.[m] These offenders are punishable by a single justice with one month's imprisonment and hard labour.'

'*Rogues and vagabonds* are, 1. Persons committing any of the offences above enumerated, after having been convicted as idle and disorderly persons. 2. Persons pretending to tell fortunes, or

[i] 1 Hal. P. C. 671.
[j] 1 Geo. IV. c. 116; 23 Geo. III. c. 51.
[k] 5 & 6 Vict. c. 57, s. 5.
[l] 7 & 8 Vict. c. 101, s. 6.
[m] 11 & 12 Vict. c. 110, s. 10.

using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any other person. 3. Persons wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of themselves. 4. Persons wilfully exposing to view in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition. 5. Persons wilfully, openly, lewdly, and obscenely exposing their persons in any street or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female. 6. Persons wandering abroad and endeavouring, by exposure of wounds or deformities, to obtain alms. 7. Persons going about as collectors of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence. 8. Persons running away and leaving their wives or children chargeable, or whereby they become chargeable, to the parish. 9. Persons playing or betting in any street, highway, or other open and public place, at or with any table or instrument of gaming, at any game of chance. 10. Persons having in their custody any pick-lock key, crow-jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, or out-building, or armed with any gun, pistol, cutlass, bludgeon, or other offensive weapon; or having upon them any instrument, with intent to commit any felonious act. 11. Persons being found in or upon any dwelling-house, warehouse, or outhouse, or in any enclosed yard, warden, or area, for any unlawful purpose. 12. Suspected persons, or reputed thieves, frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse, near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony.[n] And, 13. Every person apprehended as an idle and disorderly person, and violently resisting any constable or other peace-officer so apprehending him, and being subsequently convicted of the offence for which he shall have been so apprehended. These offenders are punishable by a single magistrate with three calendar months' imprisonment and hard labour.'

'*Incorrigible rogues* are, 1. Persons breaking or escaping out of any place of legal confinement before the expiration of the

[n] Explained by 34 & 35 Vict. c. 112, s. 15.

term for which they shall have been committed, or ordered to be confined by virtue of the statute. 2. Persons committing any offence against the statute which subjects them to be dealt with as rogues and vagabonds, such persons having been at some former time adjudged so to be and duly convicted thereof. And, 3. Every person apprehended as a rogue and vagabond, and violently resisting any constable or other peace-officer so apprehending him, and being subsequently convicted of the offence for which he shall have been so apprehended. These offenders are to be committed to the next sessions, and kept to hard labour in the interim; and the sessions may further punish them by imprisonment with hard labour for one year, and if males, with whipping.'

5. Under the head of public economy 'might formerly have been' ranked the 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 political writers. Baron Montesquieu lays it down,[o] that luxury is necessary in monarchies, but ruinous to democracies. 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;[p] 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. While, as to excess in diet, there long remained one ancient statute, 10 Edw. III. st. 3, ordaining that no man should be served, at dinner or supper, with more than two courses: except upon some great holidays there specified, in which he might be served with three. 'But this act, together with many others which had long been obsolete, was repealed by the statute 19 & 20 Vict. c. 64.'

Luxury 'and extravagant expenses in dress, diet, and the like,' naturally, 'however, lead to' the offence 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

[o] Sp. L. b. 7, cc. 2, 4. [p] 3 Inst. 199.

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.[q] But, taken in any light, it is an offence 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 honour 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 prohibited to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diversions there specified,[r] unless in the time of Christmas, under pecuniary pains and imprisonment.

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 describes to have been bewitched with a spirit of play to a most exorbitant degree. "They addict themselves," says he, "to dice, which is wonderful, "when sober, and as a serious employment; with such a mad "desire of winning or losing, that, when stript 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 honour: *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 honour 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 consider what penalties they wilfully incur, and what a confidence they

[q] 'Playing at cards, dice, or other games of chance, merely for recreation, and without any view to inordinate gain, is by the common law considered perfectly innocent. Bac. Abr. *Gaming* A.; Com. Dig. *Justices of the Peace*, B. 42.'

[r] Logetting in the fields, slide-thrift, or shove-groat, cloysh-cayls, half-bowl, and coyting.

repose in sharpers: who, if successful in play, are certain to be paid with honour, or if unsuccessful, have it in their power to be still greater gainers by informing.

By the statute 16 Car. II. c. 7, it was enacted, that if any person by playing or betting lost more than 100*l.* at one time, he was not compelled to pay the same; and the winner forfeited treble the value, one moiety to the king, the other to the informer. The statute 9 Anne, c. 14, next enacted, that all bonds and other securities, given for money won at play, or money lent at the time to play withal, should be utterly void; that all mortgages and incumbrances of lands, made upon the same consideration, should be and enure to the use of the heir of the mortgagor; that if any person at any time or sitting lost 10*l.* at play, he might sue the winner, and recover it back by action of debt at law; and in case the loser did not, any other person might sue the winner for treble the sum so lost; and the plaintiff might by bill in equity examine the defendant himself upon oath; and that in any of these suits no privilege of parliament should be allowed. The statute farther enacted, that if any person by cheating at play should win any money or valuable thing, or should at any one time or sitting win more than 10*l.*, he might be indicted thereupon, and should forfeit five times the value to any person who sued for it, and, in case of cheating, should be deemed infamous, and suffer such corporal punishment as in case of wilful perjury.

'The effect of these and of various other statutory provisions, which need not be enumerated, was that all gambling securities, even when transferred to purchasers for a valuable consideration, and without notice of their illegal origin, were altogether void; a result, under such circumstances, often attended with great hardship and injustice. The law was therefore altered by the statute 5 & 6 Will. IV. c. 41, by which securities given for considerations arising out of illegal transactions are declared not to be void; but are to be deemed to have been given for an illegal consideration only, the object and effect of this enactment being to protect innocent holders of such securities. Finally, by the statute 8 & 9 Vict. c. 109, repealing the statute of Hen. VIII., so far as relates to the prohibition of the games of skill therein mentioned, together with the statute of Charles II. and Anne, and several others, every person who by any fraud, or unlawful

device, or ill practice, in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of those that play, or in wagering on the event of any game, sport, pastime, or exercise, shall win from any other person any sum of money or valuable thing, is guilty of obtaining it by a false pretence, with intent to cheat or defraud, and being convicted thereof, is punishable accordingly. By the same statute all contracts or agreements, by way of gaming or wagering, are declared to be null and void, and no suit is to be maintainable for recovering any money or valuable thing alleged to have been won upon any wager, or deposited in the hands of a stakeholder.[s] This provision, however, does not apply to any subscription, contribution, or agreement to subscribe or contribute for or toward any plate, prize, or sum of money to be awarded to the winner of any lawful game,[t] sport, pastime, or exercise.'

'Hitherto of contracts by way of gaming. For the suppression of *gaming-houses*, many statutes have been passed from time to time. The act 33 Hen. VIII. c. 9, first prohibited the keeping any gaming-house for profit, under a penalty of 40*s.* a day; and subjected any person haunting and using such gaming-houses to a penalty of 6*s.* 8*d.*' The same statute, and also the statute 30 Geo. II. c. 24, inflicted penalties as well upon the master of a public-house, wherein servants were permitted to game, as upon the servants themselves, who were found to be gaming there.

'Special provisions for the prevention of this offence were afterwards made by the statute 3 Geo. IV. c. 79; and now, by the statute 9 Geo. IV. c. 61, the unlawfully and knowingly permitting any unlawful game, or any gaming whatever, in a public-house, may involve a forfeiture of the licence as well as the imposition of a penalty. A licence is also required, under a penalty, to be obtained annually, at the general annual licensing meeting of the justices of the peace, by such persons as keep public billiard-tables and bagatelle-boards, or instruments used in any game of a like kind.'[u]

[s] The stake may be recovered from the stakeholder, if the wager is repudiated before it is paid over; *Varney* v. *Hickman*, 5 C. B. 271.

[t] Such as a foot-race, *Batty* v. *Marriot*, 5 C. B 817; or dominoes, *Reg.* v. *Ashton*, 1 El. & Bl. 286.

[u] 8 & 9 Vict. c. 109, s. 10.

By several statutes of the reign of King George II.,[v] all private lotteries by tickets, cards, or dice, and particularly the games of faro, basset, ace of hearts, hazard, passage, rolly-polly, and all other games with dice, except backgammon, are prohibited under a penalty of 200*l.* for him that shall erect such lotteries, and 50*l.* a time for the players; 'and by the statute 42 Geo. III. c. 119, games called *little-goes* are declared to be common and public nuisances, and a penalty of 500*l.* is imposed on persons keeping any office or place for that game, or for any other lottery whatsoever, not authorized by parliament.'[w]

'The effect of these statutes being to render all lotteries illegal, whatever might be the object, it was found necessary to pass a special act for the protection of those laudable associations, generally called *Art-unions*, having for their object the promotion of a taste for the fine arts; and accordingly, by the 9 & 10 Vict. c. 48, any voluntary association constituted for the distribution of works of art by lot, is to be deemed legal, provided it be incorporated by charter, or the deed constituting the association and its rules have been submitted to and approved of by a committee of the Privy Council.'

The statute 13 Geo. II. c. 19, to prevent the multiplicity of horse-races, another fund of gaming, directed that no plates or matches under 50*l.* value should be run, upon penalty of 200*l.* to be paid by the owner of each horse running, and 100*l.* by such as advertised the plate. 'But in consequence of a number of vexatious actions having been brought under this statute, it was, so far as it related to horse-racing, repealed by the statute 3 Vict. c. 5. The effect of the repeal of the provisions of the statutes 33 Hen. VIII. c. 9, and 13 Geo. II. c. 19, and of the exception before mentioned in the statute 8 & 9 Vict. c. 109, is to place all bargains relating to horse-racing on the same footing as other contracts.'

But particular descriptions will ever be lame and deficient, unless all games of mere chance are at once prohibited; the

[v] 12 Geo. II. c. 28; 13 Geo. II. c. 19; 18 Geo. II. c. 34.

[w] Public lotteries, unless by authority of parliament, and all manner of ingenious devices, under the denomination of sales or otherwise, which in the end were equivalent to lotteries, had been before prohibited by a great variety of statutes under heavy pecuniary penalties, Bl. Com. vol. iv. p. 173, 'and were finally suppressed by statute 4 Geo. IV. c. 60.'

inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another. 'No sooner were contracts as to horse-racing legalized, than an immense number of petty gaming-houses sprung up, under the name of *betting-offices*. The demoralization, which was found to be the immediate result, called for the interference of the legislature, and the statute 16 & 17 Vict. c. 119, was accordingly passed expressly for the suppression of these haunts of vice. Under this act, the owner or occupier, or any person using such places, may be summarily convicted, and either punished by a fine not exceeding 100*l.*, or by imprisonment, with or without hard labour, for any period not exceeding six months. Persons receiving deposits on bets in such houses incur a penalty of 50*l.*, or three months' imprisonment with or without hard labour; the exhibition of placards or hand-bills, or the advertising of betting lists, is prohibited, under a penalty of 30*l.*, or two months' imprisonment; and summary powers are conferred on magistrates and constables to enter and search suspected houses.'

'Common gaming-houses, as we have already seen, are public nuisances, and the keeper may be indicted at common law. To encourage the prosecution of such pernicious establishments, the statute 25 Geo. II. c. 36, as amended by 58 Geo. III. c. 70, imposes on the overseers of the parish, or the constable, the duty of prosecuting, whenever two rated inhabitants depose before a magistrate to their belief of the fact of the house being a gaming-house, and enter into recognizances to give material evidence thereof. The costs of the prosecution are, in this case, allowed out of the rates; and on conviction, the two inhabitants who originated the proceedings are entitled to 10*l.* each. To facilitate such prosecutions, it is expressly provided that the person appearing or acting as master, or as having the care and management of any gaming-house, shall be deemed the keeper thereof and liable as such. The offence is punishable by fine, to which, by the statute 3 Geo. IV. c. 114, imprisonment and hard labour may be added.'

'The more recent enactments of the statutes 8 & 9 Vict. c. 109, and 17 & 18 Vict. c. 38, have still farther facilitated the prosecution of this offence. The owner, occupier, or keeper, and every person in any manner conducting the business of any common gaming-house, or advancing or furnishing money for the purpose

of gaming, may now be convicted on the oath of one witness, before two justices of the peace; and in addition to the penalties of the act of Henry the Eighth, be fined in any sum not exceeding 500*l.*, or, in the discretion of the justices, be committed to the house of correction, with or without hard labour, for any period not exceeding twelve months. No proceeding under these statutes is a bar to an indictment being preferred; but no person summarily convicted under them can afterwards be proceeded against by indictment for the same offence. To remove any difficulty in obtaining the necessary evidence, the first-mentioned statute expressly provides that any person examined as a witness, either before the justices or on the trial of any indictment or information touching any unlawful gaming, and who shall receive from the court a certificate of his having made true discovery thereof, shall be free from all criminal prosecutions, forfeitures, and disabilities, in respect of such unlawful gaming, while the second statute expressly enables the justices to require persons apprehended in gaming-houses to give evidence.'

'Facilities are given by these statutes for entering forcibly houses and rooms suspected to be used as places for gaming; and for the arrest of persons found there; heavy penalties being imposed on persons obstructing the entry of constables, and the fact of such obstruction being itself made evidence of the house being a common gaming-house. To prevent persons evading punishment by pretending that the house was only open for the use of subscribers, it is sufficient to prove, in default of other evidence, that the house was used for playing at any unlawful game, and that a bank was kept there by one or more of the players, or that the chances of any game played in the house were not alike favourable to all the players.' 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.

6. '*Refusing to serve a public office*, without lawful cause, when duly appointed thereto, is a misdemeanor at common law, and as such punishable, if necessary, by fine and imprisonment. A vacancy in the office of sheriff, for instance, may occasion a stop of public justice;[x] and the same principle applies when duties are

[x] *Rex* v. *Woodrow*, 2 T. R. 731.

imposed by statute, as in the case of a common-councilman[y] or an overseer of the poor.'[z]

7. 'An offence against the public police may be committed by any person wantonly and furiously driving or riding on the highway, so as to endanger persons passing. This is a misdemeanor at common law;[a] and by the statute 24 & 25 Vict. c. 100, s. 35, re-enacting 1 Geo. IV. c. 4, if any person be injured by the *wanton* or *furious driving* or *racing*, or the *wilful misconduct* of any coachman, such wanton or furious driving or misconduct shall be a misdemeanor, subjecting the offender to an imprisonment, with or without hard labour, not exceeding two years.'

8. 'Another offence against the public police and economy is wanton *cruelty to an animal*, either by over-driving, beating or torturing it, or by carrying it or causing it to be carried in such a manner as to create unnecessary pain or suffering. These offences are by the statute 12 & 13 Vict. c. 92, extended by 17 & 18 Vict. c. 60, punishable by fine or imprisonment on summary conviction before a magistrate; and any constable or peace-officer, on his own view, or on complaint or information of any other person, who shall give his name and address, is authorized to secure the offender. The same statute contains provisions for the detention of vehicles and animals of which the person having the charge is taken into custody, and for compelling the owners of public vehicles to produce their servants. It prohibits under penalties, the fighting or baiting of any bull, bear, badger, dog, cock, or other animal; and makes various regulations as to slaughterhouses for horses and other animals not intended for food.'

9. '*Taking up dead bodies* is also a misdemeanor at common law,[b] unless done by lawful authority. This offence was sometimes committed in order to obtain subjects for dissection in the schools of anatomy; but is now quite unknown, regulations having been made for this purpose by the statute 2 & 3 Will. IV. c. 75. It is also an offence in those whose duty it is to bury the dead, to

[y] *Rex* v. *Bowyer*, 1 B. & C. 585.

[z] *Rex* v. *Poynder*, 1 B. & C. 178.

[a] 'Fost. 263. And if death ensue, the offence may amount to manslaughter; *Rex* v. *Mastyn*, 6 C. & P. 396. A navigable river is a highway, on which this offence may be committed; *Reg.* v. *Taylor*, 9 C. & P. 672.'

[b] *Rex* v. *Lynn*, 2 T. R. 731.

refuse to do so, and one cognizable by the temporal courts[c] as well as by the courts-Christian.'[d]

10. Lastly, there is another offence of so questionable a nature, that I shall not detain the reader with many observations thereupon. And yet it is an offence which the sportsmen of England seem to think of the highest importance; and a matter, perhaps the only one, of general and national concern; I mean the offence of destroying such beasts and fowls as are ranked under the denomination of *game;* which, we may remember, was formerly observed, upon the old principles of the forest law, to be a trespass and offence in all persons alike, who had not authority from the crown to kill game, which 'was at one time exclusively' 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, also inflicted additional punishments, chiefly pecuniary, on persons guilty of this general offence, unless they were people of such rank or fortune as were therein particularly specified. All persons, therefore, of what property or distinction soever, that killed game out of their own territories, or even upon their own estates, without the 'royal' licence expressed by the grant of a franchise, were guilty of the first original offence, of encroaching on the royal prerogative. And those indigent persons who did so, without having such rank or fortune as was generally called a *qualification,* were guilty not only of the original offence, but of the aggravations also, created by the statutes for preserving the game: which aggravations were so severely punished, and those punishments so implacably inflicted, that the offence against the sovereign was seldom thought of, provided the miserable delinquent could make his peace with the lord of the manor. The offence, 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 offence 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,[e] that

[c] *Andrews* v. *Cawthorne*, Willes, 536. [d] *Kemp* v. *Wickes*, 2 Phill. 264.
[e] Burn's Justice, *Game*, s. 3.

in one statute only, 5 Anne, 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 the 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, were, 1. The having a freehold estate of 100*l. 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*l. 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, chace, 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 killed game or had it in their possession, at unseasonable times of the year, or unseasonable hours of the day or night, on Sundays or on Christmas-day, there were various penalties assigned, corporal and pecuniary, by different statutes; on any of which, but only on one at a time, the justices might convict in a summary way, or, in most of them, prosecutions might be carried on at the assizes. And lastly, by statute 28 Geo. II. c. 12, no persons, however qualified to *kill*, might make merchandize of this valuable privilege, by *selling* or exposing to sale any game, on pain of like forfeiture as if he had no qualification.

'After repeated discussions in and out of parliament, all these statutes were repealed by 1 & 2 Will. IV. c. 32, whereby the possession of any *qualification* to kill game was made unnecessary; and the right to do so was made to depend simply on the payment of a tax.[f] In the absence of express stipulation to the contrary, the occupiers of land are not entitled to the game in preference to the owner, and the sale of game, formerly strictly prohibited, by licensed persons, is recognized.'

'The offence of trespassing by night in pursuit of game, or in other words the crime of *night-poaching*, is at the same time made highly penal by the statute 9 Geo. IV. c. 60, whereby persons

[f] '*Hares* may be killed by occupiers or owners of land, without their taking out a license; 11 & 12 Vict. c. 29.'

taking or destroying game or rabbits by night, or entering or being in any land for that purpose, are punishable, for the first offence, upon summary conviction, with imprisonment for three months and hard labour, and bound to find sureties for a year; for the second offence, with six months' imprisonment, and to find sureties for two years; and upon the third, are guilty of a misdemeanor, and now liable to penal servitude for not less than five years, or imprisonment with hard labour for any term not exceeding two years. Power is given to the owners or occupiers of land, lords of manors, their gamekeepers or servants, to apprehend offenders; and persons who assault with an offensive weapon any person thus authorized, are guilty of a misdemeanor, and liable to penal servitude for seven or not less than five years, or imprisonment and hard labour for any term not exceeding two years. If any persons, to the number of *three* or more together, by night enter or be in any land, for the purpose of taking game, any of them being armed with an offensive weapon, every one of them is guilty of a misdemeanor, and liable to penal servitude for any term not exceeding fourteen nor less than five years, or to imprisonment and hard labour for any term not exceeding three years.'

'On the other hand, the modes often resorted to by landowners themselves, for preventing trespassing, are restrained within certain limits. Thus the setting of any spring-gun, man-trap, or other engine calculated to destroy life or inflict bodily harm, with the intent that the same, or whereby the same, may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, is a misdemeanor, for which the offender may now be subjected to penal servitude for five years, or imprisonment, with or without hard labour, not exceeding two years.[g] But the statute does not extend to make it illegal to set any trap, such as may be usually set for destroying vermin; and, therefore, the setting of a dangerous engine, as dog-spears, with intent to preserve the game, and to disable dogs coming upon the land, in pursuit of it, is not unlawful.'[h]

[g] 24 & 25 Vict. c. 100, s. 31; 27 & 28 Vict. c. 47.

[h] *Jordin* v. *Crump*, 8 M. & W. 782.

CHAPTER XIV.

OF HOMICIDE.

In the 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 sovereign; 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 offences is always at the suit and in the name of the sovereign, 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 offence against the sovereign by disobedience to the laws; and thirdly, for the crime against the

public by their evil example.[a] Of which we may trace the groundwork in what Tacitus tells us of the Germans;[b] that, whenever offenders were fined, "*pars mulctæ regi, vel civitati, pars ipsi, "qui vindicatur, vel propinquis ejus, exsolvitur.*"

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 offence of taking away that life which is the immediate gift of the great Creator; and of which, therefore, no man can be entitled to deprive himself or another, 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 offence 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 divers 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 to death a malefactor, 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, or an outlaw, deliberately, uncompelled, extrajudicially, is murder. For, as Bracton very justly observes, "*istud homicidium, si fit ex livore, vel delectatione effundendi*

[a] Stiernhook, l. 1, c. 5. [b] De Mor. Germ. c. 12

"*humanum sanguinem, licet juste occidatur iste, tamen occisor peccat* "*mortaliter, propter intentionem corruptam.*" 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.[c] 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 Protector's commission;[d] 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 'said' to be murder, even though it be the judge himself. It must farther be executed, *servato juris ordine;* it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versâ*, 'this also is said to be' murder; 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 licence might occasion a very gross abuse of his power. The sovereign, indeed, may remit part of a sentence; 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 sovereign, it has been said, cannot legally order even a peer to be beheaded. 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 vigour: or, in such instances where it is committed for the *prevention* of some atrocious *crime*, which cannot otherwise be avoided.

[c] 1 Hawk. P. C. 70; 1 Hal. P. C. 497. 'This and some subsequent extreme illustrations of the positions laid down in the text cannot be received as law at the present day.

[d] Burnet, in his Life.

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. 2. If an officer, or any private person, attempts to take a man charged with felony, and is resisted; and, in the endeavour to take him, kills him. This is similar to the old Gothic constitutions, which, Stiernhook informs us,[e] "*furem, si aliter capi non "posset, occidere permittunt.*" 3. In case of a riot, or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing them, both at common law,[f] and by the Riot Act, 1 Geo. I. st. 2, c. 5. 4. Where the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he in his defence kills any of them, it is justifiable for the sake of preventing an escape.[g] 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, unless such homicide were committed: otherwise, without such absolute necessity, it is not justifiable.

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; and also by the law of England, as it stood so early as the time of Bracton. If any person attempts a robbery or murder of another, or attempts to break open a house *in the night-time*, which extends also to an attempt to burn it, 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* housebreaking; "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

[e] De Jure Goth. l. 3, c. 5.

[f] 1 Hal. P. C. 495; 1 Hawk. P. C. 161.

[g] 1 Hal. P. C. 496. 'Sir W. Blackstone here adds that' 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*, and 3 & 4 W. & M. c. 10. 'But these statutes have been repealed by 16 Geo. III. c. 30, and 7 & 8 Geo. IV. c. 27. Another instance is mentioned by Blackstone, viz., where' 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 favour of the truth.'

"be risen upon him, there shall blood be shed for him; for he "should have made full restitution." At Athens, if any theft was committed by night, it was lawful to kill the criminal if taken in the fact:[h] 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;[i] which amounts very nearly to the same as is permitted by our own constitutions.

The Roman law also justified homicide when committed in defence of the chastity either of one's self or relations;[j] and so also, according to Selden,[k] stood the law in the Jewish republic. The English law likewise justifies a woman killing one who attempts to ravish her:[l] 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.[m] 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 'against the person' is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting, 'if it can be in no other way prevented. For' we must not carry this doctrine to the same visionary length that Mr. Locke does: who holds,[n] "that all matter 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 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, 'if any reasonable means short of the death of the offender will do so.'

In these instances of *justifiable* homicide, it may be observed that the slayer is in no kind of fault whatsoever, not even in the

[h] Potter. Antiq. b. 1, c. 24.
[i] Cic. pro Milone, 3; Ff. 9, 2, 4.
[j] Ff. 48, 8, 1.
[k] De Legib. Hebraeor. l. 1, c. 3.
[l] Bac. Elem. 34; 1 Hawk. P. C. 71.
[m] 1 Hal. P. C. 485, 486.
[n] Essay on Gov. p. 2, c. 5.

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 'formerly, as we shall see hereafter, it' judged 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 stander-by; or where a person is shooting at a mark, and undesignedly kills a man; for the act 'may be' lawful, and the effect merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; for the act of correction is 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; for the act of immoderate correction is unlawful. Thus, by an edict of the Emperor Constantine,[o] when the rigour 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, 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, "*immoderatè suo jure utatur, tunc* "*reus homicidii sit.*"

But to proceed. A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and sword-playing, 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 sovereign command or permit such diversion, it is said only

[o] Cod. l. 9, t. 14.

to be misadventure, for then the act is lawful. In the like manner, as by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games authorized and permitted by the state, was not held to be guilty of homicide.[p] 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. And in general, if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, and similar cases, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts.

2. Homicide in *self-defence*, or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the English law. This species of self-defence 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-defence 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 broil 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. This right of natural defence 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 defence, 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-defence, it must appear that the slayer had no other possible, or at least probable, means of escaping from his assailant.

It is frequently difficult to distinguish this species of homicide, upon *chance-medley* in self-defence, from that of manslaughter, in the proper legal sense of the word. But the true criterion

[p] Plato, de LL. lib. 7; Ff. 9, 2, 7.

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, endeavours 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-defence. For which reason, the law requires that the person who kills another in his own defence 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 not 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 honour, because the sovereign and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves. In this the civil law also agrees with ours, or perhaps goes rather further: "*qui cum aliter tueri se "non possunt, damni culpam dederint, innoxii sunt.*"[q] 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, 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 defence he may kill his assailant instantly. And this is the doctrine of universal justice,[r] as well as the municipal law.

And, as the *manner* of the defence, so is also the *time* to be considered: for if the person assaulted does not fall upon the aggressor till the fray is over, or when he is running away, this is revenge, and not defence. Neither, under the colour of self-defence, 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. But if A. upon a sudden quarrel assaults B. first, and upon B.'s returning the assault A. really and *bonâ 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, though others have thought this opinion

[q] Ff. 9, 2, 45. [r] Puff. b. 2, c. 5, s. 13.

too favourable; inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. Under this excuse of self-defence the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself.

There is one species of homicide, *se defendendo*, where the party 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,[s] where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrust the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's is excusable through unavoidable necessity and the principle of self-defence; 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-defence, formerly agreed; and those were in their blame and punishment. For the law set so high a value upon the life of a man that it always intended some misbehaviour in the person who took it away, unless by the command or express permission of the law. In the case of misadventure it presumed negligence, or at least a want of sufficient caution in him who was so unfortunate as to commit it, who therefore was not altogether faultless.[t] And as to the necessity which excuses a man who kills another *se defendendo*, Lord Bacon[u] entitles it *necessitas culpabilis*, and thereby distinguishes it from the former necessity of killing a thief or a malefactor. For the law intended 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 could be tried who was originally in the wrong, the law would not hold the survivor entirely guiltless.

[s] Elem. c. 5; 1 Hawk. P. C. 73. [t] 1 Hawk. P. C. 72. [u] Elem. c. 5.

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 might have a farther view, to make the crime of homicide more odious, and to caution men how they ventured to kill another upon their own private judgment, by ordaining, that he who slew his neighbour without an express warrant from the law so to do, should in no case be absolutely free from guilt.

Nor was 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 appointed certain cities of refuge for him "who killed his neighbour unawares: "as if a man goeth into the wood with his neighbour to hew "wood, and his hand fetcheth a stroke with the axe to cut down "a tree, and the head slippeth from the helve, and lighteth upon "his neighbour 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[v] casual homicide was excused by the indulgence of the emperor, signed with his own sign manual, "*annotatione principis:*" otherwise the death of a man, however committed, was in some degree punishable. Among the Greeks[w] homicide by misfortune was expiated by voluntary banishment for a year.[x] In Saxony a fine was paid to the kindred of the slain, which also, among the western Goths, was little inferior to that of voluntary homicide;[y] and in France[z] no person was formerly 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, which, however, is with reason denied by later and more accurate writers. It seems rather to have consisted in a forfeiture, some say of all the goods and

[v] Cod. 9, 16, 5.

[w] Plato, de Leg. lib. 9.

[x] 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 οὐκ ἐθελων."

[y] Stiernh. de Jure Goth. l. 3, c. 4.

[z] De Morney on the Digest.

chattels, others of only part of them, by way of fine or *weregild:* which was probably disposed of, as in France, *in pios usus*, 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 became more considerable, the delinquent had, as early as our records will reach, a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out of the same. To prevent this expense in cases where the death had notoriously happened by misadventure, or in self-defence, the judges permitted, if not directed, a general verdict of acquittal; 'and finally it was enacted,[a] that no punishment or forfeiture should thereafter be incurred by any person who killed another by misfortune, or in his own defence, or in any manner without felony.'

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,[b] yet was punished by the Athenian law with cutting off the hand which committed the desperate deed.[c] 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 offence, one spiritual, in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for, the other temporal, against the sovereign, 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 one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder.[d] A *felo de se* therefore is he that

[a] 9 Geo. IV. c. 31, s. 10; 24 & 25 Vict. c. 100, s. 7.

[b] Ff. 49, 16, 6.

[c] Pot. Antiq. b. 1, c. 26.

[d] Keilw. 136. *Rex* v. *Dyson*, Russ. & Ry. C. C. 523; *Rex* v. *Alison*, 8 C & P. 418.

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. 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*, 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, 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.

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 'they act by prescribing' an ignominious 'interment by night, and without the rites of Christian burial.'[e] On the latter 'they acted until recently' by a forfeiture of all his goods and chattels to the crown; 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. 'But' the letter of the law herein bordered a little upon severity, 'although it was' some alleviation that the power of mitigation was left in the breast of the sovereign, who upon this, as on all other occasions, was by the oath of his office to execute judgment in mercy; 'and accordingly it has now been enacted that no verdict of *felo de se* shall cause any forfeiture or escheat.'[f]

The other species of criminal homicide is that of killing another man. But in this there are also degrees of guilt, which divide the offence 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, when voluntary, arises from

[e] 'See on this subject the statute 4 Geo. IV. c. 52, which prohibited the previous custom of burying in the highway and of driving a stake through the body.'

[f] 33 & 34 Vict. c. 23, s. 1.

the sudden heat of the passions; murder from the wickedness of the heart.

1. Manslaughter is therefore defined 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; quæ aut casu, aut etiam sponte "committuntur, sed in subitaneo quodam iracundiæ calore et impetu.*"[g] 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: 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. 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. 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,[h] as likewise by the Roman civil law, if the adulterer was found in the husband's own house,[i] and also among the ancient Goths;[j] 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. It is, however, the lowest degree of it; and therefore in such a case the court directed the burning in the hand 'which was formerly a part of the punishment for manslaughter,' to be gently inflicted, because there could not be a greater provocation.[k] Manslaughter therefore on a sudden

[g] See Stiernh. de Jure Goth. l. 3, c. 4.
[h] Plutarch. in Vit. Solon.
[i] Ff. 48, 5, 24.
[j] Stiernh. de Jure Goth. l. 3, c. 2.
[k] *Manning's Case*, Sir T. Raym. 212. 'See also *Reg.* v. *Fisher*, 8 C. & P. 182.'

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, 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. 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; and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind. 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, or in its consequences naturally tended to bloodshed, it will be murder; but, if no more was intended than a mere civil trespass, it will only amount to manslaughter.

Next, as to the *punishment* of this degree of homicide. The crime of manslaughter amounts to felony, but 'was' within the benefit of clergy;[1] the offender was burnt in the hand, and

[1] There was one species of manslaughter which was punished as murder, the benefit of clergy being taken away from it by statute: namely, the offence of mortally *stabbing* another, though done upon sudden provocation. For by statute 1 Jac. I. c. 8, when one thrust or stabbed another, not then having a weapon drawn, or who had not then first stricken the party stabbing, so that he died thereof within six months after, the offender was not to 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, Lord Raym. 140, and being, therefore, of a temporary nature, ought to have expired with the mischief which it meant to remedy. See Fost. 301;

forfeited all his goods and chattels. 'Now, however, the burning of the hand is no longer inflicted, but the offender is punishable, at the discretion of the court, with penal servitude for life, or for any term not less than five years, or with imprisonment, with or without hard labour, for any term not exceeding two years, or with such fine as the court shall award.'[m]

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, that "whoso sheddeth man's blood, by man shall "his blood be shed," are very emphatic in prohibiting the pardon of murderers. "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."[n] Let us consider the definition of this great offence.

The name of *murder*, as a crime, was anciently applied only to the secret killing of another,[o] which the word *mœrda* signifies in the Teutonic language;[p] and it was defined, "*homicidium quod* "*nullo vidente, nullo sciente clam perpetratur:*"[q] 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*.[r] This was an ancient usage among the Goths in Sweden and Denmark, who supposed the

1 Hawk. P. C. 77; 1 Hal. P. C. 470. 'The statute 1 Jac. I. c. 8, was repealed by 9 Geo. IV. c. 31.'

[m] 9 Geo. IV. c. 31, s. 9; re-enacted by 24 & 25 Vict. c. 100, s. 5.

[n] Our law formerly provided one course of prosecution, that by appeal, wherein the king himself was excluded the power of pardoning murder; so that, had the King of England been so inclined, he could not have imitated that Polish monarch mentioned by Puffendorf, L. of N. b. 8, c. 3, 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, &c.*"

[o] Dial. de Scacch. l. 1, c. 10.

[p] Stiernh. de Jure Sueon. l. 3, c. 3. The word *murdre* in our old statutes also signified any kind of concealment or stifling. So in the statute of Exeter, 14 Edw. 1. "*je riens ne celerai, ne sufferai estre celé ne murdré:*" which is thus translated in Fleta, l. 1, c. 18, § 4, "*Nullam veritatem celabo, nec celari permittam nec murdari.*" And the words "*pur murdre le droit*" in the articles of that statute are rendered in Fleta, ibid. § 8, "*pro jure alicujus murdriendo.*"

[q] Glanv. l. 14, c. 3.

[r] Bract. l. 3, tr. 2, c. 15, § 7; Stat. Marl. c. 26; Fost. 281.

neighbourhood, unless they produced the murderer, to have perpetrated or at least connived at the murder:[s] and, according to Bracton,[t] was introduced into this kingdom by 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.[u] And, therefore, if, upon inquisition had, it appeared that the person found slain was an Englishman, the presentment whereof was denominated *englescherie*,[v] 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,[w] 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:[x] "when a person of sound memory and discretion unlawfully killeth 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 lunatics or infants, 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 killeth.* 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 offence, though formerly it was held to be murder. The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome. 'Formerly, when it was necessary to describe the mode of death in the indictment,' if a person were indicted for one species of killing, as by *poisoning,* he could not have been convicted by evidence of a totally different species of death, as by *shooting* with a pistol, or *starving.* But where they only differed

[s] Stiernh. i. 3, c. 4.
[t] L. 3, tr. 2, c. 15.
[u] 1 Hal. P. C. 447.
[v] Bract. l. 3, tr. 2, c. 15, § 7.
[w] P. C. l. 1, c. 10.
[x] 3 Inst. 47.

in circumstance, as if a *wound* were alleged to be given with a sword, and it proved to have arisen from a staff, an axe, or a hatchet, this difference was immaterial. Of all species of deaths, the most detestable is that of poison; because it can of all others be the least prevented either by manhood or forethought. 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:[y] 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 may be dubious at this day; as there has not been an instance wherein it has been held to be murder for many ages past: 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.[z] The Gothic laws punished in this case both the judge, the witnesses, and the prosecutor: "*peculiari pœnâ judicem puniunt; peculiari "testes, quorum fides judicem seduxit; peculiari denique et maximâ "auctorem, ut homicidam.*"[a] And, among the Romans, the *lex Cornelia, de sicariis*, punished the false witness with death, as being guilty of a species of assassination.[b] And there is no doubt but this is equally murder *in foro conscientiæ* as killing with the 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, and no killing may be primarily intended: as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died; of the harlot, who laid her child under leaves in an orchard, where a kite struck it and killed it; and of the parish officers, who shifted a child from parish to parish, till

[y] This extraordinary punishment seems to have been adopted by the legislature from the peculiar circumstances of the crime which gave rise to it; for the preamble of the statute informs us that John Roose, a cook, had been lately convicted of throwing poison into a large pot of broth, prepared for the Bishop of Rochester's family, and for the poor of the parish: and the said John Roose was, by a retrospective clause of the same statute, ordered to be boiled to death. Lord Coke mentions several instances of persons suffering this horrid punishment. 3 Inst. 48.—[Christian.]

[z] Mirror, c. 1, § 9; Britt. c. 5; Bract. l. 3, c. 4.

[a] Stiernh. de Jure Goth. l. 3, c. 3.

[b] Ff. 48, 8, 1.

it died for want of care and sustenance. 'And so if a master refuse his apprentice necessary sustenance, or treat him with such continued harshness and severity, that his death is occasioned thereby, the law will imply malice, and the offence will be murder.[c] So if a prisoner die by duress of imprisonment, the person actually offending is guilty of murder.'[d] 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 dog to worry them. If a physician or surgeon gives his patient a potion or plaister to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure; 'but if there be gross neglect or ignorance in either case, the physician or surgeon, or the person taking upon himself to act as such, may be guilty of manslaughter. And although it was at one time' held that if it were not a *regular* physician or surgeon who administered the medicine or performed the operation, it was manslaughter at the least; yet Sir Matthew Hale very justly questioned the law of this determination;[e] 'and it is now settled that in such cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without licence.'[f] 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.

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 or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular born Englishman; except he be an alien enemy in

[c] Leach, 127.—[CHRISTIAN.]

[d] Fost. 321; and see *Rex* v. *Huggins*, 2 Lord Raym. 1574.

[e] 1 Hal. P. C. 430.

[f] 'If a person, having a competent degree of skill, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if a person totally ignorant of medicine takes upon himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence, he is guilty of manslaughter.' *Rex* v. *Webb*, 1 M. & Rob. 405.

time of war. 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 seems, by the better opinion, to be murder in such as administered or gave them.[g]

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 was enacted by statute 21 Jac. I. c. 27, that if any woman were delivered of a child, which if born alive should by law be a bastard; and endeavoured privately to conceal its death, by burying the child or the like; the mother so offending should suffer death as in the case of murder, unless she could prove by one witness at least that the child was actually born dead. This law, which savoured pretty strongly of severity, in making the concealment of the death almost conclusive evidence of the child's being murdered by the mother, was nevertheless to be also met with in the criminal codes of many other nations of Europe, as the Danes, the Swedes, and the French.[h] But 'for many years before the repeal of this statute it was' usual with us in England, upon trials for this offence, to require some sort of presumptive evidence that the child was born alive, before the other constrained presumption, that the child whose death had been concealed was therefore killed by its parent, was admitted to convict the prisoner; 'and the statute itself was afterwards repealed, and the concealment of the birth by a secret disposal of the dead body made a misdemeanor.'[i]

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 præcogitata*, 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;[j] *un disposition à faire un malo chose*;[k] and it may be either *express* or *implied* in law. Express malice is when one, with a sedate deliberate mind and formed design, doth kill another: which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait,

[g] *Rex* v. *Ann Crutchley*, 7 C. & P. 814; *Rex* v. *Sellis*, 7 C & P. 850.

[h] Barrington on the Statutes, 425.

[i] 43 Geo. III. c. 58; 9 Geo. IV. c. 31; 24 & 25 Vict. c. 100, s. 60.

[j] Foster, C. L. 256. [k] 2 Roll. Rep. 461.

antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. This takes place in the case of deliberate duelling, 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 own 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,[l] and on their seconds also.[m] Again, 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*. 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. 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;[n] as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun, among a multitude of people. 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 peace, of which the probable con-

[l] 1 Hawk. P. C. 82; *Rex* v. *Murphy*, 6 C. & P. 103; *Rex* v. *Young*, 8 C & P. 645.

[m] Yet, it requires such a degree of passive valour to combat the dread of even undeserved contempt, arising from the false notions of honour too generally received in Europe, that 'it was for a long time felt that' the strongest prohibitions and penalties of the law 'would' never be entirely effectual to eradicate this unhappy custom; till a method 'could' be found out of compelling the original aggressor to make some other satisfaction to the affronted party, which the world 'should' esteem equally reputable, as that which 'was' given at the hazard of the life and fortune, as well of the person insulted, as of him who has given the insult. 'Such, however, has been the progress of enlightenment in this country, that society has already placed its ban upon this absurd custom, and the sender of a challenge is now generally looked upon as an object of ridicule.'

[n] See the cases collected in *Rex* v. *Keite*, 1 Lord Raym. 143.

sequence 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 'may be' murder in them all, because of the unlawful act, the *malitia præcogitata*, or evil intended beforehand.

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. 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. 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 behaviour, as to adjudge it only manslaughter, and not murder. 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 endeavouring to conserve the peace, or any private person endeavouring 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. And if one intends to do another felony, and undesignedly kills a man, this is also murder. 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. It were needless 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 the account 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 are 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.[o]

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. But by several early statutes,[p] the benefit of clergy was early taken away from murderers through malice prepense, their abettors, procurers, and counsellors; 'and the punishment of the principal criminal, or of an accessory *before* the fact, is now, in all cases, death; while accessories *after* the fact are liable to penal servitude for life or not less than five years, or imprisonment, with or without hard labour, for any period not exceeding two years.'[q]

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. This, being quite contrary to the express command of the Mosaic law,[r] 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.[s] Afterwards it was enacted by statute 25 Geo. II. c. 37, that the

[o] Francis Smith was indicted for murder at the Old Bailey, January 13, 1804. The neighbourhood of Hammersmith had been alarmed by what was supposed to be a ghost. The prisoner went out with a loaded gun with intent to apprehend the person who personated the ghost; he met the deceased, who was dressed in white, and immediately discharged his gun and killed him. Chief Baron Macdonald, Mr. J. Rooke, and Mr. J. Lawrence were unanimously of opinion that the facts amounted to the crime of murder. For the person who represented the ghost was only guilty of a misdemeanor, a nuisance, and no one would have had a right to have killed him, even if he could not otherwise have been taken. The jury brought in a verdict of manslaughter, but the court said they could not receive that verdict; if the jury believed the witnesses, the prisoner was guilty of murder; if they did not believe them, they must acquit. Upon this they found a verdict of guilty. Sentence of death was pronounced, but the prisoner was reprieved.—[CHRISTIAN.]

[p] 23 Hen. VIII. c. 1; 1 Edw. VI. c. 12; 4 & 5 Ph. & M. c. 4.

[q] 9 Geo. IV. c. 31, s. 3; re-enacted by 24 & 25 Vict. c. 100, ss. 2, 67.

[r] "The body of a malefactor shall not remain all night upon the tree, but thou shalt in any wise bury him that day, that the land be not defiled." Deut. xxi. 23.

[s] Ff. 48, 19, 28, s. 15.

judge before whom any person was found guilty of wilful murder should pronounce sentence immediately after conviction, unless he saw cause to postpone it; and should, in passing sentence, direct him to be executed on the next day but one, unless the same were Sunday, and then on the Monday following, and that his body should be delivered to the surgeons to be dissected and anatomized: and the judge might direct his body to be afterwards hung in chains, but in nowise to be buried without dissection. And, during the short but awful interval between sentence and execution, the prisoner was to be kept alone, and sustained with only bread and water; but a power was allowed to the judge, upon good and sufficient cause, to respite the execution, and relax the other restraints of this act. 'This statute was repealed by 9 Geo. IV. c. 31; but its provisions were, in substance, re-enacted; and so the law stood, until by 2 & 3 Will. IV. c. 75, the power of the court to direct the dissection of the body of the convict was taken away, and it was provided that the court should direct the prisoner either to be hung in chains, or to be buried within the precincts of the prison. Two years later the statute 4 & 5 Will. IV. c. 26, s. 1, took away the power of the court to direct that the prisoner should be hung in chains. And sentence of death is now pronounced, after conviction for murder, to be by hanging within the gaol, followed by burial within its precincts.'[t]

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 leathern sack, with a live dog, a cock, a viper, and an ape, and so cast into the sea.[u] 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.[v] 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, we must account for the omission of an exemplary punishment for this crime in our English laws; which treats it no otherwise than as simple murder. 'A distinction was made where' the child was also the servant of his parent; for though the breach of natural relation is unobserved, yet the breach of civil or ecclesiastical

[t] 24 & 25 Vict. c. 100, s. 2; 31 Vict. c. 24.

[u] Ff. 48, 9, 9.

[v] Cic. pro S. Roscio, s. 25.

connections, when coupled with murder, denominated it a new offence; no less than a species of treason, called *parva proditio*, or *petit treason:* which however was nothing else but an aggravated degree of murder; although on account of the violation of private allegiance, it was stigmatized as an inferior species of treason. 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.[w]

Petit treason, according to the statute 25 Edw. III. c. 2, might 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 owed faith and obedience. A servant who killed his master, whom he had left, upon a grudge conceived against him during his service, was guilty of petit treason: for the traitorous intention was hatched while the relation subsisted between them; and this was only an execution of that intention. So if a wife were divorced *a mensâ et thoro*, still the *vinculum matrimonii* subsisted, and if she killed such divorced husband, she was a traitress. 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 was in him petit treason. As to the rest, whatever has been said, or remains to be observed hereafter, with respect to wilful murder, was also applicable to the crime of petit treason, which was no other than murder in its most odious degree: except that the trial was conducted as in cases of high treason, before the improvements therein made by the statutes of William III. But a person indicted of petit treason might be acquitted thereof, and found guilty of manslaughter or murder: and in such case it seems that *two* witnesses were not necessary, as in case of petit treason they were. Which crime was also distinguished from murder in its punishment.

The punishment of petit treason, in a man, was to be drawn and hanged, and in a woman, to be drawn and burnt; the idea of which latter punishment seems to have been handed down to us by the laws of the ancient Druids, which condemned a woman to be burnt for murdering her husband; and it was until very recently the usual punishment for all sorts of treasons committed by those of the female sex. Persons guilty of petit treason were

[w] Stiernh. de Jure Goth. l. 3, c. 3.

first debarred the benefit of clergy, by statute 12 Hen. VII. c. 7, which was subsequently extended to their aiders, abettors, and counsellors, by statutes 23 Hen. VIII. c. 1, and 4 & 5 P. & M. c. 4. 'But, as we have already seen, the distinction between petit treason and murder was entirely abolished by the statute 9 Geo. IV. c. 31, s. 2; and every offence which before that act would have amounted to petit treason, is now deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, are dealt with, indicted, tried, and punished as principals and accessories in murder.' [x]

[x] 24 & 25 Vict. c. 100, s. 8.

CHAPTER XV.

OF OFFENCES 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, while living.

Of these some are felonious, others are simple misdemeanors, and punishable with a lighter animadversion. Of the felonies the first is that of *mayhem*.

I. Mayhem, *mayhemium*, was in part considered in the preceding volume as a civil injury: but it is also looked upon in a criminal light by the law, being an atrocious breach of the peace, and an offence tending to deprive the sovereign 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. And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or fore-tooth, or depriving him of those parts the loss of which in all animals abates 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;*[a] which was long the law in Sweden.[b] But this went afterwards out of use; partly because

[a] 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.* Brit. c. 25.

[b] Stiernhook, de Jure Sueon. l. 3, t. 3.

the law of retaliation, as was formerly shown, is at best an inadequate rule of punishment; and partly because upon a repetition of the offence, 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; unless perhaps the offence of mayhem by castration, which all our old writers held to be felony: "*et sequitur aliquando pœna capitalis, aliquando "perpetuum exilium, cum omnium bonorum ademptione.*" And this, although the mayhem was committed upon the highest provocation.[c]

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 giving evidence against them, this offence was declared to be felony, if done of malice prepense; that is, as Sir Edward Coke[d] 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 directed that if a man should maliciously and unlawfully cut off the *ear* of any of the king's subjects, he should 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*l.* by way of fine to the king, which was his criminal amercement. The next statute, and by far the most severe and effectual of all, was 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 was enacted, that if any person should 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 counsellors, aiders, and abettors, should be guilty of felony without benefit of clergy.[e]

[c] 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.

[d] 3 Inst. 62.

[e] On this statute, Mr. Coke, a gentleman of Suffolk, and one Woodburn, a

Thus much for mayhem, 'an offence which has lost its distinctive character in the more general provisions of the statute law for the protection of persons from acts of violence. The act 43 Geo. III. c. 58, commonly known as Lord Ellenborough's Act, provided, amongst other things, for the offences of maliciously shooting, and attempting to discharge loaded fire-arms, stabbing, cutting, wounding, and poisoning; but this statute was repealed, and other provisions introduced by the 9 Geo. IV. c. 31; which, however, has been in its turn repealed, the enormity of offences against the person being now made to depend, in a great measure, on the intent of the offender. For,

First. 'To administer to or cause to be taken by any person, any poison or other destructive thing, or to wound, or cause any grievous bodily harm to any person; or to set fire to, or cast away any vessel; or to destroy any building, with intent in any of those cases to commit murder, is a felony punishable with penal servitude for life or not less than five years, or imprisonment, with or without hard labour and solitary confinement, not exceeding two years.'[f]

Secondly. 'To attempt to administer to any person any poison or other destructive thing, or to shoot at any person, or to attempt to discharge any kind of loaded arms at any person, or attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit murder, although no bodily injury be effected, or by any means whatever to attempt to commit murder,

labourer, 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 hedge-bill; 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 defence 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 to determine 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. S. T. vi. 212.

[f] 24 & 25 Vict. c. 100, ss. 11, 12, 13.

is felony, punishable in the same way.[g] It is also felony and equally penal'[h]

Thirdly. 'Unlawfully and maliciously to wound or cause grievous bodily harm to, or shoot at, or attempt to discharge any kind of loaded arms at any person, with intent to maim, disfigure, or disable, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension and detainer of any person; to attempt to choke or strangle any person;—or,'

Fourthly. 'Unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, to burn, maim, disfigure, disable, or do any grievous bodily harm to any person;—or,'

Fifthly. 'Unlawfully and maliciously to cause any gunpowder or other explosive substance to explode, or to send or deliver to or cause to be taken or received by any person any explosive substance, or any other dangerous or noxious thing, or to cast or throw at or upon or otherwise apply to any person any corrosive fluid or other destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable *any* person, or to do some grievous bodily harm to any person, although no bodily injury be effected;[i]—or,'

Sixthly. 'Unlawfully to apply or administer, or to attempt to apply or administer to any other person, any chloroform, laudanum, or other stupifying or overpowering drug, with intent thereby to enable such offender or any other person to commit, or with intent to assist such offender or other person in committing any felony;[j] —or,'

Seventhly. 'Unlawfully and maliciously to put or throw upon or across any railway any wood, stone, or other thing, or to remove or displace any rail, sleeper, or other thing belonging to any railway, or to remove or divert any points or other machinery belonging to any railway, or to make or show, hide or remove, any signal or light upon or near to any railway, or to do or cause to be done any other matter or thing, with intent, in any of the cases afore-

[g] 7 Will. IV. and 1 Vict. c. 85, s. 3; re-enacted and extended by 24 & 25 Vict. c. 100, ss. 14, 15. If a man wounds a person, intending to murder, he is guilty of the offence in the text, although he mistook the person he shot at for another. *Reg.* v. *Smith*, 1 Dearsly's C. C. R. 559.

[h] 24 & 25 Vict. c. 100, ss. 18, 20, 22, 28, 29.

[i] To which whipping may be added.

[j] 14 & 15 Vict. c. 19, s. 3; re-enacted by 24 & 25 Vict. c. 100, s. 22.

said, to endanger the safety of any person travelling upon such railway: [k]—or,'

Eighthly. 'Wilfully and maliciously to throw, or cause to fall or strike against, into, or upon any engine, carriage, or truck used upon any railway, any wood, stone, or other thing, with intent to endanger the safety of any person being in or upon such engine, tender, carriage, or truck.'[1]

'The administration of poison so as to endanger life or inflict bodily harm is a felony, the offender being liable to be kept in penal servitude for ten years; but where the intent is only to injure or annoy, the limit of penal servitude is five years, two years being the limit in either case of the imprisonment which may be imposed for these offences.[m] Finally, with respect to aggravated assaults generally, it is enacted, by the statute 24 & 25 Vict. c. 100, s. 20, amended by 27 & 28 Vict. c. 47, that any person who unlawfully and maliciously wounds or inflicts upon any other person, either with or without any weapon or instrument, any grievous bodily harm, shall be guilty of a misdemeanor, punishable by penal servitude for five years, or imprisonment, with or without hard labour, for any term not exceeding two years.'

'The offence of setting any spring-gun, man-trap, or other engine calculated to inflict bodily harm has already been referred to.'

II. The second offence, more immediately affecting the personal security of individuals, relates to the female part of the queen's subjects, being that of their *forcible abduction* and *marriage*, which is vulgarly called *stealing an heiress*. By statute 3 Hen. VII. c. 2, it was enacted, that if any person should for lucre take any woman, being maid, wife, or widow, and 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 another, or defiled; such person, his procurers and abettors, and such as knowingly received such woman, should be deemed principal felons; and by statute 39 Eliz. c. 9, the benefit

[k] 14 & 15 Vict. c. 19, s. 6, re-enacted by 24 & 25 Vict. c. 100, s. 32.

[1] Endangering in any way whatever, by unlawful act or wilful omission or neglect, the safety of persons travelling by railway is a misdemeanor punishable by imprisonment, with or without hard labour, not exceeding two years; 24 & 25 Vict. c. 100, s. 34.

[m] 23 Vict. c. 8, re-enacted by 24 & 25 Vict. c. 100, ss. 23, 24.

of clergy was taken away from all such felons, who should be principals, procurers, or accessories *before* the fact.

In the construction of this statute it was determined, 1. That the indictment must allege that the taking was for lucre, for such were the words of the statute. 2. In order to show this, it must have appeared that the woman had substance either real or personal, or was an heir-apparent. 3. It must have appeared that she was taken away against her will. 4. It must also have appeared that she was afterwards married, or defiled. And though possibly the marriage or defilement might have been by her subsequent consent, being won thereunto by flatteries after the taking, yet this was felony, if the first taking were against her will: and so, *vice versâ*, if the woman were originally taken away with her own consent, yet if she afterwards refused to continue with the offender, and was forced against her will, she might 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. It was held that a woman, thus taken away and married, might be sworn and give evidence against the offender, though he was her husband *de facto;* contrary to the general rule of law; because he was no husband *de jure*, in case the actual marriage was also against her will. In cases indeed where the actual marriage was good, by the consent of the inveigled woman, obtained after her forcible abduction, Sir Matthew Hale questioned how far her evidence should be allowed: but other authorities[n] agreed 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 was 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. 'The statute 1 Geo. IV. c. 115, took away the capital punishment for this felony, and in a few years afterwards the act of Henry VII. was repealed by 9 Geo. IV. c. 31; which has been repealed in its turn. Any person who now, from motives of lucre, takes away or detains any woman having any interest in any real or personal estate, or being an heiress presumptive or next of kin to any one having such interest, against her will, *with intent* to marry or defile her, or to cause her to be married or defiled by any other person, is guilty

[n] Cro. Car. 488; 3 Keb. 193; State Trials, v. 455.

of felony. The carrying away or detention, therefore, completes the offence, without the fourth requisite under the old statute, of marriage or defilement;[o] and the offender, who is declared incapable of taking any part of the property, is now liable on conviction to penal servitude for any term not exceeding fourteen and not less than five years, or to be imprisoned, with or without hard labour, for any term not exceeding two years.'[p]

An inferior degree of the same kind of offence, but not attended with force, was punished by the statute 4 & 5 Ph. & Mary, c. 8, which enacted, that if any person, above the age of fourteen, unlawfully should convey or *take away any woman child unmarried*, which extends 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 should be imprisoned two years, or fined at the discretion of the justices; and if he deflowered such maid or woman child, or, without the consent of parents, contracted matrimony with her, *he* should be imprisoned five years, or fined at the discretion of the justices, and *she* should 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 was rendered almost useless, by provisions of a very different kind, which made the marriage totally void, in the statute 26 Geo. II. c. 33; 'and the statute itself was finally repealed by 9 Geo. IV. c. 31. Any person who now takes or causes to be taken any unmarried girl under the age of sixteen years, out of the possession and against the will of her father or mother or of any other person having the lawful care or charge of her, is guilty of a misdemeanor, punishable by fine or imprisonment, or both.[q] Under this statute the offence is complete, although the girl goes voluntarily;[r] and it seems, moreover, that the employment of *fraud* to the parents or to the woman, is equivalent to *force*.'[s]

III. A third offence against the female part also of the queen's subjects, but attended with greater aggravations than that of

[o] *Reg.* v. *Wakefield*, 2 Lewin's Crown Cases, 1. See also *Reg.* v. *Barratt*, 9 C. & P. 393.

[p] 24 & 25 Vict. c. 100, s. 53; 27 & 28 Vict. c. 47.

[q] 24 &25 Vict. c. 100, s. 55.

[r] *Reg.* v. *Manktelow*, 1 Dear. C. C. 159.

[s] *Regina* v. *Hopkins*, 1 Car. & Mar. Rep. 254.

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, 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 damsel'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 punishes the crime of ravishment with death and confiscation of goods; under which it includes both the offence of forcible abduction, or taking away a woman from her friends, of which we last spoke; and also the present offence of forcibly dishonouring her; 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.*" And this, in order to take away from women every opportunity of offending in this way; whom the Roman law seems to 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 honour of the women. "*Si enim "ipsi raptores metu, vel atrocitate pœnæ, ab hujusmodi facinore se "temperaverint, nulli mulieri, sive volenti, sive nolenti, peccandi locus "relinquetur; quia hoc ipsum* velle *mulierum, ab insidiis nequis- "simi hominis, qui meditatur rapinam, inducitur. Nisi etenim eam "solicitaverit, nisi odiosis artibus circumvenerit, non faciet eam velle "in tantum dedecus sese prodere.*" But our English law does not entertain quite such sublime ideas of the honour 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, with death; which was also agreeable to the old Gothic or Scandinavian constitution. 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, 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, continued to be so in appeals of rape, that the woman should immediately after, "*dum recens fuerit maleficium*," go to the next town, and there make discovery to some credible persons of the injury she had suffered: and afterwards should acquaint the high constable of the hundred, the coroners, and the sheriff with the outrage. This corresponded, in some degree, with the laws of Scotland and Arragon, which required that complaint should 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 now only punishable by indictment at the suit of the crown, the maxim of law takes place, that *nullum tempus occurrit regi:* but the jury will rarely give credit to a stale complaint. During the former period also, it was held for law, 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 offence itself of ravishing a damsel within age, that is, *twelve* years old, either with her consent or without, or of any other woman against her will, being reduced to a trespass, if not prosecuted by appeal 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 offence of forcible rape felony by statute Westm. 2, c. 34. And by statute 18 Eliz. c. 7, it was made felony without benefit of clergy; as was also the abominable wickedness of carnally knowing and 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 was, 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, amounted to rape and felony; as well after as before the statute of Queen Elizabeth; but that law has in general been held only to extend to infants under *ten;* though it seems that damsels between *ten* and *twelve* were still under the protection of the statute Westm. 1, the law with respect to their seduction not

having been altered by either of the subsequent statutes 'of Edward I. and Elizabeth. Modern legislation has, however, defined the offence and regulated the punishment. The crime of rape, although continued as a capital offence by the statute 9 Geo. IV. c. 31, s. 16, is now punishable by penal servitude for life, or not less than five years, or imprisonment, with or without hard labour, not exceeding two years.[t] To carnally know and abuse any girl under the age of *twelve* years is a felony, punishable in the same manner as rape.[u] The same offence committed on a girl above twelve, and *under thirteen*, whether with or without her consent, is a misdemeanor, punishable by imprisonment, with or without hard labour, for any term not exceeding two years.[v] The attempt to commit this offence is, irrespective of the age of the female, a misdemeanor, subjecting the offender, at the discretion of the court, to two years' imprisonment, with or without hard labour.'[w]

'With respect to the age of the offender,' a male infant, under the age of fourteen years, is presumed by law incapable of committing a rape, and therefore, it seems, cannot be found guilty of it. For though in other felonies *malitia supplet ætatem*, 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 of mind.[x]

The civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind;[y] 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; for, as Bracton well observes,[z] "*licet meretrix fuerit antea, certe tunc temporis non fuit,*

[t] 24 & 25 Vict. c. 100, s. 48.

[u] 38 & 39 Vict. c. 94, s. 3.

[v] 38 & 39 Vict. c. 94, s. 4. The insertion of the words, "whether with or *without* her consent," would seem to reduce the crime of rape committed on a girl between twelve and thirteen to a *misdemeanor*, punishable by two years' imprisonment; the same offence on a full-grown woman being felony, and punishable by penal servitude for life.

[w] 24 & 25 Vict. c. 100, s. 52.

[x] *Reg.* v. *Groombridge*, 7 C. & P. 582; *Reg.* v. *Phillips*, 8 C & P. 736; *Reg.* v. *Jordan*, 9 C. & P. 118.

[y] Cod. 9, 9, 22; Ff. 47, 2, 39.

[z] Fol. 147.

"*cum reclamando nequitiæ ejus consentire noluit;*" 'or rather, as the essence of the crime is the forcible violation of the woman, it may be committed on any one, who resists on the particular occasion, whatever may be her general conduct.'

'All persons present assisting him who actually perpetrates the offence, as by holding the woman, or preventing her crying out, are principals:[a] and all accessories *before* the fact may be indicted, tried, and punished as principals, while accessories *after* the fact are guilty of a misdemeanor at common law, and are punishable with imprisonment not exceeding two years, with or without hard labour, as the court shall direct.'[b]

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*, 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 offence, 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 stand 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, 'if unexplained,' carry a strong, but not conclusive, presumption that her testimony is false or feigned. 'The woman cannot, however, be compelled to answer whether she has not had connection with other men, or with a particular person named; but the accused may show that the prosecutrix has had connection

[a] *Rex* v. *Crisham*, Car. & M. 187. [b] 25 & 25 Vict. c. 100, s. 67.

with himself, or may impeach her character for chastity by general evidence.'[c]

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; or even to be sensible of the wickedness of telling a deliberate lie. Nay, though she has not, it is thought by Sir Matthew Hale[d] that she ought to be heard without oath, to give the court information; and others have held that what the child told her mother, or other relations, may be given in evidence, since the nature of the case admits frequently of no better proof. But it has been long settled[e] that no hearsay evidence can be given of the declarations of a child who has not capacity to be sworn, nor can such child be examined in court without oath; and that there is no determinate age at which the oath of a child ought either to be admitted or rejected. 'The trial of the offender may, however, be postponed for the purpose of instructing the child in the nature and obligations of an oath.'[f] Yet, where the evidence of children is admitted, it is much to be wished, in order to render their 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 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."[g] Sir M. Hale then relates two very extraordinary cases of malicious prosecution for this crime that had happened within his own observation, and concludes thus: "I

[c] *Rex* v. *Hodgson*, Russ. & R. 211; *Reg.* v. *Holmes*, 1 Law Rep. (Crown Cases) 334.

[d] 1 Hal. P. C. 634.

[e] *Brazier's* case, 1 Leach, C. L. 237.

[f] Leach, C. L. 430, n.; *Reg.* v. *Nicholas*, 2 Car. & Kir. 216.

[g] 1 Hal. P. C. 635.

"mention these instances, that we may be the more cautious upon "trials of offences 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 offence many times transport- "ing 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."

'A charge of *rape* can only be sustained when the offence has been committed *without the consent* of the woman. If the consent be obtained by fraud, it is no rape.[h] Nevertheless whoever by false pretences, false representations, or other fraudulent means, procures any female to have illicit carnal connection with any man, is guilty of a misdemeanor, punishable by imprisonment, with or without hard labour, for any term not exceeding two years.'[i]

'Under this head of offences against women, may be classed one, equally against society at large, that of attempting to procure abortion, a crime formerly provided for by 43 Geo. III. c. 58, and 9 Geo. IV. c. 31. These statutes only applied, however, where the woman was actually pregnant; but this is no longer necessary to complete the offence.[j] For whoever, with intent to procure the miscarriage of any woman, unlawfully administers to, or causes to be taken by her, any poison or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, is guilty of felony; and liable, on conviction, to penal servitude for life or not less than five years, or to be imprisoned, with or without hard labour and solitary confinement, for any term not exceeding three years.[k] A woman with child may be guilty of this offence against herself.'

IV. What has been observed, especially with regard to the proof of *rape*, which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offence, 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 offence of so dark a nature, so

[h] *Reg.* v. *Barrow*, 1 Law Rep. (Crown Cases) 156.

[i] 24 and 25 Vict. c. 100, s. 49.

[j] *Reg.* v. *Goodhall*, 1 Den. C. C. 187.

[k] 24 & 25 Vict. c. 100, s. 58; 27 & 28 Vict. c. 47.

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 a part, to my readers as well as to 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.*"[1] A taciturnity observed likewise by the edict of Constantius and Constans;[m] "*ubi scelus est id, quod non proficit "scire, jubemus insurgere leges, armari jura gladio ultore, ut "exquisitis pœnis subdantur infames, qui sunt, vel qui futuri sunt "rei.*" Which leads me to add a word concerning its punishment.

This, the voice of nature and of reason, and the express law of God, determined 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 a universal, not merely a provincial, precept. And our ancient law in some degree imitated this punishment, by commanding such miscreants to be burned to death;[n] though Fleta[o] says they should be buried alive; either of which punishments was indifferently used for this crime among the ancient Goths.[p] But this offence, being anciently only subject to ecclesiastical censures, was made felony without benefit of clergy by statute 25 Hen. VIII. c. 6, revived and confirmed by 5 Eliz. c. 17; 'and so it remained till quite recently, although in practice the extreme punishment was never inflicted.'[q] And the rule of law, 'when the crime is committed with mankind, is,' that if both are arrived at years of discretion, *agentes et consentientes pari pœnâ plectantur.*[r]

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

[1] See in Rot. Parl. 50 Edw. III. n. 58, a complaint, that a Lombard did commit the sin "that was not to be named." 12 Rep. 37.

[m] Cod. 9, 9, 31.

[n] Britt. c. 9.

[o] L. 1, c. 37.

[p] Stiernh. de Jure Goth. l. 3, c. 2.

[q] See 9 Geo. IV. s. 31, and now 24 & 25 Vict. c. 100, s. 61. The punishment may be penal servitude for life. The attempt to commit the offence may involve penal servitude for ten years.

[r] 3 Inst. 59; *Reg.* v. *Allen*, 1 Den. C. C. 364; *Reg.* v. *Jellyman*, 8 C. & P. 604.

V. VI. VII. With regard to the nature of the three first of these offences in general, I have nothing further to add to what has already been observed in the preceding book of these commentaries; 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 queen's peace, an affront to her government, and a damage done to her subjects, they are also indictable and punishable with fine and imprisonment. 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 'were formerly' much more usual, than for the absolute perpetration of the facts themselves, on account of the difficulty of proof; 'a method of proceeding which need not, however, be resorted to, now that persons indicted for the actual commission of felonies or misdemeanors, may be convicted of the attempt.'[s] When both parties are consenting to an unnatural attempt, it is usual not to charge any *assault;* but that one of them laid hands on the other with intent to commit, and that the other permitted the same with intent to suffer, the commission of the abominable crime before mentioned. In all these cases, besides heavy fine and imprisonment, it was usual to award judgment of the pillory, 'as long as that species of punishment existed. An assault, with intent to commit the above or any other felony, is still indictable as being a misdemeanor at common law; and is punishable by statute in some cases with penal servitude, in almost all with imprisonment, to which hard labour may be added, if the court thinks fit.'[t]

'Assaults which amount to contempts against the courts of justice have been already adverted to, as well as the general provisions to prevent obstructions in the execution of legal process. It is necessary, however, in this place to notice some other assaults, which, although unlawful when committed on any person, yet acquire a higher degree of guilt when committed on persons in particular situations, or exercising peculiar duties, and to whom consequently the law affords greater protection.'

There was formerly one species of battery 'of this description, which for a long period the law regarded as' more atrocious and

[s] 14 & 15 Vict. c. 100, s. 9.

[t] 24 & 25 Vict. c. 100.

penal than the rest, viz., 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. It was enacted by the statute called *articuli cleri*, 9 Edw. II. c. 3, that if any person laid violent hands upon a clerk, the amends for the peace broken should be before the king, that is, by indictment in the king's courts; and the assailant might also be sued before the bishop, that excommunication or bodily penance might be imposed; which if the offender redeemed by money, to be given to the bishop, or the party grieved, it might be sued for before the bishop; whereas otherwise to sue in any spiritual court for civil damages for the battery, fell within the danger of *præmunire*. But suits always were allowable in the spiritual court, for money agreed to be given as a commutation for penance.[u] So that upon the whole it appears that a person guilty of such brutal behaviour to a clergyman was subject to three kinds of prosecution, all of which might be pursued for one and the same offence: 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 animæ*, by *enjoining* penance, and then again for such sum of money as should be agreed on for *taking off* the penance joined; it being usual in those courts to exchange their spiritual censures for a round compensation in money;[v] perhaps because poverty is generally esteemed by the moralists the best medicine *pro salute animæ*. 'The statute of Edward II. was, however, so far repealed by the act 9 Geo. IV. c. 31, now also repealed; and the only special protection given to the clergy is by the statute 24 & 25 Vict. c. 100, s. 36; which makes it a misdemeanor, punishable by fine or imprisonment, with or without hard labour, or both, to obstruct a clergyman in, or *arrest* him upon civil process while he is performing, or is about to perform divine service, or is returning from the performance thereof.'

'Assaulting or wounding any magistrate, officer, or other person lawfully authorized, in the exercise of his duty in the preservation of shipwrecked vessels or property, is punishable with penal servitude for seven or not less than five years, or imprisonment,

[u] Artic. Cler. 9 Edw. II. c. 4; Fitz. Nat Brev. 53.
[v] 2 Roll. Rep. 384.

with or without hard labour, for a term not exceeding two years;[w] while impeding persons endeavouring to save lives in case of shipwreck is a felony punishable by penal servitude for life or not less than five years, or imprisonment, with or without hard labour and solitary confinement, not exceeding two years.[x] Assaulting keepers of deer and game is also, as we have seen, severely punishable, as are likewise assaults on officers of workhouses, and on relieving and other officers acting under the poor laws.'[y]

'Assaults, again, committed in pursuance of any conspiracy to raise the rate of wages, are punishable with two years' imprisonment and hard labour; while forcibly hindering, or wounding, or using any violence with intent to hinder seamen, keelmen, or casters, from working at or exercising their lawful trades; and assaults with intent to obstruct the buying or selling of grain, or its transit to or from market, are punishable on summary conviction, by three months' imprisonment, with or without hard labour.'[z]

'Assaults committed by masters and mistresses on apprentices or servants, persons whom they are naturally bound to protect, so as to endanger life, or permanently injure health, constitute a misdemeanor punishable by penal servitude for five, or imprisonment not exceeding two years, with or without hard labour:[a] and in order to prevent the brutality of husbands to their wives, and of parents and others to children, aggravated assaults on all females whatever, and on male children under fourteen, shall, on summary conviction before two justices of the peace, be punished by fine or by an imprisonment, with or without hard labour, for any period not exceeding six months.'[b]

'By the common law the punishment for an assault is only imprisonment or fine, or both; but the court is now empowered, in cases of *indecent assault*, and some other assaults, to impose hard labour as part of the sentence; and if the assault occasions *actual bodily harm*, penal servitude not exceeding five years may be awarded. Common assaults and batteries may and usually are dealt with by the justices under the summary jurisdiction

[w] 24 & 25 Vict. c. 100, s. 37.
[x] 24 & 25 Vict. c. 100, s. 17.
[y] 13 & 14 Vict. c. 101, s. 9; 14 & 15 Vict. c. 105, s. 18.
[z] 24 & 25 Vict. c. 100, ss. 40, 41.
[a] 24 & 25 Vict. c. 100, s. 26.
[b] 24 & 25 Vict. c. 100, s. 43.

conferred on them to commit the offender for two months to the house of correction, or to impose a fine not exceeding 5*l.*, inclusive of costs.'

VIII. The two remaining crimes and offences against the persons of the queen'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, 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 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, that the most atrocious degree of this offence, 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 *præmunire*, and incapacity to hold any office, without any possibility of pardon.[c] Inferior degrees of the same offence of false imprisonment are also punishable by indictment, like assaults and batteries, and the delinquent may be fined and imprisoned. And indeed, 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 crown.

IX. The other remaining offence, that of *kidnapping*, being the forcible abduction or stealing away of a man, woman, or child, from their own country, and sending them into another, was capital by the Jewish law. "He that stealeth a man, and selleth "him, or if he be found in his hand, he shall surely be put to "death."[d] So likewise in the civil law, the offence of spiriting away and stealing men and children, which was called *plagiam*, and the offenders *plagiarii*, was punished with death.[e] This is unquestionably a very heinous crime, as it robs the 'crown of its' subjects, banishes a man from his country, and may in its consequences be productive of the most cruel and disagreeable hardships.

[c] Stat. 31 Car. II. c. 2. [d] Exod. xxi. 16. [e] Ff. 48, 15, 1.

The common law of England 'formerly' punished it with fine, imprisonment, and pillory; 'but the offence of *child-stealing* is now provided for by the statute 24 & 25 Vict. c. 100, s. 56, which makes it felony for any person maliciously, either by force or fraud, to take away, entice away, or detain, any child under the age of fourteen years, with intent to deprive the parent or other person having lawful charge of such child, of the possession of the child; or with intent to steal any article upon or about the person of the child; or with any such intent to receive or harbour any child, knowing it to have been by force or fraud so taken, enticed away, or detained. The punishment which also applies to every person counselling, aiding, and abetting, is now penal servitude for seven or not less than five years, or imprisonment for any term not exceeding two years, with or without hard labour, and, if the offender be a male under sixteen years of age, whipping. The statute, however, does not extend to the mother or a person claiming to be the father of an illegitimate child, or to have any right to the possession of such child, who gets possession of it, or takes it out of the care of any person having the lawful charge thereof.'

The statute 11 & 12 Will. III. c. 7, though principally intended against pirates, had a clause that extended to prevent the leaving such persons abroad, as had been kidnapped or spirited away; by enacting, that if any captain of a merchant vessel should, 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 should suffer three months' imprisonment: and now, by the statute 17 & 18 Vict. c. 104, ss. 206 & 518, it is made a misdemeanor punishable in a summary manner before justices, by fine and imprisonment, with or without hard labour, not exceeding six months, or by a penalty not exceeding 100*l.*, for the master or any other person belonging to any British ship wrongfully to force on shore and leave behind, or otherwise wilfully and wrongfully to leave behind in any place on shore or at sea, in or out of her Majesty's dominions, any seaman or apprentice belonging to such ship, before the completion of the voyage for which such person was engaged, or the return of the ship to the United Kingdom.'

'The same statute provides against the wrongful discharge of seamen or apprentices, whether in British or foreign ports,

under the guise of which masters of vessels might often perpetrate the grossest oppression, by requiring them, under the penalty of being guilty of a misdemeanor, to obtain certain formal certificates as to the grounds of the discharge of their seamen or apprentices, from consular or customs officers, or respectable merchants resident in the place where the discharge takes place.'

And thus much for offences that more immediately affect the *persons* of individuals.

CHAPTER XVI.

OF OFFENCES AGAINST THE HABITATIONS OF INDIVIDUALS.

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

I. Arson, *ab ardendo*, is the malicious and wilful burning of the house or outhouse of another man. This is an offence of very great malignity, and much more pernicious to the public than simple theft: because, first, it is an offence 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 attend it; and, lastly, because in simple theft the thing stolen only changes its master, but still remains *in esse* 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 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 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 offence; next, wherein the offence itself consists, or what amounts to a burning of such house; and lastly, how the offence 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; and this by the common law; which also accounted it felony to burn a single barn in a field, if filled with hay or corn, though not parcel of the dwelling-house. The burning of a stack of corn was anciently likewise accounted arson. And indeed, all the niceties and distinctions which we meet in our books, concerning what shall, or shall not, amount to arson, seem now to be taken away by a variety of statutes, which have made the punishment of wilful burning equally extensive as the mischief. The offence of arson, strictly so called, might be committed 'at common law' by wilfully setting fire to one's own house, provided one's neighbour's house was thereby also burnt; but if no mischief was done but to one's own, it did not amount to felony, though the fire was kindled with intent to burn another's. 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*, was always a high misdemeanor, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour. And if a landlord or reversioner set fire to his own house, of which another was in possession under a lease from himself or from those whose estate he had, it was accounted arson: for during the lease the house is the property of the tenant.

'This offence is now, however, clearly defined by statute.[a] The setting fire to any dwelling-house, *any person being therein*, was till recently a capital felony, although the extreme penalty of the law was not usually inflicted. It is now punishable by penal servitude for life, or not less than five years, or imprisonment not exceeding two years, with or without hard labour and solitary confinement, and whipping if the offender be a male under sixteen years of age. The setting fire to any church or chapel, or to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary; or to any building or erection used in carrying on any trade or manufacture; or to any hovel, shed, or fold, or to any farm building, or any building or erection used in farming land, whether the same or any of them respectively be in possession of the offender or of any other person, with intent thereby to injure or defraud any person; or any station, engine-house, warehouse, or other buildings belonging to any railway, dock, canal, or other

[a] 24 & 25 Vict. c. 100.

navigation; or to any public building, is also felony, punishable in the same manner.'

2. As to what shall be said to be a *burning*, so as to amount to arson, a bare intent, or attempt to do it, by actually setting fire to a house, unless it absolutely *burns*, did not fall within the description of *incendit et combussit;* which were words necessary, in the days of law-Latin, to all indictments of this sort. The burning and consuming of any part was, however, sufficient; though the fire were afterwards extinguished; 'but under the statute now in force, the offence consists in setting fire to the building, and consequently it is not necessary that it should be burnt or actually consumed.[b] The common law accounted it felony to burn a single barn in the field, if filled with hay or corn; and the burning of a stack of corn was anciently likewise accounted arson. So now the setting fire to any matter or thing, in, against, or under any building, under such circumstances that if the building were thereby set fire to, the offence would amount to felony, is itself a felony, and subjects the offender to penal servitude for any term not exceeding fourteen nor less than five years, or to imprisonment, with or without hard labour, solitary confinement, and whipping if the offender be a male under sixteen, for any term not exceeding two years. And an *attempt* to set fire to buildings is likewise felony, and punishable in the same way, if done with such intent that if the offence were complete the offender would be guilty of felony.'[c]

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 is not felony, contrary to the opinion of former writers. But by statute '14 Geo. III. c. 78, s. 84,' any servant negligently setting fire to a house or outhouses shall forfeit 100*l.*, 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 cædi.*"[d]

3. The *punishment* of arson was death by our ancient Saxon

[b] *Rex* v. *Salmon*, Russ. & R. 26; *Rex* v. *Stallion*, 1 M. C. C. 398.

[c] 24 & 25 Vict. c. 97, ss. 7, 8.

[d] Ff. 1, 15, 4.

laws.[e] And in the reign of Edward the First, this sentence was executed by a kind of *lex talionis:* for the incendiaries were burnt to death,[f] as they were also by the Gothic constitutions.[g] The statute 8 Henry 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 'for a long period afterwards was subject to' the punishment of all capital felonies, namely, hanging. The offence 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 Ph. & M. c. 4, which expressly denied it to the accessory before the fact; though it was expressly denied to the principal in all cases within the statute 9 Geo. I. c. 22. 'But as already observed, no offence of this description now subjects the offender to the punishment of death.'

'There are some cognate offences, however, which are still highly penal. Thus whoever unlawfully and maliciously, by the explosion of gunpowder, or other explosive substance, destroys or damages the whole or any part of any dwelling-house, *any person being therein;* or by the same means destroys or damages any building, whereby the life of any person is endangered, is guilty of felony, and is now punishable by penal servitude for life or not less than five years, or an imprisonment, with or without hard labour and solitary confinement, and whipping if the offender be a male under sixteen, not exceeding two years.[h] The attempt to blow up buildings, although it fails, is also a felony, punishable in like manner, except that the period of penal servitude may not exceed fourteen years.'[i]

II. Burglary, or nocturnal housebreaking, *burgi latrocinium,* which by our ancient law was called *ham-socn,* as it is in Scotland to this day, has always been looked upon as a very heinous offence; 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

[e] LL. Æthelst. c. 6; 1 Thorpe, p. 203.
[f] Britt. c. 9.
[g] Stiernh. de Jure Goth. l. 3. c. 6.
[h] 24 & 25 Vict. c. 97, s. 9.
[i] Ibid. s. 10.

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, 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 styles 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 Cicero;[j] "*quid enim sanctius, quid omni religione munitius, quam domus "unius-cujusque civium?*" For this reason no outward doors can in general be broken open to execute any civil progress; though, in criminal cases, 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.

The definition of a burglar is "he that by night breaketh and "entereth 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 daytime there is no burglary. We have seen, 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 sun-rising, and to end immediately upon sunset; but the better opinion seems to have been that if there were daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it was no burglary. But this did not extend to moonlight; for then many midnight burglaries would have gone unpunished: and besides, the malignity of the

[j] Pro domo 41.

offence does not so properly arise from its being done in the dark as at the dead of the night, when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless. 'And *night* is now, by express enactment, to be considered, with reference to this offence, as commencing at nine of the clock in the evening, and concluding at six of the clock in the morning of the next succeeding day.'[k]

2. As to the *place*. It must be in a *mansion*-house; and, therefore, the reason why breaking open a church is burglary, as it has sometimes been considered, is that it is *domus mansionalis Dei*. But it does not seem absolutely necessary that it should in all cases be a mansion-house; for burglary may also be committed by breaking the gates or walls of a *town* in the night; though that perhaps might be called the mansion-house of the garrison or corporation. Spelman[l] defines burglary to be, "*nocturna diruptio "alicujus habitaculi, vel ecclesiæ, etiam murorum portarumve civitatis "aut burgi, ad feloniam aliquam perpetrandam.*" 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 defence: 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*, is the object of burglary, though no one be in it at the time of the fact committed. And 'formerly,' if the barn, stable, or warehouse, were parcel of the mansion-house and within the same common fence,[m] though not under the same roof or contiguous, a burglary might be committed therein; for the capital house protects and privileges all its branches and appurtenants, if within the curtilage or homestall; 'but no building, although within the same curtilage with the dwelling-house, and occupied therewith, is now deemed to be part of such dwelling-house for the purpose of burglary, unless there be a *communication* between such building and dwelling-house, either immediate, or

[k] 24 & 25 Vict. c. 96, s. 1.
[l] Spelm. Gloss. t. *Burglary*.
[m] *Rex.* v. *Garland*, 1 Leach, C. C. 144.

by means of a covered and inclosed passage, leading from the one to the other.'[n] 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. So also is a room or lodging in any private house, the mansion for the time being of the lodger; if the owner does not himself dwell in the house, or if he and the lodger enter by different outward doors. But if the owner himself lies in the house, and has but one outward door at which he and his lodgers enter, such lodgers seem only to be inmates, and all their apartments to be parcel of the one dwelling-house of the owner. Thus, too, 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. 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 dwelling-house, nor can burglary be committed therein; for by the lease it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part; neither can I be said to dwell therein when I never lie there. Neither can burglary be committed in a tent or booth erected in a market or fair, though the owner may lodge therein;[o] for the law regards thus highly nothing but permanent edifices; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon 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. There must in general be an actual 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 a 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

[n] 24 & 25 Vict. c. 96, s. 53.

[o] *Rex* v. *Smith*, 1 M. & Rob. 256.

he afterwards unlocks an inner or chamber door, it is so. But to come down a chimney is held a burglarious entry, for that is as much closed as the nature of things will permit.[p] So also to knock at the door, and upon opening it to rush in, with a felonious intent; or under pretence 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. 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,[q] 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. The entry may be before the breaking as well as after: for by the statute 12 Anne, c. 7, if a person entered into the dwelling-house of another, without breaking in, either by day or by night, with intent to commit felony, or being in such a house committed any felony, and in the night broke out of the same, this was declared to be burglary; there having before been different opinions concerning it, Lord Bacon[r] holding the affirmative and Sir Matthew Hale[s] the negative. This act of Anne has been repealed; 'but a similar provision is still in force,[t] any person who enters the dwelling-house of another with intent to commit felony, or who, being in such dwelling-house, commits any felony, and in either case breaks *out* of the said dwelling-house in the night-time, being deemed guilty of burglary. With the above statutable exception, therefore,' 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.

[p] *Rex* v. *Brice*, Russ. & Ry. 450.
[q] *Joshua Cornwall's* case, Stra. 881.
[r] Elem. 65.
[s] 1 Hal. P. C. 554.
[t] 24 & 25 Vict. c. 96, s. 51.

4. As to the *intent;* it is clear that such breaking must be with a felonious intent, otherwise it is only a trespass and entry. 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 offence were felony at common law or only created so by statute; since that statute which makes an offence felony gives it incidentally all the properties of a felony at common law.

Thus much for the nature of burglary, which is a felony at common law, but was within the benefit of clergy. The statutes, however, of 1 Edw. VI. c. 12, and 18 Eliz. c. 7, took away clergy from the principals, and that of 3 & 4 W. & M. c. 9, from all abettors and accessories before the fact. In like manner, the laws of Athens, which punished no simple theft with death, made burglary a capital crime;[u] 'which it remained with us, after the abolition of the benefit of clergy, until made punishable by penal servitude for life or not less than five years, or by an imprisonment, with or without hard labour and solitary confinement, not exceeding two years.'[v]

'The other offences, which affect the habitations of individuals, do not amount to burglary; such are the breaking and entering a house in the daytime, or a warehouse, or shop; or a building within the curtilage; or a church or chapel, and stealing therein; or breaking and entering a house, church, or chapel with intent to commit a felony. *Housebreaking,*[w] as it is termed, that is, the breaking and entering any dwelling-house in the daytime, and committing any felony therein, is now punishable by penal servitude for any term not exceeding fourteen nor less than five years, or imprisonment, with or without hard labour and solitary confinement, not exceeding two years. It is equally penal to break and enter any *building,* and commit felony therein, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, that is, not having a *communication* between it and the dwelling-house; and the same punishment is attached to breaking and entering any school-house, *shop, ware-*

[u] Pott. Antiq. b. 1, c. 26. [v] 24 & 25 Vict. c. 96, s. 52.
[w] 24 & 25 Vict. c. 96.

house, or *counting-house*, and committing any felony therein. Breaking and entering with intent to commit a felony, although no felony be committed, is itself a felony.'[x]

'*Sacrilege*, or the offence of breaking and entering any church or other place of worship, and committing felony therein; or, having committed any felony therein, breaking out of the same, is more penal, as the offender may be kept in penal servitude for life.'[y]

'Somewhat less penal, though of not less dangerous tendency, are the offences created by recent statutes; which make it a misdemeanor punishable by penal servitude for five years, or by imprisonment, with or without hard labour, for any term not exceeding two years, in any person to be found *by night* armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building, and to commit any felony therein;—or found *by night* having in his possession, without lawful excuse, the proof of which excuse lies on such person, any picklock, key,[z] crow, jack, bit, or other implement of housebreaking;—or found *by night* having his face blackened or otherwise disguised, with intent to commit any felony,—or found *by night* in any dwelling-house or other building, with intent to commit any felony therein.[a] A repetition of any of these offences is punishable with penal servitude not exceeding ten years.'

[x] 24 & 25 Vict. c. 96, ss. 56, 57.

[y] 24 & 25 Vict. c. 96, s. 50; *Rex* v. *Nixon*, 7 C. & P. 442.

[z] *Reg.* v. *Oldham*, 2 Den. C. C. 472.

[a] 24 & 25 Vict. c. 96, ss. 58, 59.

CHAPTER XVII.

OF OFFENCES AGAINST PRIVATE PROPERTY.

THE next and last species of offences 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:—

I. Larceny, or *theft*, by contraction for latrociny, *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 was the stealing of goods above the value of twelvepence, 'was formerly' called *grand* larceny; when of goods to that value, or under, it was *petit* larceny; offences which were considerably distinguished in their punishment; 'but the difference between which has been abolished;[a] every larceny, whatever be the value of the property stolen, being now deemed to be of the same nature, and subject to the same incidents in all respects as grand larceny formerly was.' I shall, therefore, first consider the nature of simple larceny in general, and then shall observe the different degrees of punishment inflicted on its several branches.

Simple larceny, then, is "the felonious taking and carrying "away of the personal goods of another." This offence certainly commenced then, whenever it was, that the bounds of property, or laws of *meum* and *tuum*, were established. How far such an offence 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

[a] 7 & 8 Geo. IV. c. 29, s. 2; 24 & 25 Vict. c. 96, s. 2

what he has seized to his present use seems to be the only offence of this kind incident to such a state. But unquestionably, in social communities, when property is established, the necessity whereof we have formerly seen, 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 'at common law' 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. But if the carrier opens a bale or pack of goods, or pierces a vessel of wine, and takes away part thereof, these are larcenies; for here the *animus furandi* is manifest; since he had otherwise no inducement to open the goods. 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. 'And although where the possession of goods has been obtained *bonâ fide*, without any fraudulent intention in the first instance, the subsequent conversion is not larceny; yet where the original possession is obtained by a trick or artifice for the purpose of converting the goods to the taker's use, it is larceny; thus, although the voluntary loan of a horse to a person who afterwards rides off with it, is not larceny, yet if the possession was parted with in consequence of fraud, as under colour of an exchange, or a pretended hiring, the intention to steal it existing from the first, it is larceny.'[b]

'So if a servant having,' not the possession, but only the care and oversight of the goods, as the butler of plate, the shepherd of sheep, and the like, steals them, it is felony at common law. 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; and so it was declared to be by statute 3 & 4 W. & M. c. 9, if a lodger ran away with the

[b] *Rex* v. *Sheppard*, 9 C. & P. 121; *Rex* v. *Temple*, 1 Leach, 240; 2 East, P. C. 691. The subtle distinction, above pointed out, between larceny and fraud, gave rise to the several statutes about to be mentioned, by which the obtaining any property, money, or valuable security by *false pretence*, with intent to defraud, is made an indictable misdemeanor.

goods from his ready-furnished lodgings; 'and in the same way it is a felony, indictable and punishable as larceny, for any person to steal any chattel *or fixture* let to be used by him in or with any house or lodging, and that whether the contract was entered into directly by him or by any other person on his behalf.'[c]

'Other statutes, passed from time to time, have still farther narrowed the operation of those rules of the common law by which agents, brokers, bankers, factors, trustees, and others frequently escaped punishment for making away with the property intrusted to them or placed under their control. Thus,' by the common law, it was not larceny in any servant to run away with the goods committed to him 'by third persons for delivery to his master, and of which his master never had possession,' but only a breach of civil trust. But by statute 33 Hen. VI. c. 1, the servants of persons deceased, accused of embezzling their masters' goods, might, 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, on default of appearance, be attainted of felony. And by statute 21 Hen. VIII. c. 7, if any servant embezzled his master's goods to the value of forty shillings, it was made felony; except in apprentices and servants under eighteen years old. 'The restriction as to value, as well as the exception mentioned in this statute, no longer exist, however; any clerk or servant, or other person employed for the purpose or in the capacity of a clerk or servant, who fraudulently embezzles any chattel, money, or valuable security, received or taken into his possession for or in the name or on account of his master, being now deemed to have feloniously stolen the same from his master or employer, although it was not received into the possession of his master or employer otherwise than by the possession of the clerk or servant. Upon an indictment, indeed, charging the offence of larceny, the accused may be convicted of embezzlement; and so upon an indictment charging embezzlement the prisoner may be convicted of larceny.'[d]

'The statute 7 & 8 Geo. IV. c. 29, which first provided in

[c] 7 & 8 Geo. IV. c. 29, ss. 4, 5; 24 & 25 Vict. c. 96, s. 74.

[d] 24 & 25 Vict. c. 96, ss. 68, 72.

express terms "for the punishment of embezzlements committed "by *agents intrusted with property*," was followed by several others having the same object in view. Of these the most important were the statute 5 & 6 Vict. c. 39, usually called the Factor's Act, and the statute 20 & 21 Vict. c. 54, which provided for the prosecution and punishment of trustees, fraudulently disposing of trust property, and of the directors of public companies, fraudulently appropriating the property under their control, keeping fraudulent accounts, or publishing fraudulent statements, offences unhappily of much too frequent occurrence. These statutes have been recently repealed; but their various provisions were at the same time re-enacted by the statute 24 & 25 Vict. c. 96, which consolidates the statute law relating to larceny and other similar offences;[e] and to which it may therefore be sufficient to refer the reader, the more especially that the particular enactments I now refer to are framed, not so much to measure out punishment to the offenders as to prevent their escape altogether, through the subtile distinctions and minute refinements which the ingenuity of a criminal never fails to suggest.'

Under some circumstances a man may be 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 intrusted them, with intent to charge such bailee with the value. 'This principle is obviously not applicable to the case of a partner or part owner of property, for he has the same power over the joint property as his co-partner or any other part owner; and, therefore, any member of a partnership, or one of two or more beneficial owners of property, who now steals or embezzles any of the property in which he is jointly interested as part owner, has been made punishable, simply as if he were not such part owner.'[f]

2. There must not only be a taking, but a *carrying away;*

[e] 'This statute re-enacts the 52nd section of the statute 7 & 8 Geo. IV. c. 29, which provided that no agent should be liable to be convicted by any evidence as an offender against that act, if he had previously disclosed the act on oath under any compulsory process in any action, suit, &c., instituted by any party aggrieved, or in any examination or deposition before any commissioners of bankruptcy. It was under that section that the fraudulent bankers, Sir John Dean Paul, Strahan, and Bates, endeavoured, but unsuccessfully, to shield themselves from prosecution for the misappropriation of securities of various kinds, deposited with them for safe custody.'

[f] 31 & 32 Vict. c. 116.

cepit et asportavit 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 apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his chamber downstairs: these have been adjudged sufficient carrying away, to constitute a larceny. 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.

3. This taking and carrying away must also be *felonious;* that is, done *animo furandi:* or, as the civil law expresses it, *lucri causâ.* This requisite, besides excusing those who labour under incapacities of mind or will, 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 neighbour takes another's plough that is left in the field, and uses it upon his own land, and then returns it: if, under colour 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. The ordinary discovery of a felonious intent is where the party does it clandestinely; or, being charged with the fact, 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, or *animum furandi:* wherefore they must be left to the due and attentive consideration of the court and jury.[g]

4. This felonious taking and carrying away must be *of the*

[g] Upon this point of the taking being *lucri causâ*, may be mentioned the instance of a servant taking his master's corn beyond the regular allowance, for the purpose of giving it to his master's horses. In such cases the *lucri causâ* was supposed to be the saving of the servant's trouble and labour in grooming the horses by the extra corn causing them to look sleek. This was held to be sufficient *lucrum.* But the statute 26 & 27 Vict. c. 103, was specially passed for the purpose of removing such cases from the category of felonies; and they are now punishable on summary conviction before justices by imprisonment, with or without hard labour, not exceeding three months, or by fine not exceeding 5*l.*

personal goods of another: for if they are things *real*, or savour of the reality, larceny cannot at the common law 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 of the common law; but the severance of them was, and in many things is still, merely a trespass which depended on a subtilty 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 immoveable. 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 severs 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. And, 'therefore, it has been declared to be felony,[h] and punishable as simple larceny,[i] for any person' to steal, rip, cut, 'sever,' or break with intent to steal, 'any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to the public use or ornament, or in any burial ground.'

'It is also felony to steal, root up, or otherwise destroy or damage with intent to steal, any tree, sapling, shrub, or under-

[h] 4 Geo. II. c. 32; 21 Geo. III. c. 68. [i] 24 & 25 Vict. c. 96, s. 31.

wood, if the value of the articles stolen or the amount of injury done exceeds 5*l.*, or 1*l.* if they grow in any park, garden, orchard, avenue, or ground belonging to a dwelling-house. And the same offence, committed in respect of the same things growing anywhere, if to the amount of 1*s.*, is punishable on summary conviction by a fine not exceeding 5*l.* above the value of the article, a second offence by imprisonment, with or without hard labour, not exceeding a year, a third offence being felony. The stealing any live or dead fence, or any stile or gate, independent of the value thereof, is in like manner punishable on summary conviction; and so is the unlawful possession of any of such articles.[j] And similar provisions are made, with reference to the theft of plants, fruit, or other vegetable productions, growing in any garden, orchard, nursery-ground, hot-house, green-house, or conservatory, or of any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling or dyeing, or in any manufacture.'

Stealing ore out of mines is also no larceny 'at common law,' upon the same principle of adherence to the freehold; 'and therefore, by several statutes,[k] the stealing, or severing with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or black lead, or any coal, or cannel coal, from any mine, bed, or vein thereof, is made felony; and such it still is, being punishable by an imprisonment, with or without hard labour and solitary confinement, not exceeding two years;[l] which penalty may also be imposed on any person employed in a mine, who removes or conceals the ore thereof, with intent to defraud the owner.'

Upon nearly the same principle the stealing of writings relating to a real estate is no felony 'at common law,' but a trespass; because they concern the land, or, according to our technical language, *savour* 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. 'The legislature has consequently been called upon to interfere; and the stealing, or for any fraudulent purpose destroying, cancelling, or concealing of the whole or any part of any document of title to lands, is accordingly declared to be felony, punishable by penal servitude

[j] 24 & 25 Vict. c. 96, ss. 32-35. [k] 25 Geo. II. c. 10; 7 & 8 Geo. IV. c. 29.
[l] 24 & 25 Vict. c. 96, s. 38.

for five, or imprisonment, with or without hard labour and solitary confinement, not exceeding two, years. It is much more penal, either during the life or after the death of a testator, so to treat any will, codicil, or other testamentary instrument, whether relating to real or personal estate, or both; this offence being likewise felony, but punishable it may be by penal servitude for life. The stealing, obliteration, or destruction of records and other proceedings of courts of justice, which may often materially affect the title to real or personal property, is also felony and highly penal.'

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; and not importing any property in *possession* of the person from whom they are taken. But by the statute 2 Geo. II. c. 25, made perpetual by the 9 Geo. II. c. 18, they were put upon the same footing, with respect to larcenies, as the money they were meant to secure; 'and now to steal, or for any fraudulent purpose destroy, cancel, or obliterate any *valuable security*,—which words include any order or other security, entitling or evidencing the title of any person or corporate body to any share or interest in any public stock or fund, or to any deposit in any bank,—any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money, or for payment of money,—is a felony of the same nature and degree, and punishable in the same manner as for stealing chattels of the like value.' [m]

'The provisions of the' statute 15 Geo. II. c. 13, 'whereby' officers or servants of the Bank of England, secreting or embezzling any note, bill, warrant, bond, deed, security, money, or effects intrusted with them or with the company, 'were declared' guilty of felony without benefit of clergy, 'have been superseded by the more general enactments of the 24 & 25 Vict. c. 96, s. 73. A similar severity exhibited' by statute 24 Geo. II. c. 11, with respect to officers and servants of the South Sea Company, 'has ceased to be applicable, since the capital punishment for such offences was taken away by the statute 4 & 5 Vict. c. 56.' By 7 Geo. III. c. 10, 'provision was made for letter-stealing by servants of the post-office; and the statute 7 Will. IV. and 1 Vict. c. 36, consolidating the law on this subject, now makes it felony

[m] 24 & 25 Vict. c. 96.

to steal letters or post-bags, or even to open the letter-bag, the punishment in all cases being very severe, but increased where the offender is employed under the post-office.'

Larceny also cannot at common law be committed of treasure-trove, or wreck, till seized by the sovereign 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, was made felony without benefit of clergy: in like manner, as by the civil law,[n] this inhumanity is punished in the same degree as the most atrocious theft. 'Under the milder system of punishment, however, adopted in the present age, the plundering or stealing any part of a vessel in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind belonging to such ship or vessel, is punishable by penal servitude for any term not exceeding fourteen nor less than five years, or by imprisonment, with or without hard labour and solitary confinement, for any term not exceeding two years.[o] Persons found in possession of shipwrecked goods, and not giving a satisfactory account of them, or offering such goods for sale, may be imprisoned on summary conviction six months or fined in 20*l*. Penalties are also imposed by other statutes on persons plundering or secreting shipwrecked property, or defacing the marks thereon, or endeavouring to impede or hinder the saving of vessels; these penalties being in addition to any punishment to which the parties may be otherwise liable.'[p]

Larceny also cannot be committed of such animals, in which there is no property either absolute or qualified; as of beasts that are *feræ naturæ*, 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. 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. And now, by statute '24 & 25 Vict. c. 96, s. 12, to unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer, kept in the *enclosed* part of any forest, chase, or purlieu, or in any enclosed land wherein deer shall be usually

[n] Cod. 6, 2, 18.

[o] 24 & 25 Vict. c. 96, s. 64.

[p] 17 & 18 Vict. c. 104, s. 478.

kept, is felony, and punishable by imprisonment not exceeding two years, with or without hard labour and solitary confinement, and whipping if the offender be a male under sixteen years of age.'

'Although the stealing of deer in *unenclosed ground* only renders the offender liable to a fine, yet a second offence constitutes felony, punishable in like manner.[q] Killing hares or conies in any warren or ground used for breeding or keeping them, is punishable by fine on summary conviction, but if done *in the night*, it is an indictable misdemeanor;[r] and although the taking or destroying game unreclaimed is not now by statute a felony any more than at common law, yet trespassing in pursuit of game is still punished very severely. Taking game or rabbits unlawfully *by night*, anywhere, is punishable on summary conviction by imprisonment, the term of which is increased for a second offence, while a third offence constitutes an indictable misdemeanor, punishable by penal servitude for seven or not less than five years, or imprisonment with hard labour not exceeding two years; and resistance to keepers, whether for the first, second, or third offence, is also a misdemeanor punishable to the same extent.'[s]

Also by statute '24 & 25 Vict. c. 69, s. 24, the unlawful and wilful taking or destroying' fish in any water 'running through or being in any land adjoining or belonging to the dwelling-house of any person being the owner of such water or having a right of fishing therein, is an indictable misdemeanor, although if committed under other circumstances, it is only punishable by fine on summary conviction.[t] To steal any *oysters* or oyster-brood, from any oyster-bed, laying, or fishery, being private property, and sufficiently marked out or known as such, is felony, and punishable as larceny: while unlawfully to use any dredge, or any net, instrument, or engine whatsoever, within the limits of any such oyster-fishery, for the purpose of taking oysters or oyster-brood, although none be actually taken, or with any net, instrument, or engine, to drag upon the ground or soil of any such

[q] This statute makes assaults on keepers felony, and provides for the punishment by fine of persons found in possession of venison, and not satisfactorily accounting for it, or setting engines for deer, or destroying the fences of deer parks.

[r] 24 & 25 Vict. c. 96, s. 17.

[s] 9 Geo. IV. c. 69; 7 & 8 Vict. c. 29, s. 1.

[t] This statute does not extend to the offence of unlawfully angling in the daytime, which, however, is punishable by fine.

fishery, is a misdemeanor, punishable by three months' imprisonment, with or without hard labour and solitary confinement.'

Stealing hawks, in disobedience to the rules prescribed by the 'repealed' statute 37 Edw. III. c. 19, 'was said to be felony; but this may be doubted now.' It is also said, 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 other beasts of draught, and of all animals *domitæ naturæ*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool,[u] larceny may be committed; and also of the flesh of such as are either *domitæ* or *feræ naturæ*, when killed,[v] 'the statute law only regulating the punishment.'[w]

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, yet they are not of such estimation, as that the crime of stealing them amounts to larceny. 'But by the statute 24 & 25 Vict. c. 96, s. 18, superseding other provisions on the same subject, dog-stealing is made a misdemeanor, punishable, on summary conviction, for the first offence by six months' imprisonment, with or without hard labour, or fine not exceeding 20*l.* beyond the value of the dog. A second offence is, however, an indictable misdemeanor, punishable by imprisonment, with or without hard labour, for any term not exceeding eighteen months. And the statute further provides for the punishment of persons found in possession of dogs or skins of dogs, knowing them to have been stolen; and of those who take money to restore stolen dogs.'

'Unlawfully and wilfully to kill, wound, or take any house-dove or pigeon, under such circumstances as do not amount to larceny at common law, is punishable by fine on summary conviction;'[x] and so may be the offence of stealing any beast or bird

[u] 1 Hal. P. C. 507. *R.* v. *Martin*, by all the judges. P. 17 Geo. III.

[v] 1 Hal. P. C. 511.

[w] 24 & 25 Vict. c. 96, ss. 10, 11.

[x] Ibid. s. 23.

ordinarily kept in a state of confinement, or for domestic purposes, and not the subject of larceny. A repetition of this last offence, however, is punishable only by imprisonment with hard labour for any term not exceeding twelve months; while persons found in possession of any such beasts or birds, or the skins or plumage thereof, knowing the same to have been stolen, are liable to the same penalties.'

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. In like manner, as among the Romans, the *lex Hostilia de furtis* provided that a prosecution for theft might be carried on without the intervention of the owner. This is the case of stealing a shroud out 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, 'but a misdemeanor only,' unless some of the grave-clothes be stolen with it. Very different from the law of the Franks, which seems to have respected both as equal offences, 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 re-admission.[y]

'With regard to the taking of goods which the owner has *lost*, if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.[z]

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. And in the civil law, till some very late constitutions, we never find the punishment capital. The laws 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

[y] Montesq. Sp. L. b. 30, ch. 19. [z] *Reg.* v. *Flyde*, 1 Law Rep. (C. C.) 139.

pecuniary mulct. And so the Attic laws in general continued;[a] 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 offence 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 long questioned the propriety, if not lawfulness, of inflicting capital punishment for simple theft. 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 occasioned the doubt. Sir Thomas More, and the Marquis Beccaria, at the distance of more than two centuries from each other, very sensibly proposed that kind of corporal punishment which approaches the nearest to a pecuniary satisfaction; viz., a temporary imprisonment, with an obligation to labour, 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 long continued, throughout the greatest part of Europe, to be capital; and Puffendorf,[b] together with Sir Matthew Hale,[c] 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. 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 twelvepence; 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.[d] But in the ninth year of Henry the First, this power of redemption was

[a] Petit. LL. Attic. l. 7, tit. 5.
[b] L. of N. b. 8, c. 3.
[c] 1 Hal. P. C. 13.
[d] Tac. de Mor. Germ. c. 12.

taken away, and all persons guilty of larceny above the value of twelvepence were directed to be hanged; which law continued in force 'until the reign of George the Fourth.' For though the inferior species of theft, or petit larceny, was only punished by imprisonment or whipping at common law, yet the punishment of grand larceny, or the stealing above the value of twelvepence, which sum was the standard in the time of King Athelstan, eight hundred years ago, was at common law regularly death. Which, considering the great intermediate alteration[e] in the price or denomination of money, was undoubtedly a very rigorous constitution; and made Sir Henry Spelman complain, that while everything else was risen in its nominal value, and become dearer, the life of man had continually grown cheaper.[f] The mercy of jurors often made them strain a point, and bring in larceny to be under the value of twelvepence, when it was really of much greater value; but this, though evidently justifiable and proper, when it only reduced the present nominal value of money to the ancient standard, was otherwise a kind of pious perjury, and did not at all excuse our common law in this respect from the imputation of severity, but rather strongly confessed the charge. It is likewise true, that by the merciful extensions of the benefit of clergy, a person who committed a simple larceny to the value of thirteenpence or thirteen hundred pounds, though guilty of a capital offence, was excused the pains of death. But this was only for the first offence; and in many cases of simple larceny the benefit of clergy was taken away by statute: as from horse-stealing in the principals, and accessories both *before* and *after* the fact; theft by great and notorious thieves in Northumberland and Cumberland; taking woollen cloth from off the tenters, or linens, fustians, calicoes, or cotton goods, from the place of manufacture; feloniously driving away, or otherwise stealing sheep or other cattle, or killing them with intent to steal the whole or any part of the carcase, or aiding or assisting therein; thefts on navigable rivers above the value of forty shillings, or being present, aiding and assisting thereat; plundering vessels in distress, or that had suffered shipwreck; stealing letters sent by

[e] In the reign of King Henry I. the stated value, at the exchequer, of a pasture-fed ox was one shilling, Dial. de Scacc. l. 1, § 7, which, if we should even suppose to mean the *solidus legalis* mentioned by Lynewode, Prov. l. 3, c. 13, or the 72nd part of a pound of gold, is only equal to 13*s.* 4*d.* of the present standard.

[f] Gloss. 350.

the post; and also stealing deer, fish, hares, and conies under the peculiar circumstances mentioned in the statute 9 Geo. I. c. 22, usually called the Waltham Black Act. Which additional severity was owing to the great malice and mischief of the theft in some of these instances; and, in others, to the difficulties 'it was supposed' 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; and the *balnearii*, or such as stole the clothes of persons who were washing in the public baths: both which constitutions seem to be borrowed from the laws of Athens. And so too the ancient Goths punished with unrelenting severity thefts of cattle, or 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.

'The severity of our penal code was at length materially diminished by statutes passed in the reign of George IV.; by which also the distinction between grand and petit larceny was abolished; and the punishment for simple larceny, and for a variety of other offences made punishable as simple larceny, was declared to be transportation or imprisonment. For the former of these penal servitude has of late years been substituted.'[g]

'To some descriptions of property, the law affords a high degree of protection; in other cases it punishes larceny with greater severity when committed by persons filling situations of trust. Thus the stealing of horses, cattle, or sheep, which was a capital offence until the reign of William IV., is now punishable by a term of penal servitude not exceeding fourteen nor less than five years, or an imprisonment not exceeding two years, to which hard labour and certain periods of solitary confinement may be added; to steal silk, woollen, linen, or other goods, to the value of ten shillings, whilst placed or exposed, during any stage or process of manufacture, in any building, field, or other place, or to steal any goods or merchandize from any vessel, barge, or boat in any port, or upon any navigable river or canal, or from any adjacent wharf or quay, exposes the offender to be punished in the same way;[h] while clerks embezzling the property of their masters, and servants employed in the post-office, stealing letters,

[g] 16 & 17 Vict. c. 99; and 24 & 25 Vict. c. 96.

[h] 24 & 25 Vict. c. 96.

incur a similar and in some instances a much heavier penalty, extending in some cases to penal servitude for life.'

And thus much for the offence of *simple* larceny.

Mixed or *compound* larceny is such as has all the properties of the former, but is accompanied with either one or both of 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 to have a higher degree of guilt than simple larceny, yet is not at all distinguished from the other at common law; 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 by several acts of parliament, the history of which has been very ingeniously deduced by a learned writer,[i] who has shown them to have gradually arisen from our improvements in trade and opulence, the benefit of clergy was taken from larcenies committed in a house in almost every instance. The multiplicity of these general acts is apt to create some confusion;[j] 'and they have all happily been repealed, and the law on this subject consolidated by the statute 24 & 25 Vict. c. 96; which makes larceny *committed in a dwelling-house*, when the property stolen is of the value of 5*l*., or when the offence is accompanied by menaces or threats, or putting any one in bodily fear, a felony; for which the offender may be kept in penal servitude for any term not exceeding fourteen and not less than five years, or be imprisoned for any term not exceeding two years, with or without hard labour and solitary confinement.'

2. Larceny from the *person* is either by *privately* stealing, or by open and violent assault, which is usually called *robbery;* 'to constitute which offence, the thing taken must be completely, although it be only momentarily, removed from the person;[k] a removal from the place where it was, so as to constitute a simple larceny, if it still remain attached by any means to the person, not being sufficient.'[l]

The offence of *privately* stealing from a man's *person*, as by picking his pocket or the like, privily without his knowledge,

[i] Barrington, 375, &c.

[j] See Bl. Com. vol. iv. p. 241.

[k] *Reg.* v. *Simpson*, 1 Dears. 421.

[l] *Rex* v. *Thomson*, 1 Mood. C. C. 78.

was debarred of the benefit of clergy so early as by the statute 8 Eliz. c. 4. But then it must have been such a larceny as stood in need of the benefit of clergy, viz., of above the value of twelvepence; else the offender should not have judgment of death. For the statute created no new offence, but only prevented the prisoner from praying the benefit of clergy, and left him to the regular judgment of the ancient law. The severity, for a most severe law it certainly was, seems to have been owing to the ease with which such offences are committed, the difficulty of guarding against them, and the boldness with which they were practised, even in the queen's court and presence, at the time when this statute was made: besides that this is an infringement of property, in the manual occupation or corporal possession of the owner, which was an offence even in a state of nature. And therefore the *sacculārii*, or cutpurses, were more severely punished than common thieves by the Roman and Athenian laws.[m]

'At present the offence of stealing from the person may be punished by penal servitude for any term not exceeding fourteen nor less than five years, or by an imprisonment not exceeding two years, with or without hard labour and solitary confinement. But the offence, if confessed by the accused, may form the subject of a summary conviction: and in that case, is punishable only by imprisonment, with or without hard labour, for a period not exceeding six months. The attempt to commit this offence may also be dealt with summarily, and in the event of a conviction, is punishable by imprisonment, with or without hard labour, not exceeding three months.'[n]

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 violence or putting him in fear. 1. There must be a taking, otherwise it is no robbery: a mere attempt to rob was indeed held to be a felony, so late as Henry the Fourth's time; 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 made it a felony, transportable for seven years, unlawfully and maliciously to assault another with any offensive weapon or instrument;—or by menaces, or by other forcible or violent manner, to demand

[m] Ff. 47, 11, 7; Pott. Antiq. l. 1, c. 26. [n] 18 & 19 Vict. c. 126.

any money or goods;—with a felonious intent to rob. 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 or his cattle before his face. But if the taking be not either directly from his person or in his presence, it is no robbery. 2. It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery. 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,[o] "*qui vi rapuit, fur improbior esse videtur.*" This previous violence, or 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. And this *putting in fear* does not imply any great degree of terror or affright in the party robbed: it is enough that so much force, or threatening by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with his property without or against his consent. 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. So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted, whether the forcing a higler, 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 was 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 a dwelling-house, or in or near the public highway. A robbery, therefore, in a distant field, or footpath, was not punished with death; but was open to the benefit of clergy, till the statute 3 & 4 Will. & Mary, c. 9, which took away clergy from both principals and accessories before the fact, in robbery, wheresoever committed. 'The crime has, however, ceased to be capital, the punishment of the offender

[o] Ff. 4, 2, 14, § 12.

being now made to depend on the circumstances accompanying its commission.'[p]

'Thus, *firstly;* to *rob* any person, and at the time of, or immediately before, or immediately after such robbery, to wound, strike, or use violence to *such* person, is felony, punishable now with penal servitude for life or not less than five years, or imprisonment not exceeding two years, with or without hard labour and solitary confinement. *Secondly;* to *rob*, or *assault with intent to rob*, any person, while armed with an offensive weapon, is equally penal. *Thirdly;* to *rob*, or *assault with intent to rob*, any person, the offender being together with one or more other persons, is also felony, and punishable in the same manner. Crimes of this nature may be farther punished under the statute 26 & 27 Vict. c. 44, which authorizes in addition the infliction of whipping once, twice, or thrice within six months after the passing of the sentence. Further, to *rob* any person, without any circumstances of aggravation, is a felony punishable as for stealing from the person; while to *assault with intent to rob*, or with menaces or by force to demand any property of any person, with intent to steal the same, is punishable with penal servitude for five years, or imprisonment, with or without hard labour and solitary confinement, for any period not exceeding two years.'

'Before quitting this subject, it may be observed generally, that in all these cases of mixed or compound larceny, if any part of the charge necessary to bring the offence within the statutory enactment applicable to it, cannot be proved, the defendant may, nevertheless, be convicted of the minor offence. Thus upon a charge of robbery accompanied by stabbing, if the stabbing be not proved, he may yet be convicted of the robbery, or of the attempt to commit that offence; if the force which we have seen is necessary to constitute robbery cannot be proved, the offender may be convicted of stealing from the person, or of the attempt. And so, if the property does not appear to have been taken from the person of the prosecutor, the defendant may yet be convicted of simple larceny, or of the attempt to commit that offence, or of an assault with intent to rob.'

'There is one species of crime not attended with any actual or attempted violence; which, at common law,[q] and for some time

[p] 24 & 25 Vict. c. 96, ss. 40-49.

[q] 1 Leach, C. L. 290.

by statute,[r] constituted robbery; viz., the offence of obtaining property by accusation of unnatural practices. This detestable crime is now provided for by the statute 24 & 25 Vict. c. 96, s. 46, which has made it felony for any person to send or deliver to another, any letter or writing, accusing or threatening to accuse either the person to whom such letter is sent or delivered or any other person, of any crime punishable with death or penal servitude for not less than seven years, or of any assault with intent or of any attempt to commit any rape, or of any infamous crime, with a view to extort any property, money, security, or valuable thing. This offence is punishable, at the discretion of the court, by penal servitude for life or not less than five years, or imprisonment not exceeding two years, with or without hard labour and solitary confinement, and whipping if the offender be a male and under the age of sixteen. It is equally penal to accuse or threaten to accuse, with the like intent, either the person to whom such accusation or threat shall be made, or any other person, of any of the infamous crimes above alluded to, or to send or deliver, with a similar object, any letter or writing containing menaces.'[s]

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 'highly penal.'[t]

'Some of the offences which may properly be thus classed have indeed been already noticed in treating of arson and of the offences relating to trade; so that a concise enumeration of the others is all that need now be attempted.'

By the statute 22 Hen. VIII. c. 11, perversely and maliciously to cut down or destroy the powdike, in the fens of Norfolk and Ely, was made felony. In like manner it is, by many special statutes enacted upon the occasions, made felony to

[r] 7 & 8 Geo. IV. c. 29, s. 7; and 10 & 11 Vict. c. 66, s. 1.

[s] 24 & 25 Vict. c. 96, ss. 47, 44.

[t] 24 & 25 Vict. c. 97.

destroy the several sea-banks, river-banks, public navigations, and bridges, erected by virtue of those acts of parliament. By the statutes 6 Geo. II. c. 37, and 10 Geo. II. c. 32, it was also made felony without benefit of clergy, maliciously to cut down any river or sea-bank, whereby lands might be overflowed or damaged. 'But this statute has been superseded by more modern enactments, whereby the breaking down, damaging, or destroying of sea-banks or sea-walls, or the banks or walls of rivers, canals, or marshes, or the locks, sluices, floodgates, or other works on navigable rivers or canals, is made felony, punishable by penal servitude for life or not less than five years, or imprisonment not exceeding two years, with or without hard labour, solitary confinement, and whipping if the offender be a male under sixteen.'

By statute 1 Anne, 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. 12, to the prejudice of insurers also, were declared guilty of felony without benefit of clergy. And by statute 12 Anne, st. 2, c. 18, making any hole in a ship in distress, or stealing her pumps, or aiding or abetting such offence, or wilfully doing anything tending to the immediate loss of such ship, was also felony without benefit of clergy. These acts have, however, been repealed; and now, any person who sets fire to, casts away, or destroys any ship, whether it be complete or in an unfinished state; or sets fire to, casts away, or in anywise destroys any ship or vessel, with intent to prejudice any owner or part owner[u] of the ship or of any goods on board, or any person that shall have under-written any policy of insurance on the ship, freight, or goods, is guilty of felony, and liable, on conviction, to be kept in penal servitude for life or not less than five years, or to be imprisoned, with or without hard labour, solitary confinement, and whipping in a male under sixteen, for any term not exceeding two years. The attempt to commit any of these offences is also felony, though not so highly penal; an observation which applies to the offence of destroying any part of any ship which shall be in distress, wrecked, or cast on shore, or articles of any kind belonging to it; for the limit of penal servitude is in such cases fourteen years. Severely punishable are the offences of damaging ships

[u] A part owner may be guilty of this crime; *Reg.* v. *Wallace*, 1 Car. & M. 200.

otherwise than by fire, or placing explosive substances near them with that intent. Injuring or removing, sinking or destroying the *buoys* of vessels is also highly penal; exhibiting false signals with intent to lead vessels into danger may involve penal servitude for life.'[v]

By statute 43 Eliz. c. 13, for preventing rapine on the northern borders, to burn any *barn* or *stock* of *corn* or *grain;* or to imprison or carry away any subject, in order to ransom him, or to make prey or spoil of his person or goods upon deadly feud or otherwise, in the four northern counties of Northumberland, Westmoreland, Cumberland, and Durham, or being accessory before the fact to such carrying away or imprisonment; or to give or take any money or contribution, there called *blackmail*, to secure such goods from rapine; was made felony without benefit of clergy. And by statute 22 & 23 Car. II. c. 7, maliciously, unlawfully, and willingly, in the night-time, to burn, or cause to be burnt or destroyed, any *ricks* or *stacks* of corn, hay, or grain, barns, houses, buildings, or kilns, was made felony; though the offender might make his election to be transported for seven years. 'But these statutes have also been repealed, and the maliciously setting fire to any *stack* of corn, grain, pulse, tares, hay, straw, haulm, stubble, or other cultivated vegetable produce, or of furze, heath, fern, hay, turf, peat, coals, charcoal, or wood, or any steer of wood, is felony, subjecting the offender to be kept in penal servitude for life or not less than five years, or to be imprisoned, with or without hard labour, solitary confinement, and if the offender be a male under sixteen, whipping, for any term not exceeding two years.'[w]

By statute 4 & 5 Will. & Mary, c. 23, to burn on any waste, between Candlemas and Midsummer, any grig, ling, heath, furze, goss, or fern, was made punishable with whipping and confinement in the house of correction. To set fire to any goss, furze, or fern, growing in any forest or chase, was, by statute 28 Geo. II. c. 19, subject to a fine of 5*l.*; and by statute 1 Geo. I. c. 48, *maliciously* to set on fire any underwood, wood, or coppice, was made single felony. 'These acts being all repealed, the statute 24 & 25 Vict. c. 97, has made the maliciously setting fire to any *crop* of grain, whether standing or cut down, or to a wood, coppice, or plantation,

[v] 24 & 25 Vict. c. 97. [w] Ibid.

or to any heath, gorse, furze, or fern, wheresoever growing, felony, punishable by penal servitude not exceeding fourteen years, or imprisonment, with solitary confinement, and if the offender be a male under sixteen, whipping, not exceeding two years. The *attempt* to commit any of these offences is nearly equally penal.'

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, with intent so to do, 'was made' 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 deface them; either by open outrage, or by privily cutting, or casting *aqua fortis* in the streets upon such as wore them. 'Such offenders are now punished under the general provisions of the statute 24 & 25 Vict. c. 97.'[x]

By statute 9 Geo. I. c. 22, commonly called the Waltham Black Act, occasioned by the devastations committed near Waltham in Hampshire, 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; by this Black Act, I say, which has in part been mentioned under the several heads of riots, menaces, mayhem, and larceny, it was enacted, that to set fire to any house, barn, or outhouse, which was extended by statute 9 Geo. III. c. 29, to the malicious and wilful burning or setting fire to all kinds of mills, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood; or unlawfully and maliciously to break down the head of any fish-pond, whereby the fish should be lost or destroyed; all these malicious acts, or procuring by gift or promise of reward any person to join them therein, were felonies without benefit of clergy; and the hundred was to be chargeable for the damages, unless the offender were convicted. In like manner, by the Roman law, to cut down trees, and especially vines, was punished in the same degree as robbery.

[x] 'Where the primary intention was to wound *the person*, the stat. 6 Geo. I. c. 23, was held not to apply; *Rex.* v. *Williams*, 1 Leach, 553. It would therefore seem that the offence of burning the clothes can no longer be prosecuted otherwise than as suggested in the text, viz., as a malicious injury to property.'

'The first of these offences, *wilful fire-raising*, is now provided for by the statute 24 & 25 Vict. c. 97.'

'The second offence, the breaking down of fish-ponds, is no longer a felony, but a misdemeanor, punishable, however, under the same statute, with penal servitude, which may be for any term not exceeding seven nor less than five years, or an imprisonment, with or without hard labour, solitary confinement, and whipping if the offender be a male and under sixteen, not exceeding two years.'

To kill, maim, or wound any cattle, 'was felony without benefit of clergy by the Black Act. It had previously been made felony by statute 22 & 23 Car. II. c. 7; but these statutes have long been repealed. The killing, maiming, or wounding of any *cattle* is still felony, however, subjecting the offender to penal servitude or imprisonment, but not to whipping as in other cases. And the word *cattle*, it may be observed, has been held to include horses, as well as oxen, &c., pigs, and asses;[y] but does not comprise dogs, or other animals not the subject of larceny at common law, which are to some extent, however, protected against the savage treatment of man.'

By statutes 6 Geo. II. c. 37, and 10 Geo. II. c. 32, it was made felony without benefit of clergy, to cut any hop-binds growing in a plantation of hops; but this offence is now punishable under the statute already referred to, with penal servitude for any term not exceeding fourteen years, or imprisonment not exceeding two years, accompanied, if the court shall so order, with hard labour, solitary confinement, and if the offender be a male under sixteen, whipping.'

By statute 11 Geo. II. c. 22, to use any violence in order to deter any person from buying corn or grain; to seize any carriage or horse carrying grain or meal to or from any market or sea-port; or to use any outrage with such intent; or to scatter, take away, spoil, or damage such grain or meal; was to be punished for the first offence with imprisonment and public whipping: and the second offence, or destroying any granary where corn is kept for exportation, or taking away or spoiling any grain or meal in such granary, or in any ship, boat, or vessel,

[y] *Rex* v. *Paty*, 2 Wm. Bl. 721; *Rex* v. *Chapple*, Russ. & Ry. C. C. 77; *Rex* v. *Whitney*, Mood. C. C. 3.

[z] 24 & 25 Vict. c. 97, s. 41.

intended for exportation, was felony, subject to transportation for seven years. 'So much, however, of this statute as related to personal violence, and the making any second offence felony, has long been repealed;[a] and the destruction of any granary by fire or otherwise, when the offence exceeds *rioting*, is punishable, as we have already seen, under another statute; while the taking away of the grain is either larceny, if the taking be felonious, or punishable as an injury to property.'

'The Waltham Black Act, already mentioned, made the cutting down or destroying' any trees planted in an avenue, or growing in a garden, orchard, or plantation, for ornament, shelter, or profit, 'felony without benefit of clergy. Afterwards,' by statutes 6 Geo. III. cc. 36 & 48, and 13 Geo. III. c. 33, wilfully to spoil or destroy any timber or other trees, roots, shrubs, or plants, was, for the two first offences, made liable to pecuniary penalties; and for the third, if in the daytime, and even for the first if at night, the offender was guilty of felony, and liable to transportation for seven years. 'These statutes have been repealed;[b] and the offence of destroying or damaging trees or shrubs growing in a park, garden, avenue, or grounds of a house, is now felony, if the injury exceeds 20*s*., or if, growing elsewhere, the injury exceeds 5*l*. The destroying or damaging trees or shrubs to the value of 1*s*., wheresoever growing, is by the same statute made punishable for a first or second offence with imprisonment, and for a third offence is made a misdemeanor. A second offence of destroying vegetable productions in private grounds is made felony, punishable with penal servitude.'[c]

By statutes 6 Geo. II. c. 37, and 10 Geo. II. c. 32, it was made felony without benefit of clergy, wilfully and maliciously to set fire to, or cause to be set on fire, any mine, pit, or depth of coal. 'And afterwards' by statute 9 Geo. III. c. 29, wilfully and maliciously to burn or destroy any engine or other machines, therein specified, belonging to any mine; or any fences for inclosures pursuant to any act of parliament, was made single felony, and punishable with transportation for seven years, in the offender, his advisers, and procurers. 'These statutes also have, like the others, been repealed, and, as we have already seen, the firing, drowning, or damaging of a mine, are all offences of a highly penal character.'

[a] 9 Geo. IV. c. 31. [b] 7 & 8 Geo. IV. c. 30. [c] 24 & 25 Vict. c. 97, ss. 21, 22.

'To the crimes above enumerated may be added, the destruction of any bridge, viaduct, or aqueduct, with intent and so as thereby to render it dangerous or impassable, the cutting down or destroying of telegraphic apparatus, and another offence already referred to, viz., the destroying or damaging of anything kept for the purposes of art, science, or literature, or as an object of curiosity in any public building, or of any public statue or monument.[d] All these offences are more or less penal, and mostly involve imprisonment with hard labour, and if the offender be a male under sixteen, whipping.'

'It only remains to be added here, that in any case of damage to property not specially provided for by the statute 24 & 25 Vict. c. 97, the offender, when the damage exceeds five pounds, may be convicted of a misdemeanor, for which penal servitude or a term of imprisonment may be awarded, according as the offence is committed by day or by night. When the value of the property injured does not exceed five pounds, the offender may be compelled, on summary conviction, to make compensation, or be imprisoned and kept to hard labour for two months. But this enactment does not extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, or to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game.'

These are the principal punishments of malicious mischief.

III. Forgery, or the *crimen falsi*, is an offence which was punished by the civil law with deportation or banishment, and sometimes with death. 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 imprisonment, and 'formerly might have been set in the' pillory. By a variety of statutes, a more severe punishment was inflicted on the offender in many particular cases, 'and statutes to the same effect have been' so multiplied of late as almost to become general.

By the statute 5 Eliz. c. 14, to forge or make, or knowingly

[d] 24 & 25 Vict. c. 97, s. 39, re-enacting 8 & 9 Vict. c. 44, passed in consequence of the wanton destruction of the Portland *Vase* in the British Museum.

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, was 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 was given to the party grieved; and on the offender was inflicted the pillory, loss of one of his ears, and a year's imprisonment: the second offence 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, inflicted capital punishment on the forging, altering, or uttering as true, when forged, of any bank bills or notes, or other securities; of bills of credit issued from the exchequer; of South Sea bonds, &c.; of lottery-tickets or orders; of army or navy debentures; of East India bonds; of writings under seal of the London, or Royal Exchange Assurance; or of the accountant-general and certain other officers of the court of Chancery; of a letter of attorney or other power to receive or transfer stock or annuities; and on the personating a proprietor thereof, to receive or transfer such annuities, stock, or dividends; also on the personating, or procuring to be personated, any seaman or other person, entitled to wages or other naval emoluments, or any of his personal representatives; and the taking, or procuring to be taken, any false oath in order to obtain a probate, or letters of administration, in order to receive such payments; and the forging or procuring to be forged, and likewise the uttering, or publishing as true, of any counterfeited seaman's will or power: to which might 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; the forging or imitating of any stamps to defraud the public revenue; and the forging of any marriage register or licence; all which were by distinct acts of parliament made felonies, without benefit of clergy. The forging or counterfeiting any stamp or mark to denote the standard of gold and silver

plate, and certain other offences of the like tendency, were offences punishable with transportation for fourteen years; while certain frauds on the stamp duties, principally by using the same stamps more than once, were single felony, and 'subjected the offender' to transportation for seven years.

There were also certain other general laws, with regard to forgery; whereby the first offence in forging or procuring to be forged, acting or assisting therein, or uttering or publishing as true any forged deed, will, bond, writing obligatory, bill of exchange, promissory note, indorsement, or assignment thereof, or any acquittance or receipt for money or goods, with intention to defraud any person, was made felony without benefit of clergy. It was equally penal to forge or cause to be forged, or utter as true, a counterfeit acceptance of a bill of exchange, or the number or principal sum 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 was hardly a case possible to be conceived, wherein forgery, that tended to defraud, whether in the name of a real or fictitious person, was not made a capital crime. 'By the statute 1 Will. IV. c. 66, however, which repealed most of these statutes, the punishment of death was taken away in all except the more serious and important cases; and offenders, who would otherwise have been liable to suffer death as felons, were subjected instead to transportation for life or not less than seven years, or imprisonment not exceeding four and not less than two years.'

'The forgery of the great or privy seal, privy signet or sign manual, remained high treason, and punishable accordingly; and the forgery of exchequer bills or East India bonds, of bank notes or wills, or of bills of exchange, promissory notes, or orders for the payment of money, were all by special enactment punishable with death. The forgery of the books, accounts, or transfers of the stock of the Bank of England, of a transfer of the stock of any public company, or of a power of attorney to transfer stock or to receive dividends, and the false personation of an owner of stock, were also retained as capital felonies.'[e]

'The punishment of death was, however, very shortly afterwards confined to the offence of forging a will or power of attorney for the transfer of stock; and, before long, the capital

[e] 2 & 3 Will. IV. c. 123.

punishment for these as well as for certain other forgeries, which had been introduced by some intermediate statutes, was altogether abolished,[f] transportation for life, or for a period of not less than seven years, or imprisonment for a period of four or not less than two years being again substituted.'

'It would be useless, however, to attempt to wade through all the statutes which have been passed with reference to forgeries in particular cases; for not a session passes without some document being protected by provisions rendering its fabrication highly penal. This crime, indeed, when brought before our criminal courts, has hitherto been found to fall readily within one or other of the provisions of the statute 1 Will. IV. c. 66, which has been already referred to. But offences of this nature are now prosecuted under the statute 24 & 25 Vict. c. 98, which again consolidates the statute law on this subject; and provides minutely for the punishment of every class of offence which can be placed under this head, no forgery whatever now involving a greater punishment than penal servitude for life.'

These are the principal infringements of the rights of property: which were the last species of offences against individuals or private subjects, which the method of our distribution has led us to consider. We have before examined the nature of all offences against the public, or commonwealth; against the sovereign or supreme magistrate, the protector of that community; against the universal law of all civilized nations, together with some of the more atrocious offences, 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.

[f] 7 Will. IV. and 1 Vict. c. 8.

CHAPTER XVIII.

OF THE MEANS OF PREVENTING OFFENCES.

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 honour, 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; 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 a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance to the public, that such offence as is apprehended shall not happen; by finding pledges or securities for keeping the peace, or for their good behaviour. 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 offence 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 we observed in a former chapter, 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, the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour. But this great and general security being now fallen into disuse and neglected, there hath 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; "*tradat "fidejussores de pace et legalitate tuendâ.*" Let us therefore consider, first, what this security is; next, who may take or demand it; and lastly, how it may be discharged.

1. The security consists in being bound, with one or more sureties, in a recognizance or obligation to the crown, 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*l.*, 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 sovereign and all his liege people; or particularly also, with regard to the person who craves the security. Or, if it be for the good behaviour, then on condition that he shall demean and behave himself well, or be of good behaviour, 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, 'ought to' be certified to the next sessions,[a] 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 misbehaviour 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 absolute debtors of the crown, are sued for the several sums in which they are respectively bound.

[a] *Willis* v. *Bridges*, 2 B. & Ald. 287.

2. Any justices of the peace, by virtue of their commission, or those who are *ex-officio* conservators of the peace, 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 protection of the crown; for which reason it was formerly doubted, whether Jews, pagans, or persons convicted of a *præmunire*, were entitled thereto. Or, if the justice is averse to act, it may be granted by a mandatory writ, called a *supplicavit*, issuing out of the 'High Court;' 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.[b] But this writ is seldom used: for, if application be made to the 'High Court,' it will 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 'High Court;' 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 merely a private man. Wives may demand it against their husbands, or husbands, if necessary, against their wives.[c] 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 sovereign, 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 justice, as the quarter sessions, assizes, or 'High Court,' if they see sufficient cause; or in case 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.

Thus far what has been said is applicable to both species of recognizances, for the *peace*, and for the *good behaviour: 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

[b] *Mr. Clavering's* case, 2 P. Wms. 202. [c] *Rex* v. *Bowes*, 1 T. R. 696.

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*, 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 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. Also, whenever 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. 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,[d] 'or until the expiration of a year; for persons committed to prison for not entering into recognizances or finding sureties to keep the peace, can in no case be detained for more than twelve months.'[e]

2. Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an assault, or menace, 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 offences 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 the queen'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

[d] *Pickett* v. *Greatrex*, 8 Q. B. 1020. [e] 16 & 17 Vict. c. 30, s. 3.

no forfeiture of the recognizance. 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 unmeaning heat and passion, unless they amount to a challenge to fight.

The other species of recognizance, with sureties, is for the *good abearance*, or *good behaviour*. 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 behaviour 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 endangered, 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 behaviour for causes of scandal, *contra bonos mores*, as well as *contra pacem:* 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 wake in the night; common drunkards; whore-masters; cheats; idle vagabonds; and other persons whose misbehaviour may reasonably bring them within the general words of the statute, as persons not of good fame: an expression, it must be owned, 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.

2. A recognizance for the good behaviour 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 misbehaviour which the recognizance was intended to prevent. But

not by barely giving fresh cause of suspicion of that which perhaps may never actually happen: for, though it is just to compel suspected persons to give security to the public against misbehaviour that is apprehended; yet it would be hard, upon suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.

CHAPTER XIX.

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 offences; 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 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 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 offence 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.,

1. 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 attaint 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*, 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. A commoner cannot, however, be impeached before the lords for any capital offence, but only for high misdemeanors;[a] a peer may be

[a] 'To this statement Sir Wm. Blackstone adds in a note that' 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 and 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. Mr. Christian, commenting on Blackstone, says that, "according to the last resolution of the House of Lords, a commoner may be impeached for a capital offence. On the 26th of March, 1680, Edward Fitzharris, a commoner, was impeached by the Commons of high treason. Upon which the attorney-general acquainted the peers that he had an order from the king to prosecute Fitzharris by indict-

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 crown; but it has been strenuously maintained,[b] 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.*"[c] 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, yet it may happen that a subject, intrusted 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

ment; and the question thereupon was put whether he should be proceeded against according to the course of the common law or by way of impeachment, and it was resolved against proceeding in the impeachment; 13 Lords' Jour. p. 755. Fitzharris was afterwards prosecuted by indictment, and he pleaded in abatement that there was an impeachment pending against him for the same offence; but this plea was overruled, and he was convicted and executed. But on the 25th of June, 1689, Sir Adam Blair and four other commoners were impeached for high treason, in having published a proclamation of James II. On the 2nd July a long report of precedents was produced, and a question was put to the judges whether the record, 4 Edw. III. No. 6, was a statute. They answered, as it appeared to them by the copy, they believed it to be a statute; but if they saw the roll itself they could be more positive. It was then moved to ask the judges, but the motion was negatived, whether by this record the lords were barred from trying a commoner for a capital crime upon an impeachment of the commons. And they immediately resolved to proceed in this impeachment, notwithstanding the parties were commoners, and charged with high treason; 14 Lords' Jour. p. 260. But the impeachment was not prosecuted with effect, on account of an intervening dissolution of parliament."

[b] Lords' Jour. 12 May, 1679; Com. Jour. 15 May, 1679; Fost. 142, &c.

[c] Tacit. de Mor. Germ. 12.

court shall this impeachment be tried? Not before the ordinary tribunals, which 'might possibly' 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 'may for this purpose be assumed to' have neither the same interests nor the same passions as popular assemblies. 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.;[d] and is now enacted by the Act of Settlement, that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in Parliament.

2. The court of the *Lord High Steward* of Great Britain is a court instituted for the trial of peers, indicted for treason or felony, or for misprision of either. The office of this great magistrate is very ancient; and was formerly hereditary, or at least held for life, or *dum bene se gesserit:* but now it is usually, and has been for many centuries past,[e] granted *pro hac vice* 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.[f] When such an indictment is therefore found by a grand jury of freeholders in the Queen's Bench 'division,' or at the assizes before the justices of *oyer* and *terminer*, it is to be removed by a writ of *certiorari* into the court of the Lord High Steward, which only has power to determine it. A peer may plead a pardon before the Queen's Bench 'division,' and the judges have power to allow it; in

[d] Com. Jour. 5 May, 1679.

[e] 'The last occasion on which a Lord High Steward was appointed, was in 1841; when the late Lord Denman presided on the trial of the late Earl of Cardigan for murder.'

[f] *Quand un* seigneur de parlement *serra arrein de treason ou felony, le roy par ses lettres patents 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., &c.* Y.-B. 3 Hen. VIII. 11.

order to prevent the trouble of appointing a 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 sovereign therefore, in case a peer be indicted for 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 legum et consuetudinem Angliæ*. Then, when the indictment is regularly removed, by *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 not less than twenty-three, 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.[g] But now, by statute 7 Will. 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, 'first taking the proper oaths,' shall vote in the trial of such peer.

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*. 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*, or chairman of the court, than the judge of it; for the collective body of the peers are

[g] Carte's Life of Ormonde, vol. ii.

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 of matters of law, as the lords triors 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.[h] Therefore, upon the conviction and attainder of a peer for murder in full parliament, 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 Queen's Bench 'division of the High Court,' 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 offences, even upon impeachments or indictments in full parliament, much less in the court we are now treating of; for indeed they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable that, in the eleventh chapter of the Constitutions of Clarendon, made in parliament 11 Hen. II., they are expressly excused, rather than excluded, from sitting and voting in trials, when they come to concern life or limb: "*episcopi, sicut cæteri barones, debent in-*"*teresse judiciis cum baronibus, quousque perveniatur ad diminu-*"*tionem membrorum, vel ad mortem:*" and à-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

[h] State Trials, vol. iv. 214, 232, 233.

the house of lords in the Earl of Danby's case,[i] 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."[j] 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. 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, 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 'with Scotland,' 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.[k]

3. 'The Court of Appeal, created by the Judicature Act, 1873, and to which has been transferred all the jurisdiction and powers of the court of Exchequer Chamber, has no original jurisdiction over crimes or offences, but only upon writs of error, to rectify any injustice or mistake of the law,[l] committed by'

[i] Lords' Jour. 15 May, 1679.

[j] 'This was the course adopted in 1841, on the trial of the late Earl of Cardigan for murder.'

[k] But peeresses by marriage cannot be said to be ennobled by blood; for after the death of their husbands, they have even a less estate in their nobility than bishops, it being only *durante viduitate.* The reason given in the books why bishops should not be tried in parliament like temporal lords, because their honour is not inheritable, is unsatisfactory and even trifling. The true reason was, that bishops could not have demanded a trial in parliament, without admitting themselves subjects to a temporal jurisdiction.—[Christian.] Mr. Wooddeson has not only adopted this opinion, but has adduced in confirmation of it several instances of bishops, who, being arraigned before a jury, demanded the privileges of the church, and disclaimed the authority of all secular jurisdictions.

[l] 11 Geo. IV. and 1 Will. IV. c. 70, s. 8; *Reg.* v. *Wright,* 1 A. & E. 434; *Mansell* v. *Regina,* 8 El. & Bl. 54.

4. 'The *Queen's Bench division* of the High Court of Justice, to which has been transferred all the jurisdiction previously vested in or exercised by the court of Queen's Bench.' 'The court of Queen's Bench,' we may remember, was divided into a *Crown* side, and a *Plea* side. And on the crown side, or crown office, it took cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace. And into it also indictments from all inferior courts might be removed by writ of *certiorari*, and tried either at bar, or at *nisi prius*, by a jury of the county out of which the indictment was brought; 'or, by order of the court, in the case of certain offenders, at the Central Criminal Court;'[m] and, the judges 'thereof were' the supreme coroners of the kingdom.

'The Queen's Bench division has therefore become, in its place,' the principal court of criminal jurisdiction known to the laws of England. For which reason, by the coming 'thereof' into any county, as 'when the Queen's Bench was' removed to Oxford on account of the sickness in 1665, all commissions of *oyer* and *terminer*, and general gaol delivery, 'would be' at once absorbed and determined *ipso facto*, 'were it not that the courts held under such commissions are now branches of the High Court of Justice itself.'

Into this Queen's Bench 'division, as representing the Queen's Bench, has come' all that was good and salutary of the jurisdiction of the court of *Star-chamber;* which was a court of very ancient origin,[n] but new-modelled by statutes 3 Hen. VII. c. 1, and 21 Hen. VIII. c. 20, consisting of divers lords spiritual and temporal, being privy counsellors, together with two judges of the courts of common law, without the intervention of any jury. Their jurisdiction extended legally over riots, perjury, misbehaviour of sheriffs, and other notorious misdemeanors, contrary to the laws of the land. Yet, this was afterwards, as Lord Clarendon informs us,[o] stretched "to the "asserting of all proclamations, and orders of state: to the vin- "dicating of illegal commissions, and grants of monopolies; "holding for honourable that which pleased, and for just that "which profitted, and becoming both a court of law to determine "civil rights, and a court of revenue to enrich the treasury; the

[m] '19 & 20 Vict. c. 16, passed with immediate reference to the case of *William Palmer*, the poisoner.'

[n] Lamb. Arch. 156.

[o] Hist. of Reb. b. 1 & 3.

"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, im- "prisonments, 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."[p] For which reason it was finally abolished by statute 16 Car. I. c. 10, to the general joy of the whole nation.[q]

[p] 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 Dyer, Croke, Coke, and other reporters of that age, and some in manuscript, of which the author hath two—one from 40 Eliz. to 13 Jac. I., the other 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 Wm. Hudson of Gray's Inn, an eminent practitioner therein, 'and published at the beginning of the 2nd vol. of Collectanea Juridica.' A short account of the Star-chamber, with copies of all its process, may also be found in 18 Rym. Fœd. 192, &c.

[q] The court of *Chivalry*, as a military court, or court of honour, when held before the Earl Marshal only, is 'here mentioned by Sir Wm. Blackstone. It was' also a criminal court, when held before the Lord High Constable of England jointly with the Earl Marshal. And then it 'had' 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, 'has long been entirely disused,' 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 VIII., 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.

The High Court of *Admiralty*, 'whose whole jurisdiction and authorities are now vested in the High Court of Justice, was' not only a court of *civil* but also of *criminal* jurisdiction. It had cognizance of all crimes and offences 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, such as are the ports of London and Gloucester. But, as this court proceeded without a jury, in a method much conformed to the civil law, the exercise of a criminal jurisdiction there 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

These three 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 follow 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 are,

5. The courts of *oyer* and *terminer*, and general *gaol delivery:* which are held before the queen's commissioners, among whom are usually two judges of the High Court, twice, 'and sometimes thrice,' in every year in every county of the kingdom, except London and Middlesex, wherein the Central Criminal Court exercises the same jurisdiction.' These were slightly mentioned in the preceding volume. 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

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 offence of the English nation; and, therefore, in the eighth year of Henry VI. it was endeavoured to apply a remedy in parliament: which then miscarried for want of the royal assent. However, by the statute 28 Hen. VIII. c. 15, it was enacted, that these offences should be tried by commissioners of *oyer* and *terminer*, under the king's great seal; namely, the admiral or his deputy, and three or four more, among whom two common law judges were usually appointed; the indictment being first found by a grand jury of twelve men, and afterwards tried by a petty jury: and that the course of proceedings should be according to the law of the land. 'The jurisdiction of the commissioners appointed under this statute was confined to treasons, felonies, robberies, murders, and confederacies; and therefore was passed the statute 39 Geo. III. c. 37; which enacted that all offences committed upon the high seas should be offences of the like nature and subject to the same punishment as if they had been committed upon the shore, and should be tried in the same manner as the crimes enumerated in the 28 Hen. VIII. c. 15, were directed to be tried.' And this 'was long' the only method of trying marine felonies in the court of Admiralty: the judge of the Admiralty presiding therein, as the lord mayor is the president of the session of *oyer* and *terminer* in London. 'But the criminal jurisdiction of this court had become practically obsolete before it was merged in the High Court, as all offences formerly triable there are within the jurisdiction of the Central Criminal Court, 4 & 5 Will. IV. c. 36; while the justices of assize and commissioners of *oyer* and *terminer* and general gaol delivery have now also severally and jointly all the powers given to commissioners of *oyer* and *terminer* by the several statutes, 28 Hen. VIII. c. 15; 7 & 8 Vict. c. 2; 18 & 19 Vict. c. 91, s. 21.'

these justices have, by virtue of several statutes, a criminal jurisdiction also, in certain special cases. The third, which is the commission of the *peace*, was also treated of in the first volume of these commentaries, 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, &c., 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*, to hear and determine all treasons, felonies, and misdemeanors. This is directed to the judges and several others, or any two of them;[r] 'but any one may exercise all the powers of the court, which is not, as formerly, a distinct court, but is now a divisional court of the High Court of Justice.'[s] The words of the commission are, "to inquire, hear, and "determine:" so that by virtue 'thereof the commissioners' 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 *gaol delivery;* which empowers them to try and deliver every prisoner, who shall be in the gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted, or for whatever crime committed.

It was anciently the course to issue special writs of gaol delivery for each particular prisoner, which were called the writs *de bono et malo:* 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 gaols are in general cleared, and all offenders tried, punished, or delivered twice, 'and in the populous districts thrice,' in every year: a constitution of singular use and excellence. Sometimes, also, upon urgent occasions, the crown issues a special or extraordinary commission of *oyer* and *terminer*, and *gaol delivery*, confined to those offences which stand in need of immediate inquiry and punishment: upon which the course of proceeding is much the same as upon general and ordinary commissions.

[r] *Leverson* v. *The Queen*, 4 Law Rep. Q. B. 394.
[s] The Judicature Act, 1873, s. 29.

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 gaol delivery, within his own county where he was born or inhabited; in like manner as they were formerly also 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 gaol delivery within any county of England.

6. The court of general *quarter sessions* of the peace 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, was 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 St. Thomas the martyr, or the seventh of July; 'but now, by statute 1 Will. IV. c. 70, s. 35, in the first week after 11th October;—28th December;—31st March, or other day between 7th March and 22nd April, appointed at the previous sessions;[t]—and 24th June in every year.'[u]

'The court of quarter sessions' is held before two or more justices of the peace, one of whom must be of the *quorum*, whose jurisdiction by the statute 34 Edw. III. c. 1, extended to the trying and determining all felonies and trespasses whatsoever: though they seldom, if ever, tried any greater offence than small felonies within the benefit of clergy; their commission providing, that if any case of difficulty arises, they 'should' 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 were usually remitted for a more solemn trial to the assizes. Neither could they try any new-created offence, without express power given them by the statute which creates it.

'The jurisdiction of the quarter sessions is now, however, much better defined; the statute 5 & 6 Vict. c. 38, prohibiting

[t] 4 & 5 Will. IV. c. 47.

[u] The sessions for the county of Middlesex are specially regulated by statute, and are held twice in every month; 7 & 8 Vict. c. 71; 14 & 15 Vict. c. 55.

the trial of any person at these sessions for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, was punishable by transportation beyond the seas for life; or for any of the following offences:—misprision of treason; offences against the queen's title, prerogative, person, or government, or against either house of parliament; offences subject to the penalties of præmunire; blasphemy, and offences against religion; administering or taking unlawful oaths; perjury and subornation of perjury; making or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury or as a misdemeanor; forgery; unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern; bigamy, and offences against the laws relating to marriage; abduction of women and girls; endeavouring to conceal the birth of a child; offences against the laws relating to bankrupts and insolvents; composing, printing, or publishing blasphemous, seditious, or defamatory libels; bribery; unlawful combinations and conspiracies, except conspiracies or combinations to commit any offences which justices of the peace have jurisdiction to try when committed by one person; stealing, or fraudulently taking, or injuring, or destroying, records or documents belonging to any court of law or equity, or relating to any proceeding therein; and stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate, or any interest therein. By other statutes, the court of quarter sessions has no jurisdiction over the offence of entering into or being in land by night armed, for the purpose of taking game,[v] nor over offences committed by trustees, officers of public companies, &c.'[w]

But there are many offences and particular matters, which by particular statutes belong properly to this jurisdiction, and ought to be prosecuted in this court: as the smaller 'felonies and' misdemeanors against the public or commonwealth, and 'certain matters rather of a civil than a criminal nature,' such as the regulation of weights and measures;[x] questions relating to the settlement of the poor; 'and appeals against a multitude

[v] 9 Geo. IV. c. 69. [w] 24 & 25 Vict. c. 96, s. 87.
[x] 5 & 6 Will. IV. c. 63.

of orders or convictions, which may be made in petty sessions, within the laws relating to the revenue, the highways, and other matters of a local nature.' In some few of these 'last-mentioned cases, the parties are entitled to a jury, but in the great majority of them, whether as appeals or as applications of an original nature, they are disposed of by the justices, whose orders thereon' may, for the most part, unless guarded against by particular statutes, be removed into the Queen's Bench 'division,' 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*, who is always a justice of the *quorum;* and among them of the *quorum* 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 royal sign manual: and to him the nomination of the clerk of the peace belongs; which office he is expressly forbidden to sell for money.[y]

In many 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 for 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 Will. III. c. 30. 'And in all the most important of these towns, this court is presided over by the *recorder of the borough*, who must be a barrister of not less than five years' standing, and is immediately on his appointment *ex-officio* a justice of the peace for the borough.'

In both corporations and counties at large there are 'generally' kept *special* and *petty sessions*, by a few justices, for despatching smaller business in the neighbourhood, as for 'hearing appeals against poor-rates,' licensing alehouses, passing the accounts of the parish officers, and the like; 'for which and other objects, counties are usually divided into districts, under the provisions of various statutes passed for that purpose.'

'The authority of the justices in petty sessions, under recent statutes, to dispose summarily of certain minor felonies and mis-

[y] Stat. 37 Hen. VIII. c. 1; 1 W. & M. st. 1, c. 21.

demeanors will be noticed hereafter. Extensive powers of a similar nature are, with reference to an infinite variety of petty offences, vested in the metropolitan and other stipendiary magistrates;[z] one of whom may at all times exercise the jurisdiction for which the presence of two justices is otherwise required. But from the determination of all justices in petty sessions an appeal may generally be had to the next court of quarter sessions; unless, indeed, a special case has been stated for the opinion of the High Court;[a] for when this is done an appeal is incompetent.'[b]

[z] 3 & 4 Vict. c. 84; 21 & 22 Vict. c. 73, ss. 1 & 2. [a] 20 & 21 Vict. c. 43.

[b] 'Sir W. Blackstone here mentions certain courts, which still exist in contemplation of law, but are practically obsolete. These are, *firstly*,' the *sheriff's tourn*, or rotation, a court of record, 'to be' 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. This therefore 'was' the great court-leet of the county, as the county-court 'was' the court-baron: for out of this, for the ease of the sheriff, was taken, '*secondly*,' the *court-leet*, or *view of frankpledge*, which 'was' also a court of record, 'and to be' held once in the year and not oftener, 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, according to the institution of the great Alfred, were all mutually pledges for the good behaviour of each other. Besides this, the preservation of the peace, and the chastisement of divers minute offences against the public good, 'were' the objects both of the court-leet and the sheriff's tourn, which had 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 'were' obliged to attend them, and all persons commorant therein; which commorancy 'consisted' in usually lying there: a regulation which owes its origin to the laws of Canute. But persons under twelve and above sixty years old, peers, clergymen, women, and the king's tenants in ancient demesne, 'were' 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. The objects of their jurisdiction 'were' therefore very numerous: being such as in some degree, either less or more, 'affected' the public weal, or good governance of the district in which they arose; from common nuisances and other material offences against the peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the tourn and the leet have 'long fallen into total desuetude,' 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

7. The court of the *coroner* 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 visem corporis*. Of the coroner and his office we treated at large in the first volume of these commentaries, 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.

II. There are a few other criminal courts of a more confined and partial jurisdiction; extending only to some particular places which the royal favour, 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 sins, rather than temporal crimes, by penance, contrition, and excommunication, *pro salute animæ;* 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

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. 'A similar observation may be made with reference to, *thirdly*,' the court of the *clerk of the market*, 'which was' incident to every fair and market in the kingdom, to punish misdemeanors therein, as the court of *pie-poudre* 'was' to determine all disputes relating to private or civil property. The object of this jurisdiction, 'when in use, was' principally the cognizance of weights and measures, to try whether they were 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. If they were not according to the standard, then, besides the punishment of the party by a fine, the weights and measures themselves were to be burnt. 'But this superintendence of weights and measures is now vested in the courts of general and quarter sessions; and this court, as has been already remarked, is practically obsolete. While it existed, it was' 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 ædiles*.

these we discoursed sufficiently in the preceding volume. 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;[c] 'and of these the most important is'

1. 'The *Central Criminal Court*, which was first established by the statute 4 & 5 Will. IV. c. 36,[d] and has jurisdiction to hear and determine all treasons, murders, felonies, and misdemeanors, committed within the city of London and the county of Middlesex, and certain parts of the counties of Essex, Kent, and Surrey, and also all offences committed on the high seas and other places within the jurisdiction of the Admiralty. This court has superseded the general sessions of over and terminer and gaol delivery formerly held for London and the county of Middlesex, under the charter granted by Henry I. to the city of London, and confirmed by many subsequent charters of our

[c] 'Sir William Blackstone here mentions,' *first*, the court of the *lord steward*, *treasurer*, or *comptroller* of the king's *household*, instituted by stat. 3 Hen. VII. c. 14, to inquire of felony by any of the king's sworn servants, in the cheque-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 have been by a jury according to the course of the common law, consisting of twelve sad men, that is, sober and discreet persons of the king's household. 'But the stat. 3 Hen. VII. c. 14, having been repealed by the 9 Geo. IV. c. 31, the jurisdiction of this court, which had been long obsolete, has now ceased to exist.'

'*Secondly*,' the court of the *lord steward* of the king's *household*, or, in his absence, of the treasurer, comptroller, and steward of the *marshalsea*, erected by stat. 33 Hen. VIII. c. 19, to inquire of, hear, and determine all treasons, misprisions of treason, murders, manslaughters, bloodshed, and other malicious strikings; whereby blood should be shed in or within the limits, that is, within two hundred feet from the gate, of any of the palaces and houses of the king, or any other house where the royal person should abide. The proceedings were by jury, both a grand and a petit one, as at common law, taken out of the officers and sworn servants of the king's household. The form and the solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand, which 'was formerly' part of the punishment for shedding blood in the king's court, are very minutely set forth in the said statute 33 Hen. VIII., and the several offices of the servants of 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. 'But the act of Hen. VIII. having been repealed by the statute 9 Geo. IV. c. 31, "so far as relates to the punishment of "manslaughter and malicious striking, "whereby blood shall be shed," this court, which had long before fallen into entire desuetude, may now be considered to have ceased to exist.'

[d] Amended by 9 & 10 Vict. c. 24, s. 2, and 14 & 15 Vict. c. 55, s. 13.

early kings. It sits twelve times, and oftener if necessary, every year, under commissions of *oyer* and *terminer* and *gaol delivery*, the persons named therein including the lord mayor, for the time being, of the city of London, the Lord Chancellor, the judges for the time being of what were the courts of common law at Westminster, and the aldermen, recorder, common serjeant, and judges of the sheriffs' courts of London.'

'Indictments found at the sessions of the peace held for the cities of London or Westminster, the Liberty of the Tower, the borough of Southwark, or the counties of Middlesex, Essex, Kent, and Surrey, may be removed by *certiorari* into this court; to which, under the statute 19 & 20 Vict. c. 16, the Queen's Bench division may also commit the trial of certain cases removed into that court by writ of *certiorari;* and under the statute 25 & 26 Vict. c. 65, the trial of any person who is subject to the mutiny acts for the murder or manslaughter of any person subject to those acts at any place in England or Wales.'

2. As in the preceding volume we mentioned the courts of the two universities, or their chancellors' courts, for the redress of civil injuries, it will not be improper now to add a short word concerning the jurisdiction of their criminal courts, which is equally large and extensive. The chancellor's court 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 offences 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 any 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*, but only, after inquest in the common law courts, *ad audiendum et determinandum*.

When the cognizance is so allowed, if the offence be *inter minora crimina*, 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 special commission of the crown 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 of the university, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio univer-*" "*sitatis gaudentes:*" and by a jury formed *de medietate*, half of freeholders and half of matriculated persons, is the indictment to be tried. 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 two centuries past; nor will it perhaps ever be thought advisable to revive them; though it is not a right that merely rests *in scriptis* 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 I., and two in that of Charles I., 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 the university 'of Oxford.'

CHAPTER XX.

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 offences. These are plain, easy, and regular; the law never admitting any fictions 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 offence. 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.

I. Of this summary nature are all trials of offences 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 justices of the peace. 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 action or indictment; yet when we again 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 also before justices of the peace, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many disorderly offences; such as 'petty trespasses, assaults,' common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the 'statutes themselves.' These used 'anciently' to be punished by the verdict of a jury in the court-leet; 'but nearly all the offences which may in the present day form the subject of a summary conviction, have been created since the disuse of that tribunal, and have accordingly been referred to the decision of the justices of the peace in petty or quarter sessions.'[a]

The process of these summary convictions, it must be owned, is extremely speedy, though the courts of common law soon threw in one check upon them, by making it necessary to *summon* the party accused before he was condemned. This 'has been long held to be, and is now by statute,' an indispensable requisite:[b]

[a] 'Sir William Blackstone complained that' this change in the administration of justice had 'in his day produced' 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 discouraged many gentlemen of rank and character from acting in the commission, which was productive of a third mischief, which was, that this trust, when slighted by gentlemen, fell of course into the hands of those who were not so, but the mere tools of office; so that the extensive power of a justice of the peace, which even in the hands of men of honour is highly formidable, was prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice, or personal resentment. 'The learned commentator then eulogized' 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 'pointed out' the necessity of not deviating any further from our ancient constitution by ordaining new penalties to be inflicted upon summary convictions. 'But the remonstrances of the commentator have not been heeded, the summary jurisdiction of justices, whether wisely or not, having been enormously increased since the time he wrote.'

[b] Salk. 181; 2 Lord Raym. 1405. 'The course of proceeding before justices was formerly regulated by a great variety of statutes, extending from 18 Eliz. c. 5, to 6 & 7 Will. IV. c. 14. These acts have been consolidated, and the duties of the justices defined by the statute 11 & 12 Vict. c. 13.'

though the justices long struggled the point; forgetting that rule of natural reason expressed by Seneca,

> "*Qui statuit aliquid, parte inauditâ alterâ,*
> *Æquom licet statuerit, haud æquus fuit:*"

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.

'Whenever, then, an *information* is laid before a justice of the peace, that any person has committed or is suspected to have committed any offence for which he is liable, upon summary conviction, to be imprisoned, fined, or otherwise punished; and whenever, also, a *complaint* is made to any justice or justices, upon which he or they have authority to make any order for the payment of money or otherwise;—a summons is to be issued, directed to the party charged or complained of, stating shortly the matter of such information or complaint, and requiring him to appear and answer the same, and be further dealt with according to law. This summons must be served on the person to whom it is directed, either personally, or by leaving the same at his last or usual place of abode; and the constable, peace-officer, or other person by whom such service is effected, must attend at the return of the summons, so as to prove the service thereof, if necessary.'

'If the person so summoned shall not appear, after having been served a reasonable time [c] before that appointed for his doing so, the justices, upon proof to their satisfaction, substantiating the matter of the information or complaint, may issue a warrant for his apprehension; but in the case of an information being laid, and substantiated by proper evidence, a warrant may be issued in the first instance; which warrant must, in every case, state shortly the matter of the information or complaint on which it is founded and be under the hand and seal of the justice or justices by whom it is issued, and be directed to the constable, in whose hands it remains in force until executed; for it may be executed in any other district than that in which it is issued, after being backed or indorsed by a justice of the peace of that district.' [d]

'The justices have authority to issue summonses to compel

[c] Of which the justices are the judges; in *re Williams*, 21 L. J. R.; 46 M. C.

[d] 11 & 12 Vict. c. 42.

the attendance, at the hearing of any information or complaint, of witnesses for the prosecutor, complainant, or defendant, as the case may be; which, if disobeyed, may be followed up by a warrant; but if it be proved by evidence upon oath that the witness is not likely to attend, in this case also a warrant may be issued in the first instance.'

'The information or complaint, which after service of a summons may be proceeded with *ex parte*, must be heard, tried, and determined, and adjudicated upon by one or two or more justices, according to the direction, if any, of the act of parliament upon which it is framed; or where there are no such directions, then before any one justice of the county or place where the matter has arisen; the room in which the justice or justices sit officially being deemed *an open court*, to which the public are, therefore, entitled to have free access. The defendant must be admitted to make his full answer and defence, and may have the witnesses examined and cross-examined by his counsel or attorney; a similar privilege being allowed to the prosecutor; and the court may adjourn from time to time, the defendant, if in custody, being either retained in custody or liberated on recognizances.'

'The hearing, when the defendant appears by his counsel or attorney, or is present, commences by the justices stating to him the substance of the information or complaint, and calling upon him to answer. If he does not admit the truth of what is charged against him, the court hears the prosecutor or complainant, and his witnesses, and afterwards the defendant and his witnesses, and then such witnesses as the prosecutor or complainant may examine in reply, if the defendant shall have given any evidence except as to his general character; but the former is not entitled to make any observations upon the evidence given by the latter, nor the latter to make any observations upon the evidence given by the former in reply. When the justices have heard what each party has to say, and also the witnesses who have been called, and received what other evidence may have been produced, they proceed to convict, or make an order on, the defendant, or to dismiss the information or complaint, as the case may be; every conviction or order being then drawn up in a prescribed form, and deposited with the clerk of the peace, to be filed among the records of the quarter sessions. A certificate of every order of dismissal is at the same time drawn up and given to the defendant, when such is the decision at which the court has arrived.'

'It is competent to the court to award costs, either against the defendant or against the complainant, as the case may be; and for the amount of such costs, or of any pecuniary penalty, or sum of money adjudged by a conviction or order, to issue a warrant of distress on the goods and chattels of the party against whom such order is made. When there are no goods to distrain, or where the statute, on which the proceedings are founded, simply directs imprisonment, a warrant of commitment issues. If, however, the justices are satisfied that a distress would be ruinous to the defendant, or that he has no goods, the court may issue, in the first instance, a warrant of commitment.'

This is, in general, the method of summary proceedings before justices; which, it is to be observed, do not extend to informations, complaints, or proceedings relating to the excise or customs, stamps, taxes, or post-office, nor to the removal of paupers, nor to complaints or orders with respect to lunatics or bastards, nor to proceedings relating to the labour of children in mills or factories.' For particulars 'in these, and indeed in all cases,' we must have recourse to the several statutes, which create the offence, 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. 'The powers conferred on the justices to dispose summarily of certain small felonies demand, however, from their great importance, more particular mention.'

'Under the statutes 10 & 11 Vict. c. 82, and 13 & 14 Vict. c. 37, for the speedy trial and punishment of *juvenile offenders*, any two justices of the peace, assembled in petty sessions, before whom any person is charged with having committed, or attempted to commit, or been an aider, abettor, counsellor, or procurer in the commission of any offence by law deemed or declared to be *simple larceny*, or punishable as simple larceny, may, *if the age of such person shall not exceed sixteen years*, convict him in open court of such offence, and pass a sentence of imprisonment for any term not exceeding three months,[e] with or without hard labour, or impose a fine not exceeding three pounds. But if, on the other hand, the

[e] If a male, and not more than fourteen, he may be once privately whipped, either instead of or in addition to such imprisonment: 25 & 26 Vict. c. 18.

justices consider the charge not to be proved, or if proved, that it is not expedient to inflict any punishment, they may dismiss the accused, with or without requiring him to find sureties for his future good behaviour.'

'There is an important provision, however, enabling the accused to object to the case being summarily disposed of. And in order to ascertain his wish on this point, one of the justices, before calling upon him to answer the charge, must inquire, in words prescribed by the statute, whether he wishes to be tried by a jury; and if he or his parent, on his behalf, then objects to a summary trial by the justices, they must proceed with the charge against him as in ordinary cases. But if the charge be dismissed, the dismissal is, equally with a conviction, a bar to any further proceedings.'

'These statutes, which applied only to juvenile offenders, were found to work so well, that the legislature saw fit very soon afterwards to confer on the justices in petty sessions still more extensive powers. This was effected by the statute 18 & 19 Vict. c. 126, extended by 31 & 32 Vict. c. 116, which enables the justices, where the charge is one of simple larceny or embezzlement, and the value of the property does not exceed five shillings, or of an attempt to commit those offences or larceny from the person, but *only with the assent of the accused*, to hear and determine it in a summary way. In order to do so, the justices must, at the close of the examinations of the witnesses for the prosecution, state to the accused the substance of the charge against him, and then inquire whether he consents that the charge shall be tried summarily by them; for if he dissent, they must proceed as in ordinary cases. If the accused assents to its being disposed of summarily, the justices hear the charge and then proceed to give judgment as if it were an ordinary information; and may, if the defendant is convicted, or if he at the outset pleads guilty, pass a sentence of three calendar months' imprisonment, with hard labour. But a dismissal of the charge has the effect of an acquittal; and if the justices think the case legally made out, but that there are circumstances rendering it inexpedient to inflict any punishment, they may refrain from a conviction and dismiss the charge.'

'The powers thus conferred to try offenders are limited, it will be observed, to cases in which the charge is one of simple larceny or embezzlement, or an attempt to commit those offences or lar-

ceny from the person; the justices have, however, power to *punish* in some other cases, where the accused admits his guilt. Thus when the charge is simple larceny, embezzlement, stealing from the person, or larceny as a clerk or servant, but the case appears to be one which may properly be disposed of summarily, the justices, if they have resolved to commit the accused for trial, may, having previously informed him that he is not obliged to plead or answer before them at all, inquire of him whether he be guilty or not. If he says he is guilty, that plea is entered, and the justices may commit him to prison, with hard labour, for any term not exceeding six months. But as a hardened offender would inevitably embrace such an opportunity of escaping with a comparatively light punishment, it is wisely provided by the statute, that if it be made to appear that the accused has been previously convicted of felony, the justices shall have no jurisdiction so to dispose of the case.'

IV. 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 punishable 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 intrusted to their distribution; or by disobeying writs issuing out of the high court, by proceeding in a cause after it is put a stop to or removed by writ of prohibition, *certiorari*, error, *supersedeas*, and the like. For as the High Court, and especially 'the Queen's Bench division thereof,' has a general superintendence over all inferior jurisdictions, any corrupt or iniquitous practices of subordinate judges are contempts of that superintending authority, whose duty it is to keep them within the bounds of justice. 2. Those committed by sheriffs, bailiffs, gaolers, and other officers of the court: by abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behaviour,

or culpable neglect of duty. 3. Those committed by 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 malpractice of the officers reflects some dishonour 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 misbehaviours 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. Indeed, the attachment for most of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. And therefore it has been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by a general act of pardon. 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 *rescous* and the like; or when they import a disobedience to the queen's great prerogative writs of prohibition, *habeas corpus*, and the rest. Some of these contempts may arise in the face of the court; as by rude and contumelious behaviour; 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 queen'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 of the

judges acting in their judicial capacity; by printing false accounts, or even true ones, 'in defiance of the prohibition of the court,'[f] of causes then depending in judgment; and by anything, in short, that demonstrates a gross want of that 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.[g]

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[h] seems inclined 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 resisters by imprisonment, "*a quâ non deliberentur sine speciali "præcepto domini regis:*" and if the sheriff himself be resisted, he shall certify to the courts the names of the principal offenders, their aiders, consenters, commanders, and favourers, 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 Charta*.

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 further 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; or, in

[f] *Rex* v. *Clement*, 4 B. & Ald. 218. *Miller* v. *Knox*, 4 Bing. N. C. 574.

[g] See the answers of the judges in

[h] Gib. Hist. C. P. ch. 3.

very flagrant instances of contempt, the attachment issues in the first instance; 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;[i] and, if any of the interrogatories is improper, the defendant may refuse to answer it, and move the court to have it struck out.[j] If the party can clear himself upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury.[k] If he confesses the contempt, the court will proceed to correct him by fine or imprisonment, or both. If the contempt be of such a nature, that, when the fact is once acknowledged, the court can receive no further information by interrogatories than it is already possessed of, as in the case of a *rescous*,[l] 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; and seems indeed to have been derived 'originally from' 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* and not *in rem*. 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, and has in more modern times been recognized, approved, and confirmed by several acts of parliament, so the method of examining the delinquent himself upon oath with regard to the contempt alleged is at least of as high antiquity, and by long and immemorial usage is now become the law of the land.

[i] *Elderton's* case, 6 Mod. 73.

[j] *Rex* v. *Barber*, Stra. 444.

[k] 6 Mod. 73.
Rex v. *Elkins*, 4 Burr. 2129.

CHAPTER XXI.

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 eleven 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. Judgment, and its consequences; 9. Reversal of judgment; 10. Reprieve, or pardon; 11. 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 in 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 a hue and cry.

1. A warrant may be granted in extraordinary cases by the privy council, or secretaries of state;[a] but ordinarily by justices of the peace. This they may do in any cases where they have a jurisdiction over the offence, in order to compel the person accused to appear before them;[b] 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 offences as they have power to punish by statute. Sir Edward Coke, indeed, laid it down that a justice of the peace 'could' not issue a warrant to apprehend a felon

[a] 1 Lord Raym. 65. [b] 2 Hawk. P. C. 84.

upon bare suspicion; no, not even till an indictment 'had been' actually found; and the contrary practice 'was' by others held to be grounded rather upon connivance than the express rule of law. A doctrine which would in most cases 'have given' a loose to felons to escape without punishment; and therefore Sir Matthew Hale combated it within vincible authority and strength of reason; maintaining, 1. That a justice of peace 'had' power to issue a warrant to apprehend a person *accused* of felony, though not yet *indicted;* and, 2. That he 'might' also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion 'were' not in himself, but in the party that 'prayed' his warrant; because he 'was' a competent judge of the probability offered to him of such suspicion.

'Whether these powers were originally usurped, as represented by Sir Edward Coke, or an authority necessarily pertaining to the office and duty of a justice of the peace, as contended for by Sir Matthew Hale, has long been a question of no practical importance, various acts of parliament having expressly conferred such powers on these magistrates; all of which were, however, consolidated by the statute 11 & 12 Vict. c. 42, which now regulates most minutely the mode in which these important duties are to be performed.'

'In all cases where an *information* or *complaint,* in writing and upon oath, is laid before a justice of the peace,—that any person has committed, or is suspected to have committed, any treason, felony, or indictable misdemeanor, or other indictable offence whatsoever, within the limits of the jurisdiction of such justice,—or that any person guilty, or suspected to be guilty, of having committed any such crime or offence elsewhere out of the jurisdiction of such justice is residing, or is suspected to reside or be, within the same,—such justice may issue his *warrant* to apprehend such person, and cause him to be brought before him or any other justice or justices, to answer the charge and be dealt with according to law. Instead of a warrant, the justice may, in his discretion, and on a mere charge or complaint, without a written information or oath, issue a *summons* in the first instance, and if that be disobeyed by the person charged, then a warrant for his apprehension. And a warrant may in like manner be issued to apprehend any person residing in, or supposed to reside within, the jurisdiction of

such justice, who is charged with having committed, or is suspected to have committed, indictable crimes or offences of any kind, on the high seas or within the jurisdiction of the Admiralty or on land beyond the seas, for which an indictment may be preferred.' [c]

This warrant ought to be under the hand and seal of the justice, 'and in the form prescribed by the statute, and' should set forth the time and place of making, and the cause for which it is made. It may be directed to the constable or any other person 'by name, or generally to the constable of the district, without naming him, or to constables or peace officers in the district,' requiring him or them to 'apprehend the offender and bring him before the justice or justices issuing the warrant, or before some other justice or justices of the peace, to answer to the charge contained in the information, and to be further dealt with according to law.'

A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to 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: [d] whereas a warrant, properly penned, even though the magistrate who issues it should exceed his jurisdiction, will indemnify the officer who executes the same ministerially.[e]

[c] A warrant to search for property alleged to be stolen, may be issued under 24 & 25 Vict. c. 96.

[d] 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, or 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 King's Bench to be void, *Money* v. *Leach*, 3 Burr. 1742, and Wm. Bl. 555. After which, the issuing of general warrants was declared illegal by a vote of the House of Commons; Com. Jour. 22 April, 1766.

[e] See *Kirby* v. *Simpson*, 10 Ex. 358.

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. 'It may be executed by apprehending the offender at any place within which the justice issuing it has jurisdiction, or in case of fresh pursuit at any place in the next adjoining county or district within seven miles of the border; and in all cases where the warrant is directed to all constables or other peace-officers of the district, any constable, headborough, tithingman, borsholder, or other peace-officer, for any parish, township, hamlet, or place within such district, may execute it therein, as if it were directed specially to him by name.' A warrant from the chief or other justice of the 'Queen's Bench division' 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, 'except in the case of fresh pursuit,' 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' having long prevailed without law, was at last authorized by statute.[f] And any warrant for apprehending an English offender, who may have escaped into Scotland 'or Ireland,' and *vice versâ*, may 'now' be indorsed and executed by the local magistrates, and the offender conveyed back to that part of the United Kingdoms in which the offence was committed.[g]

'A warrant may be granted on a Sunday as well as on any other day; it need not be made returnable at any particular *time*, for it remains in force until it is executed; and the person against whom it is issued may be apprehended in the night as well as the day,[h] and on a Sunday; for though the statute 29 Car. II. c. 7, s. 6, prohibits arrests on Sundays, it excepts the cases of treason, felonies, and breaches of the peace.'

2. Arrests by *officers*, *without warrant*, may be executed, 1. By a justice of peace, who may himself apprehend, or cause to be

[f] 23 Geo. II. c. 26; 24 Geo. II. c. 55; 11 & 12 Vict. c. 42.

[g] 'Warrants may be backed for execution in the *Channel Islands*, 14 & 15 Vict. c. 55, s. 18, and in the *colonies*, 6 & 7 Vict. c. 34; 16 & 17 Vict. c. 118. As to the apprehension of certain offenders in *France* and the *United States*, see 6 & 7 Vict. cc. 75, 76, and 8 & 9 Vict. c. 120; and *Denmark*, 25 & 26 Vict. c. 70.'

[h] *Rawlins* v. *Ellis*, 16 W. & M. 172.

apprehended, by word only, any person committing a felony or breach of the peace in his presence.[i] 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, has great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace committed in his view,[j] and carry him before a justice of the peace;[k] 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;[l] and for that purpose is authorized, as upon a justice's warrant, to break open doors, and, 'it is said,' 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.[m] 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 'beadles, or' such as are mere assistants to the constable, may *virtute officii* arrest all offenders,[n] and particularly night-walkers, and commit them to custody till the morning.

3. Any private person, and *à fortiori* a peace-officer, that is present when a 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 standers-by.[o] And they may justify breaking open doors upon following such felon; and if *they kill him*, pro-

[i] 1 Hal. P. C. 86.

[j] *Griffith* v. *Coleman*, 4 H. & N. 265.

[k] 'By 24 & 25 Vict. c. 96, s. 103, any person found committing any offence punishable under that statute, except angling in the daytime, may be apprehended without warrant by *any person*. The *Malicious Injuries to Property Act*, 24 & 25 Vict. c. 97, s. 61, is to the same effect.' *Rex* v. *Fraser*, 1 Mood. C. C. 419.

[l] *Davis* v. *Russell*, 5 Bing. 354. Thus also a constable may, without warrant, arrest any person lying or loitering in any highway, yard, or other place at night, whom he has cause to suspect has committed or is *about to commit* any of the felonies mentioned in 24 & 25 Vict. cc. 97 & 100. So he may take a person on *ticket of leave*, whom he suspects to have committed an offence, 27 & 28 Vict. c. 47; and, if authorized by the chief constable, any person whom he believes to be living by dishonest means; or, without such leave, whom he finds in any place under circumstances showing that he was about to commit an offence, 34 & 35 Vict. c. 112.

[m] 2 Hal. P. C. 88-96.

[n] 2 Hal. P. C. 98; 2 Inst. 52; *Lawrence* v. *Hedger*, 3 Taunt. 14.

[o] 2 Hawk. P. C. 74. The *Malicious Injuries to Property* Act, 24 & 25 Vitt. c. 97, s. 61, expressly authorizes the *owner* of any property with respect to which any offence under that statute is committed, or his *servant*, or any person authorized by him, to arrest any person *found committing* an offence against the act without warrant.

vided he cannot be otherwise taken, it is justifiable; though if *they are killed* in endeavouring to make such arrest, it is murder.[p]

Upon probable suspicion also a private person may arrest the felon, or other person so suspected; but he 'does so at his own peril.' A *constable* having reasonable ground[q] to suspect that a felony has been committed, is authorized to detain the party suspected, until inquiry can be made by the proper authorities; in order to justify a *private individual* in causing the imprisonment of any one, he must not only make out a *reasonable* ground of suspicion,[r] but he must prove that a felony has actually been committed.[s] A private individual may, however, apprehend any person found *by night*, *i.e.* between nine P.M. and six A.M., committing an indictable offence.[t] And any person to whom any property is offered to be sold, pawned, or delivered, if he has reasonable cause to suspect that it has been *stolen*, is authorized, and if in his power is required, to apprehend and forthwith to take before a justice of the peace the party offering the same, together with such property, to be dealt with according to law.[u] A private person cannot, upon probable suspicion merely, justify breaking open doors to 'arrest a felon or other suspected person;' and if either party kill the other in the attempt, it is 'said to be' manslaughter, and no more.[v] No more, because there is no malicious design to kill: but it amounts to so much, 'it is contended,' because it would be of most pernicious consequence, if, under pretence 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 a *hue* and *cry* raised upon a felony committed. A 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. It is also mentioned by statute Westm. 1, 3 Edw. I. c. 9, and 4 Edw. I. *de officio coronatoris*. But

[p] 2 Hal. P. C. 77.
[q] *Hogg* v. *Ward*, 3 H. & N. 417.
[r] *Mure* v. *Kaye*, 4 Taunt. 34.
[s] *Beckwith* v. *Philby*, 6 B. & C. 635.
[t] 14 & 15 Vict. c. 19, s. 11.
[u] 24 & 25 Vict. c. 96, s. 103.
[v] 2 Hal. P. C. 82, 83.

the principal statutes relative to it 'are those' of Winchester,[w] 13 Edw. I. statute 2, cc. 1 and 4, 'the 27 Eliz. c. 13, and the 8 Geo. II. c. 16; all of which were repealed by the statute 7 & 8 Geo. IV. c. 27.' That the hue and cry might more effectually be made, the hundred was bound by the 'statute of Winchester,' c. 3, to answer for all robberies therein committed unless they took the felon, which was the foundation of an action against the hundred, in case of any loss by robbery; 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 was in part introduced even into the Mogul Empire, about the beginning of the seventeenth 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. Hue and cry 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 neighbouring 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.[x]

In order to encourage further the apprehending of certain offenders, rewards may be bestowed on such as bring them to justice. 'This was formerly directed' by divers acts of parliament. Thus, the statute 4 & 5 W. & M. c. 8, enacted that such as apprehended a highwayman, and prosecuted him to conviction, should receive a reward of 40*l.* from the public; to be paid to them, or,

[w] 'This statute' directed that immediately upon robberies and felonies committed fresh suit should be made from town to town, and from county to county; and that hue and cry should be raised upon the felons, and they that kept the town should follow with hue and cry with all the town and the towns near; and so hue and cry should be made from town to town, until the felons were taken and delivered to the sheriff.

[x] 1 Hawk. P. C. 75.

if killed in the endeavour to take him, their executors, by the sheriff of the county; besides the horse, furniture, arms, money, and other goods taken upon the person of such robber; with a reservation of the right of any person from whom the same might have been stolen: to which the statute 8 Geo. II. c. 16, superadded 10*l.* to be paid by the hundred indemnified by such taking. By statutes 6 & 7 Will. III. c. 17, and 15 Geo. II. c. 28, persons apprehending and convicting any offender against those statutes, respecting the coinage, should, in case the offence were treason or felony, receive a reward of forty pounds; or ten pounds if it only amounted to counterfeiting the copper coin. By statute 10 & 11 Will. III. c. 23, any person apprehending and prosecuting to conviction a felon guilty of burglary, housebreaking, horse-stealing, or private larceny to the value of 5*s.* from any shop, warehouse, coach-house, or stable, was excused from all parish offices. And by statute 5 Anne, c. 31, any person so apprehending and prosecuting a burglar, or felonious housebreaker, or, if killed in the attempt, his executors, was entitled to a reward of 40*l.* By statute 6 Geo. I. c. 23, persons discovering, apprehending, and prosecuting to conviction, any person taking reward for helping others to their stolen goods, were entitled to forty pounds.[y] By statute 14 Geo. II. c. 6, explained by 15 Geo. II. c. 34, any person apprehending and prosecuting to conviction such as stole, or killed with intent to steal, any sheep or other cattle specified in the latter of the said acts, for every such conviction received a reward of ten pounds. Lastly, by statutes 16 Geo. II. c. 15, and 8 Geo. III. c. 15, persons discovering, apprehending, and convicting felons, and others found at large during the term for which they had been ordered to be transported, received a reward of twenty pounds.

'But all these enactments have been so far repealed;[z] and now by 7 Geo. IV. c. 64, s. 28, courts of oyer and terminer or gaol delivery may direct the payment to any person, who appears to have been active in the apprehension of any person charged with murder,—or with maliciously shooting or attempting to discharge loaded arms,—or with stabbing, cutting, poisoning,—or adminis-

[y] 'As a necessary consequence the whole race of thieves were fostered into a steady advance from small offences to great, till they obligingly ventured upon some deed of more than common atrocity, which should bestow the blood-money upon the officers of the law who had so long petted and protected them.—Knight's History of England, vol. viii. p. 65.'

[z] 58 Geo. III. c. 70; 7 Geo. IV. c. 64; 7 & 8 Geo. IV. c. 27.

tering anything to procure miscarriage,—or with rape,—or with burglary or housebreaking,—or with robbery,—or with arson,—or with horse, bullock, or sheep stealing,—or with being accessory before the fact to any of those offences,—or with knowingly receiving stolen property,—of such sum as shall seem sufficient to compensate him for his expenses, exertions, and loss of time. And if any man is killed in endeavouring to apprehend any person charged with any of these offences, the court may order payment to his widow, or children, or parents, of such sum of money as seems meet.'[a]

[a] A similar power to award compensation to the amount of 5*l.* is extended by 14 & 15 Vict. c. 55, s. 8, to the courts of quarter sessions.

CHAPTER XXII.

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 was directed to take in writing the examination of such prisoner, and the information of those who bring him: which, Mr. Lambard observes,[a] was the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum:* and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men.

'The statute of Philip and Mary was repealed by the statute 7 Geo. IV. c. 64, and other provisions introduced; but the course of proceeding before the justices is now regulated by the statutes mentioned in the preceding chapter;[b] and although these proceedings are commonly spoken of as the *examination* of the accused, in point of fact there is no examination at all in the sense above referred to.'

'Whether, then, the person charged with any offence appears voluntarily upon summons, or has been apprehended with or without warrant, or is already in custody for the same or any other offence, the justice, before committing him to prison for trial, or admitting him to bail, is in his presence to take the statements on oath, or affirmation, of those who know the facts of the case, for which purpose the attendance of witnesses may, as we have already seen, be compelled. The accused person has a right to put questions to the witnesses, and is in general allowed the assistance of an attorney or counsel; but this is in the discretion of the magis-

[a] Eirenarch. b. 2, c. 7. [b] 11 & 12 Vict. c. 42; 30 & 31 Vict. c. 35.

trate, for the place where the examination takes place is not an open court; and the public may be excluded, if it appears that such a course will conduce to the ends of justice.

'The statements of the witnesses being put into writing, are next to be read over to and signed by them, and also by the magistrate, and are then termed the *depositions*.

'If, from the absence of witnesses, or other reasonable cause, it becomes necessary or advisable to adjourn the examination, this may be done, the accused person, if in custody, being remanded to prison by warrant of the magistrate, for such time as he thinks reasonable, not exceeding eight clear days; though, if the remand be for a period not exceeding three days, the detention of the prisoner may be verbally ordered for that period. The accused person may, however, be allowed to go at large, upon his entering into a recognizance, with or without sureties, at the discretion of the magistrate, conditioned for his appearance at the time to which the examination shall have been adjourned.'

'After the examination of the witnesses for the prosecution has been completed, the depositions are to be read over to the accused, and he is then to be asked, whether, having heard the evidence, he wishes to say anything in answer to the charge, being warned at the same time that he is not obliged to do so, but that whatever he does say will be taken down in writing, and may be given in evidence against him upon the trial. If it appear that some inducement or threat has previously been held out to him,[c] the magistrate should further give him clearly to understand, that he has nothing to hope from any promise of favour held out, and nothing to fear from any threat made to him, as an inducement to make any admission or confession of his guilt; but that whatever he shall then say may be given in evidence, notwithstanding any such promise or threat.'

'Whatever he then says in answer, is to be taken down in writing, and after being read over to him, to be signed by the magistrate, and transmitted with the depositions to the court by which he is to be tried.'

'The magistrate is also to demand of the accused whether he desires to call any witnesses, and if he desires to do so, the magistrate must take their statements in writing as to the facts and

[c] *Reg.* v. *Sansome*, 1 Den. C. C. 545; *Reg.* v. *Bond*, 3 Car. & Kir. 337.

circumstances of the case, or as to anything tending to prove the innocence of the accused.'[d]

If, upon inquiry 'in the manner above pointed out, the justice or justices then present are of opinion that the evidence is not sufficient to put the accused party upon his trial, he may forthwith, if in custody, be discharged.' Otherwise 'or if the evidence given raise a strong or probable presumption of his guilt,' 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 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.[e] What the nature of bail is, has been shown in the preceding volume of these commentaries, 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 gaol. 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 offence against the liberty of the subject, in any magistrate, by the common law;[f] as well as by 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

[d] 30 & 31 Vict. c. 35.

[e] Pott. Antiq. b. 1, c. 18.

[f] 2 Hawk. P. C. 90. This duty being *judicial*, no action can be sustained against him except on proof of *malice*; *Linford* v. *Fitzroy*, 13 Q. B. 240.

statute 1 Will. & Mary, 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, 'it is said,' to be fined, if the criminal does not appear. 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.

Formerly, in all offences either against the common law or act of parliament, that were below felony, the offender ought to have been admitted to bail, unless it were prohibited by some special act of parliament. 'Before, then, stating what offences *are* bailable under the existing law,' let us see who might *not* be admitted to bail, or what offences were *not* bailable 'as the law formerly stood.'

And here I shall not consider any one of those cases in which bail is ousted by statute, from prisoners *convicted* of particular offences: 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 offence 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 insure that justice shall be done upon him, if guilty. Such persons, therefore, have no other sureties but the four walls of the prison.

By the ancient common law, before and since the Conquest, all felonies were bailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case. The statute Westm. 1, 3 Edw. I. c. 15, took away the power of bailing in treason, and in divers instances of felony. And the statutes 23 Hen. VI. c. 9, and 1 & 2 Ph. & M. c. 13, gave farther regulations in this matter; and upon the whole we may collect, that 'as the law thus stood' no justice of the peace could bail, 1. Upon an accusation of treason: nor, 2. Of murder: nor, 3. In case of manslaughter, if the prisoner were clearly the slayer, and not barely suspected to be so; or if any indictment were found against him: nor, 4. Such as, having been committed for felony, broke prison; because it not only carried a presumption of guilt, but was also superadding one felony to another: 5. Persons

outlawed: 6. Such as had 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:* all which were clearly not admissible to bail by the justices. Others were of a dubious nature, as, 11. Thieves openly defamed and known: 12. Persons charged with other felonies, or manifest and enormous offences, not being of good fame: and, 13. Accessories to felony, that laboured under the same want of reputation. These seem to have been in the discretion of the justices, whether bailable or not. The last class comprised such as *must* have been 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.

'Persons accused of felonies were, however, made bailable by the statute 7 Geo. IV. c. 64, s. 1, when the evidence before the justices did not raise a strong presumption of guilt; and this power to take bail was extended to all cases of felony, whatever the nature of the proof might be, by the statute 5 & 6 Will. IV. c. 33, s. 3. But both acts of parliament have been so far repealed by the statute 11 & 12 Vict. c. 42, s. 23, that any person, who appears or is brought before a justice of the peace, charged with any felony, treason excepted,—or with any assault with intent to commit felony,—or with any attempt to commit felony,—or with obtaining or attempting to obtain property by false pretences,—or with receiving property stolen or obtained by false pretences,—or with perjury or subornation of perjury,—or with concealing the birth of a child by secret burying or otherwise,—or with wilful and indecent exposure of the person,—or with riot,—or with assault, in pursuance of a conspiracy to raise wages,—or upon a peace-officer in the execution of his duty, or upon any person acting in his aid,—or with neglect or breach of duty as a peace-officer,—or with any misdemeanor for the prosecution of which the costs may be allowed out of the county rate,—may *in the discretion* of the justices be admitted to bail.'

'For all other indictable misdemeanors the accused is entitled as a matter *of right* to be bailed; but no justice of the peace can admit any person to bail for *treason*, unless by order of one of the secretaries of state.'

The Queen's Bench 'division,' or any judge thereof in time of vacation, may however bail for any crime whatsoever, be it treason, murder,[g] or any other offence, according to the circumstance of the case.[h] 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 offence. The law therefore provided one court, which always had 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 superior courts of justice.

Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the common gaol or house of correction[i] by the warrant of the justice, under his hand and seal, containing the cause of his commitment: there to abide till delivered by due course of law, 'or until he finds bail, if the justice consents, and so certifies by indorsement on the warrant.'[j] 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, nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement only;[k] this being the humane language of our ancient lawgivers, "*custodes pœnam sibi "commissorum non augeant, nec eos torqueant; sed omni sævitiâ "remotâ, pietateque adhibitâ, judicia debite exequantur.*"[l]

'Whether *held to bail or committed to prison,* in order to trial,[m] the accused person is entitled to have furnished to him, on demand, copies of the depositions[n] on which he is held to bail or committed; and in either case the prosecutor and witnesses for the prosecution and for the accused may be bound over in recog-

[g] Glan. l. 14, cc. 1, 3.

[h] 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.

[i] 14 & 15 Vict. c. 55.

[j] 11 & 12 Vict. c. 42, s. 23.

[k] 28 & 29 Vict. c. 126.

[l] Prisoners before trial have the option of being employed, but are not compelled to work; 28 & 29 Vict. c. 126.

[m] *Reg.* v. *Mayor of London*, 5 Q. B. 555.

[n] 6 & 7 Will. IV. c. 114; 11 & 12 Vict. c. 42, s 27.

nizances to appear at the trial in order to prosecute or give evidence. The original information, if any; the depositions; any recognizances so taken by the justices; the statement, if any, made by the accused; and his recognizances, if he has been released on bail, must all be delivered to the proper officer on or before the first day of the assizes or sessions to which the accused is sent for trial.'[o]

[o] 11 & 12 Vict. c. 42, s. 20; 30 & 31 Vict. c. 35.

CHAPTER XXIII.

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 offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the crown; 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 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. Such 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* 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 gaol delivery, twenty-four good and lawful men of the county, to inquire, present, do, and

execute all those things which, on the part of the sovereign, shall then and there be commanded them. 'The qualifications required in grand jurors at the sessions of the peace are the same as those of the petit jurors.[a] Grand jurors at the assizes' ought to be freeholders, but to what amount is uncertain: which seems to be *casus omissus,* 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;[b] 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.[c] "And the twelve senior "thanes go out, and the reeve with them, and swear on the relic "that is given them in hand, that they will accuse no innocent "man, nor conceal any guilty one." In the time of King Richard I., according to Hovenden, 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 'long remained; for till it was made unnecessary by the statute 6 Geo. IV. c. 50, s. 13,' some of the jury must have been summoned out of every hundred.

This grand jury, 'having chosen their foreman, are next' 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 queen, 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

[a] 6 Geo. IV. c. 50.

[b] *Rex* v. *March,* 6 A. & E. 236.

[c] 1 Thorpe, p. 295.

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. 'And they cannot receive any indictment for perjury or subornation of perjury, for conspiracy or obtaining money or property by false pretences, for keeping a gambling or disorderly house, or for an indecent assault, unless the person preferring the charge shall have been previously bound over to prosecute by a magistrate, which, however, the magistrate has no discretion but to do, or the prosecution itself is directed by one of the judges of the superior courts of law at Westminster, or the attorney or solicitor general,[d] or sanctioned by the court before which it is preferred.'

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 was made indictable in the county where the party died; 'and by the statute 7 Geo. IV. c. 64, s. 12, any offence committed on or within five hundred yards of the boundary of two or more counties, or begun in one and completed in another, may be inquired of, tried, and punished in any of the said counties.' And by the statute '24 & 25 Vict. c. 100, s. 10, re-enacting and extending' 2 Geo. II. c. 21, if the stroke or poisoning be in England, and the death upon the sea or out of England, or *vice versâ*, the offenders and their accessories may be indicted in the county where either the death, poisoning, or stroke shall happen. 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 crown shall direct, in pursuance of statutes 26 Hen. VIII. c. 13; 35 Hen. VIII. c. 2; and 5 & 6 Edw. VI. c. 11. Felonies committed out of the realm, as burning or destroying the royal ships, magazines, or stores, may by statute 12 Geo. III. c. 24, be inquired of and tried in any county of England, or in the place where the offence is committed. Crimes

[d] 22 & 23 Vict. c. 17, entitled, '*An Act to prevent vexatious indictments for certain misdemeanors.*' Amended by 30 & 31 Vict. c. 35.

committed by persons employed in any public service abroad may be tried in Middlesex;[e] and the offences of endeavouring to seduce soldiers or sailors from their duty,[f] and of administering or taking unlawful oaths,[g] may be tried in *any* county, whether the offence be committed on the high seas or in England.

Counterfeiters, washers, or minishers of the current coin, together with all manner of felons and their accessories, might 'formerly,' by several statutes of Henry VIII. be indicted and tried for those offences, if committed in any part of Wales, before the justices of gaol delivery and of the peace in the next adjoining county of England, where the king's writ ran: that is, in the county of Hereford or Salop; and not as it seems in the county of Chester or Monmouth: the one being 'then' a county palatine where the king's writ did not run, and the other a part of Wales, in 26 Hen. VIII. 'But indictments for offences committed in Wales must now, by the statute 1 Will. IV. c. 70, s. 14, as in England, be tried in the county where the offence was committed, unless otherwise provided by statute.'

Murders, whether committed in England or in foreign parts,[h] might, by virtue of the statute 33 Hen. VIII. c. 23, be inquired of and tried by the king's special commission in any shire or place in the kingdom. 'But the statute of Henry was repealed by 9 Geo. IV. c. 31; and any murder or manslaughter committed on land out of the United Kingdom, may now be dealt with, inquired of, tried, determined, and punished in any county or place in which the person charged with the offence shall be apprehended or be in custody, in the same manner as if the offence had been actually committed therein.[i] The power to deal with crimes committed on the high seas, within the jurisdiction of the Admiralty, has been already noticed.'

By statute 26 Geo. II. c. 19, plundering or stealing from any vessel in distress or wrecked, might have been prosecuted either in the county where the fact was committed, or in any county next adjoining; and, if committed in Wales, then in the next adjoining English county: by which was meant such English county as had a concurrent jurisdiction with the great sessions, of felonies com-

[e] 42 Geo. III. c. 85, s. 1.

[f] 37 Geo. III. c. 70; 57 Geo. III. c. 7.

[g] 37 Geo. III. c. 123; 52 Geo. III. c. 104.

[h] *Ely's* case, at the Old Bailey, Dec. 1720; *Rouche's* case, Dec. 1775.

[i] 24 & 25 Vict. c. 100, s. 9.

mitted in Wales. 'The first part of the statute of Geo. II. was re-enacted by 7 & 8 Geo. IV. c. 29, s. 18, and more recently by the statute 24 & 25 Vict. c. 96, s. 64; which now provides for the offence of plundering vessels in distress. The proviso as to Wales is of course repealed by the statute 1 Will. IV. c. 70, s. 14, which has been already referred to.'

By statute 10 & 11 Will. III. c. 25, all robberies and other capital crimes, committed in Newfoundland, may be inquired of and tried in any county of England; and by statute 13 Geo. III. c. 63, misdemeanors committed in India may be tried in England; and a mode is marked out for examining witnesses by commission, and transmitting their depositions to the court. 'Other statutes, too numerous to mention in detail, permit offences to be dealt with where the offender is in custody. Thus, forgery and the uttering of forged instruments may be tried and punished in the county or place where the offender is apprehended or in custody; accessories to any such offence, if a felony, and aiders and abettors in misdemeanors, being in like manner indictable and punishable, as if the offence had been actually committed in such county or place. So indictments against persons in the public service for larceny or embezzlement may be tried either where the defendant was apprehended, or is in custody, or where the offence was committed; and offences relating to the post-office, or against the stamp acts, either in the county where the offence was committed or in that in which the accused was apprehended. Bigamy may be dealt with, either where the offender was apprehended or is in custody, or in the county in which the second marriage took place; and the offence of returning from transportation, either in the county or place where the party is apprehended, or in that from whence he was ordered to be transported. Escapes, breaches of prison, and rescues, may be tried either in the jurisdiction in which the offence was committed, or in that in which the offender was apprehended and retaken; and in offences relating to the coin, where two or more persons have acted in concert in different counties or jurisdictions, the indictment may be tried and the offence charged to have been committed in any one of these counties or jurisdictions.'

'Indictments for offences committed within the county of any city or town corporate, may be preferred to the jury of the county

next adjoining;'[j] but, in general, all offences must be inquired into as well as tried in the county where the fact is committed. Yet if larceny be committed in one county, and the goods carried into another, the offender may be indicted in either; for the offence is complete in both; 'and any person, having stolen or otherwise feloniously taken any chattel, money, or other property whatever, in any one part of the United Kingdom, may be indicted for larceny or theft in any other part of the United Kingdom in which he afterwards has the property in his possession, in the same manner as if he had actually stolen it there.' But for robbery, burglary, and the like, the offender can only be indicted where the fact was actually committed; for though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore larceny in the second county, yet it is not a robbery or burglary in that jurisdiction.

'Indictments for felonies or misdemeanors committed upon any person, or on or in respect of any property, in a carriage on any journey, or on board any vessel on any voyage, may, by the statute 7 Geo. IV. c. 64, s. 13, be tried in any county *through* or *along the boundary* of which the coach, &c., or vessel shall have passed in the course of that journey or voyage. And a similar provision is made as to offences against the post-office acts, or committed upon persons engaged in the conveyance or delivery of letters sent by post, by the statute 7 Will. IV. and 1 Vict. c. 36, s. 37.'

'Accessories to felony, whether before or after the fact, may be tried by any court having jurisdiction to try the principal felon, or felonies committed in the county or place, in which the act, by reason whereof the prisoner has become an accessory, was committed; and in every other case the offence of the accessory may be dealt with in any county or place where he shall be apprehended or be in custody.'

'Finally, receivers of stolen property, whether charged as accessories after the fact, or with a substantive felony, or with a misdemeanor only, may be dealt with in any county or place in which they have or have had the property in their possession, or in which the principal may by law be tried, or in the county in which the property was actually received.'

[j] Except, it may be added, in London, Westminster, and Southwark.

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse 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;" or, which is the better way, "not found;" and then the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury.[k] If they are satisfied of the truth of the accusation, they then indorse 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 'upon an indictment' at the suit of the crown of any offence, unless by the unanimous voice of twenty-four of his equals and neighbours: 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. 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 are required to 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*. 'But no indictment can now[l] be held insufficient for want of or imperfection in the addition of any defendant, nor on account of any person mentioned in the indictment being designated by a name, office, or other descriptive appellation, instead of his proper name.' The *time* and *place* were also formerly to be ascertained by naming the day and township in which the fact was committed: though a mistake in these points was in general not held to be material provided the *time* was laid previous to the finding of the indictment, and the *place* were within the jurisdiction of the court; unless where the place was laid, not merely as a *venue*, but as part of the description of the fact. 'And it has consequently been expressly provided, that no indictment shall now be insufficient for omitting to state the *time* at which

[k] *Reg.* v. *Humphreys*, Car. & Mar. 601; *Reg.* v. *Newton*, 2 M. & Rob. 503.
[l] 14 & 15 Vict. c. 100.

the offence was committed, in any case in which time is not of the essence of the offence, nor for stating the time imperfectly or incorrectly. Nor is it any longer necessary to state any *venue* in the body of an indictment, but the county, city, or other jurisdiction named in the margin, is to be taken to be the venue of all the facts stated therein;[m] unless in cases where local description is required, and then it must be given in the body of the indictment itself.'

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 offence committed; and in case of murder, the time of the death must 'formerly have been' laid, 'and must still be shown to have been' within a year and a day after the mortal stroke was given.

The *offence* 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 offence, 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, "treasonably and against "his allegiance;" anciently, "*proditorie et contra ligeantiæ suæ "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 statute '4 Geo II. c. 26, directing all legal proceedings to be in English,' was expressed in Latin by the word "*murdravit.*" 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 offence. 'Finally, where the

[m] *Reg.* v. *O'Connor*, 5 Q. B. 16.

crime is one created by an act of parliament, the precise words of the statute should be used in describing the offence in the indictment;[n] for it must contain such a description of the offence, that the defendant may know what he is called upon to answer; that the jury may be warranted in their decision of "guilty" or "not "guilty," upon the premises delivered to them; and that the court may see such a definite offence, that they may apply the punishment which the law prescribes.'[o]

In indictments for murder, 'it was at one time held, that' the length and depth of the wound should in general be expressed,[p] in order that it might appear to the court to have been of a mortal nature; but if it went through the body, then its dimensions were immaterial, for that was apparently sufficient to have been the cause of the death. Also, where a limb, or the like, was absolutely cut off, there such description was impossible. 'It was also necessary to state with great minuteness the *manner* in which the death was caused; but the technical strictness required in doing so led in many instances[q] to a scandalous failure of justice; and ultimately gave rise to the enactments of the statute 14 & 15 Vict. c. 100, providing, among other things, that, in indictments for murder or manslaughter, it should be sufficient, as regards the former offence, to charge that the defendant did *feloniously, wilfully, and of his malice aforethought, kill and murder,* and, as regards the latter, that he did *feloniously kill and slay* the deceased.'

Lastly, in indictments, the *value* of the thing which is the subject or instrument of the offence, must 'formerly have been' expressed. Especially as in indictments for larcenies this was necessary, that it might appear whether it were *grand* or *petit* larceny; and whether entitled or not to the benefit of clergy; and in homicide of all sorts it was necessary, as the weapon with which the crime had been committed was forfeited to the crown as a deodand. 'Although the reason, in the one case, ceased with the removal of the distinction between *grand* and *petit* larceny, and in the other with the abolition of deodands, the practice of stating the value continues; but no indictment is insufficient for want of

[n] *Rex* v. *Jukes*, 8 T. R. 536.

[o] *Reg.* v. *Rowed*, 3 Q. B. 185.

[p] *Rex* v. *Kelly*, 1 Mood. C. C. 113; *Rex* v. *Hughes*, 5 C. & P. 126; *Reg* v. *Jones*, 4 Car. & Kir. 243.

[q] 5 Rep. 122; see *Reg.* v. *Morley*, 1 Mood. C. C. 97.

such a statement, in any case where it is not of the essence of the offence.'[r]

'So that now, provided the offence be set forth with the requisite clearness and certainty, no formal defect in the indictment need cause any defeat of justice; for large powers have been conferred on the judges to amend both *formal defects* and *variances* between the allegation and the proof of immaterial matters; the statute 14 & 15 Vict. c. 100, s. 25, providing with respect to the former that every objection to the indictment for any *formal defect* apparent on its face, shall be taken by demurrer or motion to quash it, before the jury are sworn, and not afterwards; the court being then authorized to cause the indictment to be amended, so that the trial may proceed as if no such defect had appeared.'

'With respect, again, to *variances* that arise during the trial between the proof and the allegation of immaterial facts, the same statute,—after reciting that a failure of justice often took place by reason thereof,—expressly enables the court, whenever any variance appears between the statement in the indictment and the evidence offered in proof of it, in the *name of any place* mentioned in the indictment—or in the *name* or *description of any person*, or body politic or corporate—or in the Christian name or surname, or other description of any person whomsoever—or in the *name* or *description of any matter or thing* named or described in the indictment—or in the *ownership of any property* named or described therein,—if it considers such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence, to order the indictment to be amended according to the proof, on such terms as to postponing the trial, to be had before the same or another jury or otherwise, as it shall think reasonable.'

III. The remaining method of prosecution is, without any previous finding by a jury, to fix the authoritative stamp of verisimilitude upon the accusation. Such, by the common law, was when a thief was taken *with the mainour*, that is, with the thing stolen upon him *in manu*. For he might, when so detected *flagrante delicto*, 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.[s] But this proceeding was taken away by several statutes in the reign of

[r] 14 & 15 Vict. c. 100, s. 24.

[s] Stiernh. de Jure Sueon. l. 3, c. 5.

Edward the Third; so that the only species of proceeding at the suit of the crown, without a previous indictment or presentment by a grand jury, now seems to be that of *information*.

Informations are of two sorts: first, those which are partly at the suit of the crown, and partly at that of a subject; and secondly, such as are only in the name of the sovereign. The *former* are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the crown, and another to the use of the informer; and are a sort of *qui tam* actions, only carried on by a criminal instead of a civil process, 'as was more fully' explained in the third volume of these commentaries.

The *latter*, or those informations that are exhibited in the name of the sovereign alone, in criminal cases, are also of two kinds: first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney-general; secondly, those in which, though the crown is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed in the 'Queen's Bench division' by the queen's coroner and attorney, usually called the master of the Crown-office, who is for this purpose the standing officer of the public.

The objects of the sovereign'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 offences 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: which power, thus 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, wherein provision is wisely made 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, 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 offence arises: after which, if the defendant be found guilty, the court must be resorted to for his punishment.

There can be no doubt but that this mode of prosecution by information, or suggestion, filed on record by the attorney-general, or by the master of the Crown-office, is as ancient as the common law itself.[t] For as the sovereign 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 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 'felonious'[u] offence 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.

As to those offences 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 the 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

[t] 1 Show. 118. [u] Com. Dig. *Information*, A. 1.

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, 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 vigour, 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 authority of the court of King's Bench, as the *custos morum* of the nation, being found necessary to reside somewhere for the peace and good government of the kingdom, was again revived in practice. 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.[v] It is true, Sir Matthew Hale, who presided in this court soon after the time of such revival, is said[w] 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.[x] 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,[y] 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.

In a few years afterwards, a more temperate remedy was

[v] Stat. 16 Car. I. c. 10, s. 6.
[w] 5 Mod. 460.
[x] 1 Saund. 301; 1 Sid. 174.
[y] M. 1 W. & M. 5 Mod. 459; Comb. 141; Farr. 361; 1 Show. 106.

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: 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 suit of the crown, filed by the attorney-general, are no way restrained thereby.

There is one species of informations, still farther regulated by statute 9 Anne, c. 20, viz., those in the nature of a writ of *quo warranto;* which was shown, in the preceding volume, 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 crown.

There 'was formerly' another, merely at the suit of the subject, called an *appeal*, which in the sense here used did not signify any complaint to a superior court of injustice done by an inferior one, which is the general use of the word; but 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 offence against the public.[z] As this method

[z] This private process for the punishment of public crimes had probably its origin in those times when a private pecuniary satisfaction, called a *weregild*, was constantly paid to the party injured, or his relations, to expiate enormous offences. This was a custom derived to us, in common with other northern nations, from our ancestors, the ancient Germans; among whom, according to

of prosecution, 'after having been for a long time previously' very little in use, 'was abolished in 1819,' indictment and infor-

Tacitus, "*luitur homicidium certo armen-*
"*torum ac pecorum numero; recipitque*
"*satisfactionem universa domus.*" 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;* Spencer's State of Ireland. And thus we find in our Saxon laws, particularly those of King Athelstan, 1 Thorpe, 229, the several weregilds for homicide established in progressive order, from the death of the ceorl or peasant, up to that of the king himself. And in the laws of King Henry I. c. 12, we have an account of what other offences were then redeemable by weregild, and what were not so. 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 offences 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 offence.

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, or in parliament, or for treasons committed beyond the seas in the court of the high constable and marshal. And so late as 1631 there was a trial by battel awarded in the Court of Chivalry on such an appeal of treason, *Lord Rea* v. *David Ramsey*, Rush. Coll., vol. ii. part 2, p. 112; but that in the first was *virtually* abolished by the statutes 5 Edw. III. c. 9, and 25 Edw. III. c. 24, and in the second *expressly* by stat. 1 Hen. IV. c. 14. So that the only appeals 'continuing' in force 'after these statutes' for things done within the realm, 'were' appeals of felony and mayhem.

An appeal of *felony* might have been brought for crimes committed either against the parties themselves or their relations. The crimes against the parties themselves were *larceny*, *rape*, and *arson*. And for these, as well as for mayhem, the persons robbed, ravished, maimed, or whose houses were burnt, might institute this private process. The only crime against one's relation for which an appeal could be brought was that of *killing* him, by either murder or manslaughter. But this could not 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 I., to the four nearest degrees of blood. It was given to the wife on account of the loss of her husband; therefore, if she married again, before or pending her appeal, it was lost and gone; or, if she married after judgment, she could not demand execution. The heir, as was said, must also have been 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 had three exceptions:—1. If the person killed left an innocent wife, she only, and not the heir, had the appeal; 2. If there were no wife, and the heir were accused of the murder, the person who next to him would have been heir male must have brought the appeal; 3. If the wife killed her husband, the heir might appeal her of the death. And, by the statute of Gloucester, 6 Edw. I. c. 9, all appeals of death must have been 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.

[These

mation remain the only methods of prosecution 'which can now be resorted to' for the punishment of offences, of which that by

These appeals might be brought previous to any indictment; and if the appellee were acquitted thereon, he could not be afterwards indicted for the same offence. In like manner as by the old Gothic constitution, if any offender gained a verdict in his favour, when prosecuted by the party injured, he was also understood to be acquitted of any crown prosecution for the same offence, Stiernh. l. 1, c. 5; 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 were acquitted on an indictment of murder, or found guilty, and pardoned by the king, still he ought not, in strictness, to go at large, but be imprisoned or let to bail till the year and day were passed, by virtue of the statute 3 Hen. VII. c. 1, in order to be forthcoming to answer any appeal for the same felony, not having as yet been punished for it, though if he had been found guilty of manslaughter on an indictment, and had had the benefit of clergy, and suffered the judgment of the law, he could not afterwards be appealed; for it is a maxim in law, that "*nemo bis punitur pro eodem "delicto.*" Before this statute was made, it was not usual to indict a man for homicide within the time limited for appeals, which produced very great inconvenience, of which more hereafter.

If the appellee were acquitted, the appellor, by virtue of the statute of Westm. 2, 13 Edw. I. c. 12, suffered one year's imprisonment and paid a fine to the king, besides restitution of damages to the party for the imprisonment and infamy which he had sustained; and if the appellor were incapable to make restitution, the abettors did it for him, and were also liable to imprisonment. This provision, as was foreseen by the author of Fleta, l. 1, c. 34, § 48, proved a great discouragement to appeals; so that henceforward they ceased to be in common use.

If the appellee were found guilty, he suffered 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 might pardon and remit the execution; on an appeal, which was at the suit of a private subject, to make an atonement for the private wrong, the king could no more pardon it than he could remit the damages recovered on an action of battery. 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, 1 Thorpe, 249. And the ancient usage was, so late as Henry IV.'s time, that all the relations of the slain should drag the appellee to the place of execution—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 might be remitted and discharged by the concurrence of all parties interested; and as the king by his pardon might frustrate an indictment, so the appellant by his release might discharge an appeal; "*nam quilibet potest renunciare juri, "pro se introducto.*"

'After having become entirely obsolete, an *appeal* of murder was brought in the year 1818, *Ashford* v. *Thornton*, 1 B. & Ald. 405. To add if possible to the astonishment of the public at this resuscitation of a mode of proceeding, which had not been resorted to for nearly two centuries, the appellee waged his battel; his right to do so in the circumstances being solemnly argued and determined in his favour. The appellor, however, proceeded no further;

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 information.

and the legislature immediately afterwards abolished this species of prosecution altogether, 59 Geo. III. c. 46.

CHAPTER XXIV.

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, or as soon as convenience permits, to be arraigned thereon. But if he has fled, or secretes himself, or has not 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 until he personally appears: according to the rules of equity in all cases, and the express provision of the statute 28 Edw. III. c. 3.

'Any court, then, before which an indictment is found may forthwith issue a *bench warrant* for arresting the party charged, and bringing him immediately before the court to answer to the indictment; but the more usual course of proceeding, where an indictment has been found previous to the defendant's arrest, is that provided by the statute 11 & 12 Vict. c. 42, s. 3, which directs the clerk of court, upon the application of the prosecutor, to grant a certificate of the indictment having been found; upon production of which to any justice of the peace for the place in which the offence is alleged to have been committed, or in which the defendant resides or is, or is supposed to reside or be, such justice is bound to issue his warrant for the apprehension of the defendant, that he may be brought before him or any other justice for the same place, to be dealt with according to law. When the defendant has been arrested, and is brought before any such justice, the latter, on proof of the identity of the person, must, without further inquiry or examination, commit him for trial or admit him to bail as in ordinary cases; but should

it so happen that the defendant is already in prison for some other offence, the justice, on proof of the identity of the person indicted with the prisoner, must then issue his warrant to the gaoler for the detention of the accused until he is removed for trial by writ of *habeas corpus*, which, when the defendant is in the custody of another court, is the proper course to be adopted.'

'If the accused is known to have fled, so that he cannot be arrested under a warrant, and the prosecutor desires to proceed to outlawry, he must resort to the ancient and regular process of the court. This,' on an indictment for any petit misdemeanor, or on a penal statute, 'was formerly in all cases' a writ of *venire facias*, in the nature of a summons to cause the party to appear. And if by the return to such *venire* it appeared that the party had lands in the county whereby he might be distrained, then a *distress infinite* was issued from time to time till he appeared. But if the sheriff returned that he had no lands in his bailiwick, then, upon his non-appearance, a writ of *capias* issued, which commanded the sheriff to take his body, and have him at the next assizes; if he could not be taken upon the first *capias*, a second and a third issued, called an *alias* and a *pluries capias*.

On indictments for treason or felony, a *capias*, 'when a warrant is not obtained,' is the first process: and, for treason or homicide, only one shall be allowed to issue. Two are allowed in the case of other felonies, by statute 25 Edw. III. c. 14, though the usage continues to issue one only in any felony; the provisions of this statute being in most cases found impracticable. And so, in the case of misdemeanors, it became 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, 'until the stat. 48 Geo. III. c. 58, enabled any one of the judges in such cases, on production of an affidavit or certificate of an indictment having been found, or an information filed, at once to issue his warrant for apprehending the defendant and holding him to bail.'

If the 'defendant, as I have said,' 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 of *venire*

facias, distringas, and *capias* 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,* 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,* and *proclamation,* we spoke in the preceding volume, viz. forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction of the offence charged in the indictment, as much as if the offender had been found guilty by his country. His life is, however, still under the protection of the law, as has formerly been observed; so that though anciently an outlawed felon was said to have *caput lupinum,* and might be knocked on the head like a wolf by any one that should meet him; 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, unless it happens in the endeavour to apprehend him. For any person may arrest an outlaw on a criminal prosecution, either of his own head, or by writ or warrant of *capias utlagatum,* 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:[a] 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* are usually had, though they may be had at any time before trial, 'unless taken away by the express words of

[a] 'In *Tynte* v. *Reginam,* 7 Q. B. 216, a judgment of outlawry, pronounced in 1729, was reversed after the lapse of 116 years.'

a statute,' to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal jurisdiction into the Queen's Bench 'division;' which 'represents the High Court of Justice' as 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 indictments or 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; or before the justices of *nisi prius*, 'or at the Central Criminal Court:' or, 3. It is so removed, in order to plead the royal pardon there: or, 4. To issue process of outlawry against the offender in those counties or places where the process of the inferior courts will not reach him. Such writ of *certiorari*, 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 'above' 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: 'and although formerly the application by the prosecutor was granted as' a matter of right, 'it is now in all cases, except when the application is at the instance of the attorney-general, in the discretion of the court to grant or withhold the writ;'[b] and therefore it is seldom granted to remove indictments from the justices of gaol delivery, or after issue joined or confession of the fact in any of the courts below.[c] 'Where, however, the defendant is allowed to remove an indictment, he must enter into a recognizance before a justice, conditioned as required by the statutes 5 & 6 W. & M. c. 11, and 8 & 9 Will. III. c. 33; and whether removed at the instance of a prosecutor or of a defendant, the party removing must enter into a recognizance to pay the costs subsequent to the removal in the case of acquittal or conviction, as the case may be.'[d]

At this stage of prosecution also it is that indictments found by the grand jury against a peer must, in consequence of a writ

[b] 5 & 6 Will. IV. c. 33; 16 Vict. c. 30.
[c] 2 Hawk. P. C. 287; *Rex v. Gwynne et al.*, 2 Burr. 749.
[d] 16 Vict. c. 30. s. 5.

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.

CHAPTER XXV.

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. The prisoner is to be called to the bar by his name; and it is laid down in our ancient books, 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.[a]

When he is brought to the bar, he may be 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 personâ*, and he owns himself to be of that name by which he is called. 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.[b]

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

[a] But yet, in Layer'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; State Trials, vi. 230. And it has since been held that the court has no authority to order the irons to be taken off till the prisoner has pleaded, and the jury are charged to try him; *Waite's* case, Leach, 34.

[b] Raym. 408.

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 attainted, unless he chose it; for he might waive the benefit of the law: and therefore principal and accessory might, and may still, be arraigned and plead, and also be tried together. But otherwise, 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* whether any felony had been committed or no, till the principal was attainted; 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 at common law the accessory could not be tried so long as the principal remained liable to be hereafter. 'But the law in this respect has been completely altered by modern legislation; and though an accessory may still be indicted *as an accessory*, it is more usual to indict him for a substantive offence.'

'The first alteration in the law was made by' statute 1 Anne, c. 9, by which if the principal were once convicted, and before attainder, that is, before he received judgment of death or outlawry, he were delivered by pardon, the benefit of clergy, or otherwise; or if the principal stood mute, or challenged 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 could be had of the principal, the accessory might be proceeded against, as if the principal felon had been attainted; there being no danger of future contradiction.

'The provisions of this act were extended by the statute 7 Geo. IV. c. 64, whereby it was made lawful, if the principal offender were *convicted*, to proceed against the accessory, in the same manner as if the principal had been attainted, notwithstanding the principal should die, or be pardoned, or otherwise delivered before attainder. And power was given to indict and convict accessories *before* the fact, either as theretofore, namely,

together with or after the conviction of the principal, or for a substantive felony, whether the principal felon should or should not have been previously convicted, or should or should not be amenable to justice.'

'Next, by the statute 11 & 12 Vict. c. 46, an accessory *before* the fact might be indicted, tried, convicted, and punished in all respects as if he were a principal; while an accessory *after* the fact, who previously, except in the case of receivers of stolen goods, could be tried only along with the principal, or after he had been convicted, might be indicted and convicted, and punished as *for a substantive felony*, whether the principal felon had or had not been previously convicted, or was or was not amenable to justice.'

'These several enactments have been preserved in the statute 24 & 25 Vict. c. 94, consolidating the law on this subject; but now as ever,' upon the trial of the accessory, as well after as before the conviction of the principal, he 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, then, a criminal is arraigned, he either *stands mute*, or *confesses* the fact; which circumstances we may call *incidents* to to the arraignment; or else he *pleads* to the indictment, which is to be considered as the next stage of the proceedings. Let us observe these incidents to the arraignment, of standing mute, or confession.

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, 8. Upon having pleaded not guilty, refuses to put himself upon the country.

If he says nothing, the court ought *ex officio* to impanel a jury to inquire whether he stands obstinately mute, or whether he be dumb *ex visitatione Dei*. 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.[c] Whether

[c] 'If there be any reason to suppose that he is unable by reason of insanity to understand the charge against him, a jury is immediately to be charged to

judgment of death could be given against such a prisoner who never pleaded, and could say nothing in arrest of judgment, was never determined.

'Formerly,' if he were found to be obstinately mute, which a prisoner has been held to be that had cut out his own tongue, then, if it were on an indictment of high treason, standing mute was equivalent to a conviction, and he received the same judgment and execution. 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 was always equivalent to conviction. But upon appeals or indictments for other felonies, or petit treason, the prisoner was not, by the ancient law, looked upon as convicted, so as to receive judgment for the felony; but should, for his obstinacy, receive the terrible sentence of *penance*, or *peine forte et dure*.

Before this was pronounced, the prisoner had not only *trina admonitio*, but also a respite of a few hours, and the sentence was distinctly read to him, that he might know his danger; and, after all, if he continued obstinate, and his offence was clergyable, he had the benefit of his clergy allowed him, even though he was too stubborn to pray it. Thus tender was the law of inflicting this dreadful punishment; but if no other means could prevail, and the prisoner, when charged with a capital felony, continued stubbornly mute, the judgment was then given against him without any distinction of sex or degree. A judgment, which was purposely ordained to be exquisitely severe, that by that very means it might rarely be put in execution.[d]

inquire whether he be sane or not; *Rex* v. *Dyson*, 7 C. & P. 303, 305, n., and *Reg.* v. *Thomson*, 2 Lewin, C. C. 137. For the law will not allow a prisoner to plead at all, unless he fully comprehends the proceedings. Should the jury find the accused insane, he cannot be tried upon the indictment, but must be ordered by the court to be detained in custody during the pleasure of the crown; 39 & 40 Geo. III. c. 94.'

[d] Aulus Gellius, with more truth, has made the same observation upon the cruel law of the Twelve Tables: *De inope debitore secando*, "*Eo consilio tanta immanitas pœnæ denunciata est, ne ad eam unquam perveniretur;*" for he adds, "*dissectum esse antiquitus neminem equidem neque legi neque audivi,*" lib. 20, c. 1. But with respect to the horrid judgment of the *peine forte et dure*, the prosecutor and the court could exercise no discretion, and show no favour to a prisoner who stood obstinately mute. And in the legal history of this country there are numerous instances of persons who have had resolution and patience to undergo so perilous a death in order to benefit their heirs by preventing a forfeiture of their estates, which would

The rack, or question, to exort a confession from criminals, is a practice of a different nature; *this* having been 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; where it was occasionally used as an engine of state, not of law, more than once in the reign of Queen Elizabeth. 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 honour and the honour of the English law, that no such proceeding was allowable by the laws of England.[e] 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 nations: 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,[f] in order most effectually to expose this inhuman species of

have been the consequence of a conviction by a verdict. There is a memorable story of an ancestor of an ancient family in the north of England. In a fit of jealousy he killed his wife, and put to death his children who were at home, by throwing them from the battlements of his castle; and proceeding with an intent to destroy his only remaining child, an infant nursed at a farmhouse at some distance, he was intercepted by a storm of thunder and lightning. This awakened in his breast the compunctions of conscience. He desisted from his purpose, and, having surrendered himself to justice, in order to secure his estates to this child, he had the resolution to die under the dreadful judgment of *peine forte et dure*.—[CHRISTIAN.]

[e] Rushw. Coll. i. 638.

[f] The Marquess 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."

mercy, the uncertainty of which, as a test and criterion of truth, was long ago very elegantly pointed out by Cicero: 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 quæsitor, "flectit libido, corrumpit spes, infirmat metus, ut in tot rerum angus-"tiis nihil veritati loci relinquatur.*" [g]

The English judgment of penance for standing mute was as follows: that the prisoner be remanded to the prison from whence he came, 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 could bear, and more; that he have no sustenance, save only, on the first day, three morsels of the worst bread; and, on the second day, three draughts of standing water, that should be nearest to the prison-door; and in this situation this should be alternately his daily diet *till he died*, or, as anciently the judgment ran, *till he answered.*

It has been doubted whether this punishment subsisted at the common law, or was introduced in consequence of the statute Westm. 1, 3 Edw. I. c. 12, 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 Henry III.[h] 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.[i] 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 prisone 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 strait 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

[g] Pro Sulla. 28.

[h] Emlyn, on 2 Hal. P. C. 322.

[i] *Al common ley, avant le statute de West.* 1, c. 12, *si ascun ust estre appeal, et ust estre mute, ill serra convict de felony.* M. 8 Hen. IV. c. 2.

punishment on persons adjudged to penance, so as to shorten their lives, is reckoned by Horne in the Mirror as a species of criminal homicide. It also clearly appears, by a record of 31 Edw. III.,[j] 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 was usually called, *pressing him to death*, was gradually introduced between 31 Edw. III. and 8 Hen. IV., at which last period it first appears upon our books;[k] being 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[l] 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 origin, the doubts that were conceived of its legality, and the repugnance of its theory, for it rarely was carried into practice, to the humanity of the laws of England, all concurred 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 had been removed, the judgment of *peine forte et dure* might perhaps have still innocently remained, as a monument of the savage rapacity with which the lordly tyrants of feudal antiquity hunted after escheats and forfeitures; since no one would ever have been tempted to undergo such a horrid alternative. For the law was, that by standing mute, and suffering this heavy penance, the judgment, and of course the corruption of the blood and escheat of the *lands*, were 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 in high treason, as standing mute was equivalent to a conviction, the same judgment, the same corruption of blood, and the same forfeitures always attended it, as in other cases of conviction.

It was enacted by statute 12 Geo. III. c. 20, that every person who, being arraigned for felony or piracy, should stand mute or

[j] 6 Rym. 13. [k] Year-b. 8 Hen. IV. 1.

[l] *Et fuit dit, que le contraire avait estre fait devant ces heures*; Ibid. 2.

not answer directly to the offence, should be convicted of the same; and the same judgment and execution, with all their consequences in every respect, should be thereupon awarded, as if the person had been convicted by verdict or confession of the crime. 'The adoption of a more humane and equitable rule was reserved for a subsequent generation; for now, by the statute 7 & 8 Geo. IV. c. 28, if any person being arraigned upon, or charged with, any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, the court, if it thinks fit, may order the proper officer to enter a plea of "not guilty;" and the plea so entered has the same force and effect as if the accused had actually pleaded it. This is the course, it may be added, invariably adopted.' And thus much for the demeanor of a prisoner upon his arraignment, by standing mute; which now, 'practically,' in all cases amounts to a 'plea of not guilty.'

II. The other incident to arraignment, exclusive of the plea, is the prisoner's actual *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, 'especially in capital felonies,' out of tenderness to the life of the subject, and will generally advise the prisoner to retract it, and plead to the indictment.

There 'was formerly' another species of confession, which we read much of in our ancient books, of a far more complicated kind, which was called *approvement*. And that was, when a person, indicted of treason or felony, and arraigned for the same, confessed the fact before plea pleaded; and appealed or accused others, his accomplices, of the same crime, in order to obtain his pardon. In this case he was called an *approver* or prover, *probator*, and the party appealed or accused was called the *appellee*. Such approvement could only be in capital offences; and it was, as it were, equivalent to an indictment, since the appellee was equally called upon to answer it; and if he had no reasonable and legal exceptions to make to the person of the approver, which indeed were very numerous, he must have put himself upon his trial, either by battel or by the country; and if vanquished or found guilty, must have suffered the judgment of the law, and the approver had his pardon *ex debito justitiæ*. On the other hand, if the appellee were

conqueror, or acquitted by the jury, the approver received judgment to be hanged, upon his own confession of the indictment; for the condition of his pardon had failed, viz., the convicting of some other person, and therefore his conviction remained absolute.

But it was purely in the discretion of the court to permit the approver thus to appeal, or not: and, in fact, this course of admitting approvements 'had been entirely' disused 'long before the final abolition of wager of battle;' for the truth was, as Sir Matthew Hale observes, that more mischief had 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: though, since their discontinuance, the doctrine of approvements has become a matter of more curiosity than use. I shall only observe, that all the good, whatever it be, that could be expected from approvement, was thought to be fully provided for, in the cases of coining, robbery, burglary, housebreaking, horse-stealing, and larceny to the value of five shillings from shops, warehouses, stables, and coach-houses, by the statutes 4 & 5 Will. & M. c. 8; 6 & 7 Will. III. c. 17; 10 & 11 Will. III. c. 23; and 5 Anne, c. 31, which enacted, that if any such offender, being out of prison, should discover two or more persons, who had committed the like offences, so as they might be convicted thereof; he should, in case of burglary or housebreaking, receive a reward of 40*l.*, and in general be entitled to a pardon of all capital offences, excepting only murder and treason; and of them also in the case of coining. And if any such person, having feloniously stolen any lead, iron, or other metals, discovered and convicted two offenders of having illegally bought or received the same, he was by virtue of the statute 29 Geo. II. c. 30, pardoned for all *such* felonies committed before such discovery. 'But all these statutes were repealed in the reign of George IV., the reward having been found in practice to be a temptation to unprincipled persons to make false charges.'

It has, however, long been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness, or, as it is generally termed, *king's evidence*, against his fellows; upon an implied confidence, which the judges of gaol delivery have usually

countenanced and adopted, that if such accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards give his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offence of the same degree.

CHAPTER XXVI.

OF PLEA AND ISSUE.

We are now to consider the plea of a 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.[a]

I. A plea to the *jurisdiction* is where an indictment is taken before a court that has no cognizance of the offence; as if a

[a] 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 formerly paid to consecrated ground. 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 churchyard, and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence; 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 if, during this forty days' privilege of sanctuary, or in his road to the seaside, 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. But by this abjuration his blood was attainted, and he forfeited all his goods and chattels. 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 by the statute 21 Jac. I. c. 28, all privilege of sanctuary, and abjuration consequent thereupon, was 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. But, as the prisoner upon a trial has a chance to be acquitted, and totally discharged; and, if convicted of a clergyable felony, was entitled equally to his clergy after as before conviction; this course was extremely disadvantageous; and therefore the benefit of clergy was very rarely pleaded; but, if found requisite, was prayed by the convict before judgment was passed upon him.

man be indicted for a rape 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. 'This is a plea which is rarely resorted to, however. For if the offence was committed out of the jurisdiction of the court the defendant may take advantage of this under the general issue;[b] or if the objection appear on the record, he may demur, move in arrest of judgment, or bring a writ of error.[c] If the offence was committed within its jurisdiction, but the court has not cognizance of it, the defendant may either demur,[d] or the Queen's Bench division, upon the indictment being removed by *certiorari*, will quash it.'[e]

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, for instance, 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 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. If, on demurrer, the point of law be adjudged *against* the prisoner, he 'shall on an indictment for felony' have judgment and execution, as if convicted by verdict;[f] the judgment for the crown 'being' final. In indictments for misdemeanors the judgment on demurrer is the same as in civil cases,[g] and the court has the same power of permitting the defendant to plead over after judgment against him.'[h]

III. A plea in *abatement* is principally for a *misnomer*, a wrong

[b] *Rex* v. *Johnston*, 6 East, 583.
[c] *Rex* v. *Hewitt*, R. & R. 58.
[d] *Rex* v. *Fearnley*, 1 T. R. 316.
[e] *Rex* v. *Bainton*, 2 Str. 1088.
[f] *Reg.* v. *Faderman*, 1 Den. C. C. 569.
[g] *R.* v. *Taylor*, 3 B. & C. 502.
[h] *Reg.* v. *Birmingham and Gloucester Railway Company*, 3 Q. B. 224. Demurrers were seldom used, 'because' the same advantages might be taken upon a plea of not guilty; or afterwards, in arrest of judgment, when the verdict had established the fact. 'But the statute 7 Geo. IV. c. 64, s. 20, having enacted that judgment should not be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of various formal phrases which had previously been essential, objections by *demurrer* on account of such omissions became of more frequent occurrence. And so remained until the statute 14 & 15 Vict. c. 100, removed many of these grounds of objection, and conferred powers on the courts to amend others, so that demurrers to an indictment have again fallen into disuse.'

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 formerly,' if either fact was found by a jury, then the indictment abated, as writs or declarations formerly did in civil actions. But, in the end, there was little advantage accruing to the prisoner by means of these dilatory pleas; because, if the exception were allowed, a new bill of indictment might be framed, according to what the prisoner in his plea averred 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. 'And such pleas are now in practice unknown; for by the statute 7 Geo. IV. c. 64, s. 15, the court, if satisfied by affidavit or otherwise of the truth of a plea of *misnomer*, may forthwith amend the indictment or information, and call upon the defendant to plead as if no such dilatory plea had been pleaded. And by the statute 14 & 15 Vict. c. 100, s. 24, no *addition* is necessary, and therefore a wrong addition is mere surplusage.'

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.

1. First, the plea of *auterfois 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 more than once for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence,[i] he may plead such acquittal in bar of any subsequent accusation for the same crime.[j]

2. Secondly, the plea of *auterfois convict*, or a former conviction for the same identical crime, though no judgment was ever given, is a good plea in bar to an indictment. And this depends upon

[i] *Reg.* v. *Drury*, 3 Car. & Kir. 193.

[j] *Rex* v. *Clark*, 1 Brod. & B. 473; *Reg.* v. *Bird*, 2 Den. C. C. 94.

the same principle as the former, that no man ought to be twice brought in danger for one and the same crime. Hereupon it has been held, that a conviction of manslaughter, on an appeal or an indictment, 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 offences differ in colouring and in degree.

It is to be observed, that 'if, by reason of some defect in the record, either in the indictment, the place of trial, the process, or the like, the defendant was not lawfully liable to suffer judgment upon the offences charged against him, he has not been *in jeopardy* in the sense which entitles him to plead the former acquittal or conviction in bar of a subsequent indictment.[k] And it is also to be observed that' the pleas of *auterfois acquit* and *auterfois convict*, or a former acquittal and former conviction, must be upon a prosecution for the same identical act and crime, 'or for such a charge as that, by statute or otherwise, the defendant might have been convicted upon it of the identical act and crime subsequently charged against him.' But the case was otherwise, in

3. Thirdly, the plea of *auterfois attaint*, or a former attainder; which is a good plea in bar for the same felony.

'Formerly this was a good plea in bar,' whether for the same or any other felony; for wherever a man was attainted of felony, by judgment of death either upon a verdict or confession, by outlawry, or by abjuration, and whether upon an appeal or an indictment, he might plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felony.[l] And this because, generally, such proceeding on a second prosecution could not be to any purpose; for the prisoner was dead in law by the first attainder, his blood was already corrupted, and he had forfeited all that he had; so that it was absurd and superfluous to endeavour to attaint him a second time.[m]

[k] *Reg.* v. *Drury*, 3 Car. & Kir. 123.

[l] 2 Hawk. P. C. 375.

[m] To this general rule, however, as to all others, there were some exceptions; wherein, *cessante ratione, cessat et ipsa lex*. As, 1. Where the former attainder had been reversed for error, or the attainder reversed by parliament, or the judgment vacated by the royal pardon. 2. Where the attainder was upon indictment, such attainder was no bar to an appeal. 3. An attainder in felony was no bar to an indictment of treason; the judgment and manner of death being different, the forfeiture more extensive, and the land gone to different persons. 4. Where a person attainted of one felony was afterwards indicted as principal in another, to which there were also accessories, here the plea of *auterfois*

'But this plea is now in effect the same as *auterfois convict*, the statute 7 & 8 Geo. IV. c. 28, s. 4, having enacted, that no plea setting forth any attainder shall be pleaded in bar, unless the attainder be for the same offence as that charged in the indictment.'

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.[n] But as the title of pardons is applicable to other stages of prosecutions; and they have their respective force and efficacy, as well after as before conviction; I shall 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, 'I would' observe, that though in civil actions when a man has his election what plea in bar to make, he is, 'in general,' concluded by that plea, and cannot resort to another if that be determined against him; yet, in criminal prosecutions 'for felony,'[o] when a prisoner's plea in bar is found against him, still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty.[p] For the law allows many pleas, by which a prisoner may escape 'the punishment of felony;' 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*. In case of an

attaint was no bar, but the prisoner was compelled to take his trial, for the sake of public justice; because the accessories could not be convicted till after the conviction of the principal; Poph. 107. So that the plea of *auterfois attaint* was never good, except when a second trial would have been quite superfluous; Staundf. P. C. 107.

[n] There was one advantage attending pleading a pardon in bar, or an arrest of judgment, *before* sentence was past, which gave it by much the preference to pleading it *after* sentence or attainder. This was that by stopping the judgment it stopped the attainder, and prevented the corruption of the blood; which when once corrupted by attainder, could not afterwards be restored, otherwise than by act of parliament.

[o] 'Sir William Blackstone here uses the words *in favorem vitæ;* but these words are no longer applicable. When the learned commentator wrote, all felonies were *capital*, but most of them *clergyable; Rex* v. *Gibson*, 8 East, 110.'

[p] 2 Hal. P. C. 239. 'This privilege is not allowed in indictments or informations for misdemeanors; *Rex* v. *Taylor*, 8 B. & C. 502.'

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 defence 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 ligeantiæ suæ debitum*, 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.

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, is supposed to reply that the prisoner is guilty, and that he is ready to prove him so. This used to be done by two monosyllables in the same spirit of abbreviation, "*cul. prît.*," which signified first that the prisoner was guilty, *cul. culpable*, or *culpabilis*, and then that the crown was ready to prove him so; *prît præsto sum*, or *paratus verificare.* This is therefore a replication on behalf of the sovereign *vivâ voce* at the bar; which was formerly the course in all pleadings, as well in civil as in criminal causes.[q] By this replication the crown and the prisoner are therefore at issue; for 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 'as' the formal conclusion of all affirmative pleadings, as this of *cul.* or *guilty* is, was

[q] 'This was anciently' 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, &c., either in form or matter, were sufficiently good in law; and if 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 year-books and other ancient repositories of law; North's Life of Lord Guildford, 98.

'formerly' by an averment in these words, "and this he is *ready* "to verify; *et hoc paratus est verificare;*" the same thing is here expressed by the single word "*prît.*"

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. prît.:*" which afterwards the ignorance of succeeding clerks adopted for the very words to be by them spoken.

But however it may have arisen, the joining of issue, which, though usually entered on the record, is not otherwise joined in any part of the proceedings, seems to be clearly the meaning of this obscure expression; 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 used to be inquired of the prisoner, by what trial he would make his innocence appear. This form latterly had reference to appeals and approvements only, wherein the appellee had his choice either to try the accusation by battel or by jury. After the abolition of ordeal, there could be no other trial but by jury, *per pais,* or by the country: and therefore, if the prisoner refused to put himself upon the inquest in the usual form, that is, to answer that he would be tried by God and the country,[r] if a commoner; and, if a peer, by God and his peers;[s] the indictment, if in treason, was taken *pro confesso;* and the prisoner, in cases of felony, was adjudged to stand mute, and if he persevered in his obstinacy, 'might, after the statute 12 Geo. III. c. 20,' be convicted of the felony. 'But, as we have already seen, a plea of "*not guilty*" may

[r] 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.* 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.

[s] Kelynge, 57; State Trials, *passim.* 'By 4 & 5 Vict. c. 22, peers must plead as any other person.'

now be entered upon the record; and by that plea the defendant shall, without further form, be deemed to have put himself upon the country for trial;[t] so that the clerk need no longer 'answer 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."

They next proceed, as soon as conveniently may be, to the trial, the manner of which will be considered at large in the next chapter.

[t] 7 Geo. IV. c. 28, s. 1.

CHAPTER XXVII.

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, through 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.[a] 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.

The most ancient[b] species of trial was that by *ordeal:* which was peculiarly distinguished by the appellation of *judicium Dei;* and sometimes *vulgaris purgatio,* to distinguish it from the canonical purgation, which was by the oath of the party. This was of two sorts, either *fire*-ordeal, or *water*-ordeal; the former being confined to persons of higher rank, the latter to the common people.[c] 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.[d] 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 red-hot ploughshares, 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,

[a] De Mor. Germ. 10.

[b] LL. Athel. 4, 5; 1 Thorpe, 203.

[c] *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.* Glanv. l. 14, c. 1.

[d] This is still expressed in that common form of speech, "of going through fire and water to serve another."

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.[e]

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 practised 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 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, 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 tells us, was then a very usual purgation. And Grotius[f] 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.[g]

One cannot but be astonished at the folly and impiety of

[e] Rudborne, Hist. Winton, l. 4, c. 1. [f] On Numb. v. 17.
[g] Mod. Univ. Hist. vii. 266.

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, aquæ, et ignis.* 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[h] gives the reason; "*non defuit illis operæ et "laboris pretium; semper enim ab ejusmodi judicio aliquid lucri "sacerdotibus obveniebat.*" 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 "præceptum Domini, non tentabis Dominum Deum tuum.*"[i] 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,[j] to disuse and abolish this trial entirely in our courts of justice, by an act of parliament in 3 Hen. III.[k]

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; as the water of jealousy among the Jews was, by God's special 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;[l] if indeed the corsned was not, as some have suspected, the sacramental bread itself; till 'a better appreciation of the rite' preserved it from profane uses with a more profound respect than formerly. Our historians assure us, that Godwin, Earl of Kent, in the reign of King Edward the Confessor, abjuring the death of

[h] De Jure Sueonum, l. 1, c. 8.

[i] Decret. part 2, caus. 2, qu. 5, dist. 7; Decretal. lib. 3, tit. 50, c. 9.

[j] Mod. Univ. Hist. xxxii. 105.

[k] See 9 Rep. 32; and also 1 Rym. Fœd. 228.

[l] 'If a friendless servant of the altar be charged with an accusation, who has no support to his oath, let him go to the corsned, and then thereat fare as God will, unless he may clear himself on the housel.' LL. Canut. c. 6; 1 Thorpe, 363.

the king's brother, at last appealed to his corsned, "*per buccellam "deglutiendam abjuravit,*" 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.[m]

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 subsisted a trial by the corsned, very similar to that of our ancestors, only substituting raw rice instead of bread.[n] And, in the kingdom of Monomotapa, 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 undetermined.[o]

These two antiquated methods of trial were principally in use among our Saxon ancestors. The next owed its introduction among us to the princes of the Norman line. And that is,—

The trial by *battel*, 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 mentioned in the preceding volume: to which I have only to add, that the trial by battel might be demanded at the election of the appellee, in either an appeal or an approvement, and that it was 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

[m] As, "I will take the sacrament upon it," "May this morsel be my last."

[n] Mod. Univ. History, vii. 129.

[o] Mod. Univ. Hist. xv. 464. In Ashantee, a public court is held every Friday for the trial of offenders. If the testimony is deemed insufficient, the accuser takes an oath that his evidence is true. If the accused persists in his innocence, he is forced to chew a piece of odum wood and afterwards to drink a pitcher of water. If he is sick in consequence, he is deemed innocent, and the accuser is put to death. If, on the contrary, no ill effects ensue, the accused is considered guilty, and suffers capital punishment.—Four Years in Ashantee, London, 1875.

they must have fought in their proper persons. And therefore if the appellant or approver were a woman, a priest, an infant, or of the age of sixty, or lame or blind, he or she might counterplead and refuse the wager of battel, and compel the appellee to put himself upon the country. Also peers of the realm, bringing an appeal, could not be challenged to wage battel, 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 were notorious, as if the thief were taken with the *mainour*, or the murderer in the room with a bloody knife, the appellant might refuse the tender of battel from the appellee; for it was unreasonable that an innocent man should stake his life against one who was already half-convicted.[p]

[p] The form and manner of waging battel upon appeals were much the same as upon a writ of right; only the oaths of the two combatants were vastly more striking and solemn. The appellee, when appealed of felony, pleaded *not guilty*, and threw down his glove, and declared he would defend the same by his body; the appellant took up the glove, and replied that he was 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, swore to this effect: "*Hoc audi, homo, quem per manum* "*teneo*, &c." "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 replied, 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 "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." The battel was then to be fought with the same weapon, viz., batons, the same solemnity, and the same oath against amulets and sorcery, that were used in the civil combat; and if the appellee were so far vanquished, that he could not or would not fight any longer, he was adjudged to be hanged immediately; and then, as well as if he were killed in battel, Providence was deemed to have determined in favour of the truth, and his blood was attainted. But if he killed the appellant, or could maintain the fight from sunrising till the stars appeared in the evening, he was acquitted. So also if the appellant became recreant, and pronounced the horrible word of *craven*, he lost his *liberam legem*, and became infamous; and the appellee recovered his damages, and also was for ever quit, not only of the appeal, but of all indictments likewise for the same offence. The last time, 'previously to 1818,' that the trial by battel was awarded in this country was in the case of Lord Rae and Mr. Ramsay, in the 7 Car. I. The king, by his commission, appointed a constable of England to preside at the trial, who proclaimed a day for the duel, on which the combatants were to appear with a spear, a long sword, a short sword, and

'Trial by battel having been abolished by the stat. 59 Geo. III. c. 46, there remain, therefore, only two modes of trying persons accused of crimes.'

'The first of these methods' of trial 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 *indicted* 'for treason, misprison of treason, or felony;'[q] for in 'all other criminal prosecutions' a peer shall be tried by jury.[r] Of this enough has been said in a former chapter; 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 no special verdict can be given in the trial of a peer; because the lords of parliament, or the lord high steward, if the trial be had in his court, are judges sufficiently competent of the law that may arise from the fact; and except also 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.[s]

The 'other, or 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: "*nullus liber homo capiatur, vel imprisonetur, aut exulet, "aut aliquo alio modo destruatur, nisi per legale judicium parium "suorum, vel per legem terræ.*"

The antiquity and excellence of this trial for the settling of civil property has already been explained at large. 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 sovereign 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 twofold 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,

a dagger; but the combat was prorogued to a further day, before which the king revoked the commission; 11 Harg. St. Tr. 124. In 1818 the defendant waged his battel in the case of *Ashford* v. *Thornton*, 1 B. & Ald. 405. The statute mentioned in the text was passed in 1819.

[q] 3 Inst. 30.

[r] 9 Rep. 30; 2 Inst. 49.

[s] Kelynge, 56; stat. 7 Will. III. c. 3, § 11; Foster, 247.

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 imprison, despatch, 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 law have, with excellent forecast, contrived that no man should be called to answer to the crown for any serious 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 or information, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion. So that the liberties of England cannot but subsist so long as this *palladium* 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 other tribunals similarly constituted. 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 opposed 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,[t] in *civil* cases, will greatly shorten our present remarks with regard to the trial of *criminal* suits, indictments, and informations: 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

[t] 'Thus the prosecution may sum up the evidence if the prisoner calls witnesses; and the prisoner may comment on the evidence before the reply for the prosecution; 28 & 29 Vict. c. 18.'

of jurors, *liberos et legales homines, de vicineto;* that is, 'jurors possessed of the requisite qualification,' without just exception, and of the *visne* or neighbourhood; which is 'the body' of the county where the fact was committed.[w] If the proceedings are before the Queen's Bench 'division,' there is time allowed, between the arraignment and the trial, for a jury to be impanelled, as in civil causes; and the trial in case of a misdemeanor is had at *nisi prius,* unless it be of such consequence as to merit a trial at bar. But before commissioners of *oyer* and *terminer* and gaol delivery, the sheriff, by virtue of a general precept directed to him beforehand, returns to the court a panel of 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.

'Formerly' it was not customary, unless by consent of parties, or where the defendant was actually in gaol, to try persons indicted of smaller misdemeanors at the same court in which they had pleaded *not guilty,* or *traversed* the indictment. But they usually gave security to the court, to appear at the next assizes or sessions, and then and there to try the traverse, giving notice to the prosecutor of the same. 'Now, however, by the statute 14 & 15 Vict. c. 100, no person prosecuted is entitled to traverse or postpone the trial of any indictment; but the court, upon the defendant's application, may adjourn the trial to the next subsequent session, upon such terms as to bail or otherwise as seems meet. Independently of this provision, the court has authority in felonies as well as misdemeanors, to postpone the trial to a subsequent day or to a subsequent assizes or sessions, at its discretion.'

In cases of high treason it is enacted by statute 7 Will. III. c. 3, first, that no person shall be tried for any such treason, except an attempt to assassinate the sovereign, unless the indictment be found within three years after the offence committed: next, that the prisoner shall have a copy of the indictment, which includes the caption, 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; 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,

[w] '6 Geo. IV. c. 50; 25 & 26 Vict. c. 107; 33 & 34 Vict. c. 77; 34 Vict. c. 2.'

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 Anne, c. 21, 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 impanelled, 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 defence.[v] But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, was repealed by the statute 6 Geo. III. c. 53,[w] else it had been impossible to have tried those offences in the same circuit in which they are indicted; for ten clear days, between the finding and the trial of the indictment, exceeds the time usually allotted for any session of *oyer* and *terminer;* ' and so far as it relates to furnishing the defendant with a list of the jury, further repealed by the statute 6 Geo. IV. c. 50, s. 21 ; which now requires that any person indicted for high treason, or misprision of treason, in any court *other than the Queen's Bench*, shall be furnished with a list of the petit jury, at the same time that the copy of the indictment is delivered to him, which must be ten days before the arraignment, and in the presence of two or more credible witnesses. Any person indicted for high treason or misprision of treason *in the Queen's Bench* must also be furnished with a copy of the indictment within the same time, and in the same manner; but the list of the petit jury may be delivered to him at any time after the arraignment, so as it be delivered ten days before the day of trial.'

' The statute 39 & 40 Geo. III. c. 93, as extended by 5 & 6 Vict. c. 51, however, enacts that in all cases of high treason, in compassing and imagining the death of the sovereign, or in compassing or imagining any bodily harm tending to the death or destruction, maiming or wounding of the sovereign, and in all cases of misprision of any such treason, where the overt act of such treason is alleged in the indictment to be the assassination of the sovereign, or any attempt against his life, or any attempt to injure in any manner whatsoever his person, the person accused shall be indicted and tried in the same manner in every respect as if he was charged with murder. So that to such offences the statutes of William III., Anne, and George IV. do not apply.'

[v] See *Reg.* v. *Frost*, 9 C. & P. 129. [w] 11 Geo. IV. and 1 Will. IV. c. 66, s. 2.

No person indicted for felony is, or, as the law stands, ever can be, entitled to copies 'of the indictment and lists of witnesses and jurors,' before the time of his trial. 'But any person committed for trial, or admitted to bail, may, at any time after the examination of the witnesses before the committing justices, and before the first day of the assizes or sessions, or other first sitting of the court at which he is to be tried, require and is entitled to have from the officer having their custody, copies of the depositions on which he has been committed or bailed, on payment of a reasonable sum for the same, not exceeding three halfpence for each folio of ninety words.'[x]

'In offences not amounting to felony, the defendant is entitled to a copy of the indictment.[y] And in prosecutions for misdemeanors instituted by the attorney-general, the court is required by the statutes 60 Geo. III. and 1 Geo. IV. c. 4, s. 8, to order a copy of the information or indictment to be delivered, after appearance, to the party prosecuted, free of expense to him.'

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.[z]

Challenges may here be made, either on the part of the crown, 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. For it is here at least as necessary as there, that the sheriff or returning officer be totally indifferent; and that the particular jurors should be *omni exceptione majores;* not liable to objection either *propter honoris respectum, propter defectum, propter affectum,* or *propter delictum.*

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,[a] or at least in capital ones, there is, *in favorem vitæ,* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors,

[x] '11 & 12 Vict. c. 42, s. 27.'

[y] '*Lady Fulwood's* case, Cro. Car. 483.'

[z] Formerly when an alien was indicted, the jury must have been *de medietate*, or half foreigners, if so many were found in the place and the accused demanded it; 6 Geo. IV. c. 50, s. 47. This did not indeed hold in treasons, aliens being very improper judges of the breach of allegiance.

[a] 'In all *felonies.* Co. Litt. 156 b.'

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 crown by the statute 33 Edw. I. statute 4, which enacts that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court; 'and a similar provision is inserted in the Jury Act, 6 Geo. IV. c. 50.' However, it is held that the crown need not assign cause of challenge till all the panel is gone through, and unless there cannot be a full jury without the person so challenged. And then, and not sooner, the counsel for the crown must show the cause: otherwise the juror shall be sworn.[b]

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 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

[b] 2 Hawk. P. C. 413; 2 Hal. P. C. 271. And the practice is the same both in trials for misdemeanors and for capital offences, 3 Harg. St. Tr. 519. Where there is a challenge for cause, two persons in court, not of the jury, are sworn to try whether the juryman challenged will try the prisoner indifferently. Evidence is then produced to support the challenge; and, according to the verdict of the two tryers, the juryman is admitted or rejected. A juryman was thus set aside in O'Coigly's trial for treason, because, upon looking at the prisoners, he had uttered the words, "damned rascals."—[CHRISTIAN.] See *O'Brien* v. *Reg.*, 2 H. L. Cas. 469; *Mansell* v. *Reg.*, 8 El. & Bl. 54.

a greater number, or three full juries, has no intention to be tried at all. And therefore it dealt with one who peremptorily challenged above thirty-five, and would not retract his challenge, as with one who stood mute or refused his trial; by sentencing him to the *peine forte et dure* in felony, and by attainting him in treason.

But by statute 22 Henry VIII. c. 14, which, with regard to felonies, stood unrepealed by statute 1 & 2 Ph. & M. c. 10, 'and was in fact re-enacted by the statute 6 Geo. IV. c. 50,' 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: but the better opinion seems to have been, that such challenge should 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, or that of conviction, which succeeds it, shall not be imposed by implication. Secondly, the words of the statute are, "that he be not *admitted* to challenge "more than twenty;" the evident construction of which is, that any further 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. 'And now, in accordance with the common law in this respect, the statute 7 & 8 Geo. IV. c. 28, s. 3, has enacted that if any person indicted for any treason, felony, or piracy, shall challenge peremptorily a greater number of the men returned to be of the jury than such person is entitled by law so to challenge, in any of the said cases, every peremptory challenge beyond the number allowed by law shall be entirely void, and the trial shall proceed as if no such challenge had been made.'[c]

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,[d] till the number of twelve is sworn, "well and truly to try, and true deliverance make, between our

[c] The improper disallowance of a challenge is ground for a *venire de novo*. *Rex* v. *Edmonds*, 4 B. & Ald. 471.

[d] In commissions of gaol delivery, no *tales* can be awarded, though the court may, *ore tenus*, order a new panel to be returned *instanter*. 4 Inst. 68; 4 St. Tr. 728, *Cooke's* case.

"sovereign lady the queen, 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 marshalled, examined, and enforced by the counsel for the crown, or prosecution. It was a settled rule at common law, that no counsel should be allowed a prisoner upon his trial, upon the general issue, in any 'felony,' unless some point of law arose proper to be debated. A rule, which, however it may have been 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, 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 could that assistance be denied to save the life of a man, which yet was allowed him in prosecutions for every petty trespass? Nor indeed was it, strictly speaking, a part of our ancient law: for the Mirror, 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 defence upon indictments and "appeals of felony, than upon other venial causes." And the judges themselves were so sensible of this defect, that they never scrupled to allow a prisoner counsel to 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 were *entitled* to the assistance of counsel. But, lest this indulgence should be intercepted by superior influence, in the case of state criminals, the legislature directed by statute 7 Will. III. c. 3, that persons *indicted* for high treason, or misprision thereof, 'might' make their full defence by counsel, not exceeding two, to be named by the prisoner and assigned by the court or judge: and the same indulgence, by statute 20 Geo. II. c. 30, was extended to parliamentary *impeachments* for high treason, which were excepted in the former act. 'Finally, although only after strenuous opposition, and many struggles, an act was passed in the last reign, by which all persons tried for felonies are admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel, or by attorney in courts where attorneys, now called solicitors, practise as counsel.'[e]

[e] 6 & 7 Will. IV. c. 114; see also 28 Vict. c. 18.

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 treason, and misprision of treason, by statutes 1 Edward VI. c. 12, and 5 & 6 Edward VI. c. 11, *two* lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence confess the same. By statute 1 & 2 Ph. & M. c. 10, a further exception was made as to treasons in counterfeiting the king's seals or signatures, and treasons concerning coin current within this realm; and more particularly by c. 11, the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin; 'any of which offences amounted formerly to what was called petit treason.' The statutes 8 & 9 Will. III. c. 25, and 15 & 16 Geo. II. c. 28, 'which are both now repealed,' in their subsequent extensions of this species of treason, also provided that the offenders might be indicted, arraigned, tried, convicted, and attainted, by the like evidence, and in such manner and form as might be had and used against offenders for counterfeiting the king's money. But by the statute 7 Will. III. c. 3, in prosecutions for those treasons to which that act extends, the same rule, of requiring *two* witnesses, 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*. In the construction of which act it has been held, that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. And indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. By the same statute 7 Will. III. it is declared, that both witnesses must be to the same overt act of treason, or one to one overt act, and the other to another overt act, of the same species of treason, and not of distinct heads or kinds: 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[f] was made on purpose to attaint him of treason, and he was executed.[g] 'Finally it is provided by the statute 11 Vict. c. 12, that no person shall be convicted of any felonious compassings, imaginations, inventions, devices or intentions, under that act, in so far as the same are expressed, uttered, or declared, by open or advised speaking, except upon his own confession in open court, or unless the words so spoken shall be proved by two credible witnesses.'

'That species of treason which is directed against the person of the sovereign may be proved by such evidence as suffices in the case of murder; in which, and' in almost every other accusation, one positive witness is sufficient. Baron Montesquieu lays it down for a rule,[h] 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, that the witness who affirms, and the accused who denies, make 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.[i] 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, 'although there is no positive rule of evidence distinguishing between the weight to be attached to the testimony of accomplices and persons implicated in the crime respecting

[f] Stat. 8 Will. III. c. 4.
[g] St. Tr. V. 40.
[h] Sp. L. b. 12, c. 3.
[i] Per *Parker*, C. J. in *The Queen* v. *Muscot*, 10 Mod. 194.

which they are examined,[j] juries are nevertheless recommended by the judges not to convict prisoners on the uncorroborated testimony of one or more persons of that description.'

Thirdly, 'in criminal proceedings, husbands and wives are not admitted to give evidence for or against each other, for although in most civil suits they are now admissible, the legislature has, for obvious reasons, not extended this admissibility to the criminal courts. Thus the wife cannot be called to prove her marriage when the husband is indicted for bigamy;[k] so a husband is not admissible to prove that his wife and others conspired to procure his marriage without the consent of his parents.[l] But on this rule a necessary exception was engrafted by the common law, in those cases, namely, where a crime has been committed by the one against the other. And therefore a wife is a competent witness to prove a forcible abduction and marriage;[m] or an assault upon her by the husband;[n] or that he assisted at a rape committed on her person;[o] or in general for any offence against her liberty or person.'

Fourthly, 'the depositions of witnesses duly taken before the committing justices are admissible in evidence on the trial of the accused, if it is proved that the person making such deposition is dead, or is so ill as not to be able to travel, and also that the deposition was taken in the presence of the accused, and that he or his counsel or solicitor had a full opportunity of cross-examining the witness.'[p]

Fifthly, 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 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.

[j] See *Rex* v. *Hastings*, 7 C. & P. 152.
[k] *Grigg's* case, L. Raym. 1.
[l] *Rex* v. *Serjeant*, Ry. & M. 352.
[m] *Brown's* case, 1 Vent. 243.
[n] *Rex* v. *Ayre*, 1 Str. 633.
[o] *Lord Audley's* case, 3 How. St. Tr.
[p] 11 & 12 Vict. c. 42, s. 17; see also 30 & 31 Vict. c. 35, ss. 6, 7.

'Sixthly, confessions or acknowledgments of guilt, as distinguished from admissions in civil transactions, form a distinct head of evidence in criminal trials. The requisite formalities which must be attended to, in order to render the statements of accused persons made before the committing justices admissible in evidence against them on the trial, have been already mentioned. Other statements of the accused, *voluntarily* made to any person at any time and in any place, either before or after his apprehension, and whether verbal or in writing, may be proved against him, although, as a general rule, evidence of oral confessions of guilt ought to be received *with great caution*.'

Seventhly, 'dying declarations form a species of evidence admissible only in the single instance of *homicide*, "where the "death of the deceased is the subject of the charge, and the "circumstances of the death are the subject of the dying declara-"tion."[q] The general principle on which this species of evidence is admitted is, that such declarations "made in extremity when the "party is at the point of death, and when every hope of this world "is gone; when every motive to falsehood is silenced, and the "mind is induced by the most powerful considerations to speak "the truth," have, although made in the absence of the accused, the weight of testimony given on oath in his presence. And it is accordingly essential to the admissibility of these declarations, first, that at the time they were made the declarant should have been in actual danger of death; secondly, that he should then have had a full apprehension of his danger; and lastly, that death should have ensued. But these declarations are in any case admissible only as to matters to which the accused would have been competent to testify, if sworn on the trial.'[r]

'Eighthly,' it was an ancient and commonly-received practice, derived from the civil law, and which formerly also obtained in France, 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 honour of Mary I., whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous, that when she appointed Sir Richard Morgan chief justice of the common pleas, she enjoined him,

[q] *Rex* v. *Mead*, 2 B. & C. 608.

[r] 30 & 31 Vict. c. 35, ss. 6, 7.

"that notwithstanding the old error, which did not admit any "witness to speak, or any other matter to be heard, in favour of "the adversary, her Majesty being party; her Highness's plea- "sure was, that whatsoever could be brought in favour 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." 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 defence;" 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: 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 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* against it. And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland, 4 Jac. I. c. 1, when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, they insisted on a clause, and carried it[s] in defiance of 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,[t] "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 Will. 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 Anne, 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.

[s] Com. Jour. 4, 30 Jun. 1607. [t] Com. Jour. 4 Jun. 1607.

'Lastly, there is a peculiarity in one respect in the nature of the evidence admitted on behalf of the defendant in criminal cases; namely, that he is allowed to call witnesses to prove that he has previously borne a general good character—for honesty, if the charge be one involving larceny, embezzlement, or fraud, or for peaceable demeanor, if it include an accusation of personal violence. Such testimony is important, as leading to the inference that a man of those previous habits would refrain from any such violation of the law. But it is, from its very nature, evidence to which the jury ought only to attach weight, when that adduced for the prosecution is not of a decisive character; for the crown cannot in general contradict it by affirmative proof of particular immoral acts. If, however, the prisoner calls such evidence and he has been previously convicted of felony, and the indictment so alleges, that fact may be proved, although the jury are not entitled, except where evidence of good character is given by the accused, to inquire as to a previous conviction until the prisoner has been found guilty of the subsequent offence.'

'It occasionally happens during the trial, and more particularly at the close of the case for the prosecution, that objections are taken on behalf of the prisoner, that the facts proved do not amount to the offence charged; or that the evidence in support of the indictment will not justify a conviction. At an earlier stage of the case, objections are not unfrequently offered to the admissibility or to the rejection of evidence; any one of which may give rise to questions too difficult for the immediate determination of the court. The humane anxiety of the judges to give the prisoner the full advantage of every point urged on his behalf, so frequently induced them to reserve objections thus suggested, and which appeared to them worthy of mature consideration, for the opinion of their brethren, that this soon became a settled practice; the questions of law being afterwards discussed, often with the assistance of counsel, at Serjeants' Inn, where the judges assembled frequently during term; and the prisoner being recommended to the crown for a free pardon, if the objections urged on his behalf were deemed to be well founded. But although the decision of the judges in such cases was known, the reasoning by which they arrived at the conclusion did not transpire; while the power of reserving questions of law was not possessed by the courts often most in need of the highest legal assistance, namely,

the courts of quarter sessions. This defect has now been remedied. Where any person has been convicted of any treason, felony, or misdemeanor before any court of oyer and terminer, or gaol delivery, or court of quarter sessions, the judge, or commissioner, or justices of the peace before whom the case has been tried, may, in his or their discretion, reserve any question of law which has arisen on the trial, for the consideration of the judges of the High Court of Justice;[u] who are required to meet for the consideration thereof; and then in open court, and either upon or without argument, to deliver their judgment, reversing, affirming, or amending that already given, or where the conviction is affirmed and no judgment has been already given, ordering when and where it shall be given.'

'The powers thus conferred on the courts of reserving questions for the determination of the judges does not, when exercised, interfere with the course of the trial, which proceeds in the ordinary way to a verdict, for it is only in the event of a conviction that it becomes necessary to reserve the point. Nor does it clash, on the other hand, with the corrective jurisdiction of the courts of appeal; for although questions arising on the indictment, as well as other matters of law, may be thus disposed of, no case can be reserved upon any demurrer to the pleadings; for the obvious reason, that on objections so raised the opinion of the established tribunals may be obtained by means of a writ of error. For the judges who determine these reserved questions of criminal law do not constitute a *court* of criminal jurisdiction or appeal, in the legal or ordinary sense of the term. They merely assist, and guide with their opinion, the determination of the court below, in whose discretion is exclusively vested the reservation of the case, and to which the judgment, if the conviction be affirmed, is wholly left.'

When the evidence on both sides is closed, and indeed when any evidence has been given, the jury cannot be discharged, unless in cases of evident necessity,[v] till they have given in their

[u] 11 & 12 Vict. c. 78; The Judicature Act, 1873, s. 47. The court reserving the question may either give judgment, or respite execution or postpone the giving of judgment until any question thus reserved has been decided, and in the mean time either commit the person convicted to prison or admit him to bail.

[v] *Gould's* case, Hil. 1764; *Mercy Newton's* case, 3 C. & Kir. 85; 13 Q. B. 716; *Windsor* v. *Reg.*, 1 Law Rep. Q. B. 289, 390.

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 which touches life or member, give a *privy* verdict. But the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court. And such public or 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 the law, and therefore *choose* to leave it to the determination of 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.

'Formerly,' if the verdict were notoriously wrong, the jurors might have been punished, and the verdict set aside by writ of *attaint* at the suit of the crown; but not at the suit of the prisoner. But the practice, which at one time prevailed, 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, nearly three hundred years ago, who accounted "such doings to be very violent, tyrannical, and "contrary to the liberty and custom of the realm of England."[w] For, as Sir Matthew Hale well observes,[x] 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,[y] 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 could not be set right by attaint. But there has yet been no instance of granting a new trial, where the prisoner was *acquitted* upon the first.[z]

[w] Smith's Commonw. l. 3, c. 1.

[x] 2 Hal. P. C. 313.

[y] 'Of *Misdemeanors*,' 1 Lev. 9; St. Tr. X. 416; *Reg.* v. *Whitehouse*, 1 Heart. C. C. 1. There is no power to grant a new trial in cases of *felony*. See *Reg.* v. *Scarfe*, 17 Q. B. 238; and *Reg.* v. *Bertrand*, 1 Law Rep. P. C. 520; *Reg.* v. *Murphy*, 2 Law Rep. P. C. 535.

[z] 'If the jury have been discharged on account of their being unable to agree, or by reason of the illness of a juror, the prisoner may be arraigned and tried *de novo*. *Reg.* v. *Newton*, Q. B. Trin. T. 1849; *R.* v. *Scalbert*, 2 Leach, 706.'

If the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation. And upon such his acquittal, or discharge for want of prosecution, he shall be immediately set at large without payment of any fee to the gaoler.[a] But if the jury find him guilty, 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 offence and pleading guilty, or by his being found so by the verdict of his country.

'If a prisoner, charged with a felony not punishable with death, has been before convicted of felony or of certain misdemeanors, the indictment generally charges him with having committed the offence *after having been convicted of felony;* the legislature having, in order to secure the more exemplary punishment of such offenders, conferred powers on the courts not only to pass a sentence of much greater severity than that which may be imposed for the single offence, but to subject the offender to a long period of *police supervision* after the expiration of his punishment.[b] Although a prisoner is so charged, however, the jury are only directed to inquire whether he is guilty or not guilty of the particular crime alleged on the indictment; and it is only when they have found the prisoner guilty of that offence,[c] that they are then, if the prisoner disputes it, further informed of, or charged to inquire concerning, the previous conviction. This is proved by the mere production of a certificate, signed by the officer of the court having the custody of the records, containing the substance and effect of the previous indictment and conviction, and by evidence of the identity of the prisoner with the person mentioned in the certificate.'[d]

When the offender is convicted, there are two collateral circumstances that immediately arise, 'the first relating to the costs of the prosecution; the second, in cases of larceny, to the restitution of the stolen property.'

1. On a conviction, or even upon an acquittal where there was a reasonable ground to prosecute, and in fact a *bonâ fide* prosecution, for any grand or petit larceny or other felony, the reasonable expenses of prosecution, and also, if the prosecutor

[a] Stat. 14 Geo. III. c. 20.
[b] 34 & 35 Vict. c. 112.
[c] *Reg.* v. *Shuttleworth*, 3 C. & K. 375.
[d] 7 & 8 Geo. IV. c. 28, s. 11; 6 & 7 Will. IV. c. 111; 24 & 25 Vict. c. 96, s. 116, and c. 99, s. 37.

happened to be poor, a compensation for his trouble and loss of time, were, by statutes 25 Geo. II. c. 36, and 18 Geo. III. c. 19, to be allowed him out of the county stock, if he petitioned the judge for that purpose; and by statute 27 Geo. II. c. 3, explained by the same statute 18 Geo. III. c. 19, all persons appearing upon recognizance or *subpœna* to give evidence, whether any indictment were preferred or no, and as well without conviction as with it, were entitled to be paid their charges, with a further allowance, if poor, for their trouble and loss of time. 'The right to costs in criminal prosecutions now rests, however, on the statute 7 Geo. IV. c. 64, as amended and extended by subsequent acts; the court before which any person is prosecuted or tried for any *felony*,[e] being now authorized to order payment to the prosecutor of the expenses which he shall have incurred in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as seem reasonable and sufficient to reimburse them for the expenses they have incurred in attending before the examining magistrate and the grand jury, and in otherwise carrying on the prosecution, and also to compensate them for their trouble and loss of time therein. And although no bill of indictment be preferred, the court may, where any person has *bonâ fide* attended in obedience to any recognizance or *subpœna*, order payment to him of such sum as is reasonable and sufficient to reimburse him for the expenses *bonâ fide* incurred by reason of his attendance before the examining magistrate, and by reason of such recognizance or *subpœna*, and also to compensate him for trouble and loss of time. The amount of the expenses of attending before the magistrate, and the compensation for trouble and loss of time therein, is ascertained by his certificate, granted before the trial or attendance in court, if the magistrate thinks fit to grant the same; but it is subject to taxation by the officer of the court; the amount of all the other expenses, and compensation, is ascertained by an officer of the court.'

'Under the same and other statutes, a similar power is given to the court in the following, amongst other cases of *misdemeanor*: assaults with intent to commit felony; attempts to commit felony; riot; receiving stolen property; assault on a peace-officer in the execution of his duty, or any person acting in aid of such officer; neglect or breach of duty as a peace-officer;

[e] Except felonies under 11 & 12 Vict. c. 12.

assault in pursuance of any conspiracy to raise the rate of wages; obtaining property by false pretences; indecent exposure of the person; perjury, and subornation of perjury; concealment of birth; fraudulently procuring the defilement of women or girls under twenty-one; carnally knowing girls under twelve; abduction of unmarried girls under sixteen; assaults upon workhouse or relieving officers; neglecting to provide for apprentices or servants, or exposing children; being found by night armed or disguised with intent to commit felony, &c.; conspiring to charge any person with felony, and conspiracy to commit felony; assaults prosecuted by direction of justices, and certain other misdemeanors. These costs of prosecution when allowed are paid, in the first place, by the treasurer of the county, to whom the amount is repaid out of the Consolidated Fund.'

'No costs or expenses were allowable to an accused or his witnesses out of the public purse, until quite recently,[f] notwithstanding repeated complaints by prisoners, that they were unable by reason of poverty to call witnesses on their behalf. This injustice has now been remedied. In all cases where the accused calls witnesses before the magistrate and their evidence is reduced to writing, and made part of the depositions, and they are bound by recognizance to appear at the trial, and do so appear, the court has the same power to order payment to them for their expenses and loss of time as in the case of witnesses for the prosecution.'

2. By the common law there was no restitution of goods upon an indictment, because it is at the suit of the crown only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again. But, it being considered that the party prosecuting the offender by indictment, deserved to the full as much encouragement as he who prosecuted by appeal, the statute 21 Hen. VIII. c. 11, was made, which enacted, that if any person were convicted of larceny, by the evidence of the party robbed, he should have full restitution of his money, goods, and chattels; or the value of them out of the offender's goods, if he had any, by a writ to be granted by the justices. And the construction of this act having been in great measure conformable to the law of appeals, it therefore in practice superseded the use of appeals of larceny. For instance: as formerly upon appeals,

[f] 30 & 31 Vict. c. 35.

so under that statute, upon indictments of larceny, the writ of restitution reached the goods so stolen, notwithstanding the property of them was endeavoured to be altered by sale in market overt.[g] And though this may seem somewhat hard upon the buyer, yet the rule of law is, that "*spoliatus debet, ante omnia, "restitui;*" 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.[h] 'The statute of Henry VIII. has been re-enacted,[i] and the right to restitution at the same time extended to all cases of felony or misdemeanor, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or knowingly receiving any chattel, money, valuable security, or other property whatsoever. And' accordingly, it is now usual for the court, upon the conviction of the offender, to order, without any writ, the immediate restitution of the stolen property to be made to the several prosecutors.[j] 'But such restitution cannot be directed in the case of any valuable security *bonâ fide* paid or discharged by any person liable to the payment thereof, or of any negotiable instrument *bonâ fide* taken or received for a just and valuable consideration, without notice, or without any reasonable cause to suspect that the same had been stolen or illegally obtained.' Without any such writ of restitution, however, the party 'whose property has been stolen' may peaceably retake his goods, wherever he happens to find them, unless a new property be fairly acquired therein; or if the felon be convicted and pardoned, the party robbed may bring his action of trover against him for

[g] *Scattergood* v. *Sylvester*, 15 Q. B. 506.

[h] 'An attempt to mitigate this hardship on the innocent buyer has been provided by the statute 30 & 31 Vict. c. 35, which provides that any money found on the accused may be ordered by the court to be paid over to such innocent buyer, to the extent of the money paid by him, upon restitution to the owner of the stolen property. It is not often, however, that money is found on the accused. In cases of felony, again, the statute 33 & 34 Vict. c. 23, enables the court to order the accused, when convicted, to compensate to the extent of 100*l.* any person suffering loss through or by means of the felony committed. Assuming that the convict has means, it is difficult to understand upon what principle the compensation should be limited to cases of felony or to a sum of 100*l.*'

[i] By 7 & 8 Geo. IV. c. 29, s. 57; and 24 & 25 Vict. c. 96, s. 100.

[j] *Reg.* v. *Woillez & Bliss*, 8 Cox's Crim. Law Cases, p. 337.

his goods, and recover a satisfaction in damages. But such action lies not before prosecution; for so felonies would be made up and healed;[k] and also recaption is unlawful, if it be done with intention to smother or compound the larceny; it then becoming the heinous offence of theftbote, as was mentioned in a former chapter.

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 circuity of a civil action.[l] But it surely is a dangerous practice: and though it may be intrusted 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 prosecutor becomes in effect a plaintiff. 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,[m] 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."

[k] *White* v. *Spettigue*, 13 M. & W. 603. [l] See *Keir* v. *Seaman*, 9 Q. B. 371.
[m] Beccar. c. 46.

CHAPTER XXVIII.

OF JUDGMENT AND ITS CONSEQUENCES.

THE next stage of criminal prosecution, after trial and conviction are past, is that of *judgment*.[a] For when, upon a charge

[a] 'Judgment might formerly have been suspended or arrested by the convict claiming the *benefit of clergy*. When called upon to show cause why judgment should not be given, he was told by the gaoler to "kneel down and pray your clergy." This he did, by appearing to read a verse from the New Testament, which he had been previously taught to repeat, and which was thence called the "neck verse." This is' a title of no small curiosity; and concerning which I may be permitted to inquire, 1. Into its origin, and the various mutations which this privilege of clergy has sustained? 2. To what persons it was allowed 'previous to its final abolition'? 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 origin from the pious regard paid by Christian princes to the Church in its infant state; and the ill use which the 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 origin and meaning of the *privilegium clericale*.

But the clergy, increasing in wealth, power, honour, number, and interest, began soon to set up for themselves; and that which they obtained by the favour of the civil government, they now claimed as their inherent right; and as a right of the highest nature, indefeasible, and *jure divino*. "Touch not mine anointed, and do my prophets no harm." (Keilw. 181.) By their canons therefore and constitutions they endeavoured 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 list became quite universal, 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, yet a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, 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 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: till at length it was finally settled in the reign of Henry VI., that the prisoner

'of felony,' the jury have brought in their verdict of guilty, in the presence of the prisoner, he is either immediately, or at a

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.

Originally the law held, that no man should be admitted to the privilege of clergy, but such as had the *habitum et tonsuram clericalem*. 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*. But when learning 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 the statute 4 Hen. VII. c. 13, directed that no person once admitted to the benefit of clergy should be admitted thereto a second time unless he produced his orders: and in order to distinguish them, all laymen who were allowed this privilege were to be burnt with a hot iron in the brawn of the left thumb. This distinction, abolished for a time 'under' Henry VIII., 'was' restored by 1 Edw. VI. c. 12, 'whereby' lords of parliament and peers of the realm, having place and voice in parliament, 'might' have the benefit of their peerage, equivalent to that of clergy, for the first offence, although they 'could' not read, and without being burnt in the hand, for all offences 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 real clergy were 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 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. 'Mr. Justice Hobart pointed out' with much indignation the vast complication of perjury and subornation of perjury, in this solemn farce of a mock trial. And yet by this purgation the party was restored to his credit, his liberty, his lands, and was made a new and an innocent man.

'When the' almost constant acquittal of felonious clerks by purgation 'led' the temporal courts to deliver over to the ordinary the convicted clerk, *absque purgatione facienda*, in which situation the clerk continued in prison during life, and was incapable of acquiring any personal property, or receiving the profits of his lands, unless the king pardoned him, 'then' it became high time to abolish so vain and impious a ceremony.

Accordingly the 18 Eliz. c. 7, enacted, that, after the offender had been allowed his clergy, he should not be delivered to the ordinary as formerly; but 'might by the judge be continued' in gaol 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, 'and who could' not properly have the benefit of clergy, 'as they could not be clerics,' should be burned in the hand, and whipped, stocked, or imprisoned, for any time not

convenient time soon after, asked by the court, if he has anything to offer why judgment should not be awarded against him.[b]

exceeding a year. A similar indulgence was 'afterwards' extended to women guilty of any clergyable felony whatsoever; who were allowed once 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. The punishment of burning in the *hand* being found ineffectual, was 'next' changed by 10 & 11 Will. III. c. 23, into burning in the left *cheek*, nearest the nose: but such an indelible stigma being found by experience to render offenders desperate, this provision was repealed by 5 Anne, c. 6; and till that period all women, all peers of parliament and peeresses, and all male commoners who could read, were discharged in all clergyable felonies; the males absolutely, if clerks in orders; and other commoners, both male and female, upon branding; and peers and peeresses without branding, for the first offence: yet all liable, excepting peers and peeresses, if the judge saw occasion, to imprisonment not exceeding a year. Those men who could not read, if under the degree of peerage, were hanged.

Afterwards it was considered that education 'was' no extenuation 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, *à fortiori*, too severe for the ignorant also. And thereupon, by 5 Anne, c. 6, the benefit of clergy 'was' granted to all those who were entitled to ask it, without requiring them to read. And experience having shown that so very universal a 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 offences, yet no punishment at all, or next to none, was as much too gentle: it was further enacted, that when any person was convicted of any theft or larceny, and burnt in the hand for the same according to the ancient law, he should also, at the discretion of the judge, be committed to the house of correction or public workhouse, to be there kept to hard labour, for any time not less than six months, and not exceeding two years; with a power of inflicting a double confinement in case of the party's escape from the first. 'Afterwards,' by 4 Geo. I. c. 11, and 6 Geo. I. c. 23, convicted persons entitled to the benefit of clergy, and liable only to burning in the hand or whipping, might be transported to America, or, by statute 19 Geo. III. c. 74, to any other parts beyond the seas, for seven years: and if they returned 'were to be hanged.' 'Next,' by 19 Geo. III. c. 72, offenders liable to transportation might be employed, if males, in hard labour for the benefit of some public navigation, or confined to hard labour in penitentiary houses, but in no case 'for periods' exceeding seven years, 'there being' a power of subsequent mitigation, and even of reward, in case of their good behaviour. But if they escaped and were retaken, for the first time an addition of three years was made to the term of their confinement, and a second escape was felony without benefit of clergy.

It was also enacted by the statute 19 Geo. III. c. 74, that, instead of burning in the hand, which was sometimes too slight and sometimes too disgraceful a punishment, the court in all clergyable felonies might impose a pecuniary fine; or, except in the case of manslaughter, might order the offender to be once or oftener, but no more than thrice, either publicly or privately whipped; such private whipping, to prevent collusion

[b] Where a point of law has been reserved at the trial for the consideration of the judges, the giving of judgment may be postponed.

And in case the defendant be found guilty of a misdemeanor, the trial of which may, and sometimes does, happen in his

or abuse, to be inflicted in the presence of two witnesses, and in case of female offenders in the presence of females only; which fine or whipping had the same consequence as burning in the hand; and the offender so fined or whipped was equally liable to a subsequent detainer or imprisonment.

In this state did the benefit of clergy stand 'at the period of its abolition,' very considerably different from its original institution: the legislature having, in the course of a long and laborious process, converted, by gradual mutations, what was at first an unreasonable exemption of ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.

II. To what *persons* the benefit of clergy was allowed must be collected from what has been 'already stated.' All clerks in orders were without any branding, and of course without any transportation, fine, or whipping, for those were only substituted in lieu of the other, to be admitted to this privilege, and immediately discharged; and this as often as they offended. All lords of parliament, and peers of the realm having place and voice in parliament, by the statute 1 Edw. VI. c. 12, which was likewise held to extend to peeresses, *Duchess of Kingston's* case, in parliament, April 22, 1776, were discharged in all clergyable and other felonies provided for by the act, without any burning in the hand or imprisonment, or other punishment substituted in its stead, in the same manner as real clerks convict; but this was only for the first offence. All the commons of the realm, not in orders, whether male or female, were for the first offence to be discharged of the capital punishment of felonies within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or suffering a discretionary imprisonment in the common gaol, the house of correction, one of the penitentiary houses, or in the places of labour for the benefit of some navigation; or, in case of larceny, upon being transported for seven years, if the court thought proper. Jews and other infidels and heretics 'says Sir William Blackstone,' were not capable of the benefit of clergy, till after the statute 5 Anne, c. 6, as being under a legal incapacity for orders. But 'he much questions' whether this was ever ruled for law, since the reintroduction of the Jews into England, in the time of Oliver Cromwell; the statute of 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. For what *crimes* the benefit of clergy was allowed? Neither in high treason nor in petit larceny, nor in any mere misdemeanors, was it indulged at common law; and therefore it was allowable only in petit treason and capital felonies: which became legally entitled to this indulgence by the statute *de clero*, 25 Edw. III. st. 3, c. 4, which provided that clerks convict for treasons or felonies, touching other persons than the king himself or his royal majesty, should 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 county; and *combustio domorum*, or arson, that is, the burning of houses; all of which are a kind of hostile acts, and in some degree border upon treason. So tender, 'however,' was the law of inflicting capital punishment in the first instance for any inferior felony, that notwithstanding by the marine law, as declared in 28 Hen. VIII. c. 15, the benefit of clergy was not allowed in any case whatsoever; yet, when offences were committed within the admiralty jurisdiction, which would

absence, after he has once appeared, a *capias* may be awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry; 'or if he is under recognizances to appear, and he makes default, the recognizances may be estreated, and a warrant issued for his apprehension.' [c]

But whenever the defendant appears in person, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in *arrest* or stay of judgment. And

be clergyable if committed by land, the constant course was to acquit and discharge the prisoner.

IV. What were the consequences of allowing this benefit of clergy? 'These affected the convict's' 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 operated as a kind of statute pardon.

By his conviction he forfeited all his goods; which being once vested in the crown, should not afterwards be restored to the offender. After conviction, and till he received the judgment of the law, by branding, or some of its substitutes, or else was pardoned, he was to all intents and purposes a felon, and subject to all the disabilities of a felon. After burning, or its substitute, or pardon, he was discharged for ever of that, and all other felonies before committed, within the benefit of clergy. By the burning, or its substitute, or the pardon of it, he was restored to all capacities and credits, and the possession of his lands, as if he had never been convicted. What has been said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, was equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishment in its stead. For they had the same privileges without any burning, or any substitute for it, which others were entitled to after it.

'Notwithstanding, however, the various legislative provisions by which it was thus from time to time attempted to modify the operation of the *privilegium clericale*, so as to allow it to remain a part of the complicated system of punishment which formerly prevailed, its total abolition necessarily formed a part of those measures for amending the criminal law, adopted by the legislature in the reign of George IV. The various acts of parliament already referred to were accordingly repealed by the 7 & 8 Geo. IV. c. 27; and the privilege of clergy at the same time entirely abolished by the 7 & 8 Geo. IV. c. 28, amended, so as to include peers, by 4 & 5 Vict. c. 22. As the effect of this would have been to leave no punishment for any felony but death, it was at the same time enacted that no person convicted of felony should thereafter suffer capitally unless for some felony which was before excluded from the benefit of clergy, or which had been or should be made punishable with death by some future statute. And it was further provided that every person convicted of any felony, not punishable with death, should be punished in the manner prescribed by the statute or statutes specially relating to such felony; and that every person convicted of any felony for which no punishment had been or might thereafter be provided, should be liable to transportation for seven years, for which penal servitude has now been substituted, or imprisonment not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped, if the court thought fit, in addition to such imprisonment.'

[c] In certain cases judgment may be pronounced, and a warrant issued; 11 Geo. IV. and 1 Will. IV. c. 70, s. 9.

if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again. And we may take notice, 1. That none of the statutes of *jeofails*, mentioned in the preceding volume, extended 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 great strictness has at all times been observed, in every point of an indictment.[d] Sir Matthew Hale complained that this strictness 'had in his time' grown to be a blemish and inconvenience in the law, and the administration thereof: for that more offenders escaped by the over-easy ear given to exceptions in indictments, than by their own innocence. 'And recent statutes have, as we have seen, so far simplified our criminal procedure, that many formal objections can no longer be taken to an indictment, or else must be stated at an earlier stage of the case, so as not to be available after verdict. No defect in the evidence can be urged in this stage of the proceedings; and a motion in arrest of judgment can, therefore, only be founded on some substantial objection apparent on the face of the record itself. If for instance the defendant has been found guilty of what does not constitute an offence in point of law, the judgment will be arrested.'[e]

A pardon also, as has been before said, may be pleaded in arrest of judgment, and it 'had formerly' the same advantage when pleaded here, as when pleaded upon arraignment; viz., the saving the attainder, and of course the corruption of blood, 'which followed on conviction; and' which nothing 'could' restore but parliament, when a pardon 'had not been' 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.

If all these resources fail, the court must pronounce that judgment which the law has annexed to the crime, and which has been 'generally' mentioned, together with the crime itself, in some or other of the former chapters. Of these some are capital, and consist in being hanged by the neck till dead. Other circumstances of terror, pain, or disgrace, 'were in certain cases formerly superadded. Thus,' in case of treason committed by a female, the judgment was formerly to be burned alive; 'in high treason, a male offender

[d] Sir W. Blackstone says *in favor of life;* that is, when so many felonies were capital.

[e] *Rex* v. *Waddington*, 1 East, 146.

was to be embowelled alive.' But the humanity of the English nation authorized, by a tacit consent, an almost general mitigation of such parts of those judgments as savoured of torture or cruelty: a sledge or hurdle being usually allowed to such traitors as were condemned to be drawn; and there are very few instances, and those accidental or by negligence, of any person's being embowelled or burned, till previously deprived of sensation by strangling. 'In lieu of these barbarous punishments, the statute 54 Geo. III. c. 146, expressly directed that the offender should be drawn on a hurdle to the place of execution, and be there hanged, and, after death, beheaded and quartered. And it was probably because the sentence itself was almost unknown, that the offences for which women were liable to be burned alive, were not made simply capital, till towards the end of the reign of the succeeding monarch. Now, as we have already seen, the punishment is deprived of all the aggravations formerly attached to it, and is made the same as in cases of murder; viz., death, followed by burial within the precincts of the prison.'

Some punishments consist in loss of liberty, by perpetual or temporary 'penal servitude' or imprisonment; and some induce a disability of holding offices or employments. 'Thus any person convicted of treason or felony and sentenced to death, penal servitude, or an imprisonment, with hard labour, not exceeding twelve months, thereby forfeits any military, naval, or civil office he holds under the crown, or any other public employment he had, or any ecclesiastical benefice, or any office or emolument in any university or college which he holds, or any pension or superannuation allowance he is entitled to, unless he receives a free pardon within two months of his conviction, or before the vacancy, if it be an office, is filled up. He remains, until he shall have suffered his punishment or been pardoned, incapable of holding any public office or benefice, or of exercising any parliamentary or municipal suffrage.'

Some 'punishments, again,' are merely pecuniary, by stated or discretionary fines: and there are others, that consist principally in their ignominy, though most of them are mixed with some degree of corporal pain; such as *whipping* and *hard labour*, in the house of correction or otherwise. 'The latter for almost all offences now accompanies a sentence of imprisonment. *Solitary confinement* may also be directed in almost every case of felony, and in many of the more aggravated misdemeanors; but can in

no case exceed in duration one month at a time, or three months in the space of one year.[f] In almost all cases in which a criminal has been previously convicted of a similar offence, the punishment may be much more severe; and in all cases in which a criminal is twice convicted, though it may be of different crimes, he may be subjected to the *supervision of the police*, for a period not exceeding seven years. This compels him to notify his residence, and every change of residence, to the chief officer of police of the district, and to report himself every month to that officer, or to such other person as he may direct; otherwise he may be taken up, and imprisoned for a year.'[g]

'There were formerly' some offences, 'which' occasioned a mutilation or dismembering, by cutting off the hand or ears: and others which fixed a lasting stigma on the offender, by slitting the nostrils, or branding in the hand or cheek; 'but all these are now unknown to the law.' The pillory 'has long ceased to be a punishment, fine and imprisonment, or both, having been substituted for it in cases where it was the only punishment to be inflicted.'[h] The stocks and ducking-stool 'have long been disused; the whole tendency of modern legislation being to obtain, if possible, the reformation of the offender.'

'For this purpose, the *Reformatory Schools* have been established; to which *juvenile offenders*, that is, convicted prisoners who appear to be less than sixteen years of age, may be sent, if necessary, for a period of five years, their parents, if able, being obliged to contribute to their support;[i] the managers of these institutions having powers, after a certain time, to grant licences permitting the offender to live with a trustworthy and respectable person, and afterwards, with his own consent, to apprentice him to some trade or calling or service, so as to enable him, if so disposed, to return to and become a useful member of society; benefits which he may forfeit by a disregard of the regulations of the school.'

Disgusting as this catalogue may seem, it will afford pleasure to an English reader, and do honour 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 species, though not always the quantity or degree, of punishment is *ascertained* for every offence; and that it is not left in the

[f] Will. IV. and 1 Vict. c. 90, s. 5.
[g] 34 & 35 Vict. c. 112.
[h] 56 Geo. III. c. 138; 7 Will. IV. and 1 Vict. c. 23.
[i] 29 & 30 Vict. c. 117.

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 humour 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 offence, the quality and condition of the parties, and from innumerable other circumstances. The *quantum*, 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:* 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 whomsoever 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 offence 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 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 further 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 of the old constitutional law; and accordingly we find it expressly holden, long before,[j] 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 Charta*, c. 14, concerning amercements for misbehaviour by the suitors 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 contenemento suo: et mercator eodem* "*modo, salva mercandisa sua; et villanus eodem modo amercietur,* "*salvo wanagio suo.*" A rule that obtained even in Henry the Second's time,[k] 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 contenement, or land; to the trader his merchandize; 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,*" shall be set, *ponatur*, or reduced to a certainty, by the oath of good and lawful men of the neighbourhood. Which method of liquidating the amercement to a precise sum, was usually performed in the superior courts by the assessment or *affeerment* of the coroner, a sworn officer chosen by the neighbourhood, under the equity of the statute Westm. 1, c. 18; and then the judges estreated them into the Exchequer. Amercements imposed by the superior courts on their own officers and ministers were affeered by the judges themselves; but when a pecuniary mulct was inflicted by them on a stranger, not being party to any suit, it was then denominated a *fine;* and the ancient practice was, when any such fine was imposed, to inquire by a jury "*quantum inde regi dare* "*valeat per annum, salvâ sustentatione suâ, et uxoris, et liberorum* "*suorum.*" 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 a limited imprisonment, instead of such fine as might amount to imprisonment for life.

[j] 2 Inst. 48.

[k] Glanv. l. 9, cc. 8, 11.

'Formerly,' when sentence of death, the most terrible and highest judgment in the laws of England, was pronounced, the immediate inseparable consequence was *attainder*. The criminal was then called attaint, *attinctus*, stained, or blackened. He was no longer of any credit or reputation; he could not be a witness in any court; neither was he capable of performing the functions of another man: for, by an anticipation of his punishment, he was already dead in law. This was after *judgment:* for there was great difference between a man *convicted* and *attainted;* though they were frequently confounded together. After conviction only, a man was liable to none of these disabilities; for there was still in contemplation of law a possibility of his innocence. Something might be offered in arrest of judgment: the indictment might be erroneous, which would render his guilt uncertain, and thereupon the present conviction might be quashed: he might obtain a pardon, which supposed some latent sparks of merit, which pleaded in extenuation of his fault. But when judgment was once pronounced, both law and fact conspired to prove him completely guilty; and there was not the remotest possibility left, it was considered, of anything to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commenced; the consequences of which were *forfeiture* and *corruption of blood.*

Forfeiture was twofold; of real and personal estates. First, as to real estates: by attainder in high treason a man forfeited to the crown all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry; and also the profits of all lands and tenements, which he had in his own right, for life or years. This forfeiture related backwards to the time of the treason committed: so as to avoid all intermediate sales and incumbrances, but not those before the fact: and therefore a wife's jointure was not forfeitable for the treason of her husband, because settled upon her previous to the treason committed. But her dower was forfeited by the express provision of 5 & 6 Edw. VI. c. 11. And yet the husband was to be tenant by the courtesy of the wife's lands, if the wife were attainted of treason: for that was not prohibited by the statute. But though after attainder the forfeiture related back to the time of the treason committed, yet it did not take effect unless an attainder were had, of which it was one of the fruits; and,

therefore, if a traitor died before judgment pronounced, or was killed in open rebellion, or was hanged by martial law, it worked no forfeiture of his lands: for he was never attainted of treason. But if the chief justice, the supreme coroner of all England, in person, upon the view of the body of one killed in open rebellion, recorded it and returned the record into his own court, both lands and goods were forfeited.

This forfeiture or confiscation of property, for treason, was founded in this consideration, that he who had thus violated the fundamental principles of government, had abandoned his connections with society; and had 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 were made to suffer as well as himself, helped, it was supposed, 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 interested every dependent and relation he had to keep him from offending: according to that beautiful sentiment of Cicero, "*Nec vero me fugit quam sit acerbum, parentum scelera "filiorum pœnis lui: sed hoc præclare legibus comparatum est, ut "caritas liberorum amiciores parentes reipublicæ redderet.*" 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. Yet many nations thought this posthumous punishment to savour 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 that of treason thought it more just, "*ibi esse pœnam, ubi et noxa est;*" and ordered that "*peccata suos teneant auctores, nec ulterius progrediatur metus, "quam reperiatur delictum;*" and Justinian also made a law to restrain the punishment of relations, which directed the forfeiture to go, except in the case of *crimen majestatis*, 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: and of course their

estates must have been also forfeited, as no man was left to inherit them. And in Germany, by the famous golden bull, the lives of the sons of such as conspired to kill an elector were to be 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 honour ecclesiastical or civil: "to "the end that, being always poor and necessitous, they may for "ever 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 was by no means derived from the feudal policy, but was antecedent to the establishment of that system in this island; being transmitted from our Saxon ancestors, and forming a part of the ancient Scandinavian constitution. In certain offences relating to the coin, which, though formerly within the denomination of treason, seem rather a species of the *crimen falsi*, than the *crimen læsæ majestatis*, it was provided by some of the statutes which formerly constituted the offence, that it should work no forfeiture of lands, save only for the life of the offender; and by all, that it should not deprive the wife of her dower. And, in order to abolish such hereditary punishment entirely, it was enacted by statute 7 Anne, c. 21, that, after the decease of the 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 long ago 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 entailed 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-modelling 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 com-

promise was agreed to, which was established by this statute, viz., that the same crimes, and no other, should be treason in Scotland that were so in England; and that the English forfeitures and corruption of blood should take place in Scotland till the death of the then Pretender, and then cease throughout the whole of Great Britain: the lords artfully proposing this temporary clause, in hopes, it is said, that the prudence of succeeding parliaments would make it perpetual. This was partly done by the statute 17 Geo. II. c. 39, made in the year preceding the rebellion of 1745, the operation of these indemnifying clauses being thereby still further suspended till the death of the sons of the Pretender. Afterwards, by the statute 39 & 40 Geo. III. c. 93, the clause in 7 Anne, c. 21, and the enactment of 17 Geo. II. c. 39, limiting the periods when forfeiture for treason should be abolished, were repealed; so that the law of forfeiture, in cases of high treason, became the same as it was by the common law, or as it stood prior to the seventh year of Queen Anne.

By attainder for felony, the offender also forfeited all his chattel interests absolutely, and the profits of all estates of freehold during life; and by attainder for *murder* he forfeited 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 was to have them for a year and a day, and might commit therein what waste he pleased; which was called the king's *year*, *day*, and *waste*. Anciently the king had only a liberty of committing waste on the lands of felons, by pulling down their houses, extirpating their gardens, ploughing 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 and Ezra; 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 I., 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: and therefore *Magna Charta* provided, that the king should only hold such lands for *a year and a day*, and then restore them to the lord of the fee, without any mention made of waste. But the statute 17 Edw. II., *De prærogativa regis*, seems to suppose that the king should 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. This year, day, and waste, it was long the practice to compound for: but otherwise they regularly belonged to the crown: and, after their expiration, the land would naturally have descended to the heir, had not its feudal quality intercepted such descent, and given it by way of escheat to the lord.

This forfeiture for felony arose only upon attainder; and, therefore, a *felo de se* forfeited no lands of inheritance or freehold, for he never was attainted as a felon. It likewise related back to the time of the offence committed, as well as forfeitures for treason; so as to avoid all intermediate charges and conveyances. This might be hard upon such as had unwarily engaged with the offender: but the cruelty and reproach must lie on the part, not of the law, but of the criminal, who had thus knowingly and dishonestly involved others in his own calamities.

These were 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 *præmunire* 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 judgments; as in treason and the few felonies above mentioned they were. But I shall just mention, as a part of the forfeiture of real estates, the forfeiture of the profits of lands during life: which extended to two other instances, besides those already spoken of; misprision of treason, and striking in Westminster Hall, or drawing a weapon upon a judge there sitting in the courts of justice.

The forfeiture of goods and chattels accrued in every one of the higher kinds of offence: in treason or misprision thereof, felonies of all sorts, self-murder or *felo de se*, larceny, and the above-mentioned offence of striking, &c., in Westminster Hall; and the property vested in the crown *without office found*.

For *flight* also, on an accusation of treason, felony, or even petit larceny, whether the party were found guilty or acquitted, if the jury found the flight, the party forfeited his goods and chattels: for the very flight was an offence, carrying with it a strong presumption of guilt, and was at least an endeavour to

elude and stifle the course of justice prescribed by the law. But the jury very seldom found the flight; forfeiture being looked upon as too large a penalty for an offence, to which a man is prompted by the natural love of liberty; and the statute 7 & 8 Geo. IV. c. 28, accordingly expressly directed that the jury empanelled to try any person indicted for treason or felony, should not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony.

There was a remarkable difference or two between the forfeiture of lands and of goods and chattels. 1. Lands were forfeited upon *attainder*, and not before: goods and chattels were forfeited by *conviction*. Because in many of the cases where goods were forfeited there never was any attainder, which happened only where judgment of death was given: therefore in those cases the forfeiture must have been upon conviction, or not at all; and, being necessarily upon conviction in those, it was so ordered in all other cases, for the law loves uniformity. 2. In outlawries for treason or felony, lands were and still 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*, or finally outlawed; for the secreting himself so long from justice is construed a flight in law. 3. The forfeiture of lands had relation to the time of the fact committed, so as to avoid all subsequent sales and incumbrances; but the forfeiture of goods and chattels had no relation backwards; so that those only which a man had at the time of conviction were forfeited. Therefore a traitor or felon might *bonâ fide* sell any of his chattels, real or personal, for the sustenance of himself and family between the fact and conviction; 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 were collusively and not *bonâ fide* parted with, merely to defraud the crown, the law, and particularly the statute 13 Eliz. c. 5, would reach them; for they were 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 happened to be convicted, the law would recover them for the crown.

Another consequence, which resulted from attainder, was the *corruption of blood*, both upwards and downwards; so that an attainted person could neither inherit lands from his ancestors, nor retain those he was already in possession of, nor transmit them by descent to any heir; but the same escheated to the lord of the fee, subject to the sovereign's superior right of forfeiture: and the person attainted also obstructed all descents to his posterity, wherever they were obliged to derive a title through him to a remoter ancestor.

This was one of those notions which our laws 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 in 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 descent, ever ensued; and, on judgment of mere felony, no escheat accrues to the lord. When almost every other oppressive mark of feudal tenure had been happily worn away in these kingdoms, it was high time 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, should likewise be abolished; as it stood upon a very different footing from the forfeiture of lands for high treason. The legislature, indeed, from time to time appeared inclined to give way to so equitable a provision, by enacting, that, in certain treasons respecting the papal supremacy and the public coin, and in many of the felonies created since the reign of Henry VIII. by act of parliament, corruption of blood should 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, corruption of blood, as well as escheat, continued to be the usual consequences of attainder, until by the statute 54 Geo. III. c. 145, the latter penalty was in effect confined to *treason* and *murder*.

'The incapacities for inheriting, which flowed from corruption of blood, were put an end to by the statute 3 & 4 Will. IV. c. 106; and attainder no longer prevented any person from inheriting, who would otherwise have been capable of doing so. This modification of the law has been followed by still more extensive

changes, introduced by the statute of 33 & 34 Vict. c. 23, whereby the law of forfeiture has been superseded by more lenient and merciful provisions.'

'Attainder, corruption of blood, forfeiture, and escheat in cases of treason or felony are abolished; but the forfeiture consequent upon outlawry still remains. The crown may appoint an administrator of the convict's property, who may deal with it by lease, sale, mortgage, or transfer during the time the convict is undergoing his sentence, pay his debts and liabilities, compensate persons who have sustained injury by his crime, and make allowances to his family and relatives dependent on him for support. Upon his death, bankruptcy, or having undergone his punishment or received a pardon, his property is to revert to him or his representatives, or other person entitled.'

'The forfeiture consequent on outlawry still remains, for an offender cannot be allowed to set the laws of his country at defiance and refuse to submit himself to them, and yet remain in the enjoyment of his property. There are some other offences to which the statute apparently does not extend; such as striking in the queen's courts, and *præmunire*, which are not felonies; and it may be doubted whether misprision of treason, which is not mentioned in the act, is within its operation.'

CHAPTER XXIX.

OF REVERSAL OF JUDGMENT.

We are next to consider how judgments 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 avoided, 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 comdemned, 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; 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 convicted be executed and suffer death.

Secondly, a judgment may be reversed *by writ of error:*[a] which lies from all inferior criminal jurisdictions[b] to the 'High Court of Justice,' and from the 'High Court to the Court of

[a] 'For a review of the history and nature of writs of error in criminal cases, see *Rex* v. *John Wilkes*, Burr. 2527.'

[b] 'That is, from courts of record proceeding according to the course of the common law, Com. Dig. *Pleader*, 3 B. 7. No writ of error lies upon a summary conviction, *per* Holt, C. J., Lord Raym. 469.'

Appeal;'[c] and from the 'Court of Appeal' to the House of Peers; and may be brought for notorious mistakes in the indictment, as when the offence is improperly or insufficiently described therein,[d] or in the judgment[e] or other parts of the record; as where a man is found guilty of perjury and receives the judgment of felony. 'Error might formerly have been brought' 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 officer of the court, or not duly describing where his county court was held; for laying an offence committed in the time of the late sovereign, 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, were not much to the credit or advancement of the national justice, 'and have been accordingly, as has been more than once observed, taken away by statute.'

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 justitiæ*.[f] 'But even then, execution on the judgment shall not be stayed, nor shall the defendant be discharged from execution, unless and until he become bound by recognizance to prosecute the writ of error with effect; to appear personally in court on the day whereon judgment shall be given, and, if so ordered, not to depart without leave; and forthwith to render himself to prison, in case the judgment be affirmed. In default, the writ of error may be quashed, and the defendant will then be liable to execution on the original judgment. For in this event the defendant, if present, may forthwith be committed by the court; while, if from his absence the writ be quashed, or the recognizance estreated, a warrant may be issued for his apprehension, the costs of which must be paid by him before he can be released from prison.'[g]

Writs of error to reverse judgment in cases of *felony* are only

[c] 11 Geo. IV. and 1 Will. IV. c. 70; *Rex* v. Wright, 1 A. & E. 34.

[d] *R.* v. *Mason*, 2 T. R. 581; *Holloway* v. *Reginam*, 2 Den. C. C. 296; *Reg.* v. *Overton*, 4 Q. B. 90; *Sills* v. *Reginam*, 1 El. & Bl. 553.

[e] *Whitehead* v. *Reginam*, 7 Q. B. 582.

[f] *Reg.* v. *Newton*, 4 El. & Bl. 896.

[g] 8 & 9 Vict. c. 68; 16 & 17 Vict. c. 32.

allowed *ex gratiâ;* and not without express warrant under the royal sign manual, or at least by the consent of the attorney-general.[h] These therefore 'could, and should occasion arise' can, rarely be brought by the party himself, especially where he 'has been convicted of' an offence against the state; but they 'might have been, and, should it be necessary, may still' be brought by his heir, or executor, after his death, in more favourable times.[i] The easier, and more effectual way, therefore, in this case, 'was, and if it be again necessary to reverse an attainder, as sometimes still occurs in the case of a succession to a peerage, will be'—

Thirdly and lastly, by act of parliament. This has been frequently done, upon motives of compassion, or perhaps from 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 was universally acknowledged and confessed, yet the merits of the criminal's family have after his death obtained a restitution in blood, honours, and estate, or some, or one of them, 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;* 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. Yet he still remains liable to another prosecution for the same offence; for the first being erroneous, he never was in jeopardy thereby.

[h] 1 Vern. 170, 175; 2 Salk. 503.

[i] 'As in *Tynte* v. *Reginam*, 7 Q. B. 216, where judgment of outlawry was reversed after the lapse of 116 years.'

CHAPTER XXX.

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;* 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 sometimes if it be a small felony, or any favourable 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 gaol delivery, although their session be finished, and their commission expired; but this rather by common usage, than of strict right.

'A reprieve, secondly, may be *ex mandato regis*, or from the mere pleasure of the crown, expressed in any way to the court by whom the execution is to be awarded. This is the mode in which reprieves are generally granted, through the intervention of one of the secretaries of state.'

Reprieves, thirdly, may be *ex necessitate legis*: 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;* 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,[a] a barbarity which they never learned from the laws of *ancient* Rome; which direct,[b] with the same humanity as our own, "*quod prægnantis muliertis damnatæ "pœna differatur, quoad pariat:*" which doctrine has also prevailed in England, as early as the first memorials of our law will reach. 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 stayed 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 further respite for that cause. 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 the judgment and the award of execution; for regularly, as was formerly 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*," 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 'judgment' 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 reprieve him. Or, the party may *plead* in bar of execution; which plea may be either pregnancy, the royal pardon, an act of grace, or diversity of person, viz., that he is not the same that was 'convicted,' and the like. In this last case a jury shall be impanelled to try this collateral issue, namely, the identity of his person; and not whether guilty or innocent; for that has

[a] Fox, Acts and Mon. [b] Ff. 48, 19, 3.

been decided before. And in these collateral issues the trial shall be *instanter,* and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person 'convicted;' neither shall any peremptory challenges of the jury be allowed the prisoner; though formerly such challenges were held to be allowable, whenever a man's life was in question.

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 sovereign's most gracious *pardon;* the granting of which is the most amiable prerogative of the crown. Law 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 sovereign in the coronation oath, and it is that act of his government which is the most personal and most entirely his own. The king himself condemns no man; that rugged task he leaves to his courts of justice; the great operation of his sceptre is mercy. His power of pardoning was said by our Saxon ancestors [c] to be derived *â lege suæ dignitatis:* 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 rigour of the general law, in such criminal cases as merit an exemption from punishment. Pardons, according to 'the Marquis Beccaria,' 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: 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,

[c] LL. Edw. Conf. c. 18; 1 Thorpe, 449.

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 centre in one and the same person. This, as the President Montesquieu observes, would oblige him very often to contradict himself, to make and 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 favour. 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 manner of *allowing* a pardon. 4. The *effect* of such pardon when allowed.

1. And, first, the 'queen' may pardon all offences 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 *præmunire*, unpardonable even by the king. Nor, 2. Can the crown pardon where private justice is principally concerned in the prosecution of offenders: "*non potest rex gratiam facere cum injuria et damno aliorum.*" Therefore he cannot 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 crown to avoid multiplicity of suits, yet, during its continuance, this offence savours more of the nature of a *private* injury to each individual in the neighbourhood, than of a *public* wrong. Neither, lastly, can the crown pardon an offence against a popular or penal statute, after information brought: for thereby the informer has

acquired a private property in his part of the penalty;[d] 'but here also the crown can remit the penalty.'[e]

There is also a restriction, of a peculiar nature, that affects the prerogative of pardoning in case of parliamentary impeachments; viz., that the royal 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 II., 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,[f] "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 thereupon resolved,[g] "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[h] 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,[i] "that a pardon "is not *pleadable in bar* of an impeachment." And, at length, it was enacted by the Act of Settlement, 12 & 13 Will. 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 royal grace is further 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.[j]

[d] 'Exceptions to this general principle were created by 7 & 8 Geo. IV. cc. 29 and 30, re-enacted by 24 & 25 Vict. cc. 96 and 97; under which larcenies and malicious injuries to property are punishable by fines and penalties, and imprisonment in the event of non-payment. The crown is expressly empowered to pardon persons imprisoned, although it were for non-payment of money to some third party.'

[e] 22 Vict. c. 32; see also 38 & 39 Vict. c. 80.

[f] Com. Jour. 28 Apr. 1679.

[g] Ibid. 5 May, 1679.

[h] Ibid. 26 May, 1679.

[i] Ibid. 6 June, 1689.

[j] The following remarkable record, in

2. As to the *manner* of pardoning. 1. First, it must 'until recently have been' under the *great* seal; for a warrant under the privy seal, or sign manual, though it might be a sufficient authority to admit the party to bail, in order to plead the royal pardon, when obtained in proper form, yet was not of itself a complete irrevocable pardon.[k] 'Now, however, by 6 Geo. IV. c. 25, s, 1, in the case of capital crimes, and by 7 & 8 Geo. IV. c. 28, s. 13, in all felonies, a warrant under the royal sign manual, countersigned by one of the principal secretaries of state, granting a free pardon, and the prisoner's discharge under it; or granting a conditional pardon, and the performance of such condition, is as effectual as a pardon under the great seal.' 2. Next, it is a general rule that, wherever it may reasonably be presumed the crown is deceived, the pardon is void. Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will

which it is both acknowledged by the Commons and asserted by the king, proves that the king's prerogative to pardon delinquents convicted in impeachments, is as ancient as the constitution itself :—

Item prie la commune a nostre dit seigneur le roi que nul pardon soit grante a nulle persone, petit ne grande, q'ont este de son counseil et sermentez, et sont empeschez en cest present parlement de vie ne de membre, fyn ne de raunceon, de forfaiture des terres, tennemenz, biens, ou chateaux, lesqueux sont ou serront trovez en aucun defaut encontre leur ligeance, et la tenure de leur dit serement: mais q'ils ne serront jammes conseillers ne officers du roi, mais son tout oustez de la courte le roi et de conseil as touz jours. Et sur ceo soit en present parlement fait estatut s'il plest au roi, et de touz autres en temps a venir en cas semblables, pur profit du roi et du roialme.

Responsio.—Le roi ent fra sa volente, come mieltz lui semblera. Rot. Parl. 50 Ed. III. n. 188.

After the Lords have delivered their sentence of guilty, the Commons have the power of pardoning the impeached convict, by refusing to demand judgment against him, for no judgment can be pronounced by the Lords till it is demanded by the Commons. Lord Macclesfield was found guilty without a dissenting voice in the House of Lords; but when the question was afterwards proposed in the House of Commons, *that this House will demand judgment of the Lords against Thomas Earl of Macclesfield*, it occasioned a warm debate; but, the previous question being first moved, it was carried in the affirmative by a majority of 136 voices against 65; Com. Jour. 27 May, 1725; 6 H. St. Tr. 762. In Lord Strafford's trial, the Commons sent the following message to the Lords: —"That this House holds it necessary and fit that all the members of the House may be present at the trial, to the end every one may satisfy his own conscience in the giving of their vote to demand judgment;" Com. Jour. 11 March, 1640.

In the impeachment of Warren Hastings it was decided, after much serious and learned investigation and discussion, by a very great majority in each House of Parliament, that an impeachment was not abated by a dissolution of the Parliament, though almost all the legal characters of each House voted in the minorities.—[Christian.]

[k] 5 St. Tr. 166, 173.

vitiate the whole; for the sovereign was misinformed. 3. General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction of felony, for it is presumed the sovereign knew not of those proceedings; but the conviction must be particularly mentioned: and a pardon of felonies will not include piracy; for that is no felony punishable at the common law. 4. 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 offence 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,[l] 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 offence 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* or *per infortunium:* to which two species the king's pardon was expressly confined by 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 slayeth another in his own defence, or by misfortune. But the statute of Richard II., 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* of the statute of King Richard, till the time of the Revolution; when the doctrine of *non obstantes* ceasing, it was doubted whether murder could be pardoned generally; but it was determined,[m] that the king may pardon on an indictment of murder. 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 crown.

A pardon may also be *conditional:* that is, the sovereign 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. Which prerogative is daily exerted in

[l] 3 Inst. 236. [m] Salk. 499.

the pardon of felons, on condition of being confined to hard labour for a stated time, or of transportation to some foreign country for life, or for a term of years; such transportation or banishment [n]

[n] Transportation is said, Barr. 352, to have been first inflicted as a punishment, by stat. 39 Eliz. c. 4. 'But the first Act of Parliament on the subject is the 18 Car. II. c. 3, s. 2, which enabled the judges of assize to transport certain offenders into *America*, there to remain and not to return. The 22 Car. II. c. 5, s. 4, gave the judges power, "at their "discretion," to grant a reprieve, and to cause felons to be transported beyond the seas, there to remain for the space of seven years; but if the offender refused to be transported, or returned within the time, then he was to be put to execution upon the judgment. The 22 & 23 Car. II. c. 7, s. 4, directed a judgment of transportation to be entered, when the felon elected to be transported, and authorized the sheriffs to cause offenders to be embarked. It also made a return before the expiration of the sentence a capital felony. The next statute on the subject was the act 4 Geo. I. c. 11, "the foun-"dation of the law of transportation," which enacted that, when an offender was convicted for any crime, which was excluded from the benefit of clergy, and the crown should be pleased to extend mercy, upon condition of transportation to any part of *America*, any court, having proper authority to do so, might allow such offender the benefit of a pardon under the great seal, and direct him to be transported for the term of fourteen years, or such other term as should be part of the conditions. The statute further enacted that, after such offender had served his term of transportation, such service should have the effect of a pardon to all intents and purposes. The stat. 6 Geo. I. c. 23, again made a person "*at large* in Great Britain, before "the expiration of the term" of transportation, liable, on conviction, to suffer death. The next act, 8 Geo. III. c. 15, extended the powers of the judges to make orders for transportation, under the 4 Geo. I. c. 11, by enabling them to do so out of court: and by the stat. 30 Geo. III. c. 47, the king was empowered, under the great seal, to authorize the governor or lieutenant-governor of convict settlements to remit the sentences of transports.'

'By statute 5 Geo. IV. c. 84, as amended by the 11 Geo. IV. and 1 Will. IV. c. 39, consolidating the laws on the subject of transportation, the king in council was empowered to appoint places beyond the seas, either within or without his dominions, to which persons under sentence or order of transportation or banishment should be conveyed, the governor of the colony, or other person to whom they were delivered, or his assignee, having the property in the services of the convicts. The crown was also empowered by warrant to appoint places of confinement at home, either on land or on board vessels in the Thames, or other rivers or harbours, for the removal and confinement of male offenders, recently extended by the stat. 16 & 17 Vict. to females, under sentence of death, but reprieved or respited, or under sentence of transportation, there to remain under order of the secretary of state until entitled to their liberty, or removed, or otherwise dealt with. The capital punishment for offenders found unduly at large before the expiration of their sentence was still retained, but was subsequently abolished by the stat. 4 & 5 Will. IV. c. 67, which substituted transportation for life, with previous imprisonment not exceeding four years.'

'New South Wales, Van Diemen's Land, and Norfolk Island became, under the above-mentioned statute, the principal receptacles for convicts, while other acts of parliament were passed for regulating and enforcing the discipline of convicts while under sentence. See 6 Geo. IV. c. 69; 4 & 5 Will. IV. c. 65. The power of the colonial governors to

being allowable and warranted by the *Habeas Corpus* Act, 31 Car. II. c. 2, s. 14.

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 royal charter; for a man is not bound to plead it, but the court must *ex officio* take notice of it; neither can he lose the benefit of it by his own *laches* or negligence, as he may of the

remit sentences was next restrained by the stat. 2 & 3 Will. IV. c. 62, they being only empowered to pardon or remit labour after the convicts had undergone a certain portion of their sentence; but this statute was repealed by the act 6 & 7 Vict. c. 7, which provides that, instead of governors of colonies remitting either absolutely or conditionally the period of transportation, the governors shall recommend felons to government at home for pardon, and they are to be pardoned according to the instructions received thereupon, such pardons having the same effect as a pardon under the great seal.'

'Although, as already stated, the property in the services of convicts was vested in the colonial governor, a practice prevailed in those places to which offenders were transported of granting them, in certain cases, permission to employ themselves for their own benefit. These permissions were usually called "tickets of leave." By the statute 6 & 7 Vict. c. 7, the legislature, thinking it just that such convicts should be protected in their persons and in the possession of such property as they might acquire by their industry, empowered them to hold personal property, and to maintain actions in respect thereof while their tickets remained unrevoked.'

'The reception of convicts having, however, become distasteful to the colonies, the stat. 10 & 11 Vict. c. 67, was passed, permitting offenders under sentence of transportation to be removed to any prison or penitentiary in Great Britain; directors of the principal convict prisons being appointed afterwards under the stat. 13 & 14 Vict. c. 39. The difficulty attending the reception by the colonies of transported convicts having increased, the stat. 16 & 17 Vict. c. 99, abolished the punishment of transportation for any term less than fourteen years, and substituted penal servitude, giving the courts power in all cases to award that punishment in lieu of transportation. Finally the statute 20 & 21 Vict. c. 3, abolished transportation altogether as a punishment; but convicts under sentence of penal servitude may still be sent beyond seas by order of the secretary of state.'

'For some time before the statute 16 & 17 Vict. c. 99, came into operation, a system had prevailed of granting well-conducted convicts, who, although sentenced to transportation, had been kept at home, free pardons, generally at the expiration of half their sentence. The continuance of the same practice under the new system of punishment seemed likely to cause serious evils; but as it was desirable to encourage good behaviour in convicts, it was determined to try the experiment of retaining some control over them in cases where they were set at liberty before the expiration of their sentence. And with that view the crown is now authorized to grant any convict a licence, to be at large during such portion of his term of transportation or imprisonment, and upon such conditions as may be thought fit, such licence being also revokable at pleasure. This "ticket of leave," is forfeited by a subsequent conviction, or for any breach of the conditions on which it is issued; 27 & 28 Vict. c. 47, and 34 & 35 Vict. c. 112.'

royal charter of pardon. The sovereign's charter of pardon must be speedily 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. 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.°

4. Lastly, the *effect* of such pardon by the crown is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former as to give him a new credit and capacity. 'True it is that formerly' nothing could restore or purify the blood when once corrupted, if the pardon were not allowed till after attainder, but the high and transcendent power of parliament. Yet if a person attainted received the king's pardon, and afterwards had a son, that son might 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. 'The alteration in the law, which has been already noticed, has done away altogether with that corruption of blood, which was formerly the necessary consequence of an attainder.'

° Anciently, by statute 10 Edw. III. c. 2, no pardon of felony could be allowed, unless the party found sureties for his good behaviour before the sheriff and coroners of the county. That statute was repealed by the statute 5 & 6 Will. & M. c. 13, which, instead thereof, gave the judges of the court a discretionary power to bind the criminal, pleading such pardon, to his good behaviour, with two sureties for any term not exceeding seven years. 'This act has now been repealed by 19 & 20 Vict. c. 64; so that a pardon may be allowed without any sureties whatever.'

CHAPTER XXXI.

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 'until recently have been' performed by the legal officer, the sheriff or his deputy. 'In all cases, not capital, the custody of prisoners is now in the gaoler;[a] so that the sheriff is relieved from all responsibility as to the execution of judgment upon them; and has left to him the carrying out of a sentence of death only. His' warrant for so doing was anciently by precept under the hand and seal of the judge, as in the court of the lord high steward, upon the execution of a peer; though in the court of the peers in parliament, it is done by writ from the crown. Afterwards it was established, 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, 'a copy of which, signed by the clerk of assize,' is left with the sheriff. For a capital felony, 'the judgment of death' is written opposite to the prisoner's name; and this is the only warrant that the sheriff has for so material an act as taking away the life of another. 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 name of the sovereign, 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 'be without any formal writ or warrant whatever.'[b]

[a] 28 & 29 Vict. c. 126, s. 58.

[b] Though it be true that a marginal note of a calendar, signed by the judge, was the only warrant that the sheriff had for the execution of a convict, yet it was made with more caution and solemnity than is represented by the learned commentator. At the end of the assizes, the clerk of assize made out in writing lists of all the prisoners, with separate columns, containing their crimes, verdicts, and sentences. These calendars, being first carefully compared together by the judge and the

The sheriff is to do execution within a convenient time; which in the country is also left at large. But in the court of Queen'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, or leaving it to the discretion of the sheriff.[c] It was enacted by the statute 25 Geo. II. c. 37, that in case of murder, the judge should in his sentence direct execution to be performed on the next day but one after sentence passed; 'but this provision was subsequently repealed, and now' the *time* of execution is by law no part of the judgment,[d] 'whether for murder or any other offence. The place of execution, which was formerly regulated by custom only, is now fixed by the statute 31 Vict. c. 24, abolishing public executions, and enacting that judgment of death shall be executed within the walls of the prison in which the offender is confined at the time.' It is of great importance that the punishment should follow the crime as early as possible; and that the prospect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment.

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. It is held also by Sir Edward Coke and Sir Matthew Hale, that even the 'crown' cannot change the punishment of the law, by altering the hanging into beheading; though when beheading is part of the sentence, the 'crown'

clerk of assize, were signed, one by the judge and the other by the clerk of assize, and one was given to the sheriff, one to the gaoler, and the judge and the clerk of assize each kept another. If the sheriff received afterwards no special order from the judge, he executed the judgment of the law in the usual manner, agreeably to the directions of his calendar. In every county this important subject was settled with great deliberation by the judge and the clerk of assize before the judge's leaving the assize-town; but probably in different counties, with some slight variations, as in Lancashire, no calendar was left with the gaoler, but one was sent to the secretary of state.

[c] In London, indeed, a more solemn and becoming exactness 'was formerly' 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, issued his warrant to the sheriffs, directing them to do execution on the day and at the place assigned. 'Now, however, by statute 7 Will. IV. and 1 Vict. c. 77, ss. 1, 5, the practice of the Central Criminal Court, is the same as that of the courts of oyer and terminer and gaol delivery.'

[d] So held by the twelve judges, Mich. 10 Geo. III.

may remit the rest. And, notwithstanding some examples to the contrary, Sir Edward Coke stoutly maintains that "*judicandum est "legibus, non exemplis.*" But 'it has been' thought, 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 power 'of the crown' 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 II., 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 Russell, that the king could not pardon any part of the sentence. The lords resolved[e] 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[f] 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[g] 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 Russell 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." 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. For the former hanging was no execution of the sentence; and if a false tender-

[e] Lords' Jour. 21 Dec. 1680. [f] Com. Jour. 21 Dec. 1680.
[g] Com. Jour. 23 Dec. 1680.

ness were to be indulged in such cases, a multitude of collusions might ensue. Nay, even while abjurations were in force, 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.

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. The author, however, cannot dismiss the student, for whose use alone these rudiments were originally compiled, without endeavouring 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.

CHAPTER XXXII.

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 a 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 Edward I.; 3. From thence to the Reformation; 4. From the Reformation to the Restoration of Charles II.; 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 Cæsar's account of the tenets and discipline of the ancient Druids in Gaul, in whom centred 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 origin. 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, of a custom continued from Cæsar's time 'almost' to the present day; that of burning a woman guilty of the crime of petit treason by killing her husband.[a]

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, 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 origin 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

[a] 'This barbarous law was not erased from the statute-book until the year 1829, possibly because the infliction of the punishment was unknown in practice. See the statute 9 Geo. IV. c. 37 s. 2.'

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: 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 shore 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 impossible to search out the origin of its laws; unless we had as authentic monuments thereof as the Jews had by the hand of Moses. Thirdly, this uncertainty of the true origin of particular customs must also in part have arisen from the means whereby Christianity was propagated by 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 origin, of our ancient established customs; even after the Saxon government was firmly established in this island; viz., the subdivision of the kingdom into a 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, Anglo-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 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 answerable to his immediate superior for his own conduct and that of his nearest neighbours: for to him we owe that masterpiece of judicial polity, the subdivision of England into tithings and hundreds,[b] 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, it is said, the various customs that he found dispersed in the kingdom, and reduced and digested them into one uniform system or code of laws, in his Dom-boc, or *liber judicialis*. This he compiled for the use of the court-baron, hundred and county court, the court-leet, and sheriff's tourn; 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

[b] 'It is probable that these divisions, as well as other institutions attributed to Alfred, existed long before his time, and were in fact common to the nations of Germanic origin. What Alfred really did was probably to make a new muster or regulation of the tithings, rendered necessary by the devastation and confusion which were the result of the Danish wars, and in this way to establish in some districts a new territorial division upon the old principle. See farther, Kemble's Saxons in England, vol. i. p. 247.'

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 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 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 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 be the best supported and most plausible conjecture, for certainty is not to be expected, of the rise and origin 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 *witena-gemot*, or *commune consilium* 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 a 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 portreeves, since changed into mayors and bailiffs, and even their tythingmen 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 the 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 offence, even the most notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage; for which benefit of clergy, 'now abolished, was,' in some measure, 'a substitute.' 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 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 court, held before himself in person, at the time of his parliaments; which were usually holden in different places, accordingly as he kept the three great festivals of Christmas, Easter, and Whitsuntide. An

institution which was adopted by 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. These county courts, however, differed from the modern ones, in that the ecclesiastical and civil jurisdiction were blended together, the bishop and the ealdorman or sheriff sitting in the same county court; and also that the decisions and proceedings therein were much more simple and unembarrassed; an adventure 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 endeavouring 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 counties, 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 rigour 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 licence 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 'were long ago' mitigated, and by degrees grew entirely obsolete, yet from this root sprung a bastard slip, known by the name of the game law, 'until lately' wantoning in the highest vigour; 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 raised a little Nimrod in every manor. And in one respect the ancient law was much less unreasonable than 'that which lately prevailed:' for the king's grantee of a chase or free-warren might kill game in every part of his franchise; but 'previously to the alteration of the game laws in 1831,' though a freeholder of less than 100*l.* a year was forbidden to kill a partridge upon his own estate, yet nobody else, not even the lord of the manor, unless he had a grant of free-warren, could 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*, 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 Edward III. 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 Edward came too late to eradicate. Instead of the plain and easy method of determining suits in the county courts, the chicanes and subtilties of Norman jurisprudence had taken possession of the king's courts, to which every cause of consequence was drawn. Indeed that age, and those immediately succeeding it, were the era of refinement and subtilty. 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 country, 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 subtilties, 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 latter times been made to pare off these troublesome excrescences, and restore the common law to its pristine simplicity and vigour, and the endeavour has greatly succeeded; but still the scars are deep and visible, and the liberality of our modern courts of justice has frequently been 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 honour 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 seisins, 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 holden, 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 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 'many' superstitious novelties which had been engendered by the blindness and corruption of the times, between the first mission of Augustine the monk, and the Norman Conquest; 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 battel. 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 *curfeu*. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites, 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 merchandize, such as it then was, was carried on by the Jews and Lombards, and the very name of an English fleet, which Edgar had rendered so formidable, was utterly unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the barons, or great lords of the land; the knights or soldiery, who were the subordinate landholders; and the burghers or inferior tradesmen, who from their insignificance 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 on the prerogative, as some slavish and narrow-minded writers in the 'seventeenth' century endeavoured 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 I., found it expedient, when first he came to the crown, to ingratiate himself with the people; by restoring the laws of 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 *curfeu*;[c] for, though it is mentioned in our laws a full century afterwards,[d] 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, 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, 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, *congé d'élire*, custody of the temporalities when vacant, and homage upon their restitution. He lastly united again for a time the civil and

[c] Spelm. Cod. LL. W. I. 288; Hen. I. 299. [d] Stat. Civ. Lond. 13 Edw. I.

ecclesiastical courts, which union was soon dissolved by his 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 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 Henry II., if not earlier, the charter of Henry I. seems to have been forgotten: for we find the claims of marriage, ward, and relief, then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public than the parcelling 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 I., it carries a manifest superiority. 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 endeavoured to be supplanted in favour of the latter by the clergy. Which dispute was kept on foot till the reign of Edward I.: when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the present reign of Henry II., 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 à-Becket. 2. The institution of the office of justices in eyre, *in itinere;* the king having divided the kingdom into six circuits, differing little

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, travelling 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 kind of jury in a writ of right, at the option of the tenant or defendant, instead of the barbarous and Norman trial by battel. 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 I., a brave and magnanimous prince, was a sportsman as well as a soldier, and therefore enforced the forest laws with some rigour, 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 'is said to have' 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 John's time, and that of his son Henry III., the rigours 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 John, and afterwards his son, consented to the two famous charters of English liberties, *Magna Charta* and *Charta de Forestâ*. 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 amercements, 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 pre-emption. It fixed the forfeiture of lands for felony in 'nearly' the same manner as it 'until the present reign remained;' prohibited for the future the grants of exclusive fisheries; and the erection of new bridges so as to oppress the neighbourhood. 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 to 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 battel; 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 tourn, 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.[e]

However, by means of these struggles, the pope in the reign of John gained a still greater ascendant here than he ever had before enjoyed; which continued through the long reign of his son Henry III., 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. 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 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 I., who has justly been 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, 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; so as they might not interfere with each other's proper business. 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 institu-

[e] "*Nullus liber homo capiatur, vel imprisonetur, aut dissesietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruatur: nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam.*"

tion. 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 effect of fines; though the thing itself was of Saxon origin. 8. He first established a repository for the public records of the kingdom, few of which are more ancient than the reign of his father, and those were by him collected. 9. He improved upon the laws of 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*. 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*, 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 reiterated 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 VIII.; 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 further; 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: and has continued nearly the same, in all succeeding ages, to this day; abating some few alterations,

which the humour or necessity of subsequent times has occasioned. The forms of 'original' writs, by which actions 'were formerly' 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, 'as they afterwards became, and until quite recently remained.' 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 Charta*, 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 VIII. 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 III. 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-modelled 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 *præmunire*, 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 lustre 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 VII., the civil wars and disputed titles to the crown gave no leisure for farther juridical improvement; "*nam silent leges inter arma.*"—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 was owing 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 IV., for the purpose of unfettering estates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the universal establishment of *uses*, another of the clerical inventions.

In the reign of Henry VII., 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 in 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-modelled, 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 alien. The benefit of clergy, which so often intervened to stop attainders and save the inherit-

ance, was now allowed only once to lay offenders, who 'alone' could have inheritances to lose. A writ of *capias* 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 'the Church,' under Henry VIII., and his children, which opens an entirely new scene in ecclesiastical matters; the usurped power of the pope being now for ever 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 reunited with 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 endeavouring 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 now 'prevail in all our courts.' 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 assurance by feoffment and livery upon the land being now very seldom practised, 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 moulded 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;* 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 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. 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 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 by laws of too sanguinary a nature; the forest laws having fallen into disuse; and the

administration of civil rights in the courts of justice being carried on in a regular course, according to the wise institutions of Edward I., 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 favourites had fallen with such avidity upon the spoils of the Church, that a decent and honourable 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 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 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 behaviour, 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, 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 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 rivalled 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 VIII. 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 Henry VIII. 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 threw 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 James I., no new degree of royal power was added to, or exercised by, him; but such a sceptre 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 leaders felt the pulse of the nation, and found they 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 I. 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 add to these the disuse of 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 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 befal 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 examples 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 despair at length forced them to join with a set of military hypocrites and enthusiasts, who overturned the Church and monarchy, and proceeded with deliberate solemnity to the trial and 'execution' 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 Charles II. Immediately upon which, the principal remaining grievances, 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, were 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 Charta*, as beneficial and effectual as that of Runing-Mead. That only pruned the luxuriances of the feudal system: but the statute of Charles II. extirpated all its slaveries, except perhaps in copyhold tenure; and there also they are now 'completely' enervated by gradual custom, and the interposition of our courts of justice. *Magna Charta* 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 pre-emption: the statute for holding triennial parliaments; the test and corporation acts, which secured 'for the time' both our civil and religious liberties; the abolition of the writ *de hæretico comburendo;* 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 vigour, "and the true balance between liberty and prerogative was "happily established by *law*, in the reign of King Charles II."

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*,[f] 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 a large portion of real liberty;[g] 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 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 next period of our legal history; viz.,

VI. From the revolution in 1688 to the time 'when these commentaries were first published.'[h] In this period many laws were 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 asserted our liberties in more clear and emphatic terms; regulated the succession of the crown by parliament, as the exigencies of religious and civil freedom required; confirmed, and exemplified, the doctrine of resistance, when the executive magistrate endeavours to subvert the constitution; maintained the superiority of the laws above the crown, by pronouncing the dispensing power to be illegal; indulged tender consciences with every religious liberty, 'which

[f] The point of time at which I would choose to fix this *theoretical* perfection of our public law is in 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 *practical* oppression.

[g] 'Sir William Blackstone's words are,' as large a portion of real liberty *as is consistent with a state of society*—'an expression which the editor has ventured to modify.'

[h] 'The first volume of the commentaries was published in the year 1765, and the three others in the course of the four following years.

was then deemed to be' consistent with the safety of the state; established triennial, since turned into septennial, elections of members to serve in parliament; excluded certain officers from the House of Commons; restrained the royal pardon from obstructing parliamentary impeachments; imparted to all the lords an equal right of trying their fellow-peers; regulated trials for high treason; set bounds to the Civil List, and placed the administration of that revenue in hands that are accountable to parliament; and made the judges completely independent of the sovereign, 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 'during this period' gradually and imperceptibly gained almost as much in influence as it apparently lost in prerogative.

The chief alterations of moment, for the time would fail me to descend to *minutiæ*, in the administration of private justice during the same period, were 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*, and informations in nature of *quo warranto:* the regulation of trials by jury, and the admitting witnesses for prisoners upon oath: the farther restraints upon alienation of lands in mortmain: the annihilation of the terrible judgment of *peine forte et dure:* 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 improvements which were made in ejectments for the trying of titles: the introduction and establishment of paper credit, by indorsements upon bills and notes, which showed the legal possibility and convenience, which our ancestors 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: the great system of marine jurisprudence, of which the foundations were laid, by clearly 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 took possession of our courts of common law, and induced them to adopt, where facts could be clearly ascertained, the same principle of redress as had 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 I., to almost every instance of injustice not remedied by any other process.

VII. 'Upwards of a century has elapsed since the commentaries of Sir William Blackstone were first published. Much as the learned and enthusiastic commentator had cause for exultation in the improvements which had been introduced in his own times and those immediately preceding, he would have found matter for still warmer panegyric had he lived in our days. The events of the last hundred years have changed the face of Europe; and although our own country has not sustained those disastrous shocks which have been felt from time to time by most of the continental nations, it has not remained a stranger to the general progressive tendency which has been discernible, more or less, over the whole civilized world. On the contrary, the state of continuous healthy progress, which seems to be almost peculiar to our own institutions, has, perhaps, carried us further in the direction of political and social freedom than any other nation in the world.'

'Among the first and most important constitutional changes to be mentioned is the union of the British and Irish legislatures, —an event which may be regarded as the foundation of that genuine union of interest and feeling between two nations intimately allied by geographical position, common language, and similar institutions, which, if not yet completely attained, seems now at least in a fair way of becoming permanently established. The statute of 1832, amending the representation of the people in the Commons' House of Parliament, popularly

known as the Reform Act, and "The Representation of the People Act, 1867," introduced no new principle into the constitution; but simply restored to the great body of the people that ancient right of self-government, which they had derived from their Saxon ancestors. Several attempts have since been made to prevent corrupt practices in the election of members, with more or less sincerity; the most prominent of which are the statutes establishing voting by ballot; vesting the trial of contested elections in the judges; and imposing penalties and disqualifications on all persons concerned in bribery, treating, or the use of undue influence. Though little appears to have been actually effected beyond the disfranchisement of the boroughs where such practices were found to prevail, the attention of the public is now aroused to the magnitude of the evil, and it may not unreasonably be hoped, that an offence, which strikes at the very root of our representative system, will sooner or later be extirpated. A measure of almost equal importance, of which the professed object was the restoration of an ancient institution, was that which remodelled our municipal corporations, and removed many abuses which had crept into these bodies.'

'Our civil liberties have been further secured by that amendment of the law of libel, which has vested in the jury the right in such cases of deciding as well upon the law as upon the fact; and by the statutory recognition of the privilege of parliament to publish whatever it pleases. The boundaries of religious liberty have been extended by the repeal of the Test and Corporation Acts; a measure which has enabled that numerous and influential portion of our fellow-citizens who object to the discipline or dissent from the doctrines of the Church, to participate in those political rights from which they had been before excluded; whilst the statute popularly termed the Roman Catholic Emancipation Act has relieved those who still render obedience to the See of Rome from the civil disabilities and penalties to which they were previously subject. The National Church has probably gained strength from the commutation of tithes and the abolition of church-rates, and still more from those statutes which have been passed for the abolition of pluralities, and for compelling the residence of the beneficed clergy. Large and comprehensive measures have also been adopted for the better management and application of the cathedral revenues, and for the subdivision of large and populous parishes, the formation of

new parochial districts, and the extension of the Church and its institutions. A committee of the Privy Council has been specially constituted for the distribution of the large sums of money which have for many years been annually voted by parliament for promoting education among the poorer classes of the people; and school boards have been established wherever the means of obtaining elementary education have been, or may yet be, found to be deficient.'

'The statutes amending the law relating to the celebration of marriage, while requiring that important ceremony to be accompanied in all cases by certain circumstances of publicity and notoriety, have, at the same time, enabled every individual to enter into this solemn contract in the mode which he considers necessary or proper; and have thus removed an unreasonable restriction under which a large portion of the community previously laboured.'

'The abolition of colonial slavery, accomplished at a very great pecuniary sacrifice, is an event in our history never to be forgotten. The spirit of philanthropy which dictated this measure is a very prominent feature of our age, and has displayed itself in a variety of other enactments, particularly those modifying the severity of the laws relating to unfortunate traders and debtors, securing the proper care and treatment of lunatics, amending the discipline of prisons, and providing reformatory institutions not only for criminals who seek an opportunity of regaining their lost position, but for those unfortunate children, who are born as it were into crime, and have rarely if ever been taught to distinguish between good and evil. The laws for the relief of the poor have been remodelled, and some steps taken, falteringly, it is true, but in the right direction, towards a more equitable adjustment of the heavy taxation which is imposed for their support; the numerous charities which are to be found in every part of the kingdom have been placed under the regulation and control of a body of commissioners, whose sole duty it is to see that the funds of these institutions are properly applied; the laws relating to *game*, always a fertile source of crime, have been so far modified, that we may anticipate an early repeal of all penal enactments on the subject; and several statutes have been passed, having for their object the improvement of the sanitary condition of populous places, and the preservation of the public health.'

'The interests of trade, commerce, and manufactures have been unceasingly studied and promoted since the restoration of peace in 1815. This is not the place, however, in which to attempt any enumeration of the various statutes, which have been from time to time passed for regulating these matters, the legislation relating to which has been often affected and controlled by financial necessities, or by the conflicting views of political economists. It may be enough to allude to the various statutes throwing open the trade to the East Indies, and removing many of the duties previously levied under the unpopular names of customs and excise, to the consolidation of the laws relating to the mercantile marine, and to the repeal of the Navigation Acts; all tending towards establishing a system of commerce free from all restraints, other than those which the collection of the public revenue and the machinery required for that purpose render indispensable. The law with regard to bankruptcy has been further consolidated—it can scarcely with truth be said, amended; real property has been subjected to the payment of debts; the rights of authors and inventors have been extended and secured; and the formation of joint-stock companies has been simplified and cheapened, the most ample regulations being made, at the same time, for the guidance of these bodies. The operations of the mercantile classes have been facilitated by several statutes having reference exclusively to commercial affairs; and protected to some extent by other enactments which have made breaches of trust, committed by bankers, factors, trustees, agents, and servants generally, severely punishable. Fraudulent debtors have been brought within the reach of the criminal law.'

'In regard to landed property and its transmission the most important improvements have taken place. The alteration of the law of descent, the limitation of the time within which actions for the recovery of real estate may be brought, the shortening of the time of prescription or legal memory, the abolition of those complex modes of assurance, fines and recoveries, the modification of the wife's claim of dower, the annihilation of satisfied terms,—these, among other things, have tended greatly to facilitate the transfer of property, have got rid of endless doubts and difficulties which perpetually arose upon titles, and have materially shortened conveyances. A great improvement has also been introduced into the law of wills, and there is less danger now than formerly of the wishes of a testator being frustrated. A serious, and it is to be

hoped successful, attempt has been made to get rid of copyhold tenures, and repeated efforts, hitherto without effect however, to introduce a system of registration of the titles to real estates.'

'The administration of private justice has been greatly simplified by the numerous alterations which have been made in the course of the last fifty years in the procedure of our courts. The abolition of real actions, and of the many fictions which formerly encumbered legal proceedings, was an important and beneficial change. The alteration of the old rules of law which formerly excluded the evidence of the parties to the suit, and prohibited persons who were considered disqualified, either by reason of interest or by crime, from being witnesses, have been attended with great advantage; all practical difficulties in eliciting any truth being now removed.'

'It would be premature to express any opinion on the recent consolidation of the Superior Courts of Law and Equity into one High Court of Justice. The abolition of the remaining Palatine Courts is an unquestionable advantage, and further changes are not improbably imminent. Each division of the High Court has now all the powers of the tribunals which have been merged in it; the great increase in the number of the judges ought to prevent the possibility of delay in the hearing of causes; and there seems now to be no reason why, in ordinary cases, the obtaining of justice in every branch of this court should not be a speedy and not ruinously expensive process.'

'But these changes have been much less beneficial to the great mass of the community, than the establishment of the county courts, a measure warmly recommended by Sir William Blackstone; and to some extent a return to the ancient Saxon system, restored if not established by Alfred, for securing the administration of justice at every man's door.'

'The cognizance of matrimonial and testamentary causes has been taken from the ecclesiastical, and restored to the civil, courts; the law at the same time recognizing the right of divorce for adultery; and putting that remedy, which was previously only attainable by a private act of parliament, within the reach of all who are likely to demand it.'

'The criminal law has been, as to many of its branches, amended and consolidated; and the severity of punishments at the same time much softened, and adapted more carefully than formerly to the nature and magnitude of the offence. The

barbarous sufferings prescribed for those attainted of treason no longer stain the statute-book; the punishment of innocent parties for the guilt of a remote ancestor, which sometimes resulted from the doctrine of corruption of blood, can no longer occur; forfeitures of lands and goods for felony have been abolished; and the offences involving capital punishment, which the convict only escaped by claiming the benefit of clergy, have been gradually reduced in number, until the extreme penalty of the law has become in effect confined to the atrocious crime of murder. The trial by battle, and the mode of proceeding by appeal, have been formally abolished; the law relating to principal and accessory has been divested of its niceties; and the forms of the proceedings in the criminal courts so far simplified and improved, that offenders, who have now the advantage of being defended by counsel, rarely escape punishment on purely technical objections.'

Thus, therefore, for the amusement and instruction of the student, I have endeavoured 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 I.; 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 Charles II., nor fully and explicitly acknowledged and defined, till the era of the Revolution of 1688. 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

endeavour 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 unskilful improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to 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.

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